2022

How Do You Value a Victim? Victim Impact Statements in Military Sexual Assault Trials

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HOW DO YOU VALUE A VICTIM?: VICTIM IMPACT STATEMENTS IN MILITARY SEXUAL ASSAULT TRIALS

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This Article examines a timely and important issue—the use of Victim Impact Statements (VIS) in criminal trials and, more specifically, in military courts-martial. The right for victims of offenses to provide VIS has existed in the United States for approximately three decades. However, the military's implementation of similar rights for victims has languished, with the advent of the right for a victim to provide a VIS having been implemented only within the last decade. Relying on legal precedent in the form of appellate case decisions and qualitative assessments of trial court records, this article explores the current state of the law regarding the substance of VIS to then juxtapose that with trial court records for cases where the substance of the VIS was not considered on appeal. To date, no publication has qualitatively assessed the substance of VIS provided in military courts-martial. The results of this study provide ample support for the conclusion that follow-on research is necessary in order to inform decision-making related to victim rights in the military. Additionally, the Article recommends proposed solutions to the current state of the law and practice and should further inform the debate surrounding whether VIS, from a policy perspective, should be included at the sentencing phase of trials.

I. INTRODUCTION

When Charles Manson and his followers murdered numerous people in the summer of 1969,[1] it sparked the mother of a victim to deliver one of the first—

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[1] Andrew J. Atchison & Kathleen M. Heide, *Charles Manson and the Family: The Application of Sociological Theories to Multiple Murder*, 55 INT. J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 771, 772 (2011); ERIC W. HICKEY, ENCYCLOPEDIA OF MURDER AND VIOLENT CRIME 291–96 (2003).

if not, the first—modern victim impact statements ("VIS") in the United States.[2] Sharon Tate was a beloved Hollywood actress, who was married and with child when one of Manson's followers brutally stabbed her to death. In 1982, California voters approved Proposition 8 to amend their Constitution to allow VIS at sentencing and parole hearings. Doris Tate, the mother of Sharon, delivered her VIS in 1983 at the parole hearing of her daughter's murderer.[3]

Around the same time Doris Tate was navigating the California criminal justice system, President Ronald Reagan commissioned a task force to assess the need for legislative changes related to victims' rights.[4] The results of the task force included the enactment of the Victim and Witness Protection Act of 1982 (VWPA), which afforded victims the right to provide VIS in federal court.[5] This was the precursor to the Crime Victims' Rights Act (CVRA) of 2004.[6] The rights afforded through the CVRA—specifically rights related to VIS—have been the subject of extensive appellate case law. Some of the case law addresses the substantive nature of VIS, and some of it addresses the procedural manner in which VIS are provided to courts. Both aspects—substance and procedure—are fraught with perilous legal issues, including the potential of violating constitutional safeguards for accused. Directly opposing these safeguards are victims' rights, largely not enshrined in state constitutions, that can be frustrated by the process through which victims have been allowed to participate in criminal proceedings.

In civilian courts, the substance of VIS and the procedures by which they are introduced vary by jurisdiction.[7] What can and should be included in VIS in civilian jurisdictions is not always made clear by legislatures.[8] Therefore, it is

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[2] VIS have been around in some form or another prior to the founding of the United States of America, having been borrowed from its English counterpart. There is some room to conclude that the concept of VIS, or principles which support it, come from Roman law. *See, e.g.*, George E. Woodbine, *The Origins of the Action of Trespass*, 33 YALE L. J. 343, 356–62, n.101 (1925) (describing appeals made by victims of trespass under Roman Law); Mark Stevens, *Victim Impact Statements Considered in Sentencing: Constitutional Concerns*, 2 CAL. CRIM. L. REV. 3, ¶ 2 (2000) (describing VIS as a legacy of English common law).

[3] Merrill W. Steeg, Victim Impact: The Manson Murders and the Rise of The Victims' Rights Movement 12, 25 (May 31, 2021) (M.A. thesis, California College of Arts) (ScholarWorks).

[4] LOIS HAIGHT HARRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME at vii (1982).

[5] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[6] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405 (codified as amended at 18 U.S.C. § 3771 (2015)); Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 584–87 (2005) (discussing the expansion of victim's rights under the law).

[7] MODEL PENAL CODE: SENTENCING 473–75 (AM. LAW INST., Proposed Final Draft 2017) [hereinafter MODEL PENAL CODE: SENTENCING].

[8] *Id.*

sometimes left to courts to decide the inner contours of what can be admitted through VIS.

VIS are provided to courts in a variety of formats, including written and oral statements. A major distinction between written VIS and victim testimony is the dynamic and sometimes unpredictable nature of the latter.[9] This distinction is important when considering both procedural and substantive limitations of VIS in court. Procedurally, when a witness testifies, the witness can be cross-examined. Substantively, when a witness is under examination, the contents of the statement become less predictable than in written format. For instance, under the pressure of examination, even if only direct examination, a witness' ability to cogently respond to basic questions can be frustrated. On the witness stand, witnesses are asked to call to mind information that was recorded in their memory from an earlier point in time. In many, if not most, sexual assault cases, the incident the witness is required to recall occurred a year or more earlier. Memory degrades over time and when coupled with the requirements of examination to recall upon demand, the ability to accurately state what previously took place diminishes. This does not begin to address the sometimes problematic interaction that occurs when a victim of sexual assault is asked to recount the details of the assault and the adverse consequences stemming from it in front of the offender and public. Regardless of the testimonial obstacles, little research has been conducted to ascertain what is actually being said in open court during the pre-sentencing phase of military sexual assault trials.[10] Laws are being enacted and amended to allow broader opportunities for victims' *voices* during the criminal justice process, but there are few-to-no empirically-derived studies on the substance of those voices when they are heard in court.[11]

This Article aims to shed light on an important topic that has never been studied in detail previously,[12] namely, the voices of victims who have been afforded, and taken advantage of, the opportunity to provide VIS in military sexual assault trials.

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[9] Heather Zaykowski et al., *Judicial Narratives of Ideal and Deviant Victims in Judges' Capital Sentencing Decisions*, 39 AM. J. CRIM. JUST. 716, 720 (2014) (describing VIS as "second-hand retellings" and testimony as "far more visceral and emotional").

[10] *See generally, e.g.*, Edward Meyers, Note, *Right or Burden: Victim Impact Statements at Court-Martial*, 30 PUB. INT. L.J. 117 (2021) (discussing one appellate court decision concerning one VIS).

[11] *See generally* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2002) (providing a salient piece that eloquently and thoroughly discusses and analyzes the theoretical considerations surrounding victim impact statements, but limited by the nature of the article wherein the discussion centers on one seminal appellate decision).

[12] The author is unaware of any published research qualitatively assessing the substantive contents of victim impact statements in the civilian or military systems.

Part II provides background describing the U.S. Supreme Court and military appellate court jurisprudence that laid the foundation for the procedural mechanisms through which VIS are utilized in courts-martial. Part III includes a synopsis of the literary framework for this study, incorporating the scholarly discourse surrounding VIS. Part III also includes a subsection on gendered violence and intersectional approaches to understanding violence to illuminate the way in which those bodies of literature inform the scholarly discourse. Lastly, Part III includes reference to the military mission, which sets the military criminal justice system apart from its civilian analogs. Part IV consists of the methodologies used to conduct the research for this Article, relying on qualitative coding of trial transcripts.

In Prong One (Part V),[13] the Article relies solely on records predating the enactment of Rules for Courts-Martial (RCM) 1001A[14] and 1001(c)[15] and uses qualitative methods to expose themes within VIS. In Prong Two (Part VI), the Article discusses appellate military cases that have interpreted RCM 1001A and 1001(c). The Article adopts this two-prong approach, because relying solely on appellate case law is insufficient to inform the discussion about the propriety of VIS. Not all cases with VIS are heard on appeal, and, when they are, the issue of VIS is not always litigated. For instance, many of the records from Prong Two were assigned without error on appeal, and, therefore, there is no appellate decision that would inform a reader that VIS was submitted at the trial level. Additionally, only one of the 50 records analyzed in Prong Two assigned any error related to VIS.[16]

Melding these two approaches gives greater depth and breadth of understanding to the current structure of the military criminal justice system. The findings presented here can assist policy-makers when they decide whether, and to what extent, changes, if any, should be made to the military's criminal justice process. Ultimately, questions remain regarding whether the value of the victim

[13] Prong One and Prong Two reference the dual-prong approach used in this Article. However, Prong One is included in Part V and Prong Two is included in Part VI.
[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001A (2016) [hereinafter 2016 MCM].
[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c) (2019) [hereinafter MCM]. Created in 2016, RCM 1001A is the precursor to current RCM 1001(c), both of which address VIS at sentencing in courts-martial. Because the text of RCM 1001A (2016 MCM) and 1001(c) (MCM) are identical, the RCM numbers are used interchangeably throughout the Article.
[16] In the one case that did find error, the error was not attributable to the merits or sentencing portion of the trial. United States v. Northrup, No. 201100478, 2012 CCA LEXIS 846 (N-M. Ct. Crim. App. Feb. 23, 2012). In denying the accused's clemency request, the convening authority considered VIS without giving the accused an opportunity to respond to it. *Id*. at *2–3. The appellate court set aside the denial of clemency and required that the convening authority reconsider clemency in accordance with the rules that allowed the accused to comment on any adverse matters provided to the convening authority. *Id*.

should be a consideration in sentencing, and if it should be, to what extent that value is permitted under the military rules as currently drafted.

Part VII is dedicated to the analysis and conclusion from the findings in Prongs One and Two. Part VIII provides modest proposals for reform based on these findings and conclusions.

II. THE LEGAL LANDSCAPE

A. Seminal U.S. Supreme Court and Military Case Law Addressing VIS

Both federal courts and Congress have provided legal guidelines for the use of VIS in criminal cases, but they are a relatively new tool utilized in criminal trials. It was not until 1991 that the U.S. Supreme Court in *Payne v. Tennessee* sanctioned the use of VIS in capital trials.[17] In a cocaine- and alcohol-fueled episode, Pervis Tyrone Payne went to Charisse Christopher's house and made sexual advances on her.[18] When she resisted, he stabbed Charisse and her two children, resulting in her death and the death of her two-year-old child.[19] Her other child survived after extensive surgeries. The grandmother of the deceased child testified at trial about the impact the two-year-old's death had on the surviving child.[20] In argument, the prosecutor referenced that testimony when asking for the death penalty, and the jury awarded the death penalty.[21] On appeal, Payne contended that the admission of the grandmother's testimony and the prosecutor's closing argument prejudiced his rights under the Eighth Amendment of the U.S. Constitution.[22]

Evaluating the Eighth Amendment jurisprudence as applied to the facts in *Payne*, the U.S. Supreme Court analyzed the admissibility of VIS in capital cases. Eschewing notions attributing value assignments to some victims over others, the Court reasoned that VIS "is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."[23] In overturning prior cases, the *Payne* court held that VIS provided the finder of fact information about the

[17] Payne v. Tennessee, 501 U.S. 808, 830 (1991).
[18] *Id.* at 812.
[19] *Id.* at 813.
[20] *Id.* at 814–15.
[21] *Id.* at 815.
[22] *Id.* at 816–17 (citing Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989)) (explaining that the appellant relied on *Booth* and *Gathers* to argue that introducing the VIS violated the Eighth Amendment, because it led to an arbitrary sentencing outcome).
[23] *Id.* at 823.

specific harm caused by the accused and does not lead to arbitrary sentencing decisions.[24]

Military courts refined the contours of the use of VIS in military criminal trials. In *United States v. Pearson*,[25] the Court of Military Appeals (CMA)[26] was grappling with an unprecedented challenge to victim impact information—the argument that VIS was impermissible and could not be admitted as evidence at trial—which included testimony that the victim was "an outstanding person and Marine, and that his family and community were devastated by his loss."[27] Citing to federal practice and acknowledging the desire to incorporate the "full measure of loss suffered by all of the victims, including the family and the close community," the CMA found that this type of evidence can be permissible in the military context, even after applying the Military Rule of Evidence (MRE) 403 balancing test.[28]

In *Pearson*, the victim died as a result of the negligent act of the accused while the two were engaged in a bar fight.[29] At the time *Pearson* was decided, "the victim . . . ha[d] no standing in the Court beyond the status of a mere witness – he ha[d] no right of allocution and [was] often overlooked in the process of plea negotiation."[30] However, the appellate court also found that it was appropriate, if not necessary, to sentence an accused after "listening to the victim's offense-related needs."[31] Yet even *Pearson* found limits to the kind of information that could be considered, overturning the sentence based on testimony that included the community's desires regarding an appropriate sentence.[32] The appellate court's ruling echoed sentiments from *Payne*:

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[24] *Id.* at 825.
[25] United States v. Pearson, 17 M.J. 149 (C.M.A. 1984).
[26] The CMA is the name of the court that preceded the Court of Appeals for the Armed Forces.
[27] *Pearson*, 17 M.J. at 152.
[28] *Id*. at 153. *Pearson* involved government evidence in aggravation, which is subject to the Military Rules of Evidence. Applying MCM, Military Rules of Evidence (M.R.E.), the court found that the "victim's character and magnitude of loss felt by his family and community" was not unfairly prejudicial and therefore admissible. *Id.* However, it did overturn the sentence after finding the trial court impermissibly admitted testimony from the father which said, "I've been sitting over there trying to think how I can go back home, how I can call my wife tonight, and how I can go back home to Reeseville, and tell them that the verdict was negligent homicide[,]" and testimony from someone from the victim's unit that the entire unit was waiting on the results of the court-martial. *Id.* at 151 (quoting the father's testimony). *But see* United States v. Tyler, 81 M.J. 108 (C.A.A.F. 2021) (holding that victim impact statements offered by the victim, not the Government, are not evidence and therefore not subject to M.R.E. 403).
[29] *Pearson*, 17 M.J. at 150.
[30] *Id.* at 152 (internal citations omitted).
[31] *Id*.
[32] *Id.* at 153.

> Thus trial judges, in their sound discretion, may permit counsel to introduce evidence of the character of the victim. This is not to imply that the life of a victim who is unloved or unappreciated by his community is any less precious than that of a pillar of society. It is simply a recognition that the actual extent of damages inflicted by a criminal can be brought to the attention of the sentencing body.[33]

The CMA's decision in *Pearson* acknowledged the importance of conveying the effect of victim impact information but drew a line between the impact to the victim's family and unit and the impact of the court-martial verdict.

B. Procedural Developments

Over 30 years after victims received the right to provide VIS at sentencing hearings in federal courts through the VWPA, Congress created Article 6b, Uniform Code of Military Justice (UCMJ),[34] and promulgation of the Rules for Courts-Martial (RCM) implementing that statute followed.[35] Sentencing principles in the military now allow victims the independent right to introduce information that relates to the impact of crimes on them.[36] These changes are consistent with the majority of jurisdictions within the United States, which require sworn statements at capital hearings.[37] According to the RCM, victims are entitled to provide a sworn or unsworn statement, and the unsworn statement may be made orally, in writing, or both.[38]

There are two ways in which VIS may be introduced in a military sentencing hearing. The first way is via the prosecutor, who may introduce evidence in aggravation under RCM 1001(b)(4), which states:

> Trial counsel may present evidence as to any aggravating circumstances *directly relating to or resulting from* the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of

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[33] *Id*.
[34] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 953 (2013); Exec. Order No. 13696, 80 C.F.R. § 35783 (2015).
[35] *See* 2016 MCM, *supra* note 14, R.C.M. 1001A(b)(4) ("Right to be reasonably heard. (A) Capital cases. In capital cases, for purposes of this rule, the 'right to be reasonably heard' means the right to make a sworn statement."). Prior to this change, victims could be called as witnesses by the Government to offer sworn statements and, in limited circumstances, they could provide handwritten statements the prosecution could offer as evidence. However, victims did not hold a right independent of the prosecution to present VIS to the court.
[36] MCM, *supra* note 15, R.C.M. 1001(c).
[37] MODEL PENAL CODE: SENTENCING, *supra* note 7.
[38] MCM, *supra* note 15, R.C.M. 1001(c)(2)(D)(ii).

> financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command *directly and immediately resulting from* the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.[39]

Military law has provided the opportunity for evidence in aggravation to be considered since at least as far back as the late nineteenth century.[40] It is likely that a court could have heard testimony from a victim for sentencing purposes prior to 1891.[41] The law related to VIS is currently evolving, and through this evolution, the lack of clarity on what can and should be considered 'victim impact' is apparent. This lack of clarity is not simply a military problem but exists in state jurisdictions too.[42] In the military, at least one court has interpreted the scope of the substance of a victim's VIS under RCM 1001A and RCM 1001(c) as broader and more encompassing than the government's ability to introduce evidence in aggravation under RCM 1001(b)(4).[43] The basis for finding a broader right stems from the language, 'arising from' in RCM 1001(c)(2)(B), as distinguished from 'resulting from,' used to define evidence in aggravation under RCM 1001(b)(4). However, whether the scope of VIS in the military is broader than the government's evidence in aggravation is not settled.

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[39] MCM, *supra* note 15, R.C.M. 1001(b)(4) (emphasis added).

