

# **“To Support and Defend” Against Sexual Misconduct: Calling on Future Military Leaders to Bridge the Cultural Divide**

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*“I . . . do solemnly swear . . . that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . . and that I will well and faithfully discharge the duties of the office upon which I am about to enter . . . .”<sup>1</sup>*

## I. INTRODUCTION

After four years of dedication and training at the United States military service academies [MSAs], the young women and men of these prestigious academies will take an oath to support and defend the Constitution. They step forward as commissioned military officers, assuming a duty of service to our Nation. As the military’s newest leaders, they also inherit a decades-long battle with a silent, pernicious enemy—the sexual victimization of military members perpetrated by their comrades-in-arms.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 3331 (1966); *see also* U.S. CONST. art. VI, cl. 3. (“[A]ll executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”).

<sup>2</sup> “Military sexual misconduct,” as used in this article, is intended to encompass both sexual assault and sexual harassment.

“Sexual assault,” as used in this article, is defined as all sexual contact, which is characterized by the use of force, physical threat or abuse of authority or when the victim does not or cannot consent; it includes the crimes of rape, nonconsensual sodomy, indecent assault, and attempts to commit these acts. *See*, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 920, 925, 934 (1956) [hereinafter UCMJ]. The Department of Defense [DoD] uses the general term “unwanted sexual contact” [USC] to describe these same behaviors. *See* DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEP’T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN THE MIL. VOL. II 1 (2012) [hereinafter “FY 2012 DoD Sexual Assault Report II”]. Fiscal Year 2012 captures the dates October 1, 2011 through September 30, 2012.

“Sexual harassment,” as used herein, can be categorized as either “crude” or “offensive” behavior; unwelcome sexual advances, and quid pro quo sexual coercion.” *Id.* at 2 (surveying military personnel experiences and listing twelve different types of sexually harassing behaviors which fit into one of the above three categories).

The latest figures from the DoD, which illustrate the prevalence of military sexual assault within its ranks, are staggering. While the overall figure of 26,000 military victims represents an extrapolated estimate,<sup>3</sup> it nevertheless signals an underlying military culture apathetic to the sexual victimization of its members. In May 2013, the DoD reported to Congress that of the nation's 1.4 million active duty military members, nearly 3,000 had reported they were victims of sexual assault during the prior fiscal year,<sup>4</sup> with a 16% increase in reports of military member-on-military member sexual assault from the prior year and the highest number of such reports ever recorded.<sup>5</sup> The DoD's 2013 report also revealed that 88% of reporting victims were female, and the perpetrators of the sexual assaults were 90% male.<sup>6</sup> It is estimated that thousands more female military members refuse to step forward and report sexual assaults due to fears of reprisal and blame from an unsympathetic military culture.

For more than twenty years, the institutional response to sexual assault and harassment within the military has taken a cyclical route. One or more sensational cases bring the topic to the forefront of public attention and media scrutiny, which then triggers Congressional hearings.<sup>7</sup> Law and policy reforms are then quickly drafted which seek to "get tough" on sexual assault and sexual harassment. Soon after, the issue fades from public awareness until the next big scandal occurs; and the cycle is revived once again.

With the "epidemic" of military sexual assault recently in the forefront of the news,<sup>8</sup> it signals more reform on the horizon. The typical response to increased

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<sup>3</sup> See DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, DEP'T OF DEF. ANN. REP. ON SEXUAL ASSAULT IN THE MIL. VOL. I 12 (2012) [hereinafter FY 2012 DoD Sexual Assault Report I]; see generally Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69 JOINT FORCES Q. 25 (April 2013) (criticizing the "unrealistically high" estimates DoD officials arrive at with unclear methodologies); see also FY 2012 DoD Sexual Assault Report II, *supra* note 2, at 1 (discussing the FY 2012 DoD Sexual Assault Report's effort to extrapolate the number of actual military victims from a small number of service members who completed a voluntary survey).

<sup>4</sup> FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 58–59. Of the 2,558 unrestricted reports involving military members in FY 2012, 80% of the sexual assaults occurred during FY 2012. *Id.* at 58.

<sup>5</sup> *Id.* at 61.

<sup>6</sup> *Id.* at 81, 83.

<sup>7</sup> See *infra* § III.A (outlining the notable sexual assault scandals within the military departments from 1993 through 2011).

<sup>8</sup> See, e.g., Amanda Hess, *In the Coast Guard, Sexual Assault Cases Get Washed Away*, SLATE (July 2, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/07/02/coast\\_guard\\_lags\\_behind\\_other\\_branches\\_of\\_the\\_military\\_in\\_addressing\\_sexual.html](http://www.slate.com/blogs/xx_factor/2013/07/02/coast_guard_lags_behind_other_branches_of_the_military_in_addressing_sexual.html); Bill Briggs, *U.S. Military Faces Historic Tipping Point on Rape Epidemic*, NBCNEWS.COM (May 15, 2013, 5:30 AM), <http://usnews.nbcnews.com/news/2013/05/15/18256635-us-military-faces-historic-tipping-point-on-rape-epidemic?lite>; Dana Ford, *Army Investigates Sergeant for Alleged Sexual Assault*, CNN (May 15, 2013), [www.cnn.com/2013/05/14/us/army-sexual-assault-investigation/index.html](http://www.cnn.com/2013/05/14/us/army-sexual-assault-investigation/index.html); James Dao, *Assault-Prevention Officer in Air Force is Arrested*, N.Y. TIMES (May 6, 2012), [www.nytimes.com/2013/05/07/us/air-force-officer-who-led-sexual-assault-prevention-](http://www.nytimes.com/2013/05/07/us/air-force-officer-who-led-sexual-assault-prevention-)

reports of sexual misconduct by military members is policy change and statutory amendments. For decades, reactionary reforms such as increased prosecutions and convictions based upon the principal of deterrence have been ill-conceived.<sup>9</sup> Lawmakers misstep each time they affix reactive reforms to a deep-seated cultural problem. When reform efforts shift focus from greater punishment to education and prevention of sexual misconduct, institutional change can more easily be affected. A renewed prevention focus requires calling to action all stakeholders in the fight to rid the military of the "cancer"<sup>10</sup> of sexual assault and sexual harassment and to protect military members from further victimization. This approach, earnest in its effort to effect long-term cultural change, has the ability to far more effectively empower would-be military victims and bystanders than could ever be accomplished merely from increased trials and punishments. A commitment by the majority to identify and purge from its ranks all military members unable to conform their behavior to the new cultural norm is what is needed to accomplish institutional change.

Today's MSA students are in a unique position to achieve positive cultural change within the military departments. While they are being instructed on what it means to lead, it is imperative they realize the extraordinary power their beliefs and attitudes will have in shaping the actions of those they will lead. MSA students must be challenged to dispel the "old school" biases of blaming victims and disregarding inappropriate behaviors. They must be encouraged to develop as ethical leaders with a responsibility to support and defend those whom they lead, especially the military members most vulnerable to abuse. As President Obama poignantly noted in his commencement address to the Naval Academy's most recent graduates: "[T]hose who commit sexual assault are not only committing a crime, they threaten the trust and discipline that make our military strong."<sup>11</sup>

This article looks to the MSAs to instill in future military leaders an upgraded value system, one truly egalitarian in its view of military service and which regards the notion of one military member sexually preying upon another as absolutely incompatible with service. Part II first explains the mandate under which the four

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efforts-arrested.html; Anna Mulrine, *Sexual Assault Reports Jump at Military Academies, Pentagon Finds*, CHRISTIAN SCIENCE MONITOR (Dec. 21, 2012), [www.csmonitor.com/USA/Military/2012/1221/Sexual-assault-reports-jump-at-military-academies.html](http://www.csmonitor.com/USA/Military/2012/1221/Sexual-assault-reports-jump-at-military-academies.html).

<sup>9</sup> See Moira Carmody, *Preventing Adult Sexual Violence Through Education?*, 18 CURRENT ISSUES CRIM. JUST. 342, 342 (2006) ("The role of the law as a deterrent of crime has a chequered history especially when it relates to crimes of interpersonal violence such as sexual assault.").

<sup>10</sup> In a hearing before the Senate Armed Services Committee on June 4, 2013, Army Chief of Staff General Ray Odierno stated: "Sexual assault and harassment are like a cancer within the force—a cancer that left untreated will destroy the fabric of our force." Donna Cassata, *Military Calls Sexual Assault 'Like a Cancer'*, THE ASSOCIATED PRESS (June 4, 2013), <http://abclocal.go.com/kfsn/story?section=news/politics&id=9126787>.

