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**ALL IS NOT FAIR IN LOVE AND WAR:
AN EXPLORATION OF THE MILITARY MASCULINITY MYTH**

Meghan O'Malley¹

Abstract

Sexual assault has become pandemic and even a common occurrence among the ranks of all branches of the U.S. military. The Department of Defense estimates that in the year 2012 alone, 26,000 active duty soldiers were sexually assaulted. The military rape culture was thrust to the forefront of the media in 1991 as a result of the Tailhook Scandal. The military and Congress have not sat idly by, but twenty-three years and hundreds of thousands of assaults later, nothing has successfully alleviated the rates of sexual violence.

This paper explores why such efforts have failed to produce the desired results and what must be done moving forward. It cannot be that the military is simply stubbornly anti-feminist. I offer that such past efforts fall flat because they fail to permeate the hyper-masculine military culture. In order to make real change, the military must rebrand itself in a way that encourages female leadership and moves beyond the inhibitions imposed by “hyper-masculinity.”

¹ J.D. Candidate, 2016, Boston University School of Law. Many thanks to Professor Linda McClain for her invaluable insight, input, and support while writing this paper and for inspiring me to continue to pursue feminist legal scholarship.

I. INTRODUCTION

Those who commit sexual assault are not only committing a crime, they threaten the trust and discipline that make our military strong. That's why we have to be determined to stop those crimes, because they've got no place in the greatest military on Earth.

-President Barack Obama²

The United States military is the most powerful armed force in the world.³ The men and women of the U.S. military enlist to protect, serve, and uphold American safety and ideals. American soldiers are faced with the constant hardships of war, including enemy fire, bombs, civilian deaths, sleeplessness, fear, and the ever-looming threat of sexual assault by a fellow soldier. The bitter irony is that “[a] woman who signs up to protect her country is more likely to be raped by a fellow soldier than killed by enemy fire.”⁴ Sexual assault has become pandemic and even a common occurrence among the ranks of all branches of the U.S. military. The Department of Defense estimated that in the year 2012 alone, 26,000 active duty soldiers were sexually assaulted.⁵

The military rape culture was thrust to the forefront of the media in 1991 as a result of the Tailhook Scandal.⁶ More than 100 U.S. Navy and U.S. Marine Corps Aviation Officers were accused of assaulting at least 83 women and 7 men at the 35th Annual Tailhook Association

² Valerie Strauss, *Text: Obama's Speech at U.S. Naval Academy Graduation*, WASH. POST (May 23, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/05/24/text-obamas-speech-at-u-s-naval-academy-graduation/>.

³ For the sake of the arguments in this paper, I will mostly refer to the military as a single entity. To be clear, rates of sexual assault are higher than in greater society across all branches of the military. I do not mean to undermine the interconnected yet very individual nature of each branch of the services (Army, Navy, Air Force, Marine). The nuances of each branch's plight with sexual assault is beyond the scope of this paper. This paper focuses on the issue as “military” because Congressional responses have been framed in this manner.

⁴ H. Patricia Hynes, *Military Sexual Abuse: A Greater Menace than Combat*, TRUTH-OUT (Jan. 26, 2012), <http://www.truth-out.org/news/item/6299-military-sexual-abuse-a-greater-menace-than-combat#> (quoting former California Democratic Representative Jane Hartman).

⁵ U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2013 1 (Apr. 14, 2014) [hereinafter DD ANNUAL FISCAL REPORT 2013].

⁶ Michael Winerip, *Revisiting Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0.

Symposium in Las Vegas, Nevada.⁷ As a result of the scandal and subsequent investigations, the Secretary of the Navy resigned and the military passed a reform agenda stressing a “zero tolerance” policy.⁸ In 1996, at Aberdeen Proving Ground, a U.S. Army Base in Maryland, the Army charged three male trainers with rape, abuse, and harassment of female soldiers under their supervision.⁹ These charges led to an outpouring of abuse complaints at Aberdeen, ultimately resulting in one company commander and three drill sergeants going to prison.¹⁰ These are but two of a myriad of rape scandals that have plagued the U.S. military for the past two decades. The military and Congress have not sat idly by, but 23 years and hundreds of thousands of assaults later, nothing has successfully alleviated the rates of sexual violence.¹¹ This paper explores why such efforts have failed to produce the desired results and what must be done moving forward. It seems implausible that the military is simply stubbornly anti-feminist. I offer that such past efforts fall flat because they fail to permeate the hyper-masculine military culture. In order to make real change, the military must rebrand itself in a way that encourages female leadership and moves beyond the inhibitions imposed by “hyper-masculinity.”

Hyper-masculinity is an exaggerated form of stereotypical “male” behavior.¹² Hyper-masculinity embodies strength and stoicism, breeding a sense of power and relentless aggression. Accordingly, women and femininity are the antithesis of hyper-masculinity.¹³ While the United States military as a whole does not have a set of core values, each branch extols a set of their

⁷ *Id.*

⁸ *Id.*

⁹ Jackie Spinner, *In Wake of Sex Scandal, Caution is the Rule of Aberdeen*, WASH. POST. (Nov. 7, 1997), <http://www.washingtonpost.com/wp-srv/local/longterm/library/aberdeen/caution.htm>.

¹⁰ *Id.*

¹¹ U.S. DEP’T OF DEF., REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE 34 (Nov. 25, 2014) [hereinafter DD REPORT TO PRESIDENT] (“A record number of victim’s in FY 2013 and 2014 came forward to make reports.”)

¹² Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION AND VIOLENT BEHAVIOR 267, 271 (2010).

¹³ Valori K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY J. GENDER L. & JUST. 68, 97 (2013).

own. The Army emphasizes loyalty, duty, respect, selfless service, honor, integrity, and personal courage.¹⁴ The Marine Corps stresses honor, courage, and commitment.¹⁵ The Air Force values integrity, service before self, and excellence.¹⁶ The military's stated core values are at odds with the current pattern of sexual assault in the military. There is an inherent tension between "hyper-masculinity" and an official commitment to values that should condemn sexual assault. This paper explores this apparent disconnect.

Since the 1970s, society has come a long way in recognizing sexual harassment in the work place and in the home.¹⁷ Feminist legal theories have provided a backdrop for developing progressive sexual assault and domestic violence laws. Meanwhile in the military, not much has changed for women, except a higher rate of enlistment.¹⁸ As greater society has made progressive strides benefiting female equality, the military has seen only meager positive change.

Military sexual assault is an overwhelmingly complicated, nuanced issue that requires penetrating the seemingly impenetrable "military society" in order to fully understand the issues and the stakes. The military has its own law and system of justice. Deemed by defenders of the military justice system as its own "separate society,"¹⁹ military norms, behaviors, and traditions must be understood independently from greater American society. Most importantly, for the

¹⁴ The Army Values, U.S. ARMY, <http://www.army.mil/values/> (last visited May 15, 2015) (listing and describing each of the core values of the Army) [hereinafter Army Values].

¹⁵ What are the Marine Corps Values, U.S. MARINE CORPS, <http://www.hqmc.marines.mil/hrom/NewEmployees/AbouttheMarineCorps/Values.aspx> (last visited May 15, 2015) (listing and describing the core values of the Marines).

¹⁶ Our Values, U.S. AIR FORCE, <http://www.airforce.com/learn-about/our-values/> (last visited May 15, 2015) (listing and describing the core values of the Air Force).

¹⁷ See, e.g., CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); see also SUSAN GLUCK MEZEY, *ELUSIVE EQUALITY: WOMEN'S RIGHTS, PUBLIC POLICY, & THE LAW*, 150-152 (2003) (noting the legal advances made in regards to sexual harassment in the workplace while acknowledging that the issue has not been eradicated).

¹⁸ Eileen Patten & Kim Parker, *Women in the U.S. Military: Growing Share, Distinctive Profile*, PEW SOCIAL & DEMOGRAPHIC TRENDS 1 <http://www.pewsocialtrends.org/files/2011/12/women-in-the-military.pdf>.

¹⁹ See EUGENE R. FIDELL & DWIGHT HALL SULLIVAN, *EVOLVING MILITARY JUSTICE* 68 (2002) (explaining that defenders of military justice identify the military as a separate society in order to defend the "importance of enforcing discipline among service members, particularly during wartime . . . frequently cited to support the practice of admitting good military character evidence during findings.")

purposes of this paper, gender is constructed differently in the military than in greater society. Violence against fellow soldiers in the military combines the spheres of work place harassment and domestic violence. A soldier works, eats, sleeps and breathes military. In other words, the military is a lifestyle and a profession; it is a world unto itself.

A soldier is not the “normal” victim of sexual assault and, therefore, requires particularized care and attention. A feminist approach allows for exploration of why sexual assault rates are so much higher in the military and why there are virtually no effective means for reporting, investigating and prosecuting these endemic assaults. We must remember, however, that the military sexual assault problem is not simply a feminist, gender or even military issue. It is a national security concern. It is an ever-growing stain on human and civil rights. It is an alarmingly tolerated public health emergency. It is a shameful American legacy that must be addressed immediately. This paper offers but one of many perspectives on how to approach this problem.

Sexual assault against fellow soldiers has become part and parcel of military masculinity. Military culture itself is complicit in, and inherently connected to the rising rates of sexual assault. If we hope to achieve any change, we must start there. In this paper, I argue that the alarming rates of sexual assault stem from the hyper-masculine gender identity of the military, which is why Congressional and military interventions have fallen short. This hyper-masculine gender identity is embraced by the military as an institution and collectively by its members. Soldiers drawn to the military are often attracted by this very ideal—the military as the last bastion of unadulterated masculinity.²⁰ I argue that the best way to target military culture is

²⁰ MELISSA T. BROWN, ENLISTING MASCULINITY: THE CONSTRUCTION OF GENDER IN U.S. MILITARY RECRUITING ADVERTISING DURING THE ALL-VOLUNTEER FORCE 10 (2012).

through augmenting female leadership and holding offenders to the same standards as their civilian counterparts.