[40] ARTHUR MURRAY, INSTRUCTIONS FOR COURTS-MARTIAL INCLUDING SUMMARY COURTS 24 (2d ed. 1891) ("In all cases of discretionary punishment . . . full knowledge of the circumstances attending the offense is essential to an enlightened exercise of the discretion of the court in measuring punishment, and for the information of the reviewing authority in judging of the merits of the sentence. It is, therefore, proper for the court to take evidence after a plea of guilty in any such case, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation that accompany the offense.").

[41] *Id*.; MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. IX, ¶ 154(c) (1921) [hereinafter 1921 MCM] (restating similar language to that found in the Murray Manual: "In cases where the punishment is discretionary a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority in acting on the sentence.").

[42] MODEL PENAL CODE: SENTENCING, *supra* note 7; Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument after* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1035 (1992) (finding that the *Payne* decision's single-pronged approach to constitutionally problematic evidence, that is also deemed harmless, creates an ambiguity for trial participants in assessing whether evidence is admissible).

[43] *See* United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240 (N-M. Ct. Crim. App. Apr. 13, 2017)*; see also* discussion, *infra*, Part V.

The second way in which VIS may be introduced is by the victim, after the prosecution has presented its evidence. In some cases, VIS is introduced both as prosecution aggravation evidence and through the victim, but there is no requirement that either or both mechanisms be used. A victim has a right to reasonably be heard under RCM 1001(c)(2)(B), which includes the ability to provide victim impact information: "victim impact includes any financial, social, psychological, or medical impact on the crime victim *directly relating to or arising from* the offense of which the accused has been found guilty."[44]

III. LITERARY FRAMEWORK

A. VIS

The scholarly debate surrounding VIS reveals a chasm between two opposing views, including those who support the use of VIS and those who do not. The debates revolve around the arguments illuminated in the U.S. Supreme Court case law already discussed. Yet the scholarly discourse provides additional context to the debate due to the scientific findings from the research fueling the discussion. While case law can address the greater issues revolving around VIS, it is limited to the facts of the case before the court. In this Part, the Article includes some of the research and literature that helps inform the debate from a scientific perspective.

Permitting the admission of VIS in criminal proceedings has been one significant change to the law regarding victim rights. While this change occurred at different times in different jurisdictions, most states allow for VIS in some form.[45] The primary purpose of the VIS, from a legal standpoint, is to provide information to the finder of fact for consideration when voting on a sentence and can be used as a basis to ask for more or less punishment from the finder of fact.[46] Some opine that another purpose of VIS is to provide a channel through which victims receive a therapeutic benefit.[47] Yet others believe that any therapeutic

[44] (emphasis added). *See supra* note 15 (explaining that the language in RCMs 1001A and 1001(c) is the same).
[45] *See* Kimberly J. Winbush, *Admissibility of Victim Impact Evidence in Noncapital State Proceedings*, 8 A.L.R. 7th Art. 6 (2016).
[46] *See, e.g.*, Karen-Lee Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUAL. HEALTH RES. 1445, 1445 (2013) [hereinafter Miller, *Purposing*]; Karen-Lee Miller, *Relational Caring: The Use of the Victim Impact Statement by Sexually Assaulted Women*, 29 VIOLENCE & VICTIMS 797, 797–98 (2014) [hereinafter Miller, *Relational*].
[47] Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1, 5 (1994); Amy L. Wevodau et al., *The Role of Emotion and Cognition in Juror Perceptions of Victim Impact Statements*, 27 SOC. JUST. RSCH. 45, 47 (2014).

benefit to the victim may not be worth the possible additional trauma experienced through participating in the criminal justice process.[48]

Although many jurisdictions allow victims to provide a VIS, studies have shown that victims often do not participate when afforded the right to do so.[49] These results might be skewed when taking into account other research that shows victims do not always remember providing VIS.[50] Despite this, based on the data that is available, victims choose to provide VIS for a variety of reasons. In one study, benefits of providing VIS were assessed through qualitative victim interviews and various themes were pronounced.[51] While focusing on the harm to the victim was a component of the reason victims provided VIS, the potential to prevent harm to others also arose as a compelling reason for victims to participate in the process.[52]

Proponents of the laws allowing the admission of VIS in criminal proceedings believe that the change in the law has been instrumental in giving victims a "voice" throughout the criminal justice process, because it allows victims the opportunity to express their thoughts about the decisions made throughout the process.[53] Researchers have questioned whether the advent of VIS has given victims any additional satisfaction in the criminal justice process, and findings are mixed.[54]

The debate surrounding VIS has precipitated research on the impact VIS have on sentencing outcomes.[55] In one study, potential jurors were given a questionnaire to assess personal attributes of the participant and the way in which the participant stated they would sentence a sexual assault offender, based on a

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[48] Miller, *Relational*, *supra* note 46, at 799.

[49] Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH., PUB. POL'Y, & L. 492, 493 (2004) (finding that most victims do not participate when afforded the opportunity to provide VIS. Only 18 percent of victims attended the sentencing hearing, and only nine percent provided an oral statement to a judge or jury).

[50] *See* Jeanna M. Mastrocinque, *Victim Personal Statements: An Analysis of Notification and Utilization*, 14 CRIMINOLOGY & CRIM. JUST. 216, 229 (2013) (identifying this as a suggested topic for additional research on VIS).

[51] Miller, *Relational*, *supra* note 46, at 807 (describing how the interviews identified multiple reasons for why victims chose to participate in the proceedings, with a common theme being the desire to help other victims); *id.* at 802 (identifying victims' concerns for the safety of others or those who also suffered as a result of the violence).

[52] *Id.* at 804.

[53] Kristin L. Anderson, *Victims' Voices and Victims' Choices in Three IPV Courts*, 21 VIOLENCE AGAINST WOMEN 105, 107 (2015); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 217 (1999); Mastrocinque, *supra* note 50, at 217.

[54] Davis & Smith, *supra* note 47, at 10–11.

[55] Erez & Rogers, *supra* note 53, at 220–21; Amy L. Wevodau et al., *Why the Impact? Negative Affective Change as a Mediator of the Effects of Victim Impact Statements*, 29 J. INTERPERSONAL VIOLENCE 45, 46 (2014).

vignette provided in the study.[56] The questions pertaining to personal attributes were used to determine whether the participants were more likely to make judgments based on emotion.[57] The study showed that the introduction of a VIS in a criminal trial had a positive correlation with increased confinement.[58] Yet this study did not address whether VIS impacted sentencing decisions in actual cases.

Some scholars have criticized the reforms allowing VIS to be admitted in criminal trials.[59] Professor Susan Bandes argues that the focus in determining punishment should be on the offender rather than the victim.[60] One major concern for Bandes is that while allowing admission of VIS might seem to be a positive change in the law, it ultimately harms the community of victims when assessed at the meta-level.[61] Bandes posits that VIS are "inappropriate" and should be suppressed, because they "appeal to hatred, the desire for undifferentiated vengeance, and even bigotry."[62] If the focus of a sentencing proceeding is, in part, on the victim, and the value of the victim is given weight in determining an appropriate sentence, then there must be some victims who are valued more than others in terms of punishments imposed. Bandes supports her arguments for abolishing VIS, in part, on the findings in the studies conducted by David Baldus.[63] Those studies showed that the death penalty was 22 percent more likely to be awarded to Black defendants with White victims than Black defendants with Black victims.[64]

Bandes perceives this purported disparity in sentencing based on the value ascribed to the victim as problematic.[65] For instance, some victims state they were more trusting of others before the assault.[66] Some victims state they were unable to keep intimate bonds with others due to the assault.[67] While the contextual evidence provided by the VIS logically assists in assessing the totality

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[56] Wevodau et al., *supra* note 55, at 51.
[57] *Id.* at 52.
[58] *Id.* at 57.
[59] Stevens, *supra* note 2, ¶¶ 49–55 (arguing VIS can be subject to U.S. Constitution, Fourteenth Amendment challenges).
[60] Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365–66, 398 (1996).
[61] *Id.* at 405–08.
[62] *Id.* at 365.
[63] *Id.*
[64] *Id.* at 398 (citing to DAVID C. BALDUS, GEORGE WOODWORTH, & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern Univ. Press, 1990)); *see also* McClesky v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting) (relying on the Baldus study to show that race increased the likelihood of the death penalty being sought and awarded and concluding, therefore, that the sentence to death was constitutionally untenable in McClesky's case).
[65] Bandes, *supra* note 60, at 398.
[66] Miller, *Purposing*, *supra* note 46, at 1453.
[67] *Id.*

of the harm inflicted by the perpetrator, it implicitly allows for the conclusion that the experiences of victims who do not suffer in the same way—in terms of factors that should increase the punishment for the offender—are not as important as others who do. In other words, assailing an unsympathetic victim potentially provides a benefit to the offender in sentencing. Furthermore, given the results of studies showing racial effects in punishments awarded in criminal trials,[68] differentiating between victims through VIS creates the possibility of the very kind of racial discrimination found problematic by the dissent in the U.S. Supreme Court's case of *McClesky v. Kemp*.[69]

B. Gendered Violence

In the context of sexual assault, the empirical evidence supports the arguments of some that introducing VIS implicitly asks the finder of fact to make a value judgment on the victim.[70] Placing value judgments on the worth of women is nothing new, especially as it relates to their purity, directly tied to their virginity.[71] Historically, women were chattel, the exclusive property of their fathers or husbands.[72] A sexual violation against a woman, or more precisely a virgin, was, by law and social construction, a violation against the man who owned her.[73] It was her virginity that made her valuable, or of value.[74] While some

[68] Sara Steen, Rodney L. Engen, & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435 (2005) (finding Black defendants were significantly more likely to be confined compared to White defendants); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judge's Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2006) (finding White defendants received the greatest leniency in sentencing, followed by Black and then Hispanic defendants).

[69] *See supra* note 64.

[70] Bandes, *supra* note 60, at 394–95.

[71] *See generally* Susan Estrich, *Real Rape*, 95 YALE L.J. 1087, 1141 (1986) ("Rape has long been viewed not only as a crime against women, but also as a crime against the man who is entitled to exclusive possession of that woman."); NILS CHRISTIE, THE IDEAL VICTIM 19 (1986) (being a virgin increases the likelihood that a victim is considered an ideal rape victim); Mirka Smolej, *Constructing Ideal Victims? Violence Narratives in Finnish Crime-Appeal Programming*, 6 CRIME MEDIA CULT. 69, 81 (2010) ("the identification as an 'ideal victim' is connected with vulnerability and innocence.").

[72] Gerald D. Robin, *Forcible Rape Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQ. 136, 149 (1977); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 13 (1st Ballantine Books ed. 1975).

[73] BROWNMILLER, *supra* note 72, at 17.

[74] *See* Jennifer Dunn & Tennley Vik, *Virginity for Sale: A Foucauldian Moment in the History of Sexuality*, 18 SEX. CULT. 487, 491 (2014) (discussing the social and economic value of virginity throughout history); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 110 (1989) (describing how feminists have recognized that greater society perceives that "[v]irtuous girls, virginal, are 'attractive,' up on those pedestals from which they must be brought down; unvirtuous girls, whores, are 'provocative,' so deserve what they get."). MacKinnon further explains: "The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally [have intercourse with], who is open season and who is off limits, not how to listen to women. The paradigm categories are

ancient cultures proscribed the death penalty for taking a woman's virginity, some merely required the offender to pay the price a suitor would have paid to marry her.[75] Of course, given the woman was her father's chattel, the compensatory fee was paid to the father.[76] In Assyrian culture, the father was not paid nor was capital punishment imposed on the offender, but as a consolation to the father, he was allowed to rape the wife of the offender.[77]

The criminal code applicable to the military, being enacted by a society that adhered to chattel law, included marriage as a defense to sexual assault well into the twenty-first Century.[78] The exception to criminal sanction for marital rape was included by the drafters of the Model Penal Code who, broadly, did not want an "unwarranted intrusion of the penal law into the life of the family."[79] Additionally, in American culture, the crime of sexual assault has historically been seen as a crime against the state vice the victim.[80]

With this context in mind, one could reasonably conclude that the arguments in *Payne* and *Pearson*, which implicitly fail to acknowledge the underlying sociological schema that pervade VIS,[81] are unsatisfying. Although the concept of VIS is relatively new compared to the long history showing subjugation of women to men, it, at least implicitly, seems to hold faith with earlier conceptions about female autonomy—that is, society should make distinctions in criminal justice decision-making based on the value of the victim.[82] Although virginity could be a relevant factor for consideration at a sentencing hearing under current laws, melding the old with the new continues to raise

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the virginial daughter and other young girls, with whom all sex is proscribed, and the whorelike wives and prostitutes, with whom no sex is proscribed." *Id*. at 175.

[75] BROWNMILLER, *supra* note 72, at 20.

[76] *Id.*

[77] *Id.*

[78] *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45.a.(g) (2012), *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45.a.(o)(1) (2008).

[79] Estrich, *supra* note 71, at 1142 n.176.

[80] *See* Jamie L. Small, *Classing Sex Offenders: How Prosecutors and Defense Attorneys Differentiate Men Accused of Sexual Assault*, 49 LAW & SOC'Y REV. 109, 122 (2015) (suggesting that historically, the anti-rape agenda has been rooted in a paternalistic vision of society wherein "[s]exual assault emerges as a crime against the state to be resolved by prosecutors."); *see also* Edna Erez, *Who is Afraid of the Big Bad Victim: Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 547 (1999) (comparing the restitutive model of justice with the traditional standards, the latter of which is not meant to make the victim whole).

[81] Friederike Eyssel & Gerd Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, 26 J. INTERPERSONAL VIOLENCE 1579, 1581 (2011) (focusing on "schematic influences of rape-supporting attitudes on perceptions of guilt and responsibility in rape cases.").

[82] Of the victims with a coded gender in the cases reviewed for this Article, the data revealed that 47 of the cases included female victims and three cases included male victims.

questions about how to incorporate impact to victims without the pitfall that *Payne* and *Pearson* dismiss.[83]

C. Intersectional Approaches to Gendered Violence

An intersectional approach uncovers how gender and race, as two examples, impact individuals in different ways, including how society constructs and responds to individuals with those characteristics.[84] Some scholars take an intersectional approach in order to appreciate the contextual, causal factors that underlie some forms of gendered violence.[85] Intersectional approaches to gendered violence allow for an appreciation of how heteronormativity does not explain the circumstances through which all individuals experience and respond to violence.[86] Historically, constructions of victimization failed to take into account intersectional approaches to understanding victimization, because those constructions focused on responding to the experiences of middle-class White women, which differed from lower-income (and) Black women.[87] For instance, dominant discourse on race and gender fail to appreciate or treat as significant experiences of Black women in violent situations.[88] The experiences of middle-class women included the social and economic ability to access resources in response to victimization by violence.[89] Further, defining victimization in middle-class White women's terms meant that the experiences of low-income, Black women were "invisible to the mainstream public . . . [or] cast as something other than a case of gender violence."[90] Therefore, these mainstream discourses failed

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[83] Payne v. Tennessee, 501 U.S. 808, 819 (1991); United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984).

[84] *See, e.g.,* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) ("Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment."); Xavier Guadalupe-Diaz, *An Exploration of Differences in the Help-Seeking of LGBQ Victims of Violence by Race, Economic Class and Gender*, 9 GAY LESBIAN ISSUES PSYCHOL. REV. 15 (2013) (finding that in "the hypothesized statement that both class and gender identity are important factors in the decision to seek help for LGBQ victims of violence, class was especially influential."); Archana Bodas LaPollo, Lisa Bond, & Jennifer L. Lauby, *Hypermasculinity and Sexual Risk Among Black and White Men Who Have Sex with Men and Women*, 8 AM. J. MENS HEALTH 362 (2014); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012) [hereinafter RICHIE, ARRESTED JUSTICE] ("Black women's bodies are simultaneously marked by racial, gender, sexual, color, historical, class, and other stigmas . . .").

[85] *See, e.g.*, Crenshaw, *supra* note 84; Guadalupe-Diaz, *supra* note 84; LaPollo, Bond, & Lauby, *supra* note 84; RICHIE, ARRESTED JUSTICE, *supra* note 84.

[86] Clare Cannon et al., *Re-Theorizing Intimate Partner Violence through Post-Structural Feminism, Queer Theory, and the Sociology of Gender*, 4 SOC. SCI. 668, 672 (2015).

[87] Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 J. WOMEN CULTURE & SOC'Y 1133, 1135 (2000) [hereinafter Richie, *Feminist*].

[88] Crenshaw, *supra* note 84, at 1269.

[89] Richie, *Feminist*, *supra* note 87, at 1135.

[90] *Id.*

to account for the stark differences between the experiences of victims of violence within and without Black communities and at different levels of the socio-economic ladder.[91] These differences have often been left out or masked in mainstream discourses concerning both issues of race and gender because neither takes into account the impact of being both Black and a woman.[92] And while gender and race are factors analyzed through intersectional approaches, many other characteristics are as well.

D. Military Environment

Consideration must also be given to the notion that the military society is separated, arguably for good reason, from its civilian counterparts. The basis for the military's criminal code and the system that adheres to it is predicated on the need to maintain a disciplined fighting force, and is executed to some extent through criminal sanctions. Questions arise in the context of VIS as to what extent should the impact of sexual assault—to the mission, not just the individual—be considered at sentencing. The extent of harm to the military mission can be significant, especially when victims are military members and offenses occur within units.