<sup>11</sup> Matthew Hay Brown, *Sexual Assault on Mid Alleged*, THE BALTIMORE SUN, June 1, 2013, at 1A (reporting a midshipwoman at the Naval Academy learned from third parties and social media that three USNA football players engaged in sexual intercourse with her while she was incapacitated).

MSAs operate, and how the epidemic of sexual misconduct in the military has infected the MSAs. Part III seeks to persuade that the time is now to employ a long-term strategy to prevent military sexual misconduct. First, a historical overview of past reforms demonstrates the absence of initiatives aimed at changing the cultural norms underlying military member victimization. In fact, many reform measures currently under review pose a greater risk of harm to the military justice system and its military members than the benefits sought to be conferred upon victims. This section delves into the military culture, in the larger military as well as the MSAs, in an effort to understand its norms and how they contribute to the recurring victimization of female military members. Finally, Part IV provides recommendations for the MSAs to consider incorporating into their specific prevention programs. The focus of these recommendations is to motivate these young women and men to assume a shared responsibility for ending these inside attacks and to transform themselves into true leaders of character who model respect and empathy for all those they lead.

## II. THE ROLE OF THE MILITARY SERVICE ACADEMIES

The four MSAs examined below<sup>12</sup> are charged with the strategic mission of educating and developing future leaders of character to serve as officers in each branch of our armed forces. The MSAs seek to inspire and instill in their students a value system, which includes honor, loyalty, duty, and obedience.<sup>13</sup> Upon completion of a rigorous forty-eight month training and educational program at one of the MSAs, each student raises their right hand and swears to support and

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<sup>12</sup> The use of “military service academies” herein is limited to the USMA, the United States Naval Academy [USNA], the United States Coast Guard Academy [USCGA], and the United States Air Force Academy [USFA]. See *infra* § II.A (providing an overview of the four institutions created by federal statute and funded by Congress).

Due to the lack of reportable data, this article does not reference the United States Merchant Marine Academy [USMMA], located in Kings Point, New York, which was dedicated in 1943 and is regulated by the United States Maritime Administration and the Department of Transportation. See *USMMA History*, U.S. MERCHANT MARINE ACADEMY, <http://www.usmma.edu/about/usmma-history> (last visited Mar. 20, 2014) (quoting President Franklin D. Roosevelt who noted the USMMA “serves the Merchant Marine as West Point serves the Army and Annapolis the Navy.”). Unlike the other four MSAs, the USMMA has thus far been exempt from submitting annual sexual assault and sexual harassment reports to Congress. Nevertheless, it does administer a Sexual Assault Prevention and Response Program. See *Sexual Assault Prevention and Response Program*, U.S. MERCHANT MARINE ACADEMY, <http://www.usmma.edu/academy-life/sexual-assault-prevention/sexual-assault-prevention-and-response-program> (last visited Mar. 20, 2014).

<sup>13</sup> See, e.g., U.S. MILITARY ACADEMY WEST POINT, <http://www.usma.edu/SitePages/Home.aspx> (last visited Apr. 26, 2014) (mission statement of the USMA); *Mission of USNA*, U.S. NAVAL ACADEMY, <http://www.usna.edu/About/mission.php> (last visited Apr. 26, 2014) (mission statement of the USNA); *USGA Vision and Mission*, U.S. COAST GUARD ACADEMY, <http://www.cga.edu/about2.aspx?id=37> (last visited Apr. 26, 2014) (mission statement of the USCGA); *Airforce Academy*, MYBASEGUIDE, <http://www.mybaseguide.com/article/military/air-force-academy/566/Welcome> (last visited Apr. 26, 2014) (mission statement of the USAFA).

defend the Constitution of the United States. These MSA students<sup>14</sup> step forward and assume the role of the military's newest leaders. As such, they accept an immense responsibility to support and protect those entrusted to their leadership. The values and social norms ingrained in these young men and women during their MSA training will be the culture they carry forward as a new generation of military leaders.

At the behest of Congress, the DoD began documenting incidences of sexual harassment and violence at its three MSAs in 2005. At that time, numerous findings and recommendations were made by a taskforce to improve safety measures in the living spaces and create an educational environment free of sexual assault and harassment for MSA students. However, seven years later, the DoD reports that sexual assault and harassment remain problems at the three MSAs.<sup>15</sup> Likewise, in its latest report to Congress, the USCGA showed 9.8% of the female cadets surveyed had experienced an assault during the twelve-month period, a 26% increase from its prior survey.<sup>16</sup>

As discussed below, sexual assault and harassment are already embedded in the MSA culture. This is endemic of a deeply rooted institutional problem. Before offering recommendations for the students to affect institutional change, this section provides an overview of the MSAs' student bodies and also lists examples of how the inside threat of sexual assault and harassment at the MSAs mirrors that within the greater military culture.

#### A. *The MSAs—An Overview*

Each of the four MSAs discussed below were independently established by federal statute for the purpose of educating and training future leaders of character in the United States armed forces. The USMA, the USNA, and the USAFA fall under the supervision of their respective military departments and the DoD.<sup>17</sup> The Department of Homeland Security [DHS] regulates the USCGA.<sup>18</sup>

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<sup>14</sup> The term "midshipperson" is adopted herein as a gender-neutral term to avoid the masculine connotations of the traditional term "midshipman" and to describe male and female students in attendance at the U.S. Naval Academy.

<sup>15</sup> FY 2012 DoD Sexual Assault Report I, *supra* note 3, at i (introductory letter from Jessica L. Wright, Acting Principal Deputy, Office of the Under Secretary of Defense to Chairman and Ranking Members of the House and Senate Committees on Armed Services, accompanying the 2011–2012 Service Academies Report).

<sup>16</sup> See DEF. MANPOWER DATA CENTER, 2012 SERVICE ACADEMY GENDER RELATIONS SURVEY 6 (2012) (reporting 7.8% of females cadets experienced unwanted sexual contact in 2010).

<sup>17</sup> See 10 U.S.C. §§ 9331–62 (2008) (USAFA); 10 U.S.C. §§ 4331–61 (2008) (USMA); 10 U.S.C. §§ 6951–81 (2004) (USNA).

<sup>18</sup> 14 U.S.C. §§ 181–200 (2010) (USCGA). The U.S. Coast Guard, the smallest of the United States armed forces, is part of the DHS in peacetime; however, in wartime, it may be called to join the Navy. See 14 U.S.C. § 145 (2010).

The USMA, established at West Point, New York in 1802, was the first undergraduate institution dedicated to educating and training future military officers in the United States.<sup>19</sup> Forty-three years later, the USNA, originally launched as the Naval School, was established in Annapolis, Maryland.<sup>20</sup> Then, the USCGA was founded at sea in 1876 and eventually broke ground in New London, Connecticut.<sup>21</sup> Finally, after waiting nearly seven years from the establishment of the United States Air Force as a separate military department, the USAFA began formally educating and training future airmen in 1954.<sup>22</sup>

The total number of students permitted to attend each MSA is set by Congress. Each DoD-run MSA is currently authorized a student body which may not exceed 4,400 students.<sup>23</sup> The USCGA is authorized entry of no more than 600 cadets per annum.<sup>24</sup> Once appointment is accepted, a MSA student is considered an active duty military member subject to military regulations and the jurisdiction of the Uniform Code of Military Justice [UCMJ], the criminal code for the armed forces.<sup>25</sup> MSA students are also provided full room and board and a modest salary during their attendance.<sup>26</sup> Upon successful completion of a four-year undergraduate program, the student receives a Bachelor of Science degree and is commissioned as an active duty military officer.<sup>27</sup> In exchange for the

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<sup>19</sup> Following the Revolutionary War, and in response to the request of soldiers and statesmen seeking a federal institution dedicated to educating soldiers in the art and science of warfare, President Thomas Jefferson signed legislation establishing the United States Military Academy at West Point. STEPHEN E. AMBROSE, *DUTY, HONOR, COUNTRY: A HISTORY OF WEST POINT* 6–7 (1999).

<sup>20</sup> *A Brief History of USNA*, U.S. NAVAL ACADEMY, <http://www.usna.edu/USNAHistory> (last visited Apr. 26, 2014) (noting that in October 1845, the Secretary of the Navy established the Naval School at Fort Severn without funding by Congress, which became the United States Naval Academy in 1850).