The rates of soldier on soldier assault in the military against *both* male and female soldiers are staggering. Rapes against male soldiers account for over half of all inter-military rapes.²¹ These assaults are acts of dominance and violence; they are, for the most part, not homosexual acts.²² Within such a hyper-masculine culture, the worst thing that can happen to a male soldier is being forced into what culture perceives as a female role. As a result, it is likely that military men rape other military men for the same reasons they rape military women—to show the victim who is boss and who is in control. The analysis of this paper applies to both the rape and treatment of male and female victims. Some sections, however, speak to the unique experience of female service-members.²³

The “military masculinity myth” stems from the concept that gender performance is socially constructed and can, therefore, be socially deconstructed. The image of a soldier as violent and aggressive does not have to exclude women. Moreover, such an image does not need to be the prevailing soldier model at all. The military does not need a male-dominated and female-subordinated culture in order to flourish. Once gender is accepted as both socially constructed and socially practiced, it is easy to view the masculine military culture as mythical. The military must be rebranded and gender must be relearned. For now, however, hyper-masculinity in the military serves as an excuse and rationale for subordinating women and men

²¹ This statistic is based on the fact that there are many more men in the military. See DEP’T OF DEF., 2013 DEMOGRAPHICS REPORT: PROFILE OF THE MILITARY COMMUNITY 16 (2013) (reporting that women compose only about 14.9% of active duty members of the military).

²² Nathaniel Penn, “*Son, Men Don’t Get Raped*,” GENTLEMAN’S QUARTERLY (Sept. 2014), <http://www.gq.com/long-form/male-military-rape> (featuring a quote by James Asbrand, a psychologist with the Salt Lake City VA’s PTSD clinical team: “One of the myths is that the perpetrators identify as gay, which is by and large not the case . . . It’s not about the sex. It’s about power and control.”)

²³ See *infra* Section II. B. (reviews the concept of “Gender Outlaws” and the conflict female soldiers experience trying to assimilate to military expectations of masculinity while adhering to society’s expectation of femininity).

through sexual assault. The military as an institution grips on to this myth for dear life, espousing military expertise, readiness, and unit cohesion as logical reasons for refusing to change.²⁴ All of these are necessary and admirable purposes; however, it is mythical that each can only be accomplished through the continuance of a detrimental hyper-masculine culture. It is as if military leaders are blind to the fact that their own values are at odds with military sexual assault. Sexual assault has no place in an institution that values honor, integrity, and selfless service. Sexual assault is not “an occupational hazard” incident to serving in the U.S. military.²⁵ I argue that treating women as fellow soldiers does not undermine the concept of the American soldier. Exercising both masculinity and basic human dignity are not mutually exclusive.

So long as the alarming rates of assault continue, such violent and gendered behavior surely has the power to undermine the entire military structure and disintegrate national trust and confidence. The tried and true military defenses for sovereignty over all internal matters are mythical excuses, only serving to perpetuate the domination of “outsiders”— women and homosexuals. After such progressive legal measures as lifting “Don’t Ask, Don’t Tell” and the female combat restriction, it is clear that the military has the ability to drastically change its policies. Rampant sexual assault, however, has the power to undermine all the progress that has been made. As evidenced by these progressive strides, unquestionably the time is ripe for further reform.

In Part II, I address the gender issues plaguing today’s U.S. military in order to account for and understand the exaggerated rates of sexual assault. In Part II. A, I combine masculinities and dominance theory in order to describe the systematic subordination of women and femininity that leads to sexual misconduct against fellow soldiers. In Part II. B, I discuss the idea of the

²⁴ Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 729 (2013).

²⁵ Jenna Grassbaugh, *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution*, 11 OHIO ST. J. CRIM. L. 319, 349 (2014).

female soldier as “gender outlaw” as a way to explore the lack of institutional space for her to be male or female and how this exacerbates sexual assault. Finally, in Part C, I explore how the military’s own policies incidentally codify and promote hyper-masculinity and the degradation of femininity.

In Part III, I delineate the different measures currently underway aimed at combating military sexual assault. Finally in Part IV, I discuss the emerging space for female soldiers and my ideas on how to appropriately address the harmful gender dynamics currently flourishing in the military in order to affect meaningful and long lasting cultural change.

II. ACCOUNTING FOR AND UNDERSTANDING HIGH RATES OF SEXUAL ASSAULT

Women serving [in Iraq] don't have to be worried about enemy fire. They have to be worried about the guy that's next to them, you know, that's supposed to be protecting and taking care of them and a lot of times becomes like public enemy number one for them.²⁶

Rates of sexual assault in the military are drastically higher than rates of civilian sexual assault. This section explores the varying ways in which the military’s exaggerated masculine culture continues to promote high rates of sexual harassment and rape in order to pinpoint potential areas for intervention. Each section revolves around the theory that gender is a social practice, perpetuating the differences between men and women. As a social practice, gender privileges are “the social definition and characteristics of men.”²⁷ As a result, hyper-masculinity is practiced continuously by soldiers at all levels of the military.

First, I discuss the gender dynamics at play and the systematic endorsement of hyper-masculinity in the military. Second, I analyze how the lack of female voice in the military enables these assaults to continue unfettered. Finally, I delve into the military’s own policies

²⁶ Kristin M. Mattocks et. al., *Women at War: Understanding How Women Veterans Cope with Combat and Military Sexual Trauma*, 74 SOC. SCI. & MED. 537, 540 (2012).

²⁷ Vojdik, *supra* note 13, at 89-90.

that are not only tolerant of sexual assault but may actually serve to promote sexual violence. The military has known for decades about this epidemic.²⁸ Working along with Congress, military reforms have been implemented and laws have been continually passed and amended.²⁹ While the interventions have attempted to design and implement a system that holds violent offenders accountable and protect those vulnerable to attack, ultimately all efforts have fallen short. Despite all of the political and media attention, the problem persists because of the ubiquitous nature with which hyper-masculinity infiltrates the military. Sexual harassment and rape interventions, not tailored to such an environment, have failed to result in lasting changes.

I do not intend to stereotype all military men through this argument. In fact, many individual military men and women share a mutual respect for each other's contributions.³⁰ The individual, however, is irrelevant to the military. Rather, "[t]he military culture is driven by a group dynamic centered around male perceptions and sensibilities, male psychology and power, male anxieties and the affirmation of masculinity."³¹ Therefore, the sexual assault epidemic must be analyzed in terms of the whole—the military as an institution and soldiers as a masculine group.³²

A. Boys Will Be Boys: Hegemonic Hyper-Masculine Ideals

Viewed as a form of sexual violence and not sexual desire, sexual assault in the military is a masculine power play allowed to flourish in an extremely gendered institution. Military

²⁸ Michael Winerip, *Revisiting Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html?_r=0.

²⁹ LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 169 (1997) (following a series of hearings led by Congress's woman in the late 1970s and early 1980s on the sexual assault of women in the military, "both Congress and the services knew everything they needed to know—and would subsequently ignore—about sexual harassment.")

³⁰ See Grassbaugh, *supra* note 25, at 349.

³¹ See FRANCKE, *supra* note 29, at 152.

³² Madeline Morris, *By Force of Arms: Rape, War, Military Culture*, 45 DUKE L.J. 651, 701-702 (1996) ("[N]ormative standards of masculinity that emphasize aggressiveness, dominance, and independence, and that minimize sensitivity, gentleness, and other stereotypically feminine characteristics have been found to be associated with heightened propensity to commit rape.")

culture promotes an entirely binary system of gender roles, placing both males and females at extreme and opposite ends. A soldier *must* be masculine and the military culture has cast this masculinity role in terms of power, domination, inequality, and subordination. Therefore, in the military, masculinity is not just a belief, but a social practice.³³ In essence, the hyper-masculine culture promoted through military training implicitly promotes the use of sexual violence to denigrate women.³⁴

Hegemonic masculinity is “the dominant and most valued form of masculinity.”³⁵ Masculinity is “as much about men's relation to other men as it is about men's relation to women.”³⁶ In understanding masculinity from this point of view, it becomes clear that not all men feel power, but rather this feeling comes from membership in a male-dominated group. As a consequence, soldiers, constantly expected to perform, must struggle to achieve this masculinity, “never achieved but always needing to be proved.”³⁷ In this regard, the military represents the ultimate homo-social competition—each male soldier constantly striving to reach the peak of the masculinity hierarchy.³⁸ Accordingly, the masculinity performed in the military is an extremely exaggerated form of the masculinity performed in greater society.

Gender is the performance of power. This is perhaps most apparent when analyzing military roles and gender-based military sexual violence. As an institution, the U.S. military is itself gendered and constantly enforcing non-inclusive gender boundaries. The military, “a

³³ Captain Megan N. Schmid, *Comment, Combating A Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 492 (2010).

³⁴ *Id.* at 490 (citing Valorie Vojdik, *Women and War: A Critical Discourse: Panel Two—Women Warriors*, 20 BERKELEY J. GENDER L. & JUST. 338, 346 (2005)).

³⁵ Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC'Y. 201, 231 (2008).

³⁶ *Id.* at 210.

³⁷ *Id.* at 213

³⁸ Frank Rudy Cooper, *Towards Multidimensional Masculinities Theory: Policing Henry Louis Gates*, in EXPLORING MASCULINITIES FEMINISTS THEORY 87 (Martha A. Fineman & Michael Thomson eds., 2013) (“A masculinity contest is thus inter-relational: it arises from the conflicting relations between two or more people. It is a zero-sum game: for someone to win, someone must lose.”)

masculine [institution] historically hostile to the presence of women,”³⁹ provides and promotes a space for men to exercise hyper-masculinity. As a result, there is no room to be “a woman” in the military. In fact, the military masculine ideal makes it rational and even acceptable for male soldiers to seek domination over women.⁴⁰ This connection between a hyper-masculine organization and rates of sexual assault is supported in other contexts as well.⁴¹ In order to understand the subordination of women and basic femininity in the context of the military, it is first necessary to understand the coercive forms of masculinity imposed on all soldiers, male and female.

While feminist legal theorists do not universally agree on the definition of sexual assault, the prevailing view and most applicable for the sake of this argument comes from Catharine MacKinnon. As a threshold matter, MacKinnon argues that: “[g]ender is . . . a question of power, specifically of male supremacy and female subordination.”⁴² MacKinnon famously posits that sex is an act of subordination between male and female and that sexuality, or the eroticization of male dominance, is the key mechanism for perpetuating sex inequality. In other words, “gender emerges as the congealed form of the sexualization of inequality between men and women.”⁴³

Accordingly, under MacKinnon’s theory, males sexually abuse those individuals over whom they have power.⁴⁴ Therefore, rape is not an act of desire or pent-up lust, but an act of

³⁹ Valori Vojdik, *The Invisibility of Gender in War*, 9 DUKE J. GENDER L. & POL’Y. 261, 261 (2002).

⁴⁰ FRANCKE, *supra* note 29, at 157 (“Accepting women as military peers is antithetical to the hyper-masculine identity traditionally promoted by the institution and sought by many military men. Only by excluding women or denigrating them can men preserve their superiority.”)