When it comes to the military mission, two countervailing positions arise. One view is that the bounds of VIS could be constrained by principles of sentencing that include *foreseeable* damage caused by the offender.[93] Otherwise, one might find sentencing what some believe it has become—a popularity contest, the results of which directly impact the sentence imposed on the offender.[94] Another view exists that sexual assault, in some cases, has such a detrimental impact to the military mission that punishments to offenders should take into account that harm, regardless of its foreseeability by the offender.[95]

IV. METHODOLOGY

This study uses a two-part approach. Prong One of the study involves a qualitative review of trial-level records that predated the enactment of RCM 1001A and 1001(c), and used convenience sampling, which included reviewing as many records of trial as practicable for Navy sexual assault cases. These cases represent those to which the author had access during his tenure litigating cases

[91] RICHIE, ARRESTED JUSTICE, *supra* note 84, at 1.
[92] Crenshaw, *supra* note 84, at 1242.
[93] United States v. Stephens, 66 M.J. 520, 528 (A.F. Ct. Crim. App. 2008) (discussing foreseeable consequences as appropriate considerations for sentencing).
[94] Bandes, *supra* note 60, at 410 ("The victim impact statement dehumanizes the defendant and employs the victim's story for a particular end: to cast the defendant from the human community.").
[95] *See infra* Part VI.

as a defense counsel and prosecutor.[96] The Navy does not keep a verbatim transcript of every trial; only trials meeting specific criteria are transcribed.[97] There are thousands of military trials that have not been recorded. There are thousands of records that, although audio-recorded, have not been reduced to a transcript. Thus, the sampling plan is one of convenience, but also one involving practical realities. Within the 50 trials reviewed,[98] there were 66 victims and 61 VIS provided during the sentencing proceedings. Some of the trials had multiple victims. Some of the victims were children, and some of the VIS were provided by a family member of the victim. There were several cases with a finding of guilty where the victim did not testify at the pre-sentencing hearing. In those instances, the victim had already testified during the merits portion of the trial.

To qualitatively analyze these records, the author used grounded theory.[99] The process of grounded theory entails the review of data through two stages: "open [coding] and focused coding."[100] Open or "initial" coding is a process of looking at the data to determine "what is happening."[101] If the researcher finds there are "patterns, consequences, inconsistencies, [or] contradictions[,]" then the researcher will annotate those as a possible theme.[102] However, sometimes there is only one instance of a phenomenon occurring. That only one instance can be found should not dissuade the researcher from including the theme because pervasiveness is but one aspect of making initial coding decisions.[103] The second phase is called focused coding. Focused coding is the process of organizing themes in the data in order to analyze large amounts of data.[104]

The methodologies used herein are akin to those used by Gregory Matoesian, David Brereton, and Philip Rumney, who studied the language in trials

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[96] From 2009 to 2016, the author served as a defense counsel. From 2016 to 2021, he served as a prosecutor.

[97] During the timeframe studied, a trial with a sentence that exceeded six months or where a punitive discharge was adjudged were required to be transcribed verbatim. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b)(2)(B) (2000).

[98] For a full list of cases used for the purposes of this analysis, see *infra* Appendix A; *see also infra* Appendix C for descriptive statistics of the cases relied upon in this study and listed in Appendix A.

[99] The author is unaware of any other published studies that have analyzed VIS in a similar way. *But see generally* Tali Gal & Ruthy Lowenstein Lazar, *Sounds of Silence: A Thematic Analysis of Victim Impact Statements*, 27 LEWIS & CLARK L. REV. (forthcoming 2023), https://bit.ly/3Bjjkjy (discussing how allowing VIS to be used during criminal proceedings can "create a new framework that integrates the legal and therapeutic discourses.").

[100] Lisa Frohmann, *Constituting Power in Sexual Assault Cases: Prosecutorial Strategies for Victim Management*, 45 SOC. PROBS. 393, 395 (1998).

[101] Kathy Charmaz & Karen Henwood, *Grounded Theory*, *in* THE SAGE HANDBOOK OF QUALITATIVE RESEARCH IN PSYCHOLOGY 1, 8 (3d ed., 2008).

[102] Frohmann, *supra* note 100, at 395.

[103] *See* ROBERT M. EMERSON ET AL., WRITING ETHNOGRAPHIC FIELDNOTES 161–62 (1st ed. 1995).

[104] Charmaz & Henwood, *supra* note 101, at 7.

to discover what actually happened at trial.[105] These studies help illuminate the extent to which rape law reforms have effectuated change within the criminal justice process. For instance, Matoesian questioned whether rape shield laws produced the intended benefits legislatures had in mind when enacting them.[106] Matoesian only had to analyze one trial to come to the conclusion that criminal justice actors have a penchant for subverting the purpose of the rules.[107] He showed how "subtle descriptions emanating from the patriarchal logic of sexual rationality" and "overt sexual history references" were both types of rape shield evidence.[108] In his estimation, the former type of rape shield evidence flowed through the testimony of witnesses without objection from the participants.[109]

In Prong Two, the author researched cases addressing the language of RCM 1001A and 1001(c), specifically the 'directly related to or arising from' language. Using LexisNexis search features, the author searched all military cases with the search parameter 'arising from.' The search focused on 'arising from' rather than 'directly related to,' because the latter phrase was already contained in RCM 1001(b)(4). This produced 1,584 results. He then focused the search further with the search term, "victim impact." The author used this search term in the event that a court characterized a VIS as a statement or evidence. This search resulted in 66 cases. 55 cases were removed from the analysis, because they (1) predated RCM 1001A, and/or (2) they had the search terms in the opinion without addressing the substance of VIS within the scope of RCM 1001A or 1001(c). 11 cases remained for analysis and are discussed *infra* Part VI.

V. FINDINGS (PRONG ONE)

Core concepts and themes pervaded the data during the qualitative review of trials that preceded the enactment of RCM 1001A. There were other themes that were not as prevalent, but were included because of the perceived importance of highlighting them, such as instances of retaliation. Effort was made to include the exact language from the transcripts in order to allow the reader to make a

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[105] *See generally* David Brereton, *How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials*, 37 BRIT. J. CRIMINOLOGY 242 (1997) (examining transcripts of trials to qualitatively assess the difference in treatment of rape and assault victims); Gregory M. Matoesian, *"You Were Interested in Him as a Person?": Rhythms of Domination in the Kennedy Smith Rape Trial*, 22 L. & SOC'Y INQUIRY 55 (1997) (using conversation analysis to qualitatively analyze one rape trial to illuminate members' meanings through trial-talk); Philip N. S. Rumney, *Gender Neutrality, Rape and Trial Talk*, 21 INT. J. SEMIOTICS L. 139 (2008) (examining transcripts of trials to qualitatively assess the difference in treatment of female and male victims of sexual assault during cross-examination).

[106] Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 691 (1995).

[107] *Id.*

[108] *Id.*

[109] *Id.*

judgment about what the data means.[110] That a particular phenomenon was not discussed during testimony is not an indicator that it did not occur, which is an important factor to keep in mind considering the results. The burden of testifying in open court about a highly sensitive topic such as sexual assault could cause enough stress or anxiety that a victim might not remember to mention a particular detail.[111] Additionally, the prosecutor might not have thought a particular line of inquiry was relevant or for some other reason it was not addressed.

In the subparts that follow, the themes are grouped into victim focus, offender focus, and retaliation. Under victim focus, the groupings consist of: (1) Victim, Mental/Emotional Effect; (2) Victim, Other Effect; (3) Victim Contemporaneous Response to Sexual Assault; (4) Victim, Loss of Trust in Service and/or Chain of Command; and (5) Victims' Thoughts about the Criminal Justice Process. Several cases represented overlapping themes.

A. Victim Focus

A majority of the testimony of victims in the sample focused on the victim response.[112] Within the context of the victim-focus theme, most of the testimony covered the impact of the sexual assault on the victim. However, testimony was elicited that focused on the victim before the assault and, to a lesser degree, during the assault. In most cases, there was little-to-no discussion about the facts pertaining to the sexual assault. The lack of focus on the sexual assault event itself can be explained in the cases that were contested, where the victim earlier testified about those facts.[113]

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[110] *See infra* Appendix A and Appendix B. Appendix A provides a citation list of the trial-level cases analyzed in this study. Appendix B includes individual verbatim transcript excerpts from some of those trials referenced in Appendix A. The excerpts contained in Appendix B were selected, because they provide salient examples of the themes found within the greater data set. The full Records of Trial ("ROT") for all of the cases relied upon in this article and contained in Appendix A can be obtained by contacting the Criminal Law Division of the Office of the Judge Advocate General, U.S. Navy (Code 20).

[111] Meyers, *supra* note 10, at 146.

[112] There was only one contested case with a VIS where the victim's testimony focused on the facts of the sexual offense. *See* United States v. Owens, No. 10-09, ROT p. 546 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009). This case was different than most other cases because it was a domestic violence case involving a married couple with children. *Id*. There were numerous instances of psychological and physical abuse over an extended period of time. *Id*. at 547–48. However, the victim spent more time recounting the verbal abuse, a non-criminal offense, than she did recounting the physical abuse. *Id*. at 546–48.

[113] *See* United States v. Gifford, No. 10-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Feb. 12, 2012), *aff'd*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. Feb. 12, 2013); United States v. Jordan, No. 6-11 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Aug. 16, 2011); United States v. Kennedy, No. 16-11 (Commander, Navy Region Southeast, Kings Bay, Georgia, Aug. 25, 2011); United States v. Western, No. 20-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 1, 2011); United States v. Perry, No. 18-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Aug. 18, 2011); United States v. Hernandez-Alverado, No. 18-05 (Commanding

1. Victim, Mental/Emotional Effect

The testimony concerning the impact of the sexual assault on the victim can be parsed into impacts on mental processes and impacts associated with other aspects of victims' lives. For instance, one victim described how she has changed as a result of the sexual assault: "it's made me someone who's, like, less carefree. And now I have to—everything is more calculated."[114] In contrast, there are aspects of the sexual assault that have affected victims physically. For example, one child victim responded to the sexual assault by physically harming herself. As her mother described it, "[the child will] pull her hair; she'll bite herself; she'll scratch herself."[115] These physical manifestations might be a product of the psychological impact caused by the sexual assault. However, where there is reference to the mental processes of the victim, these were coded under mental processes. Testimony concerning impact not directly related to mental processes was coded separately.

All but three of the VIS provided in the form of testimony referenced an impact to the victim's emotional or psychological state emanating from the sexual trauma. Victims testified about going into "deep shock" and being "numb," as well as suffering from "depression" and "PTSD."[116] Ten victims testified that they had "nightmares" or "bad dreams."[117] However, there were several victims who stated they had many "psychological issues" without providing further context.

Officer, 1st Force Service Support Group, Camp Pendleton, California, Nov. 5, 2004) (Victims 1 through 4), *aff'd*, 2006 CCA LEXIS 298 (N-M. Ct. Crim. App. Nov. 21, 2006); United States v. Heyward, No. 05-0699 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Oct. 5, 2001); United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000) (Victims 1 and 2).

[114] United States v. Castillo, No. M12-01, ROT p. 1700 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).

[115] United States v. Cantrell, No. 1-04, ROT p. 1687 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, June 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).

[116] United States v. Bohlayer, No. 1-2014, ROT p. 56 (Commander, Marine Corps Installations Command, Washington Navy Yard, District of Columbia, Nov. 1, 2013); United States v. Edmond, No. 01-12 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sept. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. 2015); United States v. Antonio, No. 02-2013 (3d Marine Aircraft Wing, Camp Pendleton, California, Feb. 28, 2013); *Cantrell*, No. 1-04; United States v. Harris, No. 23-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 21, 2011), *aff'd*, 2012 CCA LEXIS 860 (N-M. Ct. Crim. App. Feb. 21, 2012); *Owens*, No. 10-09.

[117] *Bohlayer*, No. 1-2014; *Antonio*, No. 02-2013; United States v. Sanchez, No. 2-2013 (Commanding General, Marine Corps Air Station Miramar, San Diego, California, Oct. 29, 2012); United States v. Barr, No. 02-12 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011); *Harris*, No. 23-11; United States v. Holmes, No. 9-2011 (Commander, Navy Region Midwest, Great Lakes, Illinois, Aug. 27, 2011), *aff'd*, 2012 CCA LEXIS 782 (N-M. Crim. Ct. App. Dec. 18, 2012); *Owens*, No. 10-09; United States v. Morgan, No. 04-1036 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003); *Meredith*, No. 06-0697.

Some of the victims who testified about experiencing nightmares went into vivid details about those experiences.

Most victims were left with only negative perspectives concerning the sexual assault. 16 victims testified about how they continued to think about the sexual assault and the offender, especially when something occurred that triggered a "flashback."[118] The sample excerpts in Appendix B, Set #1, show how victims described the mental processes from which they suffered as a result of the sexual trauma. The mental processes affected the way in which victims engaged in basic aspects of daily life. As an example, one victim was unable to go to bed without ensuring that she was fortified in her home.[119] Shopping on base was no longer an option because the offender could have been present.[120] Contrastingly, in at least two instances, the victims testified they were actually stronger for having experienced sexual assault.[121]

Military victims are unique, compared to some populations. The data showed that many victims were required to remain at the same duty station, and in some cases in the same barracks, as the offender.[122] The military is also unique because there are potentially punitive consequences for failing to remain at one's place of duty. A victim serving on active duty in the military cannot simply quit or fail to appear at work without potentially facing punitive consequences. One victim testified about this very issue. She was aware that her failure to show up at the command could result in her being punished for being absent without authority.[123] Her fear of the offender was so significant that she risked punishment in order to avoid coming into contact with him.[124] Another victim was upset with the command, because they kept the offender on the ship with her where there were no locks on the berthing compartments.[125] She responded by sleeping in a chair in a locked space where she normally worked on the ship. Another victim

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[118] United States v. Muro, No. 12-2012, ROT p. 137, 140 (Commanding General, 3d Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012); United States v. Wylie, No. 5-12, ROT p. 186 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011) (Victim 1 and 2); *Owens*, No. 10-09, ROT p. 549.

[119] *Muro*, No. 12-2012, ROT p. 140.

[120] *Id*. at 137.

[121] *See infra* Appendix B, Set #2; *Castillo*, No. M12-01, ROT p. 142; *Cantrell*, No. 1-04, ROT p. 105 (one victim stated she was "stronger" for having endured the offense and the latter stated it made her a "strong woman").

[122] *See, e.g*., *Edmond*, No. 01-12, ROT p. 1837 (where the victim discussed feeling unsafe when she was required to live in the same barracks as the accused); *Antonio*, No. 02-2013, ROT p. 36 (where the victim described her experience living in the barracks with the accused after the assault as a form of "prison").

[123] *Muro*, No. 12-2012, ROT p. 137.

[124] *Id*.

[125] United States v. Hollars, No. 1-11, ROT p. 2145 (Commanding Officer, USS NIMITZ (CVN 68), Bremerton, Washington, Jan. 12, 2012), *aff'd*, 2012 CCA LEXIS 505 (N-M. Ct. Crim. App. June 19, 2012).

moved barracks rooms, but even this prophylactic measure did not fully mediate the effects of her hypervigilance, as she continued to experience heightened concern about her safety.[126]

2. Victim, Other Effect

Victims of sexual assault suffer from impacts other than mental and emotional ones, such as physical injury. However, some of these impacts may be indirectly related to the mental and emotional impacts from the assault.[127] In some cases, the source of the impact might be wholly outside the victim's control, such as a supervisor's response to the process flowing from the sexual assault.

One theme relating to the impact of the sexual assault encompasses work-related performance. One victim suffered at school; her grades decreased due to lack of focus and motivation.[128] Another victim had to be moved to an administrative position, because, as she described, it was "extremely hard to function at work when [she felt] like there [wa]s no one [she could] turn to."[129] The job she had performed previously required mental alertness and a high degree of danger. In contrast, one victim excelled after being sexually assaulted; she graduated at the top of her class through two training schools. She was transferred to another duty station and continued to excel there.[130] Two additional victims presented a further contrast by testifying that they experienced no effect on their personal or professional lives resulting from the assault and ensuing criminal process.[131]

Victims also suffered negative consequences at work, with no apparent connection to their military performance. Two military victims testified about how they were placed on an administrative "hold" for months due to the pending criminal trial; one victim stated she was on hold for over a year.[132] Their hold

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[126] United States v. Hudson, No. 2-11, ROT pp. 195–96 (Commander, National Naval Medical Center, Bethesda, Maryland, June 21, 2011), *aff'd*, 2012 CCA LEXIS 344 (N-M. Ct. Crim. App. Aug. 31, 2012).
[127] Alina Suris & Lisa Lind, *Military Sexual Trauma: A Review of Prevalence and Associated Health Consequences in Veterans*, 9 TRAUMA, VIOLENCE, & ABUSE 250, 261 (2008) (recognizing the link between post-traumatic stress disorder associated with sexual assault trauma and physical health symptoms).
[128] *Cantrell*, No. 1-04, ROT pp. 103–08.
[129] *Castillo*, No. M12-01, ROT p. 162.
[130] *Meredith*, No. 06-0697, ROT p. 990.
[131] *Castillo*, No. M12-01, ROT p. 1718 (Victim 2); United States v. Gonzalez, No. 18-11, ROT p. 210 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, May 12, 2011), *aff'd*, 2011 CCA LEXIS 644 (N-M. Ct. Crim. App. Nov. 30, 2011).
[132] United States v. Byrd, No. 7-95, ROT p. 127 (Victim 1), ROT p. 130 (Victim 3) (Chief of Naval Education and Training, Pensacola, Florida, May 1, 1995), *vacated*, 53 M.J. 35 (C.A.A.F. 2000).

status affected their ability to transfer, which in turn affected their opportunity to promote.