<sup>21</sup> *USCGA Timeline*, U.S. COAST GUARD ACADEMY, <http://www.cga.edu/about2.aspx?id=41> (last visited Apr. 26, 2014) (noting that the USCGA, originally called the Revenue Cutter School of Instruction, was established aboard a two-masted schooner named the *Dobbin*).

<sup>22</sup> *Air Force Academy History*, U.S. AIR FORCE ACADEMY, <http://www.usafa.af.mil/information/factsheets/factsheet.asp?id=9409> (last visited Oct. 29, 2013) (noting that for two years, while construction of the USAFA was underway in Colorado Springs, the school was temporarily located at Lowry Air Force Base in Denver).

<sup>23</sup> 10 U.S.C. § 4342 (2013) (USMA); 10 U.S.C. § 6954 (2013) (USNA); 10 U.S.C. § 9342 (2013) (USAFA).

<sup>24</sup> 14 U.S.C. § 182 (2010).

<sup>25</sup> The UCMJ is codified in Title 10 of the U.S. Code. All members of the United States Armed Forces are subject to UCMJ jurisdiction. *See* 10 U.S.C. § 802, art. 2 (2009) (“(a) The following persons are subject to this chapter . . . (2) Cadets, aviation cadets, and midshipmen.”).

<sup>26</sup> *See, e.g.*, 10 U.S.C. § 6979 (2004). MSA students also receive an allowance for the cost of uniforms, textbooks, personal computers and incidentals. *See, e.g.*, 10 U.S.C. § 6960 (1956).

<sup>27</sup> USMA cadets are commissioned as Army second lieutenants. *See* 10 U.S.C. § 4348 (2011). USNA midshipmen\* are commissioned as either Navy ensigns or Marine Corps second lieutenants. *See* 10 U.S.C. § 6959 (2011). USCGA cadets are commissioned as Coast Guard officers. *See* 14 U.S.C. § 182 (2010). USAFA cadets are commissioned as second lieutenants in the Air Force. *See* 10 U.S.C. § 9348 (2011).

undergraduate education and training received, a MSA graduate incurs a five-year service obligation.<sup>28</sup>

The selection process to gain admission to the MSAs is governed by federal statute and is highly competitive. Applicants to the USMA, USNA, and USAFA are required to be between the age of seventeen and twenty-three years of age at the time of entry and to secure nominations from Congress members or others such as the President and service secretaries.<sup>29</sup> USCGA applicants must be between the ages of seventeen and twenty-two upon entry and nationally compete for appointment based on the overall strength of their applications.<sup>30</sup> All MSAs require applicants to be U.S. citizens, unmarried, and without the legal obligation to support a child or children.<sup>31</sup> In 2012, the percentage of total applicants who gained admission to a MSA ranged from 6.8% to 15.9%.<sup>32</sup>

It was not until 1976 that the doors of MSAs opened to female students. Challenging their exclusion from the MSAs, young women gained entry by federal mandate.<sup>33</sup> Once mandated, each institution was required to reconfigure their

\* The term "midshipmen" is still in use by the USNA to describe both male and female students.

<sup>28</sup> 10 U.S.C. § 4342 (2013) (USMA); 10 U.S.C. § 6959 (2011) (USNA); 10 U.S.C. § 9346 (1996) (USAFA); 14 U.S.C. § 182 (2010).

<sup>29</sup> See, e.g., 10 U.S.C. § 4346 (1996) (USMA); 10 U.S.C. § 6958 (1997) (USNA); 10 U.S.C. § 9346 (1996) (USAFA). Appointment and nomination criteria are established by statute and regulations issued by each academy.

<sup>30</sup> See 14 U.S.C. § 182 (2010) (limiting the number appointed in any one year "not to exceed six hundred" and specifying the age requirement for the student applies on July 1 of the year she or he is admitted).

<sup>31</sup> Appointment and nomination criteria are established by statute and regulations issued by each academy. See 10 U.S.C. § 4342 (2013) (USMA appointment, number, and territorial distribution). Congress also authorizes the admission of international students at the MSAs, as approved by the DoD and administered by the individual military departments. See, e.g., 10 U.S.C. § 4344 (2001); 10 U.S.C. § 4345 (2006).

<sup>32</sup> *Top 100—Lowest Acceptance Rates*, U.S. NEWS COLLEGE COMPASS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/lowest-acceptance-rate> (last visited Apr. 26, 2014) (listing Fall 2012 Acceptance Rates). Less than 1,200 USMA applicants were offered admission for the class of 2016. See *USMA Class of 2016 Class Profile*, U.S. MILITARY ACADEMY WEST POINT, <http://www.usma.edu/admissions/shared%20documents/profile2016.pdf> (last visited Apr. 26, 2014). Approximately 1,400 USNA applicants were offered admission for the class of 2016. *U.S. Naval Academy 2016 Class Portrait*, U.S. NAVAL ACADEMY, <http://www.usna.com/document.doc?id=343> (last visited Apr. 26, 2014). Approximately 1,200 USAFA applicants were offered admission for the class of 2016. *Demographic Profile of the Class of 2016*, PAULRYAN.HOUSE.GOV, [http://paulryan.house.gov/uploadedfiles/usafa\\_2016.pdf](http://paulryan.house.gov/uploadedfiles/usafa_2016.pdf) (last visited Apr. 26, 2014).

<sup>33</sup> See 89 Stat. 537-38 (1975). Signed by President Gerald Ford on Oct. 7, 1975, the law passed the House by a vote of 303-96 and the Senate by voice vote after divisive argument within Congress, resistance from the Department of Defense, and legal action initiated by women to challenge their exclusion. See *History Archive: Women Enter Military Academies*, WOMEN IN MILITARY SERV. FOR AM. MEM'L FOUND., <http://www.womensmemorial.org/H&C/History/milacad.html> (last visited Apr. 26, 2014) [hereinafter AMERICAN MEMORIAL FOUNDATION].

facilities and adjust living space without delay.<sup>34</sup> The academic year following enactment of the law, a total of 300 women were enrolled at MSAs.<sup>35</sup> Today, the enrollment of women at the MSAs ranges from 16% to 32% of the overall student body.<sup>36</sup>

### B. *Sexual Misconduct at the Service Academies*

Public awareness that sexual assault and sexual harassment are a problem within the MSAs came to light well over a decade ago, when several female cadets at the USAFA came forward publicly. They told of their victimization and sexual assault by male cadets, as well as the negative treatment they received from other cadets and the academy leadership after they reported the sexual abuse.<sup>37</sup> In 2003, Congress ordered the DoD to submit an annual report on sexual harassment and sexual assault for its three MSAs.<sup>38</sup> Since 2004, the DoD has complied by annually providing Congress a consolidated report on sexual assault and sexual harassment at its MSAs.<sup>39</sup> In December 2012, Congress also mandated that the USCGA submit an annual report on sexual harassment and sexual assault at the academy.<sup>40</sup>

During the academic year 2005-2006, between 4% and 6% of MSA students reported a sexual assault.<sup>41</sup> During the same reporting period, between 49% and

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<sup>34</sup> See AMERICAN MEMORIAL FOUNDATION, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Best Colleges*, U.S. NEWS, <http://colleges.usnews.rankingsandreviews.com/best-colleges> (last visited Jan. 10, 2014) (U.S. News College Compass reports at USCGA, of the 967 students enrolled, 32% are female; at the USAFA, of the 4,120 students enrolled, 22% are female; at USNA, of the 4,536 students enrolled, 21% are female; at USMA, of the 4,592 enrolled, 16% are female.). See also Larry Abramson, *West Point Women: A Natural Pattern or a Camouflage Ceiling?*, NAT'L PUB. RADIO (Jan. 10, 2014), available at <http://www.npr.org/2013/10/22/239260015/west-point-women-a-natural-pattern-or-a-camouflage-ceiling>; Childs Walker, *Naval Academy Greets Record Number of Female Plebes*, THE BALT. SUN (Jun. 28, 2012), [http://articles.baltimoresun.com/2012-06-28/news/bs-md-navy-induction-day-20120628\\_1\\_plebes-naval-academy-academy-charges](http://articles.baltimoresun.com/2012-06-28/news/bs-md-navy-induction-day-20120628_1_plebes-naval-academy-academy-charges) (noting that 295 females, or 24% of the class, were admitted to the Class of 2016).