⁴¹ Turchik & Wilson, *supra* note 12, at 271 (2010) (citing James E. Gruber, *An Epidemiology of Sexual Harassment: Evidence from North America and Europe*) (explaining studies that have found that endorse stereo-typical masculinity have higher rates of sexual harassments and assault than other organizations as well as greater tolerance towards these behaviors).

⁴² CATHARINE A. MACKINNON, *Difference and Dominance*, in FEMINISM UNMODIFIED 40 (1987); *See e.g.*, Vojdik *supra* note 39. While Catharine MacKinnon’s dominance theory dates back to the 1980s, the theory and dominance framework are still implemented by scholars today

⁴³ MACKINNON, *supra* note 42, at 6.

⁴⁴ Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandal and the Military*, 83 MINN. L. REV. 305, 372 (1998) (“MacKinnon next theorizes that men sexually abuse those persons over whom they have power: first

dominance by the assailant against the victim.⁴⁵ The dominance paradigm fits perfectly in the military context. Military sexual assault is perhaps the ultimate scenario that exemplifies MacKinnon's dominance theory. Military rape is the exercise of power and dominance. In a culture that continually demands members to perform dominance, soldiers often resort to domination through sexual assault.⁴⁶ The dominance paradigm also supports the higher rates of male-on-male rapes in the military. These acts are not homosexual but about using sex to exercise power.⁴⁷ Much of the time, the male victim is being punished for weakness—a “feminine” and never tolerated trait in the military.

1. Recruitment and Training

Upon joining the military, all soldiers give up basic autonomy⁴⁸ and individuality.⁴⁹ At basic training, each soldier is stripped of their identity and molded into a combat masculine warrior, the epitome of masculinity in American society.⁵⁰ The new recruit becomes a member of an almost exclusively male group—they eat together, live together, train together, and survive together. It is no surprise, then, that the dynamic of men in groups often overrides “personal morality, individual conscience and the law.”⁵¹ While civilian society has made strides to

women and children, and then other men who are perceived as less powerful or different, based on, for example, their age, sexual orientation, ethnicity or disability.”)

⁴⁵ *Id.* at 372.

⁴⁶ Valorie Vojdik, *Women and War: A Critical Discourse: Panel Two—Women Warriors*, 20 BERKELEY J. GENDER L. & JUST. 338, 346 (2005) (“Violence against women and the denigration of women is necessary to prove the manhood of the warrior.”)

⁴⁷ See Chamallas, *supra* note 44, at 371-372 (“It is important to recognize that MacKinnon would classify these rapes as “sexual” even though the rapists regard themselves as heterosexual and are not motivated by sexual desire. In other words, that these rapes are “power rapes” does not mean that they are not sexual.”)

⁴⁸ Irene Williams & Kunsook Bernstein, *Military Sexual Trauma Among U.S. Female Veterans*, 25 ARCHIVES OF PSYCHIATRIC NURSING 138, 139 (2011) (“[B]oth men and women are likely to experience less than healthy responses to the practice of rendering new soldiers powerless during basic training to strip away their old identities and to remold them into the image of an elite military officer.”)

⁴⁹ FRANCKE, *supra* note 29, at 159 (explaining that much like the dynamics that among college athletes prone to rape, military men are subjected to the same pressures).

⁵⁰ *Id.* at 140.

⁵¹ *Id.* at 159.

understand and combat such male-group dynamics, the military continues to exploit and promote these dynamics at the expense of women.

In an era of the all-volunteer military, the military is now composed of a self-selected group of men and women. The composition of the military is drastically different from the overall population. The make-up of the military is much younger than the civilian population.⁵² Moreover, studies reveal that those individuals who suffered childhood sexual abuse may be more likely to join the military.⁵³ As a consequence, these individuals are more likely to suffer similar abuse or to be the abusers in the military.⁵⁴ Perhaps more alarmingly, recent studies tend to show a higher prevalence of previous sexual offenders enlisting in the military.⁵⁵

The reasons for this pattern vary and have not been thoroughly examined. However, it is not hard to imagine these individuals seek out the military as escape from a society that has failed them. On the other hand, these men and women may view the military as an outlet for pent-up aggression and anger. Either way, the military is often the only alternative for these individuals.

Because of the stagnant hyper-masculine culture, within the military, it is more difficult to be female or gay. Warriors are masculine and masculinity is constructed through war.⁵⁶ As a result, the hostility towards women and homosexuals is imbedded into the soldier's psyche as soon as basic training begins. The "good" soldier is defined in relation to the "outsider," with

⁵² Morris, *supra* note 32, at 750.

⁵³ Turchik & Wilson, *supra* note 12, at 270.

⁵⁴ *Id.*

⁵⁵ See Turchik & Wilson, *supra* note 41, at 270. In their review of the literature, Jessica A. Turchik & Susan M. Wilson cite "high rates of prior sexual perpetration" as a factor accounting for the elevated rates of sexual assaults in the military. Specifically, they cite samples of Navy recruits that demonstrate an elevated rate (compared to their college age counterparts) of previously perpetrating rape of a woman prior to joining the military. See also Terri Rau et al., *Evaluation of a Sexual Assault Education/Prevention Program for Male U.S. Navy Personnel*, 175 MILITARY MED. 429, 429 (2005) ("[M]en who reported a preliminary history of rape perpetration, compared with those who did not, were nearly 10 times more likely to commit rape or attempted rape during their first year of military service.")

⁵⁶ JOSHUA S. GOLDSTEIN, WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA 5-6 (2001).

the ultimate outsiders being females⁵⁷ and homosexuals.⁵⁸ At basic training, drill instructors constantly bombard recruits with “insults” such as calling them “pussies,” “sissies” or “girls,” in order to instill in them that “to be degraded is to be female.”⁵⁹ Feminizing the non-conforming soldier is the epitome of punishment and shame.⁶⁰ Homophobia also becomes a defining part of masculinity in the military. Such coercive forms of masculinity are used for hazing rituals, punishment, enforcement of the hierarchy and expressions of homophobia.⁶¹ Entrenching such sexism perpetuates the antiquated ideal that “[t]he good things are manly and collective, the despicable are feminine and individual.”⁶²

2. Barracks Culture

Most military assaults occur in the barracks.⁶³ The younger, unmarried service members are more likely to live on base.⁶⁴ This pattern is significant considering that in the military, between approximately 83% and 87% of assault victims are between the ages of 17 and 24.⁶⁵ Similar to what is observed across college campuses, this is often the first time these young

⁵⁷ ERIK ERIKSON, *TOYS AND REASONS: STAGES IN THE RITUALIZATION EXPERIENCE* 8 (1977) (describing feminism as “negative identity”).

⁵⁸ Dowd, *supra* note 35, at 209 (2008) (“The two key negatives to being man are not being a girl or woman, and not being gay.”)

⁵⁹ See Schmid, *supra* note 33, at 492.

⁶⁰ Ashley Anderson & Elizabeth Deutsch, Opinion, *Stop Assaults on Military Campuses*, N.Y. TIMES (May 12, 2015), http://www.nytimes.com/2015/05/12/opinion/stop-assaults-on-military-campuses.html?_r=0 (giving examples of the derogatory chants taught to men and women: “Several years ago, West Point cadets initiated first-year students, including young women, by teaching them to sing the following chant while marching: ‘*I wish that all the ladies were holes in the road and I was a dump truck. I’d fill ’em with my load.*’ Years before that, Air Force Academy cadets sang similar refrains marching to and from training events. One chant described taking a ‘*chain saw*’ to cut a woman ‘in two’ so that they could keep ‘the bottom half and give the top to you.’ Two years ago, a West Point investigation revealed that a cadet on the rugby team had instructed a teammate to ‘*get your girl on a leash.*’)” (emphasis added).

⁶¹ *Id.*; see Dowd, *supra* note 35, at 222 (“[Men’s strong homophobia] is expressed in avoiding men who are perceived as feminine, anti-gay harassment and violence, men themselves avoiding characteristics and behaviors that would identify them as feminine or gay.”)

⁶² GEORGE GILDER, *MEN AND MARRIAGE* 183 (1986). Note that while this is from nearly 30 years ago, the sentiments still seem to underlie the general rationale behind military training and the military lifestyle in general. See BROWN, *supra* note 20, at 129.

⁶³ Lieutenant Colonel Elizabeth Robbins, Opinion, *Alcohol Abuse is Fueling Military Sexual Assault*, WASH. POST, (June 13, 2013), http://www.washingtonpost.com/opinions/alcohol-abuse-is-fueling-military-sexual-assault/2013/06/13/da2f5ada-d37c-11e2-a73e-826d299ff459_story.html.

⁶⁴ Turchik & Wilson, *supra* note 12, at 270.

⁶⁵ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 95.

soldiers have been away from home, living independently in an environment where alcohol is readily accessible. Notably, officials cite alcohol as present in two-thirds of rape cases.⁶⁶

Alcohol consumption is at the core of off-duty association. In her *Washington Post* Op-Ed, Lieutenant Colonel Elizabeth Collins explains, “even at many official events, robust alcohol consumption is encouraged.”⁶⁷ She further reveals how she explains to new troops “that they are not safe when their military brothers are drinking. The security and fellowship of the battlefield that they can expect and provide in turn may not extend past the first drink.” Military prosecutors have recently begun to classify alcohol as a “weapon” in perpetrating a sexual assault.⁶⁸

Working in tandem with hyper-masculinity is the extreme power differential between soldiers and the superiors, living together in close quarters. As a result, an officer may demand sex from a lower ranking soldier the same way he demands him to do his laundry.⁶⁹ Respect for authority, engrained into each military recruit, keeps the majority of victims from ever coming forward.⁷⁰ Barracks culture promotes victim silence. Victims are often forced to continue working and living amongst their abusers.⁷¹ Coming forward does not guarantee any justice, but disclosure does open up the risk for retaliation and stigmatization. Thus, it is rationale for a victim to remain quiet about the assault.⁷² The barracks become both a hostile work *and* home

⁶⁶ *Military Sex Assault Claims Sky Rocket; Alcohol Cited as Main Factor*, CBS NEWS (May 11, 2014), <http://www.cbsnews.com/news/military-sex-assault-claims-skyrocket-alcohol-cited-as-main-factor/>.

⁶⁷ Robbins, *supra* note 63.

⁶⁸ Tom Roeder, *Alcohol Redefined as ‘Weapon’ in Military Sexual Assault Cases*, COLO. SPRINGS GAZETTE (Feb. 2, 2015), <http://www.military.com/daily-news/2015/02/02/alcohol-redefined-as-weapon-in-military-sexual-assault-cases.html>.