3. Victim, Contemporaneous Response to Sexual Assault

Approximately one third of the victims recounted their immediate response to being sexually assaulted.[133] Within the testimony, there were many different ways in which victims responded in the moment of the assault. Some of the victims responded by using verbal and physical countermeasures to match the offender. Others were overwhelmed with emotion and were unable to react at all. Several victims recounted their response to the assault by stating how they would have preferred to respond.

As an example, one victim used verbal protestations to try to stop the assault and the second used physical force.[134] Another victim ultimately used verbal protestations to attempt to stop her attacker. However, she described that there was a period initially where she froze. The second victim explained how she resisted to the utmost,[135] but was unable to defeat her attacker who was "larger, stronger, and *trained*."[136]

Some victims testified about how they relived the sexual assault and imagined responding differently, and in so doing, they appear to engage in self-

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[133] *Bohlayer*, No. 1-2014; United States v. Oakley, No. 01-14 (Commander, Navy Region Northwest, San Diego, California, Sept. 13, 2013); United States v. Cardona, No. 1-13 (Commanding Officer, Naval Computer and Telecommunications Area Master Station, San Diego, California, May 23, 2013), aff'd, 2013 CCA LEXIS 1110 (N-M. Ct. Crim. App. Dec. 13, 2013); *Antonio*, No. 02-2013; United States v. Adams, No. 05-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, June 5, 2012), *aff'd*, 2012 CCA LEXIS 642 (N-M. Ct. Crim. App. Oct. 31, 2012); United States v. Moore, No. 12-12 (Commander, Navy Region Southeast, Jacksonville, Florida, Apr. 26, 2012); *Muro*, No. 12-2012; *Hollars*, No. 1-11; United States v. Lugo, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 23, 2011); *Barr*, No. 02-12; *Castillo*, No. M12-01; *Edmond*, No. 01-12; United States v. Moreno, No. 1C-11 (Victim 2) (Commander Navy Region Europe, Africa, Southwest Asia, FPO AE 09622-0008, Sept. 22, 2011); *Harris*, No. 23-11; United States v. Gomez, No. 02-12 (Victim 2) (Commander, Navy Region Southwest, San Diego, California, June 16, 2011), *aff'd*, 2012 CCA LEXIS 738 (N-M. Ct. Crim. App. Jan. 24, 2012); *Gonzalez*, No. 18-11; *Owens*, No. 10-09; United States v. Montoya, No. 1-07 (Commandant, Naval District Washington, Washington Navy Yard, District of Columbia, Aug. 14, 2007); United States v. Huertas, No. 07-04 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 9, 2003); *Morgan*, No. 04-1036; *Perry*, No. 18-11; *Robinson*, No. 01-2012; *Wylie*, No. 5-12 (Victims 1 and 2).

[134] Appendix B, Set # 3; *Wylie*, No. 5-12, ROT p. 213 (Victim 2); *Castillo*, No. M12-01, ROT p. 152 (Victim 1).

[135] *See* Estrich, *supra* note 71, at 1986; M. Dyan McGuire, Steve Donner & Elizabeth Callahan, *Misogyny: It's Still the Law—An Empirical Assessment of the Missouri Juvenile Court System's Processing of Rape and Robbery Offenders*, 29 GENDER ISSUES 1, 3 (2012) ("Historically, rape victims needed to prove that they resisted to their utmost in order to establish their non-consent to being raped.").

[136] *Castillo*, No. M12-01, ROT p. 152 (Victim 1) (emphasis added).

blame. When they relive the experience, they choose to change their actions in the imagined scenario. There were two salient examples.[137] Neither victim focused on the offender and how his actions could have been different; they instead focused on how they could have prevented the assault. One victim's reaction to the sexual assault was that she "froze" and did not resist in any verbal or physical manner.[138] She thought about how she could have screamed or not been in his presence. In her mind, had she done something differently she would have been able to move on with her career.[139] Another victim imagined punching the offender harder, running away, or screaming; had she taken different steps, she believed she could have avoided the sexual assault and its adverse consequences.[140]

In one case, the victim had interacted with the offender before the sexual assault by sending text messages to him and riding in a car with him. It was later that he sexually assaulted her in a barracks room.[141] There were two question sequences relevant to this analysis. In the first question-sequence, the prosecutor focused on an interaction that preceded the acts that form the basis for the offense. Based on other information in the record, it appears the prosecutor was attempting to set the scene for how the offender became aggressive in the car. The prosecutor was likely trying to show how the offender had committed other uncharged misconduct as an aggravating factor for sentencing.

In the second question-sequence, the prosecutor elicited from the victim that she did not consent to any touching in the car. It appears the prosecutor was looking for testimony supporting a claim of utmost resistance, or an explanation for the lack of it, when the prosecutor asked the victim what else she could have done. The victim stated she had told the offender either "no" or "stop" and conveyed that saying "no" or "stop" should have been enough.[142]

4. Victim, Loss of Trust in Service and/or Chain of Command

There were 17 victims who expressed their lost trust in military members or their chain of command through the process.[143] Some desired to get out of the service even though they had previously considered making it a career. Other

[137] Appendix B, Set # 4; *Morgan*, No. 04-1036, ROT p. 2589; *Edmond*, No. 01-12, ROT p. 1238.
[138] *Morgan*, No. 04-1036, ROT p. 2589.
[139] *Id*.
[140] *Edmond*, No. 01-12, ROT p. 1238.
[141] Appendix B, Set # 5; *Barr*, No. 02-12, ROT p. 263.
[142] *Id*.
[143] *Antonio*, No. 02-2013; *Sanchez*, No. 2-2013; *Adams*, No. 05-2012; *Hollars*, No. 1-11; *Wylie*, No. 5-12 (Victims 1 and 2); *Castillo*, No. M12-01 (Victims 1 through 3); *Edmond*, No. 01-12; *Moreno*, No. 1C-11; *Perry*, No. 18-11; *Gomez*, No. 02-12; *Montoya*, No. 1-07; *Moore*, No. 12-12; *Huertas*, No. 07-04; *Meredith*, No. 06-0697.

victims lost trust in their chain of command based on either the status of the offender as a higher ranking individual or the actions of the command in response to the victim's accusation. For example, in one case, an officer assaulted an enlisted member, and the victim stated she could no longer trust officers.[144] In another case, the victim lost trust in the chain of command because she was adversely affected in job duties.[145]

Three victims testified about how their perspectives about the military changed after the assault, but the degree and nature of the change was different with all three.[146] One victim thought less of the military in general.[147] One was happy about how the military had responded to her complaint, by protecting her and initiating criminal action.[148] She described how someone issued an "MPO," which is a military protective order, and she was the only one who described the trial process as positive and attributes that success to the military.[149] Another victim thought less of the men in the military.[150]

5. Victims' Thoughts about the Criminal Justice Process

The data also exposed victims' thoughts and feelings about the criminal trial process. Several testified that undergoing the sexual assault forensic exam was "humiliat[ing],"[151] "violat[ing],"[152] and "invasive,"[153] and one testified that it made her "angry."[154] Several victims testified about how difficult it was to testify in court. In preparation for one victim's testimony, the prosecutor told her that the defense would characterize her as a "whore" and a "slut."[155] She described her thought process leading to her decision to testify, stating that she felt like she "had to."[156]

These particular victims, along with the other victims in this study, were able to suffer through what has been labelled the "crucible" of the criminal justice

[144] *Wylie*, No. 5-12, ROT p. 2962 (Victim 1).
[145] *Castillo*, No. M12-01, ROT p. 1732 (Victim 3).
[146] Appendix B, Set # 6.
[147] *Castillo*, No. M12-01, ROT p. 1732 (Victim 3).
[148] *Edmond*, No. 01-12, ROT p. 1241.
[149] *Id*. A Military Protective Order (MPO) is similar to civilian orders of protection. They are orders issued by military commanders to individuals under their command, which generally state that the individual may not come into close contact, or have any other contact, with another individual. DD Form 2873, Military Protective Order, July 2004.
[150] *Castillo*, No. M12-01, ROT p. 1718 (Victim 2).
[151] *Antonio*, No. 02-2013, ROT p. 33; *Moore*, No. 12-12, ROT p. 1186.
[152] *Robinson*, No. 01-2012, ROT p. 1414; *Antonio*, No. 02-2013, ROT p. 32; *Cardona*, No. 1-13, ROT p. 138.
[153] *Cardona*, No. 1-13, ROT p. 138.
[154] *Moore*, No. 12-12, ROT p. 1186.
[155] Appendix B, Set # 7; *Meredith*, No. 06-0697, ROT pp. 993–94.
[156] Appendix B, Set # 7; *Meredith*, No. 06-0697, ROT pp. 993–94.

process.[157] At every stage of the process, there are potential pitfalls and attrition[158] that might preclude a victim from testifying at a pre-sentencing hearing.[159] For the individual victim, there are potentially competing interests that would dissuade the victim from continuing down the lengthy criminal justice process.[160] This was not lost on these victims, as one victim aptly pointed out.[161]

One victim was proud that she became an example for other "survivors."[162] Another victim was supportive of a fellow victim that endured the process with her; but for this fellow victim, she might not have come forward.[163] Yet not every victim's testimony was as appreciative for having survived the criminal justice process. One victim testified that the entire process "backfire[d]" on her, and therefore she should never have reported the crime.[164] Her case was an egregious example of how an active duty sailor was adversely prejudiced by making a complaint of sexual assault. She was physically injured as a result of the assault.[165] Her injury hindered her ability to perform the semi-annual physical fitness test, which in turn administratively disqualified her from promoting.[166]

B. Offender Focus

There was relatively little focus on the offender in the VIS reviewed. Only seven victims spent any time focusing on the offender. For two of those seven, the testimony was limited to "he took advantage of me,"[167] and "I'm disappointed"[168] when asked about the offender's actions. The other victims who focused on the offender did so for different reasons.

The offender's physical characteristics were described to show the nature of the sexual assault, which included the use of force by an offender who overpowered the victim. In other cases, the victim and offender were military

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[157] JOHN O. SAVINO & BRENT E. TURVEY, *Sex Crimes on Trial*, *in* RAPE INVESTIGATION HANDBOOK 463, 471 (2nd ed. 2011).
[158] 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, 671–73 (2012).
[159] *See generally* SAVINO & TURVEY, *supra* note 157 (discussing the various ways in which cases attrite from reporting to charging, such as poor investigations leading to prosecutors declining to charge).
[160] Rebecca Campbell, *The Community Response to Rape: Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 26 AM. J. CMTY PSYCH. 355, 355–79 (1998).
[161] Appendix B, Set # 8; *Edmond*, No. 01-12, ROT p. 1240.
[162] *Edmond*, No. 01-12, ROT p. 1242.
[163] *Wylie*, No. 5-12, ROT p. 213 (Victim 2).
[164] *Sanchez*, No. 2-2013, ROT p. 150.
[165] *Id*.
[166] *Id*.
[167] *Gomez*, No. 02-12, ROT p. 281.
[168] *Byrd*, No. 7-95, ROT p. 127 (Victim 1).

members where the offender outranked the victim. The testimony was used to note the rank disparity. In another case, the victim testified that the offender had begun sexually harassing her as soon as she started working for the offender.[169]

C. Retaliation

Although there were many instances of negative treatment of victims, such as being ostracized by friends, there were only three instances discussed that clearly fell within the concept of retaliation.[170] Although not prevalent in the findings, the issue is important from a victim reporting perspective because of the feedback in victim surveys conducted by the Department of Defense shows that victims fear reprisal and retaliation if they report.[171] One victim testified about how her supervisor verbally abused her in the workplace. The retaliation was exacerbated by the fact that others from the unit were present when the abuse occurred. Supervisors often have an easier time setting the tone of a unit. Here, the tone was that the victim was a liar with immoral qualities. The victim also felt the supervisor treated her differently regarding job assignments by micro-managing her.[172]

VI. FINDINGS (PRONG TWO)

A. Overview of Military Courts Addressing RCM 1001A 'Directly Related To or Arising From'

Through dozens of opinions, the military courts have grappled with nuanced issues associated with the new right for victims to offer VIS, ranging from procedural aspects to the substantive contours of the rule. For the latter, 11 cases contained issues that centered on the scope of RCM 1001A, including whether the subject VIS was 'directly related to or arising from' the conduct for which the accused was found guilty.

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[169] *Castillo*, No. M12-01, ROT p. 1706.

[170] *See* Appendix B, Set # 9. The DoD has explored the effects of retaliation on victim reporting patterns. *See* DEP'T OF DEFENSE, RETALIATION PREVENTION AND RESPONSE STRATEGY: REGARDING SEXUAL ASSAULT AND HARASSMENT REPORTS (2016). The DOD provides the following:

> Retaliation for reporting a criminal offense can occur in one of several ways, including reprisal (as legally defined in 10 USC 1034), ostracism, or maltreatment (as defined pursuant to this strategy). These three means do not cover all conduct that could qualify as retaliation. For example, it would not include an action taken by a peer or subordinate against an alleged victim in an effort to dissuade the alleged victim from participating in a prosecution; these categories must be expanded to include all potential retaliatory acts.

[171] DEP'T OF DEFENSE, FY12 DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, 27 (2012).

[172] *See* Appendix B, Set # 9.

1. Court of Appeals for the Armed Forces

In the single Court of Appeals for the Armed Forces (CAAF) case,[173] Senior Judge Ryan, concurring in part and dissenting in part, highlighted, in the context of an ineffective assistance of counsel claim, that the military judge committed an abuse of discretion by allowing the government to present an unsworn statement by the husband of the woman with whom the accused had committed adultery.[174] Senior Judge Ryan's opinion held that the VIS was improperly used by the participants as "evidence," and that the substance exceeded the scope authorized by RCM 1001A.[175] The VIS was improper evidence, procedurally, because it was offered by the prosecutor in aggravation and the military judge did not allow the defense to cross-examine the witness.[176] The VIS exceeded the scope of RCM 1001A based on the husband's statement that included the fact that he had been on a violent deployment during the affair, and that he was unaware the affair was occurring. The court opined that neither of these facts were directly related to or arose from the offense of which the accused was found guilty.[177]

2. Air Force Court of Criminal Appeals

The Air Force Court of Criminal Appeals (AFCCA) has on six occasions addressed whether the contents of a VIS was encompassed within the phrase 'arising from' in RCM 1001A.[178] In *United States v. Da Silva*, the defense objected to the contents of two VIS.[179] One victim stated the accused violated her trust and that he violated her. The court found that these statements were "directly related to [and] arose from" the sexual harassment the accused committed against her.[180] The other victim was more specific, stating that the accused violated her body without her consent.[181] In assessing the matters in the VIS, the court noted that the accused had been acquitted by the court members of kissing this victim without her consent, and therefore the statements relating to how the accused

[173] United States v. Scott, 81 M.J. 79 (C.A.A.F. 2021) (J. Ryan, dissenting). See also United States v. Halfacre, 2021 CAAF LEXIS 324 (C.A.A.F. Apr. 20, 2021), where CAAF affirmed the decision in United States v. Halfacre, 80 M.J. 656 (N-M. Ct. Crim. App. 2020) without substantive analysis.
[174] *Scott*, 81 M.J. at 90.
[175] *Id*.
[176] *Id*. at 91.
[177] *Id*.
[178] 2016 MCM, *supra* note 14, R.C.M. 1001A.
[179] United States v. Da Silva, No. 39599, 2020 CCA LEXIS 213, at *54 (A.F. Ct. Crim. App. June 25, 2020).
[180] *Id*. at *56.
[181] *Id*. at *60.

violated the victim's body were outside the scope of matters appropriate for a VIS.[182]

In *United States v. Dunlap*, the accused was found guilty of adultery, and the court found some matters in the VIS, submitted by the accused's wife, acceptable and others objectionable.[183] The wife stated she felt angered and disgusted by what she learned, which the court found directly related to the offense, because it was a "predictable and natural consequence[]" of the misconduct.[184] The physical separation between the accused and his wife, the court found, had a more tenuous connection, but was not a "large leap."[185] It "was at least a substantial contributing factor" or "the cause" of the separation and therefore within the scope of RCM 1001A.[186] Stated differently, "emotional harm suffered by [the non-offending spouse was] directly related to and *proximately caused* by the adultery Appellant committed with [the non-offending spouse]."[187] Based on that rationale, the court then found that the monetary loss the wife suffered from, *inter alia*, having to move was also within the scope of RCM 1001A.[188] The court also analyzed information provided by the wife that while she was pregnant, the accused learned of the pregnancy and reacted negatively to it.[189] The court found that this information was not 'directly related to' or 'arising from' the offense of adultery with another woman.[190]