<sup>37</sup> See generally DEP'T OF DEF., REP. OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (2003) (In an open letter, Chairman Fowler concluded that the recommendations made in the report "are the beginning of the solution to the problem of sexual assault . . .").

<sup>38</sup> See 120 Stat. 2200-06 (2006); see also 117 Stat. 1466-68 (2003) (mandating the establishment of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies).

<sup>39</sup> The DoD's Sexual Assault Prevention and Response Office [SARPO] makes available to the public all annual MSA reports via its website. See DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, [www.sapr.mil/index.php/annual-reports](http://www.sapr.mil/index.php/annual-reports) (last visited Mar. 20, 2014) (containing annual reports from 2004 to the present).

<sup>40</sup> See 126 Stat. 1543 (2012) (currently 14.U.S.C. § 200 (2012)).

<sup>41</sup> See DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, ANN. REP. ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM



62% of MSA students surveyed were sexually harassed; and between 82% and 96% experienced sexist behavior.<sup>42</sup> During the 2011–12 academic year, sexual assault reporting at the MSAs increased 23% from the prior academic year.<sup>43</sup> In addition, a greater percentage of MSA women reported experiencing an “unwanted sexual contact” than their active duty counterparts assigned to military units.<sup>44</sup> What remains unknown from the collected data is whether reporting increases represent an increase in sexual assaults at the MSAs or simply an increase in the number of victims willing to come forward and report. Nevertheless, the number of reported sexual assaults at the MSAs is unacceptably high and further demonstrates that military-on-military sexual misconduct at the service academies remains a persistent problem.

No parallel studies exist which annually capture student-on-student sexual assaults at civilian universities using the same methodologies as the DoD to reliably compare against the prevalence of military-on-military sexual assault at the MSAs. However, the National College Women Sexual Victimization [NCWSV], a comprehensive federal study funded by the National Institute of Justice [NIJ], has estimated that 20% or more of undergraduate women experience a “completed or attempted rape victimization” during their college years,<sup>45</sup> with approximately 90% of perpetrators being a male the victim knew or trusted.<sup>46</sup> The

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YEAR 2005–06 (2006) [hereinafter AY 2005–06 MSA Report] (reporting sexual assaults were 6% at USMA, 5% at USNA, and 4% at USAFA). Survey methodologies were not standardized in the academic year 2004–05 report; thus, this article draws on statistics beginning with the academic year 2005–06 report and subsequent reports.

<sup>42</sup> AY 2005–06 MSA Report, *supra* note 41, (USMA reported 62%, USNA reported 59%, and USAFA reported 49%).

<sup>43</sup> DEP’T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, ANN. REP. ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2011–2012 11 [hereinafter AY 2011–12 MSA Report] (USMA increased by five reports, USAFA increased by nineteen reports, and USNA saw a decrease by nine reports).

<sup>44</sup> Compare AY 2011–12 MSA Report, *supra* note 43, at 4, with FY 2012 DoD Sexual Assault Report II, *supra* note 2, at 2 (6.1% of active duty women and 1.2% of active duty men reported experiencing unwanted sexual contact in the prior twelve months; a 4.4% increase from the prior reporting period).

The DoD defines “unwanted sexual contact” as intentional sexual contact against a person’s will or when a person “did not or could not consent,” to include the following acts: “completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body.” FY 2012 DoD Sexual Assault Report II, *supra* note 2, at 1.

<sup>45</sup> DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 3 (2000) [hereinafter NCWSV Study] (surveying a randomly selected national sample of 4,446 women who attended a two- or four-year universities during the Fall of 1996).

<sup>46</sup> *Id.* at 17 (“[A]bout 9 in 10 offenders were known to the victim. Most often, a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker sexually victimized the women.”).

NCWSV study also concluded that over 95% of undergraduate victims of sexual misconduct do not report the crime to law enforcement.<sup>47</sup>

It has been publicly acknowledged at the highest levels of the Pentagon that there is a “persistent problem” of sexual misconduct at the service academies.<sup>48</sup> In its 2012 report to Congress, the DoD disclosed that while it had “taken steps to prevent and respond to sexual assault and harassment” at the MSAs, “there is still much work to do.”<sup>49</sup>

### III. ANSWERING THE CALL FOR A LONG-TERM STRATEGY

The recurring sexual victimization of military members by military personnel greatly undermines the institutional values of the armed forces—duty, loyalty, and honor. The adage “keep doing what you’re doing, and you’ll keep getting what you get” is a fitting warning for today’s lawmakers and policymakers who propose “new” solutions to the military’s sexual misconduct problem. It is time to depart from “get tough” reforms that are no more than short-sighted, reactionary changes to policy and procedure, yet do nothing to prevent future misconduct.

The broad range of military justice reforms recently enacted by Congress in the 2014 Nation Defense Authorization Act [NDAA], for example, are emblematic of a reactionary approach. These “reforms” do nothing to address prevention from a long-term perspective.<sup>50</sup> Amending laws governing how and when commanders may initiate criminal charges against a military member when the alleged misconduct is sexual in nature overlooks the greater systemic issue. What is necessary to create a sustainable prevention approach is reform of the central problem—military culture.

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<sup>47</sup> *Id.* at 23–24 (noting that victims gave a variety of reasons for not reporting, including that the incident was “not serious enough” to report, not wanting others to know about the incident, lack of proof of the incident, and fear of reprisal).

<sup>48</sup> In a December 2012 memo to all military departments, the Secretary of Defense stated: Despite our considerable and ongoing efforts, this year’s [annual report on sexual misconduct at the MSAs] demonstrates that we have a persistent problem. I am concerned that we have not achieved greater progress in preventing sexual assault and sexual harassment among academy cadets and midshipmen. Memorandum from Leon E. Panetta, Sec’y of Def. to Secretaries of Military Dep’ts (Dec. 20, 2012) (on file with DoD).

<sup>49</sup> AY 2011–12 MSA Report, *supra* note 43, at 40.

<sup>50</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–144, 1, 18 (2013). The 2014 NDAA, among other changes to military justice, includes eliminating the five-year statute of limitations for specific sexual assault offenses under UCMJ Article 120, establishing that specific Article 120 offenses are heard before a general court-martial, the highest level of court-martial, with a mandatory minimum sentence of a dishonorable discharge or a dismissal; requiring defense counsel representing a military member accused of sexual assault to request interview of the victim through the prosecutor; and, if the alleged victim of sexual assault so requests, either the prosecutor, counsel for the victim, or a “Sexual Assault Victim Advocate” must be present during the defense counsel’s interview of the alleged victim. *See id.* at 18.

The military has an institutional blind spot.<sup>51</sup> A cultural divide has unwittingly been created within the military population, wherein a silent faction mistrusts sexual misconduct allegations against other military members as mere "he said, she said" claims or dubious distortions of fact by self-appointed "victims." Such a mindset is toxic, and it requires serious examination because it poses additional harm to individual victims, betrayed when peers and superiors disregard their need for support and protection. This same mindset also undermines the functioning and readiness of military units. A military member who sexually preys on a comrade commits an unspeakable violation of trust. If other members of the unit, in turn, discount such an act of disloyalty and impropriety against another unit member, it damages the overall strength and integrity of the institution.

#### A. *The Cycle of Reactive Reforms*

Over the past two decades, countless policy changes and statutory reforms have been implemented following military scandals, media attention, and public outcry over the sexual misconduct problem in the military. This is the reactionary stage of a never-ending cycle. This stage typically invites further mandated training of military members, further policy changes to encourage victim reporting, and further efforts to increase prosecutions and punishments for offenders.

The Navy's infamous Tailhook scandal, which triggered the first contemporary cycle of reactive reforms, broke in the media in April 1993. Twenty-six women reported being sexually assaulted while attending the Navy's annual three-day Tailhook Association Convention held in Las Vegas almost a year and a half earlier.<sup>52</sup> Each evening, more than 200 intoxicated Navy and Marine aviators lined the narrow, dimly-lit hallway, termed "the gauntlet," where more than eighty females were unwittingly lured and then pulled, bitten, groped, pinched, and subjected to lewd comments when they proceeded down the hallway.<sup>53</sup> Some male aviators in attendance also reportedly engaged in

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<sup>51</sup> See David Alexander, *Many Soldiers Fail to Grasp Army Sex Assault Problem: U.S. General*, REUTERS (Jun. 10, 2013), <http://www.reuters.com/article/2013/06/11/us-usa-defense-sexassault-idUSBRE95A01220130611> (quoting General Ray Odierno, addressing officials in the Army's Sexual Harassment, Assault Response and Prevention program: "That's the problem. We're not seeing ourselves . . . We have a huge issue. And the main thing I want everybody to understand is that this is not just a passing issue. For whatever reason, this is one that we've had for a very long time. And we have not been able to defeat it.").