⁶⁹ Penn, *supra* note 22 (“A certain kind of officer demands sex from underlings in the same way he demands they pick up his laundry.”)

⁷⁰ *Id.*

⁷¹ Grassbaugh, *supra* note 25, at 324 (“Ultimately, military assault victims are often forced to choose between frequent contact with their perpetrators or sacrificing their career goals to protect themselves from retaliation.”) (internal citation omitted).

⁷² RAND NATIONAL SECURITY RESEARCH DIVISION, *SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S MILITARY: HIGHLIGHTS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 2* (2015) (finding 32% of women

environment, leaving no escape for the victim.

Violence seemingly runs rampant on military bases. Sexual assaults are not the only violence prevalent in military camps. Military barracks and bases are often the sites of deadly violence and shootings.⁷³ U.S. Army major and psychiatrist Nidal Malik Hasan shot and killed 13 people and injured more than 30 others in a fatal mass shooting at Fort Hood in 2009.⁷⁴ In 2013, 3 Marines were killed in a murder-suicide at the Officer Candidates School at Quantico.⁷⁵ This pattern underscores the violent and aggressive atmosphere that permeates military bases and overall military culture.

3. *Disrupting and Policing Gender Boundaries*

In understanding the military as a hyper-masculine institution, it is not hard to imagine the disruption that female soldiers impose. Sexual harassment becomes an inevitable by-product of this disruption. The integration of women into the military has disturbed the long-lauded soldier's masculine identity. Retired Navy Admiral James Webb commented that the inclusion of women in the military has made service men "feel stripped, symbolically and actually."⁷⁶ Men join the military, the last strong form bastion of masculinity,⁷⁷ to exercise what they perceive as the ultimate form of manhood. Now, however, the influx of women upsets this perception. In order to compensate for this loss, sexual assault allows these men to exert their "domain of

who filed a report of sexual assault perceived professional retaliation; 53% of women who filed perceived social retaliation).

⁷³ Lori Grisham & Cooper Allen, *Shootings at U.S. Military Bases Over the Years*, USA TODAY (Apr. 2, 2014), <http://www.usatoday.com/story/news/nation-now/2014/04/02/shooting-attacks-military-bases-history/7225403/>.

⁷⁴ Josh Rubin & Matt Smith, "I am the Shooter" Nidal Hasan tells Fort Hood Court-Martial, CNN (Aug. 6, 2013), http://www.cnn.com/2013/08/06/justice/hasan-court-martial/index.html?hpt=hp_t2.

⁷⁵ Reuters, *Military Releases Names of 3 Marines Killed In Shooting at Marine Corps Base Quantico*, N.Y. DAILY NEWS (Mar. 24, 2013), <http://www.nydailynews.com/news/crime/military-releases-names-3-marines-killed-shooting-article-1.1297831>.

⁷⁶ Schmid, *supra* note 33, at 491.

⁷⁷ See BROWN, *supra* note 20, at 129.

masculine mastery” in such a way as to preserve and mark their territory.⁷⁸

Because masculinity is performed in relation to others, sexual assault in the military serves a regulatory function, as a mechanism for policing the bounds of gender.⁷⁹ The message is clear— women do not belong. A soldier, coming from a position of power, does gender while simultaneously doing dominance. A male soldier embodies power not only inherent to his position as a soldier, but also simply because he is a male. Sexual assault allows men to punish those who transcend the institutional norms, preserving the definition of being a soldier as being a man. Moreover, the lack of control soldiers feel may cause soldiers to seek out such control in a different context.⁸⁰ A male assault against a fellow soldier is the ultimate act of power and subordination. From the perspective of gender performance, the cultural expectations and general hostility towards women are methodically instilled in all soldiers, female soldiers included. Accordingly, it does not matter whether individuals come to the military with these existing beliefs or proclivities. Once absorbed into the military culture, the misogynistic cycle begins.

B. Gender Outlaws

The voice of the female soldier has remained virtually silent because of the pressures to assimilate to the “masculinity” myth. While an estimated 26,000 active service members were assaulted in 2012 alone, relatively few have managed to come forward.⁸¹ This is not surprising, however, because the military culture makes it entirely unreasonable for a woman to report her assault. If it remains unreasonable for a woman to report her rape, speaking out against military culture and policy will remain taboo.

⁷⁸ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 187 (1998) (describing sexual assault in the workplace as the “bastion of masculine competence and authority”).

⁷⁹ Vojdik, *supra* note 39, at 269.

⁸⁰ See Williams & Bernstein, *supra* note 48, at 139 (exploring the “authoritative resource power” concept; paralleling the rates of sexual assault committed by male soldiers against female soldiers and the high rates of bulimia nervosa among female soldiers.)

⁸¹ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 1.

A soldier is the opposite of femininity. A woman joins the military and must unlearn everything she has learned prior to entering.⁸² Viewing gender as a social practice, a female soldier is expected to completely change and “learn” a new gender. While she is forced to shed her feminine identity to become a soldier she is still expected and encouraged to meet the attractive feminine mode of cultural norms. While encouraged to take on the masculine role, a female must never blur the gender lines as to threaten male self-confidence.⁸³ This is why, for example, there is a debate over the standards for female hairstyles in the military. Also, in the Marines male recruits must shave their heads. There has been much debate over whether female recruits should also be required to shave their heads. If a female is required to shave her head, however, “she would not look like a male cadet, but neither would she look like a real woman.”⁸⁴ In other words, a female recruit is placed in a difficult and seemingly impossible situation.

Moreover, while the Marines do not require females to shave their legs, they must shave them when “considered unsightly and [when they] cannot, be covered with appropriate hosiery.”⁸⁵ Seemingly, all parts of the female appearance are regulated in order to maintain a sense of femininity and police gender boundaries. Female soldiers must constantly manage navigating a dichotomous and complex identity. Valorie K. Vojdik aptly refers to this

⁸² Williams & Bernstein, *supra* note 48, at 140 (“[B]asic training creates a cultural role conflict for women, who must unlearn everything they were taught prior to entering the military. Further role conflict can arise when women in the military are challenged by male soldiers who continue to encourage them to meet the attractive, feminine model cultural norms.”)

⁸³ See FRANCKE, *supra* note 29, at 156 (describing how male recruits were trained in combat while female recruits learned poise and etiquette—“women Marine recruits receive instructions in hair care, technique of make-up application, guidance on poise, and etiquette . . . The corps even issued an official Marine lipstick to its female recruits in boot camp.”); COLONEL MARY V. STREMLow, A HISTORY OF THE WOMEN MARINES, 1946-1977 112 (1986) (describing how in the past, male recruits were taught to apply camouflage while female recruits had to master the application of cosmetics). While this idea relates to past regulations, the grooming standards today may still mark the separate roles of men and women as soldiers.

⁸⁴ Vojdik, *supra* note 13, at 71.

⁸⁵ U.S. MARINE CORPS, ORDER P1020.34G, MARINE CORPS UNIFORM REGULATIONS 1004 (13 Mar. 2003).

phenomenon as a woman being a “gender outlaw;” a woman in the military who is neither male nor female.⁸⁶ Having no real identity leaves women vulnerable to negative treatment and attack.

The female voice has remained silent because of the lack of female organizational power. There is an apparent lack of advocacy on the part of current female soldiers.⁸⁷ The horror stories that emerge are overwhelmingly from female and male survivors whom have since left the service. This, however, should not undermine the influential work that has been done by these survivors. The critically acclaimed 2012 documentary “The Invisible War,” is credited “with both persuading more women to come forward to report abuse and with forcing the military to deal more openly with the problem.”⁸⁸ Shortly after the release of the film, eight women, including two who appeared in the film, filed suit against military leaders for allegedly “supporting a culture where rapists can act with impunity and victims are silenced.”⁸⁹

Two days after viewing the film, Secretary of Defense Leon Panetta issued an order providing that all sexual assault cases be dealt with by senior officers at the rank of colonel or higher.⁹⁰ His goal was to end the customary, yet often debilitating, practice of commanders adjudicating cases from within their own units.⁹¹ Subsequently, the film spurred congressional action and hearings in both the House and Senate.⁹² Senator Kristen Gillibrand, now a champion of military sexual assault reform, credits the film with inspiring her to advocate for legislation to

⁸⁶ Vojdik, *supra* note 13, at 71.

⁸⁷ Advocacy groups such as the *Service Women’s Action Network*, as discussed later in this paper, are aimed at aiding service women but they are not formed or run by current service women. See Military Sexual Violence, Service Women’s Action Network, <http://servicewomen.org/military-sexual-violence/> (last visited May 15, 2015).

⁸⁸ James Risen, *Air Force Leaders Testify on Culture that Led to Sexual Assaults of Recruits*, N.Y. TIMES (Jan. 23, 2013), http://www.nytimes.com/2013/01/24/us/air-force-leaders-testify-on-culture-that-led-to-sexual-assaults-of-recruits.html?_r=0.

⁸⁹ Cid Standifer, *Military Women’s Lawsuit Alleges Rape, Assault*, THE ARMY TIMES (Mar. 6, 2012), <http://archive.armytimes.com/article/20120306/NEWS/203060325/Military-women-s-lawsuit-alleges-rape-assault>.

⁹⁰ Lisa Daniel, *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, DEP’T OF DEF. NEWS (Apr. 16, 2012), <http://www.defense.gov/news/newsarticle.aspx?id=67954>.

⁹¹ *Id.*

⁹² *Id.*

reduce sexual assault in the military.⁹³ The undeniable impact of this film supports the power of the female voice and the good that can come from women and men in the military coming forward to push for real change. Absent from this film, however, is the narrative of current female military members.

In order to succeed in the military, soldiers must assimilate to the demands of their leaders and function within the rigidity of the chain of command. Studies have found that more military sexual assault, occur in units where the commanding officer is neutral or indifferent to assaults, than in those where officers do not tolerate such behavior.⁹⁴ As the vast majority of leaders are men, it is particularly daunting for female soldiers to band together for a common cause. This power differential compounds negative assumptions about female leadership in the military. The disproportionate male-to-female ratio in military leadership positions and the perpetual female “token” status undermine current efforts aimed at combating sexual violence.⁹⁵

C. The Military’s Own Policies

As the hyper-masculine culture of the military is the core issue perpetuating sexual assault, the military as an institution must also be targeted for reform. Because, “[w]e ‘do’ gender, not in a vacuum, but in the context of institutions constructed with gender in mind,”⁹⁶ the military as an institution must be addressed as well as the individuals that form it. The military

⁹³ KRISTEN GILLIBRAND, *OFF THE SIDELINES: RAISE YOUR VOICE, CHANGE THE WORLD* 164 (2014) (“Nothing in my life—not sitting on the Armed Services Committee, not even the anguish of watching 911 first responder dying from diseases caused by their work at Ground Zero—prepared me for what I saw in that film. . . whatever it took, I had to bring justice to these survivors, and I needed to work to prevent future crimes.”) Gillibrand went on to introduce the Military Justice Improvement Act.