In *United States v. Gillian*, the accused was convicted of assault consummated by battery and communicating threats against the victim.[191] In this case, the court found that the VIS included matters "not strictly arising from the convicted offenses."[192] Some of these matters included references to guns and drugs, as well as allusions to sexual assault amongst other things.[193] Ultimately, the court concluded that "some" of the matters in the VIS were outside the scope

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[182] *Id*. at *54. The accused was acquitted of committing abusive sexual contact. *Id*. at *1, n.3. The accused was found guilty of sexual harassment in violation of a lawful general order by making "verbal comments . . . accompanied by physical conduct of removing her lunch to-go box from her lap, placing his hand in her lap, running his fingers through [the victim's] hair, and after a brief interruption, touching her inner thigh[,]" which the court characterized as "physical conduct of touching her in a sexual manner." *Id*. at *22–23.
[183] United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *20 (A.F. Ct. Crim. App. May 4, 2020).
[184] *Id*. at *23.
[185] *Id*.
[186] *Id*.
[187] *Id*. at *20 (emphasis added).
[188] *Id*. at *23.
[189] *Id*. at *24.
[190] *Id*.
[191] United States v. Gillian, No. ACM 39692, 2020 CCA LEXIS 397, at *1 (A.F. Ct. Crim. App. Oct. 30, 2020).
[192] *Id*. at *11.
[193] *Id*. at *11–12.

of RCM 1001A.[194] However, given it was a military judge alone trial, the court assumed the judge did not consider matters that were inappropriate.[195] Therefore, the court found no prejudice to the accused even though information not 'arising from' the offenses was offered.[196]

In *United States v. Johnson*, the court, *sua sponte*, raised the issue of whether the VIS contained inappropriate information.[197] The *Johnson* case involved a married couple that was going through a civil divorce proceeding simultaneously with the criminal trial against the accused.[198] At issue in that case, *inter alia*, was the victim's perspective on how the criminal proceeding affected the victim's position in the civil divorce proceeding.[199] The court reasoned the information was outside the scope of RCM 1001A; while it did arise out of the offenses that the accused was found guilty of, it did not "directly arise" from those offenses.[200]

In *United States v. King*, the court declined to follow the approach propounded by the government—that foreseeability is the lens through which RCM 1001A matters should be reviewed.[201] In that case, the accused sexually abused the victim, a minor child. The victim stated in her VIS that as a result of the offense, she was required to move in and live with the accused's parents in another state. The court found that the victim's movements "[were] directly related to or *resulted from*" the offenses and therefore within the scope of RCM 1001A.[202] The victim also commented on other matters, such as the impact of delays in the trial. The court analyzed the comments in the VIS about delays in the trial assuming, *arguendo*, they were improper.[203] The court found that even if it was error to allow the victim to discuss the delay, it did not "substantially influence" the members in awarding a sentence.[204]

The court in *United States v. Lull*, in a footnote, identified the likelihood that there is a difference between the language 'resulting from' in RCM 1001(b) and 'arising from' in RCM 1001A but decided that providing clarity on that

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[194] *Id*. at *15.
[195] *Id*.
[196] *Id*.
[197] United States v. Johnson, No. ACM 39676, 2020 CCA LEXIS 364, at *1 (A.F. Ct. Crim. App. Oct. 16, 2020), *rev'd on other grounds*, 2021 LEXIS 739 (C.A.A.F. Aug. 10, 2021).
[198] *Id*. at *24.
[199] *Id*. at *43.
[200] *Id*. at *45.
[201] United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *1 (A.F. Ct. Crim. App. Aug. 16, 2021).
[202] *Id*. at *135 (emphasis added).
[203] *Id*. at *141.
[204] *Id*. at *142.

distinction was unnecessary.[205] The VIS in *Lull* included the victim's comments about the time it took to process the criminal case. Citing to *United States v. Stephens*, the court found that someone who sexually assaults another should foresee the likelihood of a criminal trial emanating from the offense.[206] Although *Stephens* was a case that predated RCM 1001A, the court held that matters that "result[ed] from" in *Stephens*, similarly "arose from" in *Lull*.[207]

3. Navy and Marine Corps Court of Criminal Appeals

The Navy and Marine Corps Court of Criminal Appeals (NMCCA) has issued four opinions that centered on the scope of VIS and whether the substance 'directly related to' or 'arose from' the misconduct for which the accused was found guilty. In *United States v. Daniels*, the findings and sentence were upheld over the defense's objection to the VIS.[208] The court addressed the words 'arising from,' to conclude that VIS rights under RCM 1001A are "arguably broader and more encompassing than government evidence in aggravation," which has to be "directly related to or resulting from" the offense.[209] The court found the VIS properly included psychological impact information 'arising from' the offenses for which the accused was found guilty.[210]

In *United States v. Mellette*, the court found that the VIS exceeded the scope of matters offered under RCM 1001A because the victim asked for a specific sentence.[211] The victim told the finders of fact that the accused needed a "significant amount" of confinement.[212] While finding it was error to allow the victim to recommend a specific amount, the court also found that the error did not prejudice the accused, especially when taking into account the fact that the court had already reassessed the accused's sentence on other grounds.[213]

In the case of *In re* A.J.W., the NMCCA upheld the trial court's decision concerning the scope of the VIS where the accused was found guilty of adultery

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[205] United States v. Lull, No. ACM 39555, 2020 CCA LEXIS 301, at *141 n.51 (A.F. Ct. Crim. App. Sept. 2, 2020).
[206] United States v. Stephens, 66 M.J. 520, 528 (A.F. Ct. Crim. App. 2008).
[207] *Lull*, 2020 CCA LEXIS 301, at *141.
[208] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *7 (N-M. Ct. Crim. App. Apr. 13, 2017).
[209] *Id*.; *but see* United States v. Halfacre, 80 M.J. 656, 658 (N-M. Ct. Crim. App. 2020) (citing *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988) for the proposition that the sources of evidence in aggravation is potentially greater than VIS under RCM 1001A because RCM 1001(b) allows for evidence from witnesses, whereas RCM 1001A requires the person be deemed a victim before providing matters to be considered).
[210] Appendix B, Set # 10: *Daniels*, 2017 CCA LEXIS 240, at *7–8.
[211] United States v. Mellette, 81 M.J. 681, 700 (N-M. Ct. Crim. App. 2021), *rev'd on other grounds*, 2022 CAAF LEXIS 544 (2022).
[212] *Id*. (emphasis omitted).
[213] *Id*. at 700–01.

and orders violations.[214] The VIS contained information related to the adultery offense, including the fact that the victim stated she had been sexually assaulted.[215] The VIS also included information concerning the orders violations relating to the psychological impact the violation of the military protective order had on the victim.[216] The trial court limited the substance of the VIS related to sexual assault, but considered the psychological impact from the violation of the military protective order.[217] Under an abuse of discretion standard, the appellate court upheld the trial court's rationale that the impact described by the victim related to sexual assault and not the act of adultery.[218] Therefore, according to the appellate court, the trial court was within its discretion to hold that the impact described by the victim did not 'directly relate to' or 'arise from' the adultery offense.[219] In coming to this conclusion, the NMCCA cited the decision in *Dunlap* approvingly, where the AFCCA stated that the VIS information was "proximately caused" by the accused's commission of the offense.[220]

More recently in *United States v. Miller*, the accused pled guilty to use of a controlled substance and false official statements made during the investigation of the false official statements.[221] The illicit drug use by the accused was done in coordination with another servicemember who died as a result of overdosing on those drugs.[222] In presentencing, the deceased servicemember's mother provided a VIS concerning the impact the death had on her.[223] The defense objected to the trial court's consideration of the VIS, alleging the mother was not a victim within the meaning of the rules.[224] NMCCA disagreed and held that the trial court appropriately determined that the mother was a victim within the meaning of the rules.[225] Additionally, the appellate court held that the psychological harm the mother suffered "directly arose from [some of the charged] offenses."[226] The NMCCA distinguished between the drug-related charges and the false official statement charge, finding the mother was not

[214] *In re* A.J.W., 80 M.J. 737, 745 (N-M. Ct. Crim. App. 2021).
[215] *Id*. at 740.
[216] *Id*. at 742.
[217] *Id*.
[218] *Id*. at 740.
[219] *Id*.
[220] *Id*. at 746.
[221] United States v. Miller, No. 201900234, 2022 CCA LEXIS 418, at *1 (N-M Ct. Crim. App. July 20, 2022). The author was the prosecutor in this case. *See also Miller*, 2022 CCA LEXIS 418, at *4 n.7 (citing *United States v. Felix*, No. 201800071, 2019 CCA LEXIS 258, *33–39 (N-M. Ct. Crim. App. June 19, 2019) to abrogate the language in *Felix* that found the VIS of the victim's mother was outside the scope of RCM 1001A solely because the mother was appointed as a designee of the victim rather than a victim in her own right).
[222] *Id*. at *2.
[223] *Id*. at *3–4.
[224] *Id*. at *5.
[225] *Id*. at *6.
[226] *Id*. at *7.

properly a victim of the latter.[227] However, the appellate court did not engage further the discussion regarding the standard—i.e., whether directly modifies arising; it simply stated the evidence presented by the mother did directly arise from the offenses.

VII. DISCUSSION

A. What Does 'Arising From' Mean?

When comparing the law developed in Prong Two with the results in Prong One, some initial conclusions can be drawn. The plain language of RCM 1001A and the case law interpreting it provides some clarity regarding what arising from means, but it is unclear whether 'directly' modifies 'arising.' Based on the law, as it exists at the writing of this Article, some of the information contained in the VIS from Prong One likely would have been inadmissible if it were offered under RCM 1001A/1001(c).

The definitions of 'arise' and 'result' reveal some difference between the two.[228] Rules of statutory construction dictate that the use of different words in the same rule, without some evidence to the contrary, were meant to be different in meaning.[229] 'Result' is defined as a "consequence," whereas 'arise' is defined as "to come into being."[230] Through case law, 'resulting from,' in the military sentencing context, has been further defined as "*a reasonable linkage between the offense and alleged effect thereof*."[231] Although not in a sentencing context, the CAAF has used the terms, 'resulting from' and 'arising from,' interchangeably when evaluating an incomplete record of trial.[232] In doing so, they found there was no "prejudice *arising from* the incomplete record" nor was there "any prejudice to appellant *resulting from*" their omission that could not be cured by the lower court's decision.[233] However, although CAAF may have used these

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[227] *Id*.

[228] Indeed, there must be some difference. If the President meant them to be the same, it would have been very easy to simply use the same language.

[229] ANTONIN SCALIA, BRYAN A. GARNER & FRANK H. EASTERBROOK, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (1st ed. 2011) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

[230] *Arise*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[231] United States v. Witt, 21 M.J. 637, 641 (A.C.M.R. 1985) (emphasis in original); *see also* United States v. Hicks, 2009 CCA LEXIS 177, at *7 (N-M. Ct. Crim. App. Mar. 29, 2009); United States v. Barber, 27 M.J. 885, 887 (A.C.M.R. 1989).

[232] United States v. Santoro, 46 M.J. 344, 347 (C.A.A.F. 1997); *see also* United States v. Ashby, 68 M.J. 108, 127–29 (C.A.A.F. 2009) ("[T]he CIB's decision did not *result from* outside influences . . . . unlawful command influence *arising from* the other actions by senior military officials . . . [did not] taint[]" the court-martial process. (emphasis added)).

[233] *Santoro*, 46 M.J. at 347 (emphasis added).

terms interchangeably in some scenarios, it appears CAAF has never decided under what circumstances those terms are not interchangeable.

The NMCCA found that, *arguably*, the term 'arising from' is broader in scope than the term 'resulting from'.[234] Although this does not provide a substantial amount of clarity, it does provide some, given there is a plethora of case law discussing the contours of the phrase 'resulting from.'[235] Further, the NMCCA, citing to Air Force cases, seems to approve of a definition that equates arising from to proximate causation.[236] The conclusion that arise is broader in scope than result makes sense when using the standard dictionary definition of the term arise.[237] In contrast to a result or consequence, something may come into existence from an offense but not be caused by the offense. For instance, a victim who was drinking while underage prior to meeting the assailant and being assaulted might later be punished for underage drinking. Though the punishment arose out of the offense, along with the investigation and reporting that exposed the underage drinking, the offense did not result in the underage drinking. While there may be substantial overlap between those things that do result from the offense when compared with those that arise from an offense, such as the investigation and the reporting, the underage drinking did not. However, it came "to attention" as a result of the offense.[238]

The facts in *Miller* also provide an example of a factual scenario where the harm included in the VIS may have arisen from the charges but did not result from them.[239] While the accused in *Miller* and the decedent shared in a similar criminal activity—acquiring and using drugs—NMCCA found that the decedent's death arose from the appellant's *drug use*.[240] The NMCCA also found that the decedent's death arose from the appellant's drug paraphernalia possession, because the appellant provided the needle the decedent used for the fatal dose.[241] For purposes of distinguishing the two terms, arising from and

[234] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *7 (N-M. Ct. Crim. App. Apr. 13, 2017).
[235] *See* United States v. Nourse, 55 M.J. 229, 231 (C.A.A.F. 2001). The Navy also tells us that statements in a VIS that request a specific amount of confinement are outside the scope of RCM 1001A. United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *11 (A.F. Ct. Crim. App. May 4, 2020).
[236] *See, e.g.,* DEP'T OF THE ARMY, MILITARY JUDGES' BENCHBOOK 402 (2020) (defining proximate cause as: "the natural and probable result of the accused's conduct."); *Proximate Cause*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("[T]hat cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.").
[237] *Arise*, MERRIAM-WEBSTER DICTIONARY, https://bit.ly/3rRQWAH (defining *arise* as: "to begin to occur or to exist**:** to come into being or to attention.").
[238] *See generally id.* (defining *arise* in part as: "to come . . . to attention.").
[239] *See* United States v. Miller, 2022 CCA LEXIS 418, at *1–3 (N-M Ct. Crim. App. July 20, 2022).
[240] *Id*. at *6.
[241] *Id*. at *6–7.

resulting from, the court's finding that the death resulted from the appellant's drug use better illustrates the area where the two terms may not overlap. It is a logical conclusion that providing a needle to someone who intends to use it to ingest a dangerous drug would result in death, though the connection may be tenuous. The link is more tenuous when considering the situation where the two are merely using drugs together. In the latter scenario, the death arose from those circumstances that included the appellant's drug use without there being a connection that leads to the conclusion that the death resulted from that use.

The Air Force has decided the greatest number of cases interpreting RCM 1001A and therefore has provided the greatest amount of guidance as to what the terms mean. However, the AFCCA has also issued opinions that, when taken together, muddle the meaning of 'arising from.' For instance, one Air Force case used the term "strictly" to modify arising,[242] whereas another case used "directly."[243] Another court analyzed whether VIS matters, under RCM 1001A, had 'resulted from' the offense.[244] This may have been merely a scrivener's error, but it is an error that obscures the meaning of the rule and leaves doubt as to whether the terms are always interchangeable. Moreover, when comparing *King* and *Lull*, the courts obfuscate whether foreseeability is the lens through which a military judge should view VIS information.[245] The *Lull* court also stated that there "may" be a difference between arising from and resulting from, but it was "unnecessary" to decide that issue in the case.[246] Yet, as previously stated, the Air Force also appeared to equate 'arising from' with proximate causation, embracing tort concepts in defining the phrase.[247] Applying tort concepts would be helpful, given the depth and breadth of legal analysis devoted to defining them.

B. Does 'Directly' Modify 'Arising From'?

The phrasing used in RCM 1001A/1001(c) leads to an ambiguity as to whether the word 'directly' modifies 'arising from.' "Or" is a coordinating conjunction, and here it is joining two present participles, 'arising' and 'relating,' which are adjective-verbs and both describe 'offense' in this statement. 'Directly'

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[242] United States v. Gillian, No. ACM 39692, 2020 CCA LEXIS 397, at *11 (A.F. Ct. Crim. App. Oct. 30, 2020).
[243] United States v. Simon, No. S32569, 2020 CCA LEXIS 281, at *12 (A.F. Ct. Crim. App. Aug. 19, 2020).
[244] United States v. King, 2021 CCA LEXIS 415, at *135 (A.F. Ct. Crim. App. Aug. 16, 2021).
[245] *Compare King*, 2021 CCA LEXIS 415, at *133 (expressly stating it would not adopt foreseeability as the test for what may be considered under RCM 1001A), *with* United States v. Lull, 2020 CCA LEXIS 301, at *140–41 (A.F. Ct. Crim. App. Sept. 2, 2020) (finding that it was appropriate to discuss the ensuing litigation that arose from the sexual assault based, in part, on the implicit premise that the litigation was a foreseeable consequence of the sexual assault).
[246] *Lull*, 2020 CCA LEXIS 301, at *141 n.51.
[247] United States v. Dunlap, No. 39567, 2020 CCA LEXIS 148, at *19 (A.F. Ct. Crim. App. May 4, 2020).

modifies 'relating to' because of its proximity, but whether or not it also modifies 'arising from' is a matter of interpretation.