<sup>52</sup> Norman Kempster, *What Really Happened at Tailhook Convention*, L.A. TIMES (Apr. 24, 1993), [http://articles.latimes.com/1993-04-24/news/mn-26672\\_1\\_tailhook-convention](http://articles.latimes.com/1993-04-24/news/mn-26672_1_tailhook-convention).

<sup>53</sup> See Michael R. Gordon, *Pentagon Report Tells of Aviators' 'Debauchery'*, N.Y. TIMES (Apr. 24, 1993), <http://www.nytimes.com/1993/04/24/us/pentagon-report-tells-of-aviators-debauchery.html> (reporting the eighty-three women military members and seven males were "groped, pinched and fondled on their breasts, buttocks and genitals." by the approximately 300 male aviators when they were forced to walk down "the gauntlet"); Kempster, *supra* note 52 ("When a woman

“streaking,” exposing their testicles, and exposing their buttocks.<sup>54</sup> When the story broke in the press, a DoD investigation was initiated to examine the events at the 1991 convention as well as the leadership response to reports of sexual assault and sexual harassment made by the victims.<sup>55</sup> According to a subsequent DoD report, “[s]imilar behavior had occurred at previous conventions,” with “some of the activities, such as the gauntlet, [beginning] to assume the aura of ‘tradition.’”<sup>56</sup> Hence, the DoD was forced to publicly acknowledge a sexual misconduct problem within its ranks.

The Aberdeen Proving Ground scandal came to light in November 1996.<sup>57</sup> An Army basic training post, Aberdeen Proving Ground, was the location where almost as many as fifty basic trainee females reported they had been sexually abused, to include rape, by their military instructors.<sup>58</sup> Upon instituting a task force to investigate the command environment, the DoD learned that multiple drill instructors, those charged with supervising and training the female soldiers who just entered military service, had raped and sexually abused these young women.<sup>59</sup> It had become clear that military-on-military sexual misconduct was a growing problem.<sup>60</sup>

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appeared, a scout would shout ‘clear deck’ if he considered her attractive enough to molest or ‘wave off’ if he thought her too unattractive. The terms are drawn from aircraft carrier flight operations.”).

<sup>54</sup> Kempster, *supra* note 52.

<sup>55</sup> DEP’T OF DEF. OFFICE OF THE INSPECTOR GENERAL, THE TAILHOOK REPORT: THE OFFICIAL INQUIRY INTO THE EVENTS OF TAILHOOK ’91 (1993) (recommending disciplinary action against 140 Navy and Marine Corps officers).

<sup>56</sup> *Id.* at xi.

<sup>57</sup> Several drill sergeants, those military members responsible for training and leading trainees new to the Army, assigned at Aberdeen Proving Grounds, Maryland, were charged and convicted of rape and sexual harassment of female trainees. One drill sergeant was charged with committing twenty-one counts of sexual misconduct upon female trainees, six of which were prosecuted as rape. Tim Weiner, *One Sergeant Pleads Guilty As Army Widens Sex Inquiry*, N.Y. TIMES (Nov. 13, 1996), <http://www.nytimes.com/1996/11/13/us/one-sergeant-pleads-guilty-as-army-widens-sex-inquiry.html>.

<sup>58</sup> John Haydon, *The List: Military Scandals*, WASH. TIMES (Jan. 8, 2011), <http://www.washingtontimes.com/news/2011/jan/8/list-military-scandals/> (reporting that of the twelve drill sergeants accused of sexual misconduct, one was cleared and the remaining eleven were either convicted at court-martial or punished administratively).

<sup>59</sup> *Sex Scandal at Proving Ground Investigation at Aberdeen: Army Reacted Swiftly, but Must Find if a Cover-up Occurred*, THE BALT. SUN (Nov. 12, 1996), [http://articles.baltimoresun.com/1996-11-12/news/1996317030\\_1\\_aberdeen-proving-ground-army-harassment](http://articles.baltimoresun.com/1996-11-12/news/1996317030_1_aberdeen-proving-ground-army-harassment).

<sup>60</sup> See, e.g., Philip Shenon, *Army’s Leadership Blamed in Report on Sexual Abuses*, N.Y. TIMES (Sep. 12, 1997), <http://www.nytimes.com/1997/09/12/us/army-s-leadership-blamed-in-report-on-sexual-abuses.html>. In 2011, an Air Force scandal similar to the Army’s Aberdeen scandal came to light, which involved the sexual victimization of basic trainees at Lackland Air Force. See *Lackland Sex Scandal Prompts U.S. Air Force to Discipline Former Commanders*, ASSOCIATED PRESS (May 2, 2013), <http://www.cbsnews.com/news/lackland-sex-scandal-prompts-us-air-force-to-discipline-former-commanders> (more than a dozen male instructors were investigated for assaulting, harassing or having sex with female recruits during boot camp).

When the Air Force Academy scandal broke in January 2003,<sup>61</sup> Congress intervened. They ordered the appointment of the Fowler Commission, an independent seven-member civilian panel charged with investigating the USAFA sexual assault reports, reviewing academy policies, and punishing perpetrators.<sup>62</sup> After conducting a three-month investigation, the Commission's Chairman concluded:

It is clear from our review of nearly a decade of efforts to solve this problem that the common failure in each of those efforts was the absence of sustained attention to the problem and follow-up on the effectiveness of the solution. Whatever steps are taken by the Academy, the Air Force, the Department of Defense or the Congress as a result of this report, it is absolutely critical that those actions be reviewed sometime after their implementation by those in a position to objectively evaluate their effectiveness. The women of the [USAFA] deserve no less.<sup>63</sup>

Then, in February 2004, when reports hit the media that several military members deployed in Iraq and Kuwait had been sexually assaulted and cases were not being properly investigated, the DoD initiated another task force to investigate. This ultimately led the Pentagon to standardize military sexual misconduct policy across the military departments and establish "a strategic priority . . . to increase the number of sexual assault reports made to authorities by victims in order to provide them with needed support and services and to hold those who commit sexual assault appropriately accountable."<sup>64</sup> Likewise, the DoD opened the SAPRO to provide oversight and annual reporting to Congress on all sexual assault and sexual harassment reported in each of the military departments.<sup>65</sup>

Further reform efforts to "clean up" military sexual misconduct led to a significant rewrite of the criminal statute defining the offense of rape. Congress amended Article 120 of the UCMJ to include a complex scheme of thirty-six different offenses which altered the landscape of military sexual assault offenses

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<sup>61</sup> Several female Air Force cadets came forward with accounts of retribution for reporting sexual assault by fellow cadets within the USAFA; *see also infra* notes 147–50 and accompanying text (discussing the types of retaliation experienced by military members who report sexual victimization by another military member).

<sup>62</sup> Section 502 of the statute required the panel to study the policies, management and organization practices, and cultural elements of the Academy that were conducive to allowing sexual misconduct to occur at the Academy. Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, § 502(a) (2003).

<sup>63</sup> U.S. DEPT. OF DEF., REP. OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (2003) (Open Letter from the Chairman, Tillie K. Fowler).

<sup>64</sup> AY 2011–12 MSA Report, *supra* note 43, at 4.

<sup>65</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577(f) (2004).

under the military justice system.<sup>66</sup> Since Article 120 was first amended in 2007, military courts and legal scholars alike have urged Congress to fix multiple flaws in the statute.<sup>67</sup> For example, the revised, “offender-centered” Article 120 eliminated lack of consent as an element of military sexual offenses in an effort to shift the focus of the sex crimes away from the victim’s behavior.<sup>68</sup> However, in the final statute passed by Congress, a victim focus was inartfully re-injected into the statute when defining the elements of new offenses.<sup>69</sup> In an attempt to fix the flaws and shift the focus to the offender, Congress amended Article 120 statute again in 2011.<sup>70</sup>

With broader authority to prosecute sexual assault under the UCMJ, the military departments implemented several initiatives to increase personnel and resources to prepare sexual misconduct cases for trial. In addition to personnel who serve as victim witness liaisons and laboratory examiners experienced in sexual assault and domestic violence investigations,<sup>71</sup> the Department of the Army authorized thirty additional special civilian investigators,<sup>72</sup> and fifteen special victim prosecutors<sup>73</sup> who focus almost exclusively on preparing sexual assault cases for trial.<sup>74</sup> The Naval Criminal Investigative Service [NCIS] and the Air Force Office of Special Investigations [AFOSI] both sent their investigators to advanced sexual assault investigation training.<sup>75</sup>

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<sup>66</sup> See Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN’S RIGHTS L. REP. 99, 108–09 (2008) (stating that “the new Article 120 provides a series of graded offenses relating to rape, sexual assault and other sexual misconduct, based on the presence or absence of aggravating factors.” (internal quotations omitted)).