⁹⁴ John B. Pryor, *The Phenomenology of Sexual Harassment: Why Does Sexual Behavior Bother People in the Workplace?*, 47 *CONSULTING PSYCHOLOGY JOURNAL: PRACTICE AND RESEARCH*, 160, 164 (1995); Turchik & Wilson, *supra* note 12, at 271.

⁹⁵ See Chamallas, *supra* note 45, at 322-324 (defining the token woman as “an apt characterization of the female soldier who is still likely to find herself far outnumbered by men within an historically male-dominated environment . . . As long as they are still considered oddities and outsiders, members of the token group are likely to be hampered by lack of acceptance for their individual talents. They are often looked upon as symbols of their group and socially constructed in highly predictable ways. Tokens are rarely perceived as leaders of exemplary teammates.”).

⁹⁶ Dowd, *supra* note 35, at 214 (citing MICHAEL KIMMEL, *THE GENDERED SOCIETY* 113 (2004) (“Our social world is a build on systemic, structural inequality based on gender; social life reproduces both gender difference and gender inequality.”)).

has actively “militarized” sexual assault to the point where it has become normal. Militarization is “the step-by-step process by which a person or a thing gradually comes to depend for its well-being on militarist ideas.”⁹⁷ Treating assault as an incidental occurrence that is just part and parcel of serving in the military has allowed rape and sexual harassment become common in the military experience. Put more succinctly, “[v]iolence against civilians is shocking. Violence against fellow soldiers, mundane.”⁹⁸

1. Moral Waivers and Recruitment

As a result of military recruitment, the composition of the military is inherently different than that of civilian society. When the draft ended, each branch of the military had to face the newfound task of recruiting an all-volunteer force, while also grappling with the expanding role of women in the military. In response to the prolonged war in Iraq, the federal government worried about filling military ranks. As a result, under Secretary of Defense Donald Rumsfeld, the military granted “moral waivers” in order to accept recruits with criminal records.⁹⁹ This waiver policy allowed recruits who had been arrested or convicted of offenses, including domestic violence, aggravated assault, and rape to join the military.¹⁰⁰ One such recruit allowed in under the moral waiver, Army Private Steve Green, raped and murdered 14 year-old Iraqi girl, Abeer Qassim Hamza al-Janabi, and then killed her entire family. Green is now serving a life sentence in prison without parole.¹⁰¹ The Green case serves as an extreme, yet cautionary example, of the potential harm moral waivers impose upon maintaining a strong military unit and upholding national security.

⁹⁷ CYNTHIA ENLOE, *MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES* 3 (2000).

⁹⁸ Banner, *supra* note 24, at 764.

⁹⁹ Michelle Singer, *Military Lowers Standards to Fill Ranks*, CBS NEWS (July 30, 2007), <http://www.cbsnews.com/news/military-lowers-standards-to-fill-ranks/>.

¹⁰⁰ Banner, *supra* note 24, at 734.

¹⁰¹ Jim Frederick, *When a Soldier Murders: Steven Green Gets Life*, TIME (May 21, 2009), <http://content.time.com/time/nation/article/0,8599,1900389,00.html>.

The lax moral waiver standard potentially threatens the quality of the military unit. In civilian society, most felons are not permitted to carry a firearm.¹⁰² Furthermore, to become a convicted criminal, these soldiers have exhibited a lapse in discipline and judgment in their past.¹⁰³ While the military excludes recruits who have committed more than one felony, these moral waivers symbolize a sort of tolerance towards deviance within the military ranks.¹⁰⁴ Moreover, soldiers with a criminal record seem more likely to commit an offense while serving in the military. The prolific practice of issuing moral waivers sends the wrong message to soldiers currently serving as well as to potential recruits.

2. Official Sexual Harassment Policy

The “official” sexual harassment policy of the military is zero tolerance.¹⁰⁵ A victim of sexual assault or harassment may file either a restricted or unrestricted report. A restricted report allows the victim to remain anonymous while receiving medical assistance and counseling.¹⁰⁶ If a victim hopes to bring his or her attacker to justice, they must file an unrestricted report, which does not guarantee anonymity. The assault is reported to both a commander and law enforcement.

Because the military justice system is commander-driven military policies and procedures systematically encourage the silence of victims.¹⁰⁷ As a consequence, nearly half of reported assaults result in no action at all.¹⁰⁸ Because of the chain of command, military commanders are responsible for everything that happens below them. Compounded with the prevailing

¹⁰² 18 U.S.C. § 922(g)(1)

¹⁰³ Lizette Alvarez, *Army Giving More Waivers in Recruiting*, N.Y. TIMES (Feb. 14, 2007), <http://www.nytimes.com/2007/02/14/us/14military.html?pagewanted=print>.

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, U.S. DEP’T OF ARMY, REG. 600-20, PREVENTION OF SEXUAL HARASSMENT 68 (18 Mar. 2008).

¹⁰⁶ *Id.* at 106.

¹⁰⁷ Williams & Bernstein, *supra* note 48, at 141 (“Underreporting incidents of sexual assault in the military minimizes the severity of this problem and its impact on the U.S. veterans, yet institutional rules and regulations may be inadvertent barriers to reporting.”)

¹⁰⁸ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 3 (Relating that in 2013, only 2,149 cases were reviewed for possible disciplinary action. Of those 2,149, commanders took action related to sexual assault in just 1,187 of them).

subordination of women, these commanders have no incentive to take official action on these assault reports.¹⁰⁹ Commanders are not only in charge of who is prosecuted, but also with choosing the jury. Colonel Don Christensen, the former chief prosecutor of the U.S. Air Force, recounts instances of commander support for alleged abusers, such as sitting behind the accused throughout trial. In one instance, he recounted witnessing a commander “testify at sentencing that the noncommissioned officer who had just been convicted of sexually molesting his daughter, a 13-year-old with a developmental disability, was nonetheless of great value to the unit and should therefore be retained. The judge granted his request.”¹¹⁰

Perhaps even worse than the lack of official action is the retaliation and stigmatization against women who do come forward and report their assaults. Commonly, even after reporting, a woman is forced to continue working with her attacker, who is likely her superior.¹¹¹ The victim’s conduct is often investigated before that of her attacker. Because of the military’s rules against adultery, fraternization and underage drinking, victims are hesitant to come forward for fear of their own prosecution.¹¹² It is not uncommon for victims to discharge themselves, or leave the service willingly, after suffering retaliation for their reported assaults. According to Anu Bhagwati, executive director of the Service Women’s Action Network and a former captain in the Marine Corps:

There’s overwhelming evidence that the victims who report are experiencing retaliation, . . . When you get evidence like this, you just can’t ignore it. The climate within the military is still extremely dangerous. for sex crimes victims to report. We haven’t created a safe climate for them.¹¹³

¹⁰⁹ Schmid, *supra* note 33, at 493.

¹¹⁰ Robert Draper, *The Military’s Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html?ref=magazine&_r=0.

¹¹¹ See Turchik & Wilson, *supra* note 41, at 272.

¹¹² *Id.*

¹¹³ Marisa Taylor, *Reported Sex Assaults in Military Up, But Fear of Retaliation Still High*, AL JAZEERA AMERICA (Dec. 4, 2014), <http://america.aljazeera.com/articles/2014/12/4/military-sexual-assault.html>.

The numbers more than support this trend in reporting—in 2012 alone there were an estimated 26,000 incidences of “unwanted sexual contact” against service members yet only about 2,024 soldier-on-soldier assaults were reported.¹¹⁴ In total, 880 subjects received some sort of official action regarding their sexual assault offense.¹¹⁵ In other words, 3% of the estimated offenders were reprimanded. On a more positive note, there was a 50% increase in reported incidents in 2013.¹¹⁶ This unprecedented increase comes after years of incremental increases of only about 5%.¹¹⁷ The Department of Defense (“DoD”) enthusiastically attributes this trend to increased trust and confidence in the reporting system.¹¹⁸ Of the unrestricted reports made, less than half received official action.¹¹⁹ While the increased percentage of those offenders receiving a court-martial charge seems like a DoD success, the percentage fails to account for those court martial charges that are eventually dismissed. In 2013, of the 838 subjects who had court-martial charges against them, only 370 were convicted of any charge at court-martial.¹²⁰ Likewise, only 197 convicted military members were required to register as sex offenders.¹²¹ Faced with the miniscule possibility of justice and the enormous possibility of retaliation and stigmatization, it is simply illogical for victims to come forward and report their assaults. Ultimately, military policies and practices have codified the subordination of women, seen most starkly through normalization of the sexual assault of female soldiers.

¹¹⁴ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 2.

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.* at 8.

¹¹⁹ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 3.

¹²⁰ *Id.* at 82.

¹²¹ *Id.* at 83 (“484 subjects proceeded to trial, 90 subjects were granted a discharge or resignation in lieu of court-martial, and 133 subjects had court-martial charges dismissed.”)

III. WHAT IS BEING DONE?

*“I wanted to die because I basically got fired for being raped.”*¹²²

A. In the Courts

Thirty-six victims of military sexual assault in two pending class action suits, *Cioca v. Rumsfeld* and *Klay v. Panetta*, seek institutional responsibility for the sexual violence perpetrated against them by fellow servicemen. Both cases were dismissed at trial and the dismissals were confirmed on appeal under the oft-applied military deference.¹²³ Military deference, “the reluctance of the judiciary to usurp Congressional responsibility for the conduct of military affairs,”¹²⁴ results in a lack of meaningful action beyond the Uniform Code of Military Justice (UCMJ) and the chain of command.¹²⁵ As a result, the judiciary has consistently failed to intervene in intra-military matters, viewing such issues as beyond the expertise of the judiciary.