The conclusion that 'directly' modifies 'arising from' in RCM 1001(c) is supported by cases that stand for the proposition that "directly" modifies 'resulting from' in RCM 1001(b).[248] The sentence structure is equivalent in both rules, and the President would have been aware of case law interpreting the formerly enacted clause, resulting from, when E.O. 13669 was issued.[249] Therefore, it stands to reason that if courts have found that the term 'directly' modifies the subsequent phrase, 'resulting from', then 'directly' would also modify 'arising from' where 'arising' replaces 'resulting'. In this vein, the defense counsel in *United States v. Simon* claimed that the information in the VIS was not "directly arising from" the offenses.[250] While not granting relief in that case, the same court, in *Johnson*, did grant relief because information contained in the VIS did not "directly arise" from the offense to which the accused was found guilty.[251] Lastly, the rule of lenity also supports a reading where 'directly' modifies 'arising from.' The rule of lenity is, "broadly stated, where a writing lends itself equally

[248] *See, e.g.*, United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006) (holding that the appellee offered no evidence that he was prejudiced in any substantial way by evidence "concerning the Coast Guard's response to his allegations that others were involved with drugs." The appellee claimed that the evidence at issue did not "'*directly' result from* his various drug offenses, but rather from his identification of others involved with drugs[.]" (emphasis added)); United States v. White, No. 39600, 2020 CCA LEXIS 235, at *21 (A.F. Ct. Crim. App. July 15, 2020) (holding that the trial court judge did not abuse his discretion in finding that that aggravation evidence "'directly resulted' from Appellant's assault with the knife."); United States v. Stapp, 60 M.J. 795, 803 (A. Ct. Crim. App. 2004) (holding, in part, that the trial judge erred in allowing testimony from a witness that "exaggerated the degree of dishonor directly resulting from the offenses of which appellant had been found guilty[.]"); United States v. Broussard, 35 M.J. 665, 670 (A.C.M.R. 1992) (holding that "[t]he government may present evidence in the sentencing portion of the trial of any aggravating circumstances directly resulting from the offenses of which an accused has been found guilty.") (citation omitted); United States v. Robertson, 27 M.J. 741, 742–43 (A.C.M.R. 1998) (holding, in part, that aggravation evidence offered by the government was "directly resulting from the offense of which the appellant was found guilty.") (citation omitted); United States v. Olsen, 79 M.J. 682, 689 (C.G. Ct. Crim. App. 2019) ("The parties seem to misapprehend that evidence in aggravation must be of actual harm already inflicted, but this is not so for two reasons. First, R.C.M. 1001(b)(4) allows not only evidence of aggravating circumstances directly 'resulting from the offenses of which the accused has been found guilty,' but those 'directly relating to' them."); United States v. Baer, 1999 CCA LEXIS 180, at *21 (N-M. Ct. Crim. App. June 30, 1999) ("The determination of whether evidence directly resulted from an offense is within the sound discretion of the military judge and his judgment will not be lightly overturned.") (citation omitted); United States v. Guzman, 1998 CCA LEXIS 312 at *7–8 (N-M. Ct. Crim. App. 1998) (finding testimony of victim in aggravation was an "aggravating circumstance[] directly . . . resulting from the offenses of which [the appellant was] found guilty.") (citation omitted).

[249] Exec. Order No. 13669, 79 Fed. Reg. 34,999 (June 18, 2014).

[250] United States v. Simon, No. S32569, 2020 CCA LEXIS 281, at *12 (A.F. Ct. Crim. App. Aug. 19, 2020).

[251] United States v. Johnson, 2020 CCA LEXIS 364, *45 (A.F. Ct. Crim. App. Oct. 16, 2020), *aff'd in part, rev'd in part*, 81 M.J. 451 (C.A.A.F. 2021).

to two different readings, the choice should be that reading which is least harsh to the accused."[252] Assuming that the term 'directly arising' is more limiting than just the term 'arising,' the former would be the preferred interpretation under the rule of lenity.

This distinction is not without a difference. In *Johnson*, the court was confronted with the question as to whether the accused's litigation in the civil divorce proceedings 'arose from' the offenses for which the accused was found guilty.[253] While stating that the harm to the victim did 'arise' out of the offenses, the court stated that the harm did not 'directly arise from' them.[254] Therefore, the distinction between these two phrases has been interpreted by at least one court and has had a practical application in an actual case.

The language of RCM 1001(b)(4), when describing impact to the mission or command, states that the impact must be "directly and *immediately* resulting from" the offense.[255] Adding the modifier immediately must have been done in order to further restrict the introduction of information related to mission or command impact.[256] In comparing directly and immediately, one interpretation is that directly concerns the linear connection to the harm, whereas immediately concerns the temporal connection. However, the language of the rule also shows some desire by the drafters to modify 'resulting from' with 'directly.'

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[252] United States v. Brinston, 31 M.J. 222, 226 (C.A.A.F. 1990).
[253] *Johnson*, 2020 CCA LEXIS 364, at *45.
[254] *Id*. at *44–45.
[255] MCM, *supra* note 15, R.C.M. 1001(b)(4) (emphasis added).
[256] United States v. Armon, 51 M.J. 83, 87 (C.A.A.F. 2009) (finding that testimony that commander was offended by accused's wearing of unauthorized insignia and decorations and that the misconduct led to a breakdown in trust among combat soldiers was directly and immediately resulting from the accused's offenses.); United States v. Fisher, 67 M.J. 617, 620 (A. Ct. Crim. App. 2009) (finding that the administrative burden of trial is not immediately and directly resulting from accused's offenses); United States v. Harris, 67 M.J. 550, 553 (C.G. Ct. Crim. App. 2008) (finding that drug use by accused that had impact on unit morale was directly and immediately resulting from accused's offense); United States v. Fay, 59 M.J. 747, 748 (C.G. Ct. Crim. App. 2004) (finding that evidence concerning increased "supervision, musters and inspections" were not directly and immediately resulting from the accused's wrongful drug use); United States v. Sterling, 2015 CCA LEXIS 65, at *26 (N-M. Ct. Crim. App. Feb. 26, 2015) (finding time to refer case was "solely within the Government's control" and therefore not directly and immediately resulting from accused's orders violations), *aff'd on other grounds*, 75 M.J. 407 (C.A.A.F. 2016); United States v. Marcus, 2003 CCA LEXIS 173, at *5 (A.F. Ct. Crim. App. July 9, 2003) (finding that the company commander's remedial actions were directly and immediately resulting from accused's wrongful concealment of a government weapon, which made the commander's actions "significantly more likely"); United States v. McKeague, No. ACM S31187, 2007 CCA LEXIS 404, at *4 (A.F. Ct. Crim. App. Sept. 24, 2007) (finding the increase in workload for others at the command during the time the accused was using drugs was directly and immediately resulting from the accused's drug use).

C. Intersectionality and the Findings from Prong One

The results of Prong One show that VIS were largely victim-focused. This finding makes sense given that the rules applicable at courts-martial require VIS to relate to the impact to the victim from the offense for which the accused was found guilty. Yet a world in which inclusivity and respect for all is the ideal, the words of Professor Bandes are worth repeating:

> Victim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims. In this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity.[257]

The sample from Prong One includes only cases where a conviction resulted. Therefore, it can be expected that the substance of the VIS fit within the confines of what an ideal victim would experience. As this study relied on qualitative methods and was limited to conviction cases, the findings cannot support conclusions as to the factors that increased the likelihood of conviction. Yet the findings do support the research that addresses the ways in which race, class, and gender impact processing. As only one example, over half of the victims made a fresh complaint and/or received a sexual assault medical forensic examination (SAMFE). Research, addressed below, shows that cases with a SAMFE and/or fresh complaint are more likely to avoid attrition, but many of the victims discussed making the fresh complaint and/or the harm caused by undergoing a SAMFE within their VIS.

These findings support a conclusion that court-martial participants' reaction to a particular offense is shaped by the way in which society places expectations on individuals based on race, class, and gender and then views them through that lens. In other words, when victims engage in behavior consistent with how victims are believed to behave (e.g., obtaining a forensic examination) and their case results in a conviction, then that phenomenon necessarily excludes those classes of victims (e.g., undocumented immigrants) who have additional barriers to conforming to that behavior.[258] The inclusion of 'real' victim criterion (e.g., SAMFE) in VIS further reifies the notion that class status matters within the criminal justice system, as victim conformity to expected norms becomes an acceptable criteria for sentencing. If, as the courts state, the only matters that may

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[257] Bandes, *supra* note 60, at 406.

[258] Ira Sommers & Deborah Baskin, *The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents*, 32 JUST. SYST. J. 314, 324–25 (2011) (finding charging and conviction rates increased when the victim received medical treatment).

be addressed in VIS are those that are a likely consequence of sexual assault, then the courts, through their decisions, evidence those expectations, which are premised on the ideal victim. Stated differently, if victims are expected to report the assault immediately and undergo a forensic examination, then what of those who do not? Is a lack of early reporting or forensic examination a matter to be considered in sentencing? If so, does the victim's failure to do so support an increase or decrease in the sentence to be awarded? And how does reporting early and undergoing a forensic examination help the finder of fact in a sentencing determination? For what reason should an offender be punished differently in a case where the victim, for reasons associated with race, class, and gender, does not report early or undergo a forensic examination?[259]

Furthermore, there is a significant amount of support for the conclusion that victims do not all respond to sexual assault similarly. Race, class, and gender, *inter alia*, mediate the response. Crenshaw points out that "[w]omen of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile."[260] Certain other classes of victims do not trust law enforcement or, in the case of (undocumented) immigrants, may be reluctant to immediately report a sexual assault and may have a more difficult time navigating access to resources.[261] In the case of sexual assault forensic examinations, delay in reporting may preclude the efficacy of the examination results. But are those cases where the victim never wanted to report—an indirect byproduct stemming from race, class, and gender—distinguishable from a sentencing perspective? Put another way, if an offender attacks someone on the 'fringe' or who is otherwise 'marginalized,' should that translate to a reduction or increase in the sentence based on the fact that the marginalization precluded VIS information such as undergoing a forensic examination?[262]

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[259] *Cf.* United States v. Stapp, 60 M.J. 795, 800–01 (A. Ct. Crim. App. 2004) ("Moreover, appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect."). The feminist movement has replaced the term victim with survivor, based in part on the premise that the term victim excludes agentic qualities from those who experience violence. The choice to report and undergo forensic examination is anything but commonplace, but when it does occur, it is through the agency of the person who experienced violence. If true, then, arguably, the victim has an intervening choice that "play[s] the only important part in bringing about the" reporting or forensic examination. *Id*. at 801. Yet if one does not equate 'material role' with 'an independent, intervening event that played the only important part in bringing about the effect,' then reporting and forensic examinations would be included.

[260] Crenshaw, *supra* note 84, at 1257.

[261] *See* S.J. Creek & Jennifer L. Dunn, *Rethinking Gender and Violence: Agency, Heterogeneity, and Intersectionality*, 5 SOC. COMPASS 311–22 (2011); Crenshaw, *supra* note 84, at 1247.

[262] *Cf.* Crenshaw, *supra* note 84, at 1246–50 (accounting for, as an example, how certain classes of victims, including Black women and immigrants, respond to and are treated differently when responding to sexual assault, as compared with other races and classes of victims); Zaykowski et al., *supra* note 9, at 728 (finding a correlation between ideal victim characteristics and imposition of the

The military is no exception to delays in and absence of reporting, and being a military victim adds further complications to reporting. Surveys of victims who did not report show that they were concerned about losing their security clearances and losing opportunities for advancement, as well as being punished for minor infractions committed by the victim.[263] Delays in reporting by military servicemembers are also exacerbated by the duty locations where servicemembers are sent, which makes it more difficult for them to make reports.[264]

While Crenshaw and Ritchie address intersectional concerns in the civilian system,[265] the military brings with it its own distinctions, especially related to class.[266] Officers and enlisted servicemembers fall within distinct classes within the military. A case is more likely to be charged in the military where the victim is an officer.[267] But there is another class distinction that bears on the substance of VIS, which is the class distinction between active duty and civilian victims. Civilian spouses of military members are the least likely to participate in investigations, whereas active duty servicemember victims are the most likely to participate.[268] Additionally, cases with a civilian victim were more likely to result in a conviction.[269]

The results from this study also show that class distinctions between civilians and military victims resulted in substantive differences in the process, namely, the substance of VIS. 17 military victims discussed the response from their chain of command and the resulting lack of trust in others.[270] A civilian would be unable to discuss the chain of command's response, as they are not subject to any military command. While a civilian could discuss the response by

death penalty); Creek & Dunn, *supra* note 261, at 318 (highlighting "how marginalized identities intersect with the experiences of domestic violence").

[263] DEP'T OF DEFENSE, FY12 DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 18 (2012).

[264] *Id.* at 37 (for instance, when the victim is deployed overseas).

[265] Crenshaw, *supra* note 84; RICHIE, ARRESTED JUSTICE, *supra* note 84.

[266] *See* Patricia D. Breen & Brian D. Johnson, *Military Justice: Case Processing and Sentencing Decisions in America's "Other" Criminal Courts*, 35 JUST. Q. 639–69 (2017); DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE 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 1–128 (2020) [hereinafter DAC-IPAD].

[267] DAC-IPAD, *supra* note 266, at 20.

[268] *Id.* at 21–22.

[269] *Id*. at 21.

[270] *Perry*, No. 18-11, ROT p. 2695; *Castillo*, No. M12-01, ROT p. 1700 (Victim 1), p. 1722 (Victim 3); *Wylie*, No. 5-12, ROT p. 2962; *Antonio*, No. 02-2013, ROT p. 35; *Gomez*, No. 02-12, ROT p. 281 (Victim 1); *Meredith*, No. 06-0697, ROT p. 1077; *Montoya*, No. 1-07, ROT p. 1092; *Moore*, No. 12-12, ROT p. 1170; *Rosales*, No. 03-2012, ROT p. 1561; *Huertas*, No. 07-04, ROT p. 9; *Moreno*, No. 1C-11, ROT p. 2535 (Victim 1), 2553 (Victim 2); *Morgan*, No. 04-1036, ROT p. 2578; *Robinson*, No. 01-2012, ROT p. 1417; *Sanchez*, No. 2-2013, ROT pp. 1619–20; *Edmond*, No. 01-12, ROT pp. 1837, 1845.

criminal justice actors, the same is true for a military servicemember. The response of the command or military organization, while overlapping to some degree with the criminal justice process, is separate and distinct from the criminal justice process. The organizational response from the military imposes burdens on military victims, which is evidenced by the findings of this study (e.g., changes to job duties).[271] These burdens are distinguishable from civilian victims who participate in the military justice process because civilians' professions cannot be impacted in the same manner as military victims. The distinction between the impact to civilian and military victims is worth noting given the arguments for and against the admission of VIS.

Although not pervasive in the findings, retaliation only occurred against military victims. Two obvious points emanate from this finding. First, it likely does not account for all of the cases where retaliation occurred because the practical effect of retaliation, or the fear of it, is attrition within the process. Second, a command's ability to retaliate against a civilian is much more limited. Therefore, the status as a military victim opens the possibility for substantive VIS information which has little-to-no bearing on what the accused actually did.

Furthermore, the *Payne* decision used an anecdote from the U.S. Supreme Court's opinion in *South Carolina v. Gathers*[272] to support the conclusion that, in capital litigation, murdering an unsympathetic victim can lead to the death penalty: "The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."[273]

The *Payne* court's assessment of the victim in *Gathers* is in stark contrast to other evidence presented in the case:

> He went to the park, as his mother testified, to "spread the Word." The religious tract had been written by Haynes, and was called "The Game Guy's Prayer." It extolled the virtue of sports, and the values of leading a Christian life through football and boxing metaphors. *It would be difficult to create a victim who could create more sympathy among jurors than Richard Haynes*. Demetrius Gathers, in contrast, was a violent thug. Gathers and three friends sat on the park bench next to Haynes, drinking beer as Haynes was reading a Bible. When Gathers

[271] *See*, *e.g.*, *Harris*, No. 23-11, ROT p. 2026.
[272] South Carolina v. Gathers, 490 U.S. 805, 808 (1989).
[273] Payne v. Tennessee, 501 U.S. 808, 823–24 (1991).