<sup>67</sup> See Jack Nevin & Joshua R. Lorenz, *Neither a Model of Clarity nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the ‘New’ Article 120*, 67 A.F. L. REV. 269, 281–87 (2011) (asserting Congress engaged in “legislative overreach” when it amended Article 120, as was addressed by the military courts in three subsequent decisions).

<sup>68</sup> James G. Clark, “*A Camel is a Horse Designed by Committee*”: *Resolving Constitutional Defects in the Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses*, 2011 ARMY LAW. 3, 15.

<sup>69</sup> See *id.* at 15 (arguing for Congress to further amend Article 120 of the UCMJ for several reasons, including provisions that create an unconstitutional burden-shifting arrangement for sex crimes defenses).

<sup>70</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (effective Jun. 28, 2012).

<sup>71</sup> Maureen A. Kohn, *Special Victim Units—Not a Prosecution Program but a Justice Program*, 2010 ARMY LAW. 68.

<sup>72</sup> A “special civilian investigator” has “extensive background[] and experience in the investigation of sexual assaults and domestic violence.” *Id.* at 68.

<sup>73</sup> A “special victim prosecutor,” is a specially-trained attorney who exclusively focuses on litigating sexual assault cases. *Id.* at 73 (noting this is the first time the Army ever designated “prosecutors for a specific crime”).

<sup>74</sup> FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 22.

<sup>75</sup> See *id.*

The military's handling of its sexual misconduct problem is akin to setting up an environmental Superfund site.<sup>76</sup> During the reactive phase of the cycle, the focus is exclusively on short-term cleanup and restoration, with little regard for long-term prevention and sustainment. Despite the unified efforts under SAPRO, additional prosecutorial assets, and the passage of an expanded rape statute, rates of military sexual misconduct appear to be rising.<sup>77</sup> In a White House news conference, just days after the Pentagon released its report estimating 26,000 military members were victims of sexual assault in 2012,<sup>78</sup> the President stated "[i]f we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged—period."<sup>79</sup> While "getting tough" on military sexual misconduct makes for good sound bites, hasty reforms endanger the fair administration of military justice for pending and future cases.

With Congress and the White House once again postured in a reactionary stage, lawmakers have again drafted new substantive and procedural reforms to the UCMJ.<sup>80</sup> Several new military justice reforms have already been implemented,<sup>81</sup>

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<sup>76</sup> "Superfund" is shorthand for the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006) (creating broad federal authority for the Environmental Protection Agency [EPA] to order responsible parties to clean up releases of hazardous substances that may endanger the public health or environment).

<sup>77</sup> See *supra* note 44 and accompanying text (outlining the increase in reported assaults by military members in the DoD fiscal year 2012 report).

<sup>78</sup> See FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 12, 18, 23. While the lack of reporting by sexual assault victims is clearly a problem that needs to be addressed, there exist no reliable figures to understand the exact parameters of the problem within the military. There were 3,374 sexual assaults reported by military members in 2012. The 26,000 sexual assaults estimated by the DoD is an extrapolated figure, derived from the results of a voluntary DoD survey of a small pool of military members which indicated that 6.1% of women respondents and 1.2% of military men respondents reported experiencing an "unwanted sexual touching" in 2012. However, the actual number of military victims who have not reported an instance of sexual assault, however, remains largely unknown. *Id.*

<sup>79</sup> Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in Military*, WASH. POST (May 7, 2013), [http://articles.washingtonpost.com/2013-05-07/world/39078504\\_1\\_sexual-assault-offenders-kirsten-gillibrand](http://articles.washingtonpost.com/2013-05-07/world/39078504_1_sexual-assault-offenders-kirsten-gillibrand).

<sup>80</sup> UCMJ, 10 U.S.C. § 777 (2012).

<sup>81</sup> In June 2012, the Secretary of Defense modified court-martial procedures for "certain sexual assault cases" by directing authority to make the initial decision whether or not to charge a military member with sexual assault related crimes under the UCMJ be elevated to commanders in the 0-6 grade (that is, colonel or Navy captain) or higher to ensure these cases are handled by seasoned, more senior commanders with advice of legal counsel. See Memorandum from Sec'y of Def. Leon Panetta for Secretaries of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Commanders of the Combatant Commands, and Inspector Gen. of the Dep't of Def. (Apr. 20, 2012) (removing from subordinate commanders authority to decide whether to initiate trial by court-martial for military members under his or her command when the misconduct alleged includes of "rape, sexual assault, forcible sodomy, or attempts thereof"). See *supra* note 50 and accompanying text (outlining the NDAA reforms).

and others are pending.<sup>82</sup> Proposals currently pending before Congress seek to further reduce, or eliminate altogether, a military commander's authority to initiate court-martial charges against members under his or her command. However, the removal of commanders from the administration of military justice is a knee-jerk response based on the flawed premise that commanders frequently decline to prosecute military members.<sup>83</sup> In fact, no data or studies are known to exist which will support the proposition that increased investigations, increased prosecutions, or increased punishments in effect increases victim confidence or reporting.<sup>84</sup>

The writing is on the wall, and lawmakers have acknowledged the failure of prior reform efforts "falling well short."<sup>85</sup> Both the DoD and Congress have concurred that a new approach is needed. Increased sexual assault prosecutions borne solely out of pressure from the public, Congress, or a military commander is the typical response, and it only threatens to violate the due process rights guaranteed under the military justice system.<sup>86</sup> As Senator Inhofe warns: "There's

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<sup>82</sup> Congress and the Secretary of Defense constituted the Response Systems to Adult Sexual Assault Crimes Panel [RSP], a nine-member panel comprised of retired military officers, a former member of Congress and legal experts to study the prosecution of sexual assault within the military. See Patricia Kime, *Panel: Commanders Should Retain Authority in Sex Assault Cases*, NAVY TIMES (Jan. 30, 2014), <http://www.navytimes.com/article/20140130/NEWS05/301300023/Panel-Commanders-should-retain-authority-sex-assault-cases>; see also White House Press Release, President Barack Obama, Statement by the President on Eliminating Sexual Assault in the Armed Forces (Dec. 20, 2013) ("If I do not see the kind of progress I expect, then we will consider additional reforms that may be required to eliminate this crime from our military ranks and protect our brave service members who stand guard for us every day at home and around the world.").

<sup>83</sup> A study of nearly seventy military sexual-assault cases revealed that commanders do aggressively pursue sexual assault prosecutions, sometimes over the concerns of investigators and legal counsel. Michael Doyle & Marisa Taylor, *Military Sexual-Assault Case Triggers Political Furor*, MCCLATCHY DC (Mar. 8, 2013), <http://www.mcclatchydc.com/2013/03/08/185271/military-sexual-assault-case-triggers.html> (reviewing sixty-eight sexual assault cases at several other military bases nationwide, thirty cases, the defendants were acquitted or found guilty only of lesser charges and noting that commanders proceeded with prosecutions despite explicit objections or serious questions initially raised by investigating officers). See also Richard D. Rosen, *Commanders Must Play a Crucial Role*, N.Y. TIMES (May 28, 2013), <http://www.nytimes.com/roomfordebate/2013/05/28/ensuring-justice-in-the-military/mcclatchydc-must-play-a-crucial-role>.

<sup>84</sup> See Moira Carmody & Kerry Carrington, *Preventing Sexual Violence*, 33 AUSTL. & N.Z. J. OF CRIMINOLOGY 341, 344 (2000) (explaining that situations where the perpetrator is an acquaintance is not adequately prevented through standard crime prevention strategies and that legislative reforms provide "virtually negligible preventative value, as it represents an intervention after, not before the incident.").