Specifically, *Cioca* and *Klay* allege a violation of the Fifth Amendment right to bodily integrity, violation of due process, and a violation of the First Amendment by unfair terminations and the mistreatment stemming from reporting their assault. The complaints also allege equal protection violations based on “a pattern of . . . assault, and . . . harassment . . . on the basis of gender; and encouraged a culture of sexism and misogyny.”¹²⁶

Since the *Feres* decision, the Supreme Court has systematically declined to intervene in military matters and decisions.¹²⁷ Their rationale is threefold. First, the relationship between

¹²² *Testimony On Sexual Assaults in the Military: Hearing on Sexual Assault in the Military Before Subcommon Personnel of the Senate Comm. on Armed Forces*, 113th Cong., 1st sess. 160 (2013) (statement of Retired Technical Sergeant Jennifer Norris) [hereinafter *Hearing on Sexual Assault in the Military 2013*].

¹²³ *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2003); *Klay v. Panetta*, 758 F.3d 369 (D.C. Cir. 2014).

¹²⁴ *Banner*, *supra* note 24, at 725.

¹²⁵ *Id.* at 725-726.

¹²⁶ *Id.* at 732.

¹²⁷ *Feres v. United States*, 340 U.S. 135 (1950); *Banner*, *supra* note 24, at 725 (“Since the 1950s, *Feres* has been expansively interpreted to bar justifiability of claims by military personnel against superior officers not only for negligence and intentional torts, but also for blatant violations of constitutional rights.”)

military members and the government is strictly federal in character.¹²⁸ Second, the Supreme Court assumes that the remedies available through the military are sufficient and plaintiffs should not receive a windfall compared to civilians suffering in similar situations.¹²⁹ Third, these claims are “incident to service” and judicial intervention would undermine military discipline and effectiveness.¹³⁰

In her article *Immoral Waiver*, Francine Banner argues that “the moment is ripe for the Supreme Court to revisit what has become an outdated and unworkable doctrine,” and that the harms from sexual assault weigh heavily in favor of judicial intervention.¹³¹ Banner aptly refers to the judicial precedent since *Feres* as a “mythological idea” in which the military is viewed as “wholly and properly removed from civilian oversight.”¹³²

It remains unclear, however, what social impact this yet-to-be-realized judicial intervention will have on military culture. There may be a trickle down effect in which law transforms societal ideals. A Supreme Court decision favorable to the plaintiffs would surely represent a symbolic victory for victims of military sexual assault. Even if the Supreme Court rules in favor of these victims, however, formal progress will only be made if the military can quickly change its ways based on a Supreme Court ruling. More importantly, tort cases should be the last resort for victims of military assault. While there is great importance in the Supreme Court recognizing the indignity and harm suffered by these plaintiffs, the real indignity is that victims have to bring a class action suit at all. The institution these women have given their lives to has not protected them and neither have the courts.

¹²⁸ Banner, *supra* note 24, at 740.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 731 (“[T]hese cases provide an important opportunity for the Court to signal that it will not abdicate its responsibility to adjudicate.”)

¹³² *Id.* at 773.

B. In Congress: The End of the Combat Exclusion

*The backlash is almost laughably outdated, but it's fueled by real nervousness among some men that the last bastion of 'true masculinity' is now being scaled by feminists. And they're asking, 'Well, where can we be real men?'*¹³³

Until very recently, women have occupied both a structurally and symbolically subordinated position in the military. On January 24, 2013, Defense Secretary Leon Panetta overturned a 1994 rule banning female soldiers from being assigned to small ground combat units.¹³⁴ This lift on the combat ban gives all soldiers equal opportunity to qualify for combat positions.¹³⁵ This lift opens about 230,000 positions between the Army, Navy and Marines.¹³⁶ The purpose of the inclusion policy is “to eliminate all unnecessary gender-based barriers to service.”¹³⁷

Previously, women had been serving in such roles since at least the Gulf War, but were never given the same recognition as their male “peers.”¹³⁸ The effects of the new combat lift on sexual assault remain unknown. While the ban lift formally opens opportunities for women to occupy positions equal to men, female soldiers still have to overcome an entire culture implicitly against female advancement. The hope is that as more women acquire into leadership roles, the

¹³³ See Rebecca Burns, *The Frontlines of Feminism: Is the End of the Combat Exclusion a Win for All Women?*, IN THESE TIMES (Feb. 23, 2013), http://inthesetimes.com/article/14607/the_frontlines_of_feminism (quoting Cynthia Enloe who was featured in this critical conversation on combat ban lift).

¹³⁴ *Id.*

¹³⁵ See Grassbaugh, *supra* note 25, at 320 (highlighting that each branch has until 2016 to seek special exceptions to keep positions closed to women).

¹³⁶ Carey D. Lohrenz, *Time for Some Fearless Leadership*, TIME (Jan. 30, 2013)

<http://nation.time.com/2013/01/30/time-for-some-fearless-leadership/>; see also Staff Sergeant David Salanitri, *Air Force Sets Plan to Integrate Women in Combat Jobs by 2016*, U.S. AIR FORCE NEWS (June 19, 2013) <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/109017/air-force-sets-plan-to-integrate-women-in-combat-jobs-by-2016.aspx> (describing how prior to lifting the combat ban, the Air Force already had a very inclusive combat policy—99% of Air Force jobs were already open to females).

¹³⁷ Memorandum from Lieutenant General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, U.S. Army, to Secretary of Defense, subject: Women in Service Implementation Plan (Jan. 9, 2013).

¹³⁸ Grassbaugh, *supra* note 25, at 321.

rate of sexual assaults will decrease.¹³⁹ On the other hand, in the past the women who have risen through the ranks to become military leaders have done so by assimilating to the gender bias.¹⁴⁰ Therefore, while the combat lift is a victory for female soldiers symbolically, it is unclear whether it will actually change anything because the military culture continues to denigrate the position of female soldiers.

Several groups rallied behind and in favor of the DoD's decision to lift the combat exclusion. The push to obtain equality in military combat did not come from active-duty female service members, but rather from several groups including the Defense Advisory Committee on Women in the Service.¹⁴¹ Notably, "none of the committee members are on active duty or have any recent combat or recent combat or relevant operation experience related to the issues they are attempting to change."¹⁴² Female response to the combat ban lift has been mixed. Carey D. Lohrenz, the first female F-14 Tomcat fighter pilot in the U.S. Navy, provides encouraging comments:

The military needs to continue looking for ways to leverage top talent. Lifting the ban on women in combat was the right thing to do for the United States, for our national security and to ensure America has the most efficient, effective, capable fighting force available. No longer will commanders be limited to a talent pool that excludes thousands of ready, willing, and more-than-able soldiers.¹⁴³

Some women express the opposite view, such as Marine Corps Captain Katie Petronio author of the widely cited article, *Get Over it! We Are Not All Created Equal*. She recounts her

¹³⁹ *Id.* at 335 ("In the context of the ongoing sexual assault crisis, the DoD has offered another potential solution: integrate all branches of the military to prevent gender discrimination and place all service members on a equal playing field.")

¹⁴⁰ Burns, *supra* note 133.

¹⁴¹ This pattern reflects the discussion from Part II. B of this paper. There is a lack an apparent lack of advocacy coming from active-duty female service members.

¹⁴² Capt. Katie Pertonio, *Get Over it! We Are Not All Created Equal*, 97 THE MARINE CROPS GAZETTE (March 2013).

¹⁴³ Lohrenz, *supra* note 136.

time serving in both Iraq and Afghanistan, advocating that the physical rigors of combat duty are just not for women. She notes her concerns, stating:

In the end, my main concern is not whether women are capable of conducting combat operations, as we have already proven that we can hold our own in some very difficult combat situations; instead, my main concern is a question of longevity. Can women endure the physical and physiological rigors of sustained combat operations, and are we willing to accept the attrition and medical issues that go along with integration?¹⁴⁴

It seems Captain Petronio's main concern is whether females should subject their physical bodies to the rigors of war, rather than if they are capable of doing the required work. This view, however, fails to take into account that female soldiers hoping to enter combat positions will be held to the same standard as their male counterparts.¹⁴⁵ While theoretically 230,000 spots open up, that does not mean women will be able to fill even a sizeable portion of them. The inclusion policy is a step closer to equal opportunity and equal treatment of the sexes in the military. It is as much a symbolic as a substantive measure to rid the military of an antiquated gender-based barrier. Advocating against the combat lift because of biological and psychological differences between men and women undercuts the purposes behind the bill greatly and undermines the work of female soldiers currently holding combat positions.

C. SAPRO: Sexual Assault Prevention and Response Office

The DoD's Sexual Assault Prevention and Response Office (SAPRO) serves as the single point of accountability for sexual assault prevention and policy in the military.¹⁴⁶ This office is

¹⁴⁴ Petronio, *supra* note 142.

¹⁴⁵ *See* *United States v. Virginia*, 518 U.S. 515 (1996) (advancing the basic point that women should not be judged by generalizations about their capacities based on their gender). While *United States v. Virginia* (most commonly referred to as the *VMI* case) related to the equal protection doctrine, it provides illustrative guidance on this point—exceptional women should be allowed the opportunities for which they are qualified and capable.

¹⁴⁶ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 6 (“In 2005, the Department established the SAPR program to promote prevention, encourage increased reporting of the crime, and improve response capabilities for

an out-growth of a 2004 DoD Task Force that was originally created out of “concerns about [r]eports regarding allegations of sexual assaults of service members deployed into Iraq and Kuwait.”¹⁴⁷ Since its official creation in 2005, each year SAPRO releases “reports on sexual assault programs, initiatives, and policy enhancements developed and implemented during the prior fiscal year.”¹⁴⁸ Since 2011, Secretaries of Defense Chuck Hagel and Leon Panetta have directed a total of forty-one Sexual Assault Prevention and Response (SAPR) initiatives. The five SAPR “lines of effort” are prevention, investigation, accountability, advocacy, and assessment.¹⁴⁹ Each line is aimed at enhancing the commanders’ role, training and collaboration, and combating myths and providing accurate information.¹⁵⁰ Moreover, the office’s efforts support an underlying premise of “culture” change. SAPRO’s strategic plan states:

The Department is actively pursuing enduring culture change where every Service member is treated with dignity and respect; where all allegations of inappropriate behavior are treated with the utmost seriousness; where victim privacy is protected, and they are treated with sensitivity; where bystanders are motivated to intervene; and where offenders know they will be held appropriately accountable.¹⁵¹

Importantly, in 2013, SAPRO implemented the special victims’ advocacy program. In addition to this program, the Air Force began a “Special Victims’ Counsel,” in which Airmen who report sexual assault have the opportunity to be assigned a military attorney at the expense of the Air Force.¹⁵² Since then, the Secretary of Defense has directed all branches to follow suit.

victims...SAPRO is responsible for the policy that supports the SAPR program and oversight activities that ensure its effectiveness as provided for in Department of Defense Instruction (DoDI) 6495.02.”)