> attempted to engage Haynes in conversation, Haynes stated he did not wish to talk to Gathers.
>
> Gathers and his friends then proceeded to brutally beat and kick Haynes. Gathers smashed his beer bottle over Haynes' head. He then beat Haynes severely with an umbrella. Before leaving the scene of the beating, as Haynes lay unconscious, Gathers inserted the umbrella in Haynes' anus and tried to open it.
>
> After adjourning to the apartment complex where Gathers and some of his friends lived, Gathers and one friend returned to the park with a large knife. As Haynes lay partially conscious, Gathers and his friend strew his belongings along a bike pathway, looking for something to steal, but finding nothing. Gathers then stabbed Haynes repeatedly until he died. Gathers admitted to all the facts presented.[274]

The *Payne* court's conclusion about the propriety of VIS invokes the fact that the victim in *Gathers* was mentally disabled. The *Payne* court's rationale for invoking this fact was to suggest that, if any characteristic of the victim would, the mental capacity of the victim was the characteristic most likely to reduce the possibility of the death penalty.[275] The opinion also seems to imply that the characteristics of the victim do not have an impact on jury decision-making because the death penalty was awarded in spite of the victim having had that characteristic. Yet the point of providing the jury the victim's characteristics must be, at least in part, to influence the decision-making of the jury. This is the critical issue with VIS, which is why it is important to assess which characteristics impact decision-making.[276] The CMA's comments in *Pearson* resonate on this point where the court distinguishes between "unloved or unappreciated" victims and those who are "pillar[s] of society."[277] What makes someone a pillar of society? At one point in this nation's history, and potentially still today, factors such as

[274] Stevens, *supra* note 2, ¶¶ 34–36 (emphasis added) (internal citations omitted).
[275] *See Payne*, 501 U.S. at 823–24 (discussing the fact that the victim was unemployed, which was directly attributed to the victim's mental capacity). If one cited to unemployment as a salient characteristic for consideration, it should also be appreciated that the unemployment was possibly mediated by the characteristic regarding the victim's mental capacity. In this way, it is easy to see how the intersectionality approach exposes the way in which class makes its way into decision-making through seemingly innocuous characteristics.
[276] One can consider the words of Atticus Finch, "he did what any God-fearing, persevering, respectable white man would do under the circumstances," in order to appreciate how individual characteristics are called upon in everyday life to invoke (hidden) schema. Mr. Finch, along with the jurors, must have been aware of a what a God-fearing, persevering, respectable White man would do under the circumstances, just as the court in *Payne* seemed so sure that others knew the worth of a mentally challenged individual. HARPER LEE, TO KILL A MOCKINGBIRD 206 (1982).
[277] United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984).

race, class, and gender bore directly on whether someone could attain the status of being a pillar of society. Therefore, one received justice commensurate with one's socio-economic status. That affluent White people received leniency in the criminal justice system is nothing new.[278] That these effects can and sometimes do impact military courts-martial has been known for some time as well.[279]

Moreover, contrary to the conclusions drawn from the *Payne* court, the victim in *Gathers* was much more than a mentally-challenged person who was also unemployed. There were undercurrents of intersectional dimensions that were present for the members to consider. For the court to state that most would not have found the victim to be a contributor to society shows the lack of value the court placed on the activities the victim was doing at the time he was murdered: evangelizing. Religion is one dimension that certainly could have had an impact on a Charleston, South Carolina jury. In fact, the prosecutor expressly called upon this dimension when arguing for the death penalty, referring to the victim as "Reverend Minister Haynes," while reciting his prayers.[280] Indeed, the very reason the Supreme Court of Carolina ordered a new sentencing hearing, precipitating the request for and grant of certiorari to the U.S. Supreme Court, was based on the prosecutor's comments about the religious component to the case.[281]

Recalling the earlier finding from this study where VIS addressed the command's response,[282] the response by others is often linked to race, class, and gender in an indirect way. For instance, a prosecutor may be cold or distant, as opposed to empathetic, when confronted with a victim who does not fit within the ideal victim framework. Yet, again, individuals often fall outside of the ideal victim framework based on factors related to intersectional concerns. A classic example is when the police are called to a location after one spouse injures the other, who is an undocumented immigrant or is earning citizenship by being married to the offender.[283] Based on the immigration status, the victim refuses to speak to police. Later, the victim decides to file a report, after learning from an attorney that domestic violence cases receive favorable treatment regarding immigration status. The prosecutor may view this entire issue as one of credibility.

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[278] *See* GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 114 (1989) (internal citations omitted) ("In 1855 white men sitting in the Kansas legislature, duly elected by other white men, passed a law that sentenced white men convicted of rape of a white woman to up to five years in prison, while the penalty for a black man convicted of the same offense was castration, the costs of the procedure to be rendered by the desexed.").

[279] David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, J. CRIM. L. & CRIMINOLOGY 1227, 1272 (2011) (finding the Black offender-White victim dyad was more likely than any other composition to receive the death penalty in courts-martial).

[280] *Gathers*, 490 U.S. at 808.

[281] State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988).

[282] *See supra* Part V.A.

[283] *See generally* Crenshaw, *supra* note 84, at 1247.

An ideal victim is credible when she makes a report without wavering or motivation to lie. Yet credibility is mediated through class status, that is, by the fact that the victim risks legal backlash by making a report (e.g., deportation) and then is thought to make a report in order to gain a benefit (e.g., citizenship). The application of this concept is apparent in any number of scenarios, and class status of a military member is included, where collateral consequences for minor offenses may provide similar motives related to reporting (e.g., being punished after the investigation reveals the victim had been underage drinking).

The records also showed other ways victims allude to and expressly discuss matters related to class status. An example previously discussed saliently makes the point where the victim's chain of command retaliated against the victim. While that may be proper information to be considered by the finder of fact because it arises, potentially directly, from the offense, the question is whether it should be.[284]

As a hypothetical scenario, consider two sexual assault cases that are identical in all respects except for the fact that in the first case, the command retaliated against the victim and the prosecution's office treated her poorly.[285] Both victims provide VIS, but the victim from the first case provides a statement discussing how poorly she was treated by her command and the prosecution's office. Allowing this information to be considered by a jury can be as problematic as the concerns raised by Professor Bandes, because it would include intervening circumstances outside of the offender's control.[286] Policymakers should consider whether this type of information is appropriate and, if not, make adjustments as necessary to effectuate their will.

VIII. PROPOSED SOLUTIONS AND RECOMMENDATIONS

The results of the present exploration show that additional clarity about the limits of VIS should be provided by the appellate courts, Congress, or the President. The additional clarity could come in the form of explicitly expressing whether 'directly' modifies 'arising from' in RCM 1001(c). While that would not resolve all legal issues surrounding what is permissible in VIS, it would provide more clarity. The current framework of the rule strongly supports a finding that

[284] Under a 'resulting from' framework, that type of evidence might not be admissible, especially in light of the constraining force of M.R.E. 403 balancing. However, if the phrase 'arising from' is broader in scope than 'resulting from,' then, arguably, it might be admissible. *See* United States v. Stapp, 60 M.J. 795, 800–01 (A. Ct. Crim. App. 2004) (holding that principles of tort law are applicable to sentencing, although the "offense must play a material role in bringing about the effect at issue").
[285] Consider Appendix B, Evidence Set #10 as another example.
[286] The accused's ability to object to VIS matters that were outside of the accused's "control" was expressly rejected in *United States v. King*, 2021 CCA LEXIS 415, at *134 (A.F. Ct. Crim. App. Aug. 16, 2021).

'directly' does modify 'arising,' but it would be better for policy makers and courts to be as clear as possible on this point. There are ways in which grammatical changes could alleviate the possible ambiguities.

To remove the ambiguity and make the word 'directly' definitively not apply to 'arising from' would require a change in word order, as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim arising from or directly relating to the offense of which the accused has been found guilty.*

The word 'directly' only modifies 'relating to' because that is the participle which is placed before it. Grammatically, it cannot be interpreted as applying to the participle 'arising' because it comes after that participle.

To remove the ambiguity and make the word 'directly' apply to 'arising from' as well as 'relating to,' there are at least two possible options. In the most definitive method, 'directly' would need to be repeated before 'arising from,' as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to or directly arising from the offense of which the accused has been found guilty.*

This repetition makes it clear that the author of the sentence wants 'directly' to apply to both participles because 'directly' is placed next to both participles. As awkward as this may appear, it eliminates the ambiguity; there would be no other possible interpretation.

An alternative way to limit the ambiguity and make the word 'directly' more clearly apply to 'arising from' as well as 'relating to' would be to insert commas around 'arising from,' as follows:

> *For the purposes of this rule, 'victim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to, or arising from, the offense of which the accused has been found guilty.*

This more clearly sets up the phrase, 'arising from,' as a grammatical equivalent and substitute for 'relating to.' The commas frame exactly what would be substituted in the phrase before the coordinating conjunction 'or' and therefore lead the eye to see the adverb 'directly' as applying to the substituted phrase,

'arising from' in addition to the phrase, 'relating to.' There is still slight ambiguity with this phrasing, but the meaning is closer to definitive than in the statement as it stands.

The results of this study also bring attention to the debate surrounding the use of VIS in military sexual assault trials. Very compelling arguments exist for both sides of the debate.[287] On one hand, the extent to which a victim suffers harm from the offense is some indication of the severity of the offense. On the other hand, no two victims experience harm the same way even if the offense was similar. Additionally, neither side of the debate has addressed how, if at all, good order and discipline—a necessary component of a functioning military and a bedrock for justifying the court-martial system—informs the two opposing views. A final recommendation is for researchers to conduct further studies relating to the military to assess the extent to which VIS results in differential decision-making in courts-martial sentencing. While this endeavor would be difficult for a variety of reasons (e.g., lack of transparency, forum election, court-martial type, plea agreement limitations, etc.), it is important to understand the impact of legislation on military courts.

One final note related to the findings suggests that some victims were appreciative of the work done by criminal justice actors because of how those actors treated the victims. While this finding is consistent with what one might expect, it brings attention to the opportunity for feedback that is not currently requested nor otherwise acquired. The feedback from the victims in the analyzed records is known because it was discussed in a VIS and now included in this article, but otherwise would have been lost. Furthermore, feedback from victims who voluntarily stopped participating would be helpful in understanding where improvement to the process should be made. Therefore, it is recommended that the military services institute a process whereby they can receive feedback from victims on the process in order to better improve the system as a whole, but also to appreciate the ways in which victims experience providing VIS.[288] The best repository for these surveys would likely be victim service centers.

IX. CONCLUSION

The purpose of this Article was to review trial-level and appellate records, using a dual-prong approach to assess the current state of the law regarding VIS and to explore what information has been included in VIS. The

[287] *See generally, e.g.*, Joshua D. Greenberg, Comment, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 INDIANA L.J. 1349, 1349–82 (2000) (discussing the countervailing views for allowing VIS).

[288] *See* Davis & Smith, *supra* note 47, at 10–11 (finding that VIS did not lead "to greater feelings of involvement, greater satisfaction with the justice process, or greater satisfaction with dispositions").

findings show that the appellate case law does not provide a cohesive and clear framework for VIS nor does it comport with the information that is often included in VIS. The findings also showed several themes between the VIS, which were mostly victim-centric. These findings are helpful in informing the debate concerning VIS, especially as it relates to military criminal trials.

APPENDIX A[1]

United States v. Bohlayer, No. 1-2014 (Commander, Marine Corps Installations Command, Washington Navy Yard, District of Columbia, Nov. 1, 2013).

United States v. Oakley, No. 01-14 (Commander, Navy Region Northwest, San Diego, California, Sept. 13, 2013), *aff'd*, 2015 CCA LEXIS 846 (N-M. Ct. Crim. App. Apr. 21, 2015).

United States v. Cardona, No. 1-13 (Commanding Officer, Naval Computer and Telecommunications Area Master Station, San Diego, California, May 23, 2013), *aff'd*, 2013 CCA LEXIS 1110 (N-M. Ct. Crim. App. Dec. 31, 2013).

United States v. Antonio, No. 02-2013 (3d Marine Aircraft Wing, Camp Pendleton, California, Feb. 28, 2013).

United States v. Sanchez, No. 2-2013 (Commanding General, Marine Corps Air Station Miramar, San Diego, California, Oct. 29, 2012).

United States v. Robinson, No. 01-2012 (Commanding General, Marine Corps Air Ground Combat Center, Twentynine Palms, California, Oct. 11, 2012), *aff'd*, 2013 CCA LEXIS 429 (N-M. Ct. Crim. App. Apr. 30, 2013).

United States v. Bucknam, No. 01-2012 (Naval Construction Battalion Center, Pensacola, Florida, Aug. 24, 2012), *aff'd*, 2013 CCA LEXIS 174 (N-M. Ct. Crim. App. Feb. 28, 2013).

United States v. Adams, No. 05-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, June 5, 2012), *aff'd*, 2012 CCA LEXIS 642 (N-M. Ct. Crim. App. Oct. 31, 2012).

United States v. Rosales, No. 03-2012 (Commanding General, Marine Corps Installations Pacific, Okinawa, Japan, May 21, 2012), *aff'd*, 2013 CCA LEXIS 87 (N-M. Ct. Crim. App. Feb. 12, 2013).

United States v. Moore, No. 12-12 (Commander, Navy Region Southeast, Jacksonville, Florida, Apr. 26, 2012), *aff'd*, 2013 CCA LEXIS 171 (N-M. Ct. Crim. App. Jan. 8, 2013).

United States v. Gifford, No. 10-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Feb. 12, 2012), *aff'd*, 2013 CCA LEXIS 97 (N-M. Ct. Crim. App. Feb. 12, 2013), *petition denied*, 2013 CAAF LEXIS 851 (C.A.A.F. Aug. 2, 2013).

United States v. Muro, No. 12-2012 (Commanding General, 3D Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012), *aff'd*, 2012 CCA LEXIS 559 (N-M. Ct. Crim. App. July 31, 2012).

United States v. Hollars, No. 1-11 (Commanding Officer, USS NIMITZ (CVN 68), Bremerton, Washington, Jan. 12, 2012), *aff'd*, 2012 CCA LEXIS 505 (N-M. Ct. Crim. App. June 19, 2012).

[1] The cases are listed in reverse chronological order.

United States v. Gabbard, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Dec. 2, 2011), *aff'd*, 2012 CCA LEXIS 598 (N-M. Ct. Crim. App. July 24, 2012).

United States v. Lugo, No. 8-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 23, 2011), *aff'd*, 2013 CCA LEXIS 40 (N-M. Ct. Crim. App. Jan. 29, 2013).

United States v. Hucks, No. 3-12 (Commander, Navy Region Northwest, Bremerton, Washington, Nov. 3, 2011), *aff'd*, 2012 CCA LEXIS 673 (N-M. Ct. Crim. App. May 15, 2012).

United States v. Barr, No. 02-12 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011), *aff'd*, 2012 CCA LEXIS 748 (N-M. Ct. Crim. App. Apr. 30, 2012).

United States v. Wylie, No. 5-12 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011), *aff'd*, 2012 CCA LEXIS 456 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 2013 CAAF LEXIS 299 (C.A.A.F. Mar. 22, 2013).

United States v. Castillo, No. M12-01 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).

United States v. Edmond, No. 01-12 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sept. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. Apr. 30, 2015).

United States v. Moreno, No. 1C-11 (Commander Navy Region Europe, Africa, Southwest Asia, FPO AE 09622-0008, Sept. 22, 2011), *aff'd*, 72 M.J. 521 (N-M. Ct. Crim. App. Jan. 31, 2013).

United States v. Harris, No. 23-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 21, 2011), *aff'd*, 2012 CCA LEXIS 860 (N-M. Ct. Crim. App. Feb. 21, 2012).

United States v. Kahuli, No. 7-11 (Commander, Navy Region Northwest, Bremerton, Washington, Sept. 20, 2011), *aff'd*, 2012 CCA LEXIS 857 (N-M. Ct. Crim. App. Feb. 23, 2012).

United States v. Merrey, No. 24-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 9, 2011), *petition denied*, 2012 CAAF LEXIS 726 (C.A.A.F. June 26, 2012).

United States v. Western, No. 20-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Sept. 1, 2011), *aff'd*, 2012 CCA LEXIS 333 (N-M. Ct. Crim. App. Aug. 29, 2012), *petition denied*, 2013 CAAF LEXIS 51 (C.A.A.F. Jan. 14, 2013).

United States v. Holmes, No. 9-2011 (Commander, Navy Region Midwest, Great Lakes, Illinois, Aug. 27, 2011), *aff'd*, 2012 CCA LEXIS 782 (N-M. Ct. Crim. App. Dec. 18, 2012), *petition denied*, 2013 CAAF LEXIS 429 (C.A.A.F. Apr. 26, 2013).

United States v. Kennedy, No. 16-11 (Commander, Navy Region Southeast, Kings Bay, Georgia, Aug. 25, 2011), *aff'd*, 2012 CCA LEXIS 724 (N-M. Ct. Crim. App. Apr. 26, 2012), *petition denied*, 2012 CAAF LEXIS 1006 (C.A.A.F. Aug. 29, 2012).

United States v. Perry, No. 18-11 (Commander, Navy Region Southeast, Jacksonville, Florida, Aug. 18, 2011), *aff'd*, 2012 CCA LEXIS 701 (N-M. Ct. Crim. App. June 26, 2012), *petition denied*, 2012 CAAF LEXIS 956 (C.A.A.F. Aug. 24, 2012).

United States v. Jordan, No. 6-11 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Aug. 16, 2011), *aff'd*, 2012 CCA LEXIS 454 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 72 M.J. 403 (C.A.A.F. June 18, 2013).

United States v. Ariston, No. 8-2011 (Navy Region Midwest, Great Lakes, Illinois, July 28, 2011), *aff'd*, 2012 CCA LEXIS 497 (N-M. Ct. Crim. App. July 31, 2012).