<sup>85</sup> 159 CONG. REC. H3378 (daily ed. Jun. 13, 2013) (statement of Rep. Edwards) (stating that Congress has considered, for the last twenty years, testimony and information from the DoD on its efforts to eliminate sexual assault from its ranks. These well-intentioned efforts are falling well short, and we know that).

<sup>86</sup> See Michael Doyle, *Tough Talk by Marine Commandant James Amos Complicates Sexual-Assault Cases*, MCCLATCHY DC (Sep. 13, 2012), <http://www.mcclatchydc.com/2012/09/13/168410/tough-talk-by-marine-commandant.html> (Commandant of the Marine Corp publicly denounced lenient officers who were "soft" on sexual assault and resulting claims of unlawful command influence in over sixty cases filed); see also Michael Doyle, *Crackdown on Military Sex Assault May Have Unintended Consequences*,



a risk of unintended consequences if we act with haste without thorough and thoughtful review."<sup>87</sup> The reactive reform cycle must be broken. Thoughtful examination and transformation of the current military culture that accepts or is indifferent to the sexual victimization of its own military members is the way forward.

### B. Zeroing In on Military Culture

What is it particular to the military culture that would condone male military members perpetrating sexual violence and harassment upon the female members they serve alongside? The perpetrators of sexual violence against other military members are overwhelmingly male.<sup>88</sup> Historically, the United States armed forces operated as an all-male force for more than 170 years.<sup>89</sup> It has been over sixty-five years since women achieved permanent military status; however, females account for only 15% of total active duty military members.<sup>90</sup> While their numbers are small in relation to the total force, female military members account for over 88% of the victims of sexual misconduct.<sup>91</sup> Despite compelling evidence that military on military sexual misconduct is a serious problem, there exists a common perception within modern military culture that when a female military member comes forward to report sexual assault or harassment, it is likely they are either exaggerating or fabricating the events. From where do these perceptions originate, and how are they propagated?

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MCCLATCHY DC (May 9, 2013), <http://www.mcclatchydc.com/2013/05/09/190855/crackdown-on-military-sex-assault.html> (military judge in the Marine Corps remarked to a group of junior officers: "Congress is saying that we need more convictions . . . . As trial counsel, we need to go after these scumbags . . . . We need to crush these Marines and get them out . . . . The commandant is ordering us to be more strict on criminal cases . . . we need more convictions"); see also UCMJ art. 37 ("No authority convening [any level of court-martial], nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.").

<sup>87</sup> Elliot C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN.COM (Jun. 5, 2013), <http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/>.

<sup>88</sup> FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 83.

<sup>89</sup> See Snyder, *infra* note 105 and accompanying text (explaining that women received permanent military status in 1948, under The Women's Armed Services Integration Act).

<sup>90</sup> See OFFICE OF THE UNDER SEC'Y OF DEF., DEPT. OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES 22 (2011) [hereinafter 2011 Pop. Rep.] (describing characteristics of U.S. military personnel). The 2011 Pop Rep specifically noted Army females make up 13% of enlisted and 18% of officer population; Navy females make up 16% of enlisted and 16% of officer population; Marine Corps females make up 7% of enlisted and 6% of officer population; Air Force females make up 19% enlisted and 19% officer population. Coast Guard females make up 13% of enlisted and 18% of officer population. *Id.* at 39.

<sup>91</sup> FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 81.

## 1. The Warrior Ethos?

As individual members of the armed forces adopt military culture as a group identity over time, the culture becomes institutionalized. The military institution is generally understood and accepted as a tight-knit, hierarchical culture which functions effectively under the principles of control, authority, and subordination.<sup>92</sup> Military members are at all times subject to the orders of their superiors. Comprised predominantly of athletic young men, the United States armed forces encourages pride in service and competitive rivalries between the military departments as well as between operational specialties within the departments.<sup>93</sup> The military departments have each developed a credo or a warrior philosophy which defines their emphasis on mental toughness as a necessary component of the modern warrior. For example, the Army's ethos is: "I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade."<sup>94</sup>

The current military culture, aptly described as androcentric or patriarchal in nature, operates with the majority of positions of leadership held by men.<sup>95</sup> While 15% of military officers are women, less than 5% of senior ranking officer positions are held by women.<sup>96</sup> As a result, the military's value system is a reflection of the value system of those in possession of the power and experience—the male population. Individuals new to the military enter at the bottom of a hierarchical structure, in which selection for promotion to greater rank and advancement to positions of greater authority are made by those at the top of the institutional structure. A woman seeking to advance up the rank structure is less likely to challenge the status quo.

A defining characteristic of the modern warrior from a male-dominated view is the notion of continuing to fight and never quitting. The military culture often exhibits hyper-masculine traits that promote chest thumping and intolerance for

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<sup>92</sup> Rachel Marron & Andrew B. Whitford, *Constructing a Diverse State: Legal Change and the Gradual Incorporation of Women in the U.S. Armed Forces*, 33 T. MARSHALL L. REV. 241, 243 (2008) (viewing the problem of changing the U.S. military and diversifying the modern fighting force as a problem of organizational dynamics).

<sup>93</sup> Jennifer Hlad, *Does Military Culture Foster Environment of Sex Abuse?*, STARS AND STRIPES (May 23, 2013), <http://www.stripes.com/news/does-military-culture-foster-environment-of-sex-abuse-1.222408> (citing observations of Phillip Cater, former Army officer and current Director, Center for a New American Security's Military, Veterans and Society Program).

<sup>94</sup> GARY RICCIO ET AL., U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCIENCES, WARRIOR ETHOS: ANALYSIS OF THE CONCEPT AND INITIAL DEVELOPMENT OF APPLICATIONS v (2004) (Adopted by the Army in November 2003, seeks to set "the expectations of a warrior, a Soldier who performs required duties in a harsh and unforgiving environment which directly involves killing and also provides potential for being killed.").

<sup>95</sup> See Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217 (1993).

<sup>96</sup> Marron & Whitford, *supra* note 92, at 248–49 (attributing a number of factors as impediments to female advancement, to include the combat exclusion laws).

complaining or "sniveling."<sup>97</sup> There is no shortage of slang and derogatory terms among military members to describe "quitters" and those who show weakness or vulnerability.<sup>98</sup> Such insensitivity and pressure to submit to the status quo creates a feeling of intense shame for anyone who complains or comes forward as a victim.<sup>99</sup>

Mental health professionals have looked at this same cultural aversion to being perceived as weak or fear of harm to their military careers to explain the reluctance of military members to seek mental health treatment.<sup>100</sup> Those military members who experience depression, post traumatic stress disorder [PTSD] or suicidal thoughts are often reluctant to come forward and seek treatment. There is a concern that military members underreport such conditions due to a pronounced stigma associated with consulting a mental health professional in the military culture.<sup>101</sup> The military attitude is to "suck it up" when it comes to pain and trauma, so soldiers who break down while at war tend to be ridiculed as cowards or accused of faking an illness,<sup>102</sup> otherwise known as "malingering"—a crime punishable under the UCMJ.<sup>103</sup> This same stigma of being weak attaches to military members who come forward as victims of sexual assault and harassment.

Great progress has been achieved to integrate women legally and institutionally, but the culture itself has been slow to accept women military

<sup>97</sup> For example, circulating on the Internet is a mock document, constructed to look like an official military form, called the "Hurt Feelings Report." See HURT FEELINGS REP., <http://www.n4lcd.com/hurt-feelings-report.pdf> (last visited Apr. 26, 2014). The form's stated purpose is to assist "whiners in documenting hurt feelings" and contains a narrative portion to explain "in your own sissy words how your feelings were hurt." *Id.*

<sup>98</sup> For example, "snivel gear" (equipment or clothing such as a poncho, sweater, gloves, sleeping bag, which is perceived as providing comfort beyond that which is necessary); "pussy pad" (foam bed roll used for sleeping on the ground); "weak dick" or "broke dick" (a soldier with a medical condition that hinders their ability to perform duties); "embrace the suck" (stop complaining and accept the situation).

<sup>99</sup> 158 CONG. REC. H1646 (daily ed. Mar. 28, 2012) (statement of Rep. Speier); HELEN BENEDICT, THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ 217 (2008) ("In general, shame and remorse are taboo subjects in the military . . .").

<sup>100</sup> See KATHERINE BLAKELY & DON J. JANSEN, CONG. RESEARCH SERVICE REP. FOR CONGRESS, POST TRAUMATIC STRESS DISORDER AND OTHER MENTAL HEALTH PROBLEMS IN THE MILITARY: OVERSIGHT ISSUES FOR CONGRESS 13 (Aug. 2013) (reporting 30% of military members screening positive for mental health disorders report "fear of harm to career" as reason for not seeking treatment sooner).