¹⁴⁷ Memorandum from U.S. Secretary of Defense Donald Rumsfeld, to Under Secretary of Defense, subject: Department of Defense Care for Victims of Sexual Assault (5 Feb. 2004) (“Sexual assault will not be tolerated in the Department of Defense . . . I am directing that you review how the Department handles treatment of and care for victims of sexual assault with particular attention to any specific issues that may arise from the circumstances of a combat theater.”)

¹⁴⁸ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 1.

¹⁴⁹ U.S. Dep’t of Def., SAPRO, DoD SAPR Strategic Plan, <http://sapr.mil/index.php/about/sapr-strat-plan> (last visited May 15, 2015) [hereinafter “DoD SAPR Strategic Plan Website”].

¹⁵⁰ See e.g., U.S. Dep’t of Def., SAPRO, DoD SAPR Strategic Plan (Jan. 26, 2015).

¹⁵¹ DoD SAPR Strategic Plan Website, *supra* note 149.

¹⁵² DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 7.

Moreover, the Secretary of Defense has recommended that Congress change Article 60 of military law so that the relevant military authority would no longer have the authority to set aside convictions for offenses such as sexual assault.¹⁵³ In 2014, the DoD began implementing the Crime Victims' Rights Act, which mandates crime victims' rights be included into military law.¹⁵⁴ By the end of 2013, the DoD has certified over 22,000 Sexual Assault Response Coordinator (SARC) and Sexual Assault Prevention and Response Victim Advocate (SAPR VA's), who serve as victim's advocates.¹⁵⁵

All of these efforts are admirable and necessary. However, soft recommendations from the DoD do not alone lead to permanent or meaningful change. Victim's services are needed but these measures fall short of the need for a drastic cultural shift that will help prevent these assaults from happening. There is not a clear plan or structure for implementation, which frustrates the urgency of the sexual assault issue.

IV. A CALL TO ARMS

*Sexual assault has no place in my Army, and no place in my military . . . It is an affront to the values that we defend, and it erodes the cohesion that our units demand.*¹⁵⁶

The core issue is a military culture that is permissive of sexual assault and hostile towards change and outsiders. SAPRO can issue a report every year, advocate admirable goals, and implement myriad training and awareness programs. Unless the underlying culture of the military can open up to women, nothing will effectively change. Policy must permeate the depths of military culture and norms. Formal laws have little effect when the military culture is hell-bent against the desired result. This idea is nothing new in U.S. history—just look to

¹⁵³ *Id.* at 35.

¹⁵⁴ H.R. 3304, 113th Cong. (2013-2014) established the Crime Victim's Rights Act, which has become law under National Defense Authorization Act for Fiscal Year 2014.

¹⁵⁵ DD ANNUAL FISCAL REPORT 2013, *supra* note 5, at 39.

¹⁵⁶ Hearing on Sexual Assault in the Military 2013, *supra* note 122, at 87 (statement of Major General Gary Patton, U.S. Army, Director, DoD SAPRO).

racially-neutral admissions policies and racial segregation in the 1960's South. As an institution engaging in the most cutting-edge and technologically advanced war tactics, the military must be purged of antiquated and harmful laws and customs. For example, the "good soldier defense" still allows for military defendants to use character as a means of skirting liability. Furthermore, adultery is still a criminal offense under the UCMJ.¹⁵⁷

In order to fully explore and debunk the military masculinity myth it is important to keep in mind three contemporary military developments. First, today's "soldier" looks entirely different from the soldiers of the "Greatest Generation."¹⁵⁸ The military is now composed predominantly of volunteer-citizen soldiers.¹⁵⁹ The overwhelming majority comes from disadvantaged backgrounds, with little education and limited economic resources, serving multiple tours of combat.¹⁶⁰ Second, there is no longer a ban preventing women from serving in combat positions. This signals the growing presence, acceptance, and contributions of women in the military.¹⁶¹ Finally, the nature of warfare has changed drastically since the Korean War. Drones have replaced frontline soldiers.¹⁶² Un-uniformed terrorist organizations have replaced a readily apparent uniformed enemy.¹⁶³ Simply, we no longer live in a society with the traditional wartime model, where men go overseas to battle the enemy nation. Instead, war no longer has clear boundaries. The skills and traits necessary to be a "good" soldier continue to evolve.

¹⁵⁷ Adultery is a crime punishable under UCMJ art. 134 (2014).

¹⁵⁸ See e.g., TOM BROWKAW, THE GREATEST GENERATION (1998). "The Greatest Generation" is a term coined by journalist Tom Browkaw that refers to the generation that grew up in the U.S. during the Great Depression, fought in World War II as well as those who remained on the home front helping with the war effort.. He goes on to describe this generation as "the greatest generation any society has ever produced" because the men and women of this generation did not fight for fame and glory but just because it was the right thing to do. *Id.* at 2.

¹⁵⁹ See *supra* Section II. A. 1.

¹⁶⁰ Turchik & Wilson, *supra* note 41, at 269-271.

¹⁶¹ See *supra* Section III. B.

¹⁶² James Turitto, *Understanding Warfare in the 21st Century*, 18 INT'L AFFAIRS REV. (2010).

¹⁶³ Anne-Marie Slaughter, *War and Law in the 21st Century: Adapting to the Changing Face of Conflict*, 19 EUROPE'S WORLD, 33 (2011) (describing recent changes in how nations conduct war against terrorist groups, specifically noting "the ongoing dispute over the past decade as to whether to try terrorists as criminals in a domestic court or as unlawful combatants under the laws of war.")

These changes help ground the masculinity myth in modern day context and while demonstrating the potential growing “space” for women in military roles. Female soldiers are not going anywhere and the time is far overdue for enforcing a military culture that protects the men *and* women who serve to protect the United States. The great social advances made in the past decade, including the lift of “Don’t Ask, Don’t Tell” and the female combat ban, signal that it is time to continue pushing forward. Cultural change must target the manner in which soldiers practice gender. The doctrine and practices of war continue to evolve and the role of the soldier must continue to adapt accordingly. The military today focuses more on operations other than war. Such operations include, “peacekeeping missions, humanitarian aid, drug interdiction and efforts to control ethnic cleansers.”¹⁶⁴ These types of military operations involve skills traditionally understood as feminine, with an emphasis on cooperation, communication and interpersonal skills. Tasks of this nature do not invoke the traditional hyper-masculine warrior. Instead of considering such civilian-like tasks as emasculating the stereotypical hyper-masculine soldier, these tasks should be understood and embraced as a consequence of the changing landscape of war.¹⁶⁵ “Changing military roles and the inclusion of women does not mean that the military is becoming ‘emasculated’ or ungendered; it means that military masculinities alter and new forms become dominant.”¹⁶⁶

The best ways to move forward towards overcoming military sexual assault issue are to reconceptualize the institution’s meaning of masculinity, to deemphasize the inherent bond between a soldier and manhood, and to denormalize sexual assault as a tool for performing gender. In the following sections I advocate for accomplishing these ideas by holding offending

¹⁶⁴ BROWN, *supra* note 20, at 21-22.

¹⁶⁵ ANNICA KRONSELL, GENDER, SEX AND THE POSTNATIONAL DEFENSE: MILITARISM AND PEACEKEEPING 80 (2012) (explaining the shift from stereotypically male to female tasks in the military: “the move to more civilian like tasks, such as policing, cooperating with locals, communicating, and assisting, signify an inclusion of tasks that have been coded as feminine through military practices in the past. Hence, it may be considered a demasculinization.”).

¹⁶⁶ *Id.*; See also BROWN, *supra* note 20, at 22.

soldiers to the same standard as all citizens, encouraging a critical mass of female leadership, and targeting the chain of command.

A. Sex Offender Registry

An aggressive first step towards de-normalizing sexual assault would be to implement stringent requirements for listing military offenders on a national sex offender registry. Such a requirement puts military offenders on a level playing field with civilian offenders. As a consequence, the normalcy with which sexual assault in the military functions will be replaced with society's expectations. This would effectively reformulate sexual assault, shifting it from a natural outgrowth of gender performance to deviant and criminal behavior. Moreover, mandatory registration on a sex offender list casts these military offenders as "sexual offenders." It seems that often within the military institution, such abusers are not viewed as rapists or predators. Rather, their behavior is excused, and even applauded by peers and superiors because they are viewed as simply the exercising of military ideals and masculinity.

No national military sex offender registry currently exists.¹⁶⁷ While this is not surprising given the taboo nature of sexual assault in the military, it is extremely worrisome given the fact that these assailants also tend to evade public sex offender registration requirements.¹⁶⁸ When civilians are convicted of a sexual offense, their fingerprints and DNA are taken and their name is added to a national registry. Every time a sex offender changes residency, they must re-register, and this information is available to the public. The military system lacks the authority to require registry on the public registry. Currently, when an offender is released from military prison, the DoD simply asks where the soldier plans on going and then sends a notification to

¹⁶⁷ See Melissa Harris-Perry, *Hundreds of Military Sex Offenders Not on Public Registries*, MSNBC (Dec. 13, 2014), <http://www.msnbc.com/melissa-harris-perry/watch/hundreds-of-sex-offenders-not-on-registries-371771971506>.

¹⁶⁸ See *id.* (citing a 2014 Scripps report, "Under the Radar," revealed a "gaping loophole" in the current state of the registry system—of 1,000 military court martial cases, at least 242 convicted military sex offenders have fallen "under the radar.")

that community.¹⁶⁹ The DoD has virtually no oversight and never ensures that the offender relocated and registered in his or her indicated community.¹⁷⁰ The DoD uses an honor system, leaving it up to sex offenders to register themselves.¹⁷¹

A military sex offender registry represents a step towards permeating military culture and preventing military sexual assault. As aptly stated by Francine Banner, “[a]lthough soldiers comprise the heartland of America, military decision making has been severed from civilian accountability.”¹⁷² The reality is that sexual assault is not simply a “military” problem. Today’s citizen-soldiers return to the civilian community upon completion of their service. Sexual assault, in all contexts, is an American problem; the line between the military and greater society becomes blurred when these soldiers complete their duty. At the very least, given high rates of recidivism and basic notions of justice, there must be a system for identifying these perpetrators.