United States v. Heckrotte, No. 8-11 (Commander, Navy Region Midwest, Great Lakes, Illinois, July 28, 2011), *aff'd*, 2012 CCA LEXIS 457 (N-M. Ct. Crim. App. Nov. 30, 2012), *petition denied*, 2013 CAAF LEXIS 278 (C.A.A.F. Mar. 14, 2013).

United States v. Hudson, No. 2-11 (Commander, National Naval Medical Center, Bethesda, Maryland, June 21, 2011), *aff'd*, 2012 CCA LEXIS 344 (N-M. Ct. Crim. App. Aug. 31, 2012).

United States v. Gomez, No. 02-12 (Commander, Navy Region Southwest, San Diego, California, June 16, 2011), *aff'd*, 2012 CCA LEXIS 738 (N-M. Ct. Crim. App. Jan. 24, 2012).

United States v. Mayberry, No. 14-12 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 16, 2011), *aff'd*, 2013 CCA LEXIS 366 (N-M. Ct. Crim. App. Apr. 30, 2013), *aff'd*, 2013 CAAF LEXIS 920 (C.A.A.F. Aug. 15, 2013).

United States v. Northrup, No. 2-11 (Commander, Navy Region Midwest, Great Lakes, Illinois, June 2, 2011), *aff'd*, 2012 CCA LEXIS 846 (N-M. Ct. Crim. App. Feb. 23, 2012).

United States v. Gonzalez, No. 18-11 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, May 12, 2011), *aff'd*, 2011 CCA LEXIS 644 (N-M. Ct. Crim. App. Nov. 30, 2011).

United States v. Owens, No. 10-09 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009), *aff'd*, 2010 CCA LEXIS 751 (N-M. Ct. Crim. App. Jan. 7, 2010).

United States v. Wylie, No. 1-12 (Commander, Navy Region Midwest, Great Lakes, Illinois, Nov. 18, 2011, *aff'd*, 2012 CCA LEXIS 719 (N-M. Ct. Crim. App. Nov. 6, 2012), *petition denied*, 2013 CAAF LEXIS 190 (C.A.A.F. Feb. 14, 2013).

United States v. Montoya, No. 1-07 (Commandant, Naval District Washington, Washington Navy Yard, District of Columbia, Aug. 14, 2007), *aff'd*,

2009 CCA LEXIS 75 (N-M. Ct. Crim. App. Feb. 24, 2009), *petition denied*, 2009 CAAF LEXIS 1063 (C.A.A.F. Sept. 18, 2009).

United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000), *aff'd*, 2006 CCA LEXIS 117 (N-M. Ct. Crim. App. May 30, 2006), *petition denied*, 2006 CAAF LEXIS 1428 (C.A.A.F. Nov. 6, 2006).

United States v. Curtis, No. 25-06 (Commanding Officer, Combat Service Support Group 15, 1st Force Service Support Group, Camp Pendleton, California, Mar. 2, 2006).

United States v. Hernandez-Alverado, No. 18-05 (Commanding Officer, 1st Force Service Support Group, Camp Pendleton, California, Nov. 5, 2004), *aff'd*, 2006 CCA LEXIS 298 (N-M. Ct. Crim. App. Nov. 21, 2006).

United States v. Cantrell, No. 1-04 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, June 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).

United States v. Huertas, No. 07-04 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Dec. 9, 2003), *aff'd*, NMCCA 200400757 (N-M. Ct. Crim. App. Nov. 22, 2004).

United States v. Morgan, No. 04-1036 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003), *aff'd*, NMCCA 200301800 (N-M. Ct. Crim. App. Feb. 25, 2004).

United States v. Heyward, No. 05-0699 (Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, Oct. 5, 2001).

United Sates v. Alstadt, No. 01-1183 (Commanding General, Marine Corps Recruit Depot/ Western Recruiting Region, San Diego, California, June 14, 2001), *aff'd*, NMCCA 200100093 (N-M. Ct. Crim. App. June 14, 2001).

United States v. Meredith, No. 06-0697 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000), *aff'd*, 2006 CCA LEXIS 117 (N-M. Ct. Crim. App. May 30, 2006), *petition denied*, 2006 CAAF LEXIS 1428 (C.A.A.F. Nov. 6, 2006).

United States v. Gomezarroyo, No. 4-98 (Commanding General, Marine Corps Base Camp Smedley D. Butler, Okinawa, Japan, Aug. 27, 1998), *aff'd*, 1999 CCA LEXIS 276 (N-M. Ct. Crim. App. Oct. 19, 1999), *petition denied*, 53 M.J. 214 (C.A.A.F. 2000).

United States v. Byrd, No. 7-95 (Chief of Naval Education and Training, Pensacola, Florida, May 1, 1995), *vacated*, 53 M.J. 35 (C.A.A.F. 2000).

APPENDIX B

Key

Witness (W)
Prosecutor/Trial Counsel (TC)

Set #1

Victim One:
W: Coming on base is the worst for me. I'm completely on edge, waiting for something terrible to happen. I feel like he could be anywhere, like he's always right behind me looking for an opportunity.[1]

Victim Two:
W: It made me sick to my stomach. I live north and I would have to drive down to [the base]. There were a few days that whenever he was in the same building that I was at I couldn't come on base. I wouldn't come on base. They could charge me UA [unauthorized absence] or do anything but I am not coming on base. I would do everything to avoid, sir. I would not go to the [base shop]. I had [another member of my command] come down from [the base] a couple of times whenever I went to the [base shop]. I wouldn't go to the commissary because, sir, there's only one commissary and one [base shop] on that base. I wouldn't go to the gym because his barracks were directly across from the gym. . .[2]

When he came back -- whenever he has duty I have a routine at night. I specifically bought this house because it has a camera so you can see who is outside; front door, front driveway, everything. I have a ritual of locking doors and then I go upstairs and I have a mirror that I have strategically placed to where I can see anybody who comes in the door, and I lock my door -- I lock all the doors so when my husband is on duty, if he comes homes and he doesn't wake me up he can get in the house because I have dead bolted everything. At night -- even now, even with him being back I get up in the middle of the night and I make him go check the doors, sir.[3]

[1] United States v. Owens, No. 10-09, ROT p. 549 (Commander, Navy Region Northwest, Silverdale, Washington, Apr. 16, 2009).
[2] United States v. Muro, No. 12-2012, ROT p. 137 (Commanding General, 3D Marine Logistics Group, Okinawa, Japan, Jan. 13, 2012).
[3] *Id.* No. 12-2012, ROT p. 140.

Victim Three:
TC: Do you still think about the fear that came over you?
W: Yes, sir.
TC: How often do you think about the fear?
W: Every day, sir.
TC: And what happens to your body, physically, when you start thinking about what happened?
W: I--I shake, I can't breathe very well. I have troubled putting my thoughts together, just----[4]

Set # 2

Victim One:
W: But, don't think you broke me. Your actions were all just a test. And through that, I stood true to my morals. Your demeaning words, indecent touch, and constant pressure at work still say with me. It may have weakened me at the time, but now I'm stronger. I'm still standing, I'm here, able to face you and tell you that what you did was wrong.[5]

Victim Two:
TC: And how has it affected you emotionally?
W: Emotionally? It's a bit bad emotionally, but it's made me a strong woman.[6]

Set # 3

Victim One:
TC: What's going through your mind as you, kind of, wake up and realize what's happening?
W: When I woke up, I didn't really know what was going on. I didn't know how to comprehend it. I kind of froze, and I thought, you know, I have to do something to stop this, but I didn't know what I could do; and then eventually I just, like, I rolled over and I kind of said, "What the fuck."[7]

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[4] United States v. Wylie, No. 5-12, ROT p. 186 (Commander, Navy Region Northwest, Silverdale, Washington, Oct. 28, 2011).
[5] United States v. Castillo, No. M12-01, ROT p. 142 (Commanding Officer, Marine Corps Security Force Battalion, Naval Base Kitsap, Bangor, Washington, Oct. 12, 2011), *aff'd*, 2012 CCA LEXIS 574 (N-M. Ct. Crim. App. May 31, 2012).
[6] United States v. Cantrell, No. 1-04, ROT p. 105 (Commander, Navy Region Hawaii, Pearl Harbor, Hawaii, Jun. 18, 2004), *aff'd*, 2005 CCA LEXIS 54 (N-M. Ct. Crim. App. Feb. 22, 2005).
[7] *Wylie*, No. 5-12, ROT p. 213.

Victim Two:
TC: All right. And the only way you could think of to get out of those headlocks was to go after his most vulnerable area. Is that correct?
W: Yes, sir.
TC: So, you hit him in the groin area out of self-defense?
W: Yes, sir.
TC: Not out of some sexual desire?
W: No, sir.
TC: Not because of some sexual lust, or sexual foreplay?
W: No, sir.
TC: He put you in a headlock, and you were in a compromised position?
W: Yes, sir.
TC: And you struck back the only way I knew how?
W: Yes, sir.
TC: The most effective way possible against a larger and stronger opponent?
W: Larger, stronger, and trained, sir.[8]

Set # 4

Victim One:
TC: You talked about, when you think about it, should've, could've. What do you mean by that?
W: I always think like I froze up during it. What would have happened if I could have screamed? What would have happened if I never went at all? I always think of how I could be.
TC: What do you mean, how you could be?
W: Like if the attack had never happened at all, like if I had never went to his house. If I had just chosen to be safer that night, I could still be [at the same duty station] and I could've done many deployments and just how, I wouldn't have to have these nightmares. I wouldn't have to have any anxiety attacks.[9]

Victim Two:
TC: Did you ever blame yourself?
W: Yes, ma'am.
TC: Can you tell the members a little bit about that?
W: Well, I'll make up situations in my head where I can like punch him even harder, or like run away, or scream, or just like wish I never had

[8] *Castillo*, No. M12-01, ROT p. 152.
[9] United States v. Morgan, No. 04-1036, ROT p. 793 (Commanding Officer, Transient Personnel Unit, Norfolk, Virginia, Mar. 12, 2003).

watch that day, or I could have gone out somewhere else besides that area.[10]

Set # 5

Victim One:
TC: And how did the car ride start out, what happened?
W: The car ride it started out all--kind of brief introductions and just everybody trying to figure out how to get out of [the town where I live]. Then things started to get odd because I'd been under the impression we would be hanging out as friends and acquaintances. And he started immediately complimenting me about my appearance and how attractive he found me, and he started playing with my hands and I started to become increasingly uncomfortable.
TC: Sorry let me just stop you there. Now, you mentioned it became odd. It sounded like he was starting to express some physical interest in you. Did it take you by surprise even though you mentioned earlier that there were some flirtatious text messages that he had sent earlier?
W: It did because I thought I had been clear that I did not, I was not interested in romantic intentions and----
TC: And that was--and those were messages back to him?
W: Yeah, but he'd also talk to me on the phone for a brief period of time, so yes.

Victim One Continued:
TC: Were any of his physical advances or any of his physical touches to your body wanted or desired by you?
W: No.
TC: While in the car?
W: No.
TC: And at the time, was there anything else that came to mind to you that you could have done to let him know that beyond what you already did?
W: In my understanding, when somebody tells you no or stop that's sufficient.[11]

[10] United States v. Edmond, No. 01-12, ROT p. 1238 (Superintendent, United States Naval Academy, Annapolis, Maryland, Sep. 29, 2011), *rev'd on other grounds*, 2015 CCA LEXIS 162 (N-M. Ct. Crim. App. Apr. 30, 2015).
[11] United States v. Barr, No. 02-12, ROT p. 263 (Commander, Navy Region Northwest, Bremerton, Washington, Oct. 31, 2011).

Set # 6

Victim One:
TC: Have [the offender's] actions, have they affected your views of the military?
W: Yes, sir, because I now view the military as something that's not pure. It's something that has a lot of downfalls.[12]

Victim Two:
TC: Has this experience affected your opinion of the Navy?
W: No, I still think the Navy is really good because, after all, they helped me a lot. They brought me to the hospital. They got me the things I needed. They put an MPO [protection order]. They even gave me a chance to put this on trial and gave me a choice.[13]

Victim Three:
TC: Did it make it uncomfortable for you to come to work?
W: Yes.
TC: Did it impact your relationship with your chain of command?
W: No.
TC: Did it affect how you viewed the military?
W: It affected how I viewed other males in the military.[14]

Set # 7

TC: Were you made aware as to what you would be subjected to in order to get this case to trial?
W: Kind of, sir. You gave me a ballpark idea. . .
TC: And, what were you told to expect or what did you expect as far as once you came into the courtroom?
W: That, I would be made out to sound like a slut or a whore or something like that and I was asking for what happened to me and that--or, that it was my fault.
TC: The possibility of that happening--did that scare you?
W: Yes, sir.
TC: Why?
W: That's--that's not me--that's--that's nothing close to me.
TC: Did that deter you from wanting to do this?
W: No, it was--I knew it would be hard but I had to do it--I had to.

[12] *Castillo*, No. M12-01, ROT p. 140 (Victim 1).
[13] *Edmond*, No. 01-12, ROT p. 1241.
[14] *Castillo*, No. M12-01, ROT p. 157 (Victim 2).

TC: Why did you have to?
W: Because what he did was wrong.
TC: How do you feel about being her today?
W: I hate it.
TC: How do you feel about the fact that aspects about you and who you are was basically placed on display in front of a room full of people you don't even know?
W: I hate it.[15]

Set # 8

Victim One:
W: Well, this was really hard to get through, and you've just got to keep fighting day by day. There's going to be people that are going to talk, and you just have to be strong every day. . . I feel proud that I stood up, especially not for me, but for all the victims out there and survivors.[16]

Victim Two:
W: What plans do I have? At this point, I just want to kind of get this court case over with and move on. I mean I'll never really move on from what happened; it's going to stay there. But hopefully, my experience with this will allow other people to--to come forward maybe if--if it gets big enough. If it doesn't, then—well, it--it doesn't really matter, but specifically, I really hope [the other victim in this case]--I--like--she's my biggest concern. She's the real reason I, like, came forward and everything. So the fact that--the reason I'm testifying is so that she can see there are good leaders out there, and there are people who are--there are people who are capable of doing good things. I'm helping her out. I'm helping people who don't know how to stand up for themselves. So that's what I hope we get out of this.[17]

Set # 9

TC: Could you please tell the court the impact of his actions on you, if any?
W: The biggest impact was rumors around [the unit]. I had one of my own supervisors dislike me for it, and voiced her opinion very strongly against me, by calling me a whore, and not trusting me to be able to do anything on my own.

[15] United States v. Meredith, No. 06-0697, ROT pp. 993–94 (Commander, Navy Region Southeast, Jacksonville, Florida, Oct. 6, 2000) (Victim 1).
[16] *Edmond*, No. 01-12, ROT p. 1240.
[17] *Wylie*, No. 5-12, ROT p. 222–23 ((Victim 2).

TC: So, as a result of these rumors, your supervisor actually called you a whore?
W: Yes.
TC: Was this in the workplace?
W: Yes.
TC: Were there others around?
W: There were a few others around, yes.[18]

Set # 10

W: I took care of my niece and nephew since they were little. I love them like they are my children. My sister doesn't [let] me see them anymore. I've lost my sister, my niece and my nephew because of you, Lanorris. You took advantage of the terrible situation I was in. I only had two choices, go back to Chicago or ignore what you were doing to me. I will live with what you've done to me for the rest of my life. For the last three years, you've lied and told everyone that this didn't happen. And now you get to pretend to be a man and take responsibility. You would never have taken responsibility. You were ready to let people call me a liar and be ashamed [sic] upon for the rest of my life. I was labeled as a disgrace. You taught me how to read at the same time you molested me. I hate you, but I'm forced to think about you every day. I'm still confused every day how to think about what has happened to me. But I'm [a] survivor. I'm empowered by the horrors of what I have to go through every day. But I'm going to get through this.[19]

[18] *Castillo*, No. M12-01, ROT p. 156 (Victim 2).
[19] United States v. Daniels, No. 201600221, 2017 CCA LEXIS 240, at *3 (N-M. Ct. Crim. App. Apr. 13, 2017).

APPENDIX C

Descriptive Statistics

	N=50	Missing	Mean
Court-Martial Type			
General Court-Martial	42	0	0.84
Special Court-Martial	8	0	0.16
Class			
Offender Rank E-6 and Below	43	0	0.86
Offender Rank E-7 and Above	7	0	0.14
Victim Active Duty[1]	35	0	0.70
Victim Civilian	15	0	0.30
Victim Child	8	0	0.16
Gender			
Offender Sex Male	50	0	1.00
Victim Sex Female[2]	47	0	0.94
Race			
Offender Race White	17	4	0.37
Offender Race Non-White	29	4	0.63
Victim Race White[3]	24	10	0.60
Victim Race Non-White	16	10	0.40
Offender Black/Victim White	4	14	0.11
Discharge			
Dishonorable/Dismissal	29	0	0.58
Bad Conduct	15	0	0.30
None	6	0	0.12

[1] Multi-victim cases were counted as one where there was at least one active duty member.
[2] Multi-victim cases were counted as one. No multi-victim case included two different sexes.
[3] Multi-victim cases were counted as one. Multi-victim cases with at least one White victim were counted as White victim cases.