<sup>101</sup> See *id.* (outlining the implementation of a formal DoD policy requiring that "Commanders must also reduce stigma through positive regard for those who seek mental health assistance to restore and maintain their mission readiness, just as they would view someone seeking treatment for any other medical issue.").

<sup>102</sup> BENEDICT, *supra* note 99, at 200 (estimating that 50%–60% of traumatized military members who deployed to Iraq and Afghanistan are afraid to come forward and report PTSD).

<sup>103</sup> 10 U.S.C. § 915 (2006) ("Any person subject to [the UCMJ] who for the purpose of avoiding work, duty, or service (1) feigns illness, physical disablement, mental lapse or derangement; or (2) intentionally inflicts self-injury; shall be punished as a court-martial may direct.").

members as equal peers.<sup>104</sup> The admission of women as permanent members of the armed forces was not a smooth process.<sup>105</sup> “Behind each door that opened [to women] lay months of discussion, study and argument among policymakers and military leaders about the value and effectiveness of women to the mission of the armed forces.”<sup>106</sup> Organizational behaviorists have observed in both private and public sector organizations that when changes threaten a culture, oftentimes the members are “reluctant to abandon their embedded values and beliefs.”<sup>107</sup> This is especially true in the military culture. Contemporary studies of the United States military show its members share a common “set of values, norms, guiding beliefs, and understandings” which are taught to new members and not easily changed, even when legal and social forces seek to change its structure and rules.<sup>108</sup> Moreover, males in leadership positions often exhibit rigid world-views and rarely deviate from their beliefs and perceptions.<sup>109</sup>

Just as the warrior ethos has contempt for those viewed as “quitters,” “snivelers” or simply “broken,” these same attitudes of mistrust and resentment were transferred to females who put on the uniform. The hyper-masculine view that females are weak and a drain on a unit’s ability to accomplish the mission can also turn into anger and resentment.<sup>110</sup> Sexist comments and gender pejoratives were created to refer to female military members.<sup>111</sup> A Marine Corps officer for five years, Anu Bhagwati, recalls a typical day in the Marines:

<sup>104</sup> See Abrams, *supra* note 95, at 221 (“[T]hose responsible for enforcing [change] have not come to recognize the ways in which systematic devaluation of women pervades their attitudes and institutions”); see also Snyder, *infra* note 105, at 196.

<sup>105</sup> R. Claire Snyder, *The Citizen-Soldier Tradition and Gender Integration of the U.S. Military*, 29 ARMED FORCES & SOC’Y 185, 189–90, 196 (2003).

After much debate, women were granted permanent military status in 1948, when President Truman directed the integration of women in the military. See Women’s Armed Services Integration Act of 1967, Pub. L. No. 90-130 (1967) (“There is no reason why we should not some day have a female Chief of Staff or even a female Commander-in-Chief.”); see also *id.* (explaining how women, with each national crisis, served as volunteers, and on an unofficial basis as soldiers, spies, and support personnel to care and feed the troops, and then were sent back to civilian life after each war).

<sup>106</sup> 1970s, WOMEN IN MILITARY SERV. FOR AMERICA MEM’L FOUND., <http://chnm.gmu.edu/courses/rr/s01/cw/students/leeann/historyandcollections/history/lrmre1970s.html> (last visited Apr. 26, 2014).

<sup>107</sup> RICHARD L. DAFT & ROBERT H. LENGEL, FUSION LEADERSHIP UNLOCKING THE SUBTLE FORCES THAT CHANGE PEOPLE AND ORGANIZATIONS 224 (1998) (“Culture guides where the organization goes regardless of the overall concern for legal and social guidance.”).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 224–25.

<sup>110</sup> See Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 701, 710 (1996) (explaining construction of various forms of masculinity); Megan Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 492–93 (2010).

<sup>111</sup> The following terms have been used to describe female military members: “whore” and “slut” across the departments; “split tail” used in the Navy and Marine Corps; “WM,” used to describe a woman marine, also commonly understood as an abbreviation for either “walking mattress”

. . . hearing from male peers that women are weak, lazy and don't belong in the Marine Corps. Rape jokes were commonplace, as were demeaning vocabulary, vile pornography and reminders that the women and girls in the strip clubs and red-light districts outside our bases in the United States and abroad were there to be used as sexual objects by men in uniform.<sup>112</sup>

Ms. Helen Benedict, a journalism professor and author, interviewed multiple women about their training and experiences while deployed to Iraq and concluded: "So pervasive was woman hating in military culture, from boot camp through active duty, with obscene comments on breast size, relentless staring and ridicule, sexist rhymes, and pornography everywhere, including in latrines and common areas."<sup>113</sup>

Using gender pejoratives, rating female military members' physical appearance, and discussing their body parts reduce women to sexual objects, which, in effect, "calls for men to become *observers*, [and] for women to become the *observed*."<sup>114</sup> The objectified military female is subjugated to the role of mere stimulator of male visual interest, where value is placed only on her physical characteristics and not the skill and talent she brings to the organization.<sup>115</sup> A former Iraq war veteran explains her experience as a woman in a male-dominated military: "There are only three things the guys let you be if you're a girl in the military—a bitch, a ho, or a dyke."<sup>116</sup> As commonly understood by social scientists, sexual assault and sexual harassment really have nothing to do with

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or "waste of money;" "sea hag" describes a female sailor and "ripple," a female Noncommissioned Officer. The Navy term for a male clerk or other non-combatant military occupational specialty is often called a "titless wave," implying their work is "women's work." See *Glossary of Military Slang*, WIKTIONARY, [http://en.wiktionary.org/wiki/Appendix:Glossary\\_of\\_military\\_slang](http://en.wiktionary.org/wiki/Appendix:Glossary_of_military_slang) (last visited Mar. 29, 2013).

<sup>112</sup> Anu Bhagwati, *Ending Sexual Assault in the Military*, WASH. POST, May 26, 2013, at B3, available at [http://host.madison.com/news/opinion/column/anu-bhagwati-ending-sexual-assault-in-the-military/article\\_50064c31-c364-546d-af10-73c25d0eae81.html](http://host.madison.com/news/opinion/column/anu-bhagwati-ending-sexual-assault-in-the-military/article_50064c31-c364-546d-af10-73c25d0eae81.html) (calling on the DoD and Congress to recruit, retain and promote a "critical mass" of women as a means of transforming military culture and thus, eliminating sexual assault).

<sup>113</sup> H. Patricia Hynes, *Military Sexual Abuse: A Greater Menace Than Combat*, TRUTHOUT (Jan. 26, 2012), <http://truth-out.org/opinion/item/6299> (summarizing conclusion from HELEN BENEDICT, *THE LONELY SOLDIER: THE PRIVATE WAR OF WOMEN SERVING IN IRAQ* 5 (2008)).

<sup>114</sup> GARY BROOKS, *THE CENTERFOLD SYNDROME: HOW MEN CAN OVERCOME OBJECTIFICATION AND ACHIEVE INTIMACY WITH WOMEN* 3–4 (1995) (explaining modern construct of male sexuality as dysfunctional because "most men are too voyeuristic, too objectifying of women's bodies, too competitive for sexually attractive women, too needy of validation through sexuality, and too fearful of emotional intimacy").

<sup>115</sup> See *id.* at 4. For example, females are described as "desert foxes" or "queen for a year," meaning they are deemed more attractive in a deployed environment or when assigned to a location with few civilian females.

<sup>116</sup> BENEDICT, *supra* note 113, at 5 (quoting Mickiela Montoya, who describes her experience as a female military member).

sex.<sup>117</sup> Instead, sexually offensive conduct employed within the military culture subordinates and segregates military females, and thereby operates to preserve its male supremacy.<sup>118</sup>

This hyper-masculine, privileged military culture may also endure as part of an unspoken social compact. The military trains its young men to be violent, to protect and defend their country and, in return, the country should look the other way when military members get sexually aggressive.<sup>119</sup> “[I]nfantrymen are expected to kill and face death, so they must be allowed to let off steam by making jokes or comments that others may find offensive.”<sup>120</sup> The dominant military culture has been heard to complain that “political correctness is killing the warrior culture.”<sup>121</sup>

As the minority population, female military members often remain silent if they overhear or are targets of sexist comments or disparaging