B. Leaders and the Chain of Command

Unlike civilian society, the military functions within and thrives upon a rigidly hierarchical chain of command. Therefore, any meaningful social change must target leadership, with an eye towards a critical mass of female leaders. The presence of female leadership signals to all military members the importance and strength of female soldiers. A critical mass of female leaders would combat the biased judgments related to the competence and leadership qualities of women. In essence, it is not the chain of command itself that is at fault, but rather the attitudes

¹⁶⁹ Rebecca Linstrom, *Military Sex Offenders Can Fly Under States’ Radar*, USA TODAY (Feb. 5, 2015, 6:07 PM), <http://www.usatoday.com/story/news/nation/2015/02/05/military-sex-offender-loophole/22920521/>.

¹⁷⁰ Colonel (Ret.) Don Christensen, *Statement of Protect Out Defender’s President, Col. Don Christenson (ret.) on the Introduction of the Military TRAC Act* (2015) (“Inexplicably, the United States military lacks the authority to require service members who have been convicted of rape or sexual assault to register as sex offenders. Instead, the Pentagon relies on an “honor system,” leaving it up to convicted rapists to register themselves after leaving the military.”)

¹⁷¹ *Id.* In February, Representative Jackie Speier (D-California) and Representative Mike Foccmann (R-Colorado), co-sponsored a bill introduced in the House, *The Military Track, Register and Alert Communities Act*. This act would require the Department of Defense to register sex offenders before they are released from prison.

Representative Speier explains, “[I want] to require everyone before they’re released from military prison to be fingerprinted, to have their DNA taken and to be identified as a sexual predator.”

¹⁷² Banner, *supra* note 24, at 728.

of leaders. The female leadership problem revolves around the ability of women to progress up the hierarchy and the chain of command's effect on decisions to prosecute assaults.

First turning to the issue of female military leadership, Diane H. Mazur explains in her article *Military Values in Law*:

[T]he single greatest impediment to solving issues of sexual misconduct within the military is the assumption that issues related to women in the military service involve different principles of leadership and different means of manage good order and discipline than other issues that affect all members of the military.¹⁷³

Further, she claims, “the problem of sexual misconduct in the military arises from a failure of leadership as a professional military ethic.”¹⁷⁴ Mazur advocates for addressing sexual misconduct in the military by holding commanders responsible for their “failures of leadership.”¹⁷⁵ Arguing that a greater reliance on military values, military professionalism and leadership are necessary to overcome sexual misconduct, Mazur observes that treating the sexual assault problem need not and should not involve “distancing military women from the military values and judgment that all members of the military should internalize and rely on for their mutual well-being.”¹⁷⁶ If the military re-embraces its own values and emphasizes such values in leadership, respect for female soldiers will increase and, as a consequence, women will have an easier time moving into leadership roles.

Another military leadership issue involves the reliance on leaders for investigating and prosecuting sexual assaults. Because sexual assault is not an exclusively military issue, civilian society may be better equipped to investigate and prosecute these incidents. Mazur argues that the well-being, cohesion, and readiness of a military unit is best maintained if commanders retain

¹⁷³ Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y, 977, 993 (2007).

¹⁷⁴ *Id.* at 994.

¹⁷⁵ *Id.* at 1004.

¹⁷⁶ *Id.* at 979.

control over the sexual assaults.¹⁷⁷ While military leaders should surely be held responsible for the sexual misconduct committed under their supervision, this does not necessarily mean that they must also be the ones with total control over investigation and prosecution. There is a glaring conflict of interest in holding commanders partially responsible for the very incidents they are in charge of investigating and choosing to prosecute.

Congress has recently been grappling with deciding between multiple measures aimed at combating military sexual assault. Senator Kristen Gillibrand, chairwoman of the Senate Armed Services personnel committee, proposed the Military Justice Improvement Act (MJIA), which would have completely removed the decision to prosecute sexual assaults from the chain of command.¹⁷⁸ After analysis of the current state of affairs in the military, this may be the most logical solution. Sexual assault is not uniquely military in nature. Therefore, taking prosecution and investigation of these assaults out of the military context does not undercut military deference or respect in any way. Relieving the military from this burden should promote order and discipline, readiness, as well as unit cohesion. Senator Claire McCaskill, Democrat-Missouri, however, has successfully heralded more modest changes, which have been implemented in the 2014 defense authorization. Some of her measures allow for civilian review if a commander declines to prosecute and then stripping commanders of the authority to overturn verdicts.¹⁷⁹

Although technically women now have the ability to serve in combat roles, “formal

¹⁷⁷ Mazur, *supra* note 173, at 1004 (“If Congress, the military, or critics of military policy are dissatisfied with the performance of military leaders in punishing and preventing sexual assault, they need to hold them accountable for failures of leadership in the same manner in which they would hold them accountable in situations not involving violence against women. The answer is not to drive the responsibility underground and relieve military commanders of the obligation to protect the people they lead.”)

¹⁷⁸ Rebecca Kaplan, *Military Sexual Assault Prosecutions will Stay in the Chain of Command*, CBS NEWS (March 6, 2014, 3:24 PM), <http://www.cbsnews.com/news/military-sexual-assault-prosecutions-will-stay-in-the-chain-of-command/> (quoting Senator McCaskill: “At the end of the day the good commanders can make all the difference in the world as to whether or not you change a culture in the military.”)

¹⁷⁹ *Id.*

barriers to entry have been replaced with informal barriers of control that punish those women who transgress gender bounds.”¹⁸⁰ These informal barriers include sexual harassment and social ostracism, which women must continue to overcome in order to place themselves on equal footing with military men.¹⁸¹ Undoubtedly, the issue is more nuanced than opening up institutions to women and permitting women to partake in leadership roles. Female military leaders must serve as leaders to fellow female soldiers. No change will emerge if they simply assimilate to the male masculinity myth, willfully ignorant of the subordination of women.

Women succeed and reach roles of leadership roles by conforming the masculine ideal. Here lies the vicious cycle—how can we expect female military leaders to step up as role models to their female subordinates if these leaders can only succeed by fulfilling the very role they have been pitted against? The solution must be aimed at overcoming the scaling of bodies, currently rampant through the chain of command. The scaling of bodies refers to the concept of ranking people as more or less valuable based on certain hierarchies, here male over female.¹⁸² Value must be associated with the female soldier. The hope is that the combat lift will eventually result in a vocal critical mass of women in leadership roles.¹⁸³ This success in turn will solidify and promote the idea that female soldiers serve a valuable role in the military. As modern warfare continues to advance, this is the perfect time for female soldiers to step up into roles that are new for both men and women; roles that have not already been dubbed “male.” The military needs female leaders in order to demonstrate both that men and women can carry out similar roles and that women bring their unique female background to the job.

¹⁸⁰ Vojdik, *supra* note 13, at 73.

¹⁸¹ *Id.* at 73-74.

¹⁸² Cooper, *supra* note 38, at 84.

¹⁸³ See, e.g., TALI MENDELBERG, *THE SILENT SEX: GENDER, DELIBERATION, AND INSTITUTIONS* 15-18 (2014) (arguing that the problem with effective female deliberating bodies is not only gaining a critical mass but also and more importantly substantive representation in which females are vocal in their ideas and respected by their colleagues).

V. CONCLUSION

*There's no way you are going to change the military climate. It's a tradition.*¹⁸⁴

The Army's core values are "loyalty," "duty," "respect," "selfless service," "honor" "integrity," and "personal courage."¹⁸⁵ According to the Army:

Soldiers learn these values in detail during Basic Combat Training (BCT), from then on they live them every day in everything they do — whether they're on the job or off. In short, the Seven Core Army Values . . . are what being a Soldier is all about.¹⁸⁶

Notice "hyper-masculinity" and "aggression" are *not* included in "what being a soldier is all about." Somehow, though, masculinity and aggression have come to define each of these "core values." A soldier remains *loyal* by not telling on a buddy who sexually assaults a fellow soldier. A soldier carries out his *duty* by making sure a female soldier knows her subordinated place. A victim soldier *respects* her position in the chain of command by remaining silent after her assault.

Contrary to military outcries, the military will not disintegrate if there is less of an emphasis on this masculinity "myth," because that is what it is— a "myth." That "myth" is perpetuated by an institution adamant on maintaining a male-dominated status quo. What this institution fails to realize is that masculinity does not lead to, excuse, or permit sexual assault. Rather, traditional masculine ideals—"willpower, honour, courage, discipline, competitiveness, quiet strength, stoicism, sang-froid, persistence, adventurousness, independence, sexual virility tempered with restraint, and dignity"—are not reserved exclusively for men to embody.¹⁸⁷

Women revere, strive for, and exhibit such ideals as well. Simply, masculinity and respect for

¹⁸⁴ FRANCKE, *supra* note 29, at 164 (quoting Army senior personnel specialist).

¹⁸⁵ Army Values, *supra* note 14.

¹⁸⁶ *Id.*

¹⁸⁷ Joane Nagel, *Masculinity and Nationalism: Gender and Sexuality in the Making of Nations*, 21 ETHNIC AND RACIAL STUDIES 242, 245 (1998).

femininity and women are not mutually exclusive. Rape is never tolerated in society and should not be in the military.

Just as the soldier has been socially constructed as a hyper-masculine warrior, the soldier can be deconstructed in a way that opens up both formal and substantive space for women to be effective soldiers. If military leaders cannot protect the safety of their own soldiers, how can society possibly expect the military to protect the citizens of the United States?

VI. EPILOGUE

[Women will] be allowed to drive tanks, fire mortars and lead infantry soldiers into combat. They'll be able to serve as Army Rangers and Green Berets, Navy SEALs, Marine Corps infantry, Air Force parajumpers and everything else that was previously open only to men.

-Defense Secretary Ashton B. Carter¹⁸⁸

After this paper was written, on December 3, 2015, Defense Secretary Ashton B. Carter effectively transformed the American military by announcing that all military combat positions would be opened to women, no exceptions.¹⁸⁹ This monumental change comes three years after President Obama called for integration of women into all combat jobs.¹⁹⁰ This announcement is specifically aimed at the Marine Corps, who in September requested a partial exception to exclude women from infantry and armor positions.¹⁹¹ Rebuking this request, Defense Secretary Carter advocates for a unified approach across all branches of the military.¹⁹² This change marks a pivotal moment in military history that will enhance the military's ability to continue to move beyond antiquated masculine ideals and combat sexual violence.

¹⁸⁸ Matthew Rosenger & Dave Philips, *All Combat Roles Now Open to Women, Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html?emc=edit_th_20151204&nl=todaysheadlines&nid=57884714&_r=1. Defense Secretary Ashton B. Carter video? (quoting Defense Secretary Ashton B. Carter).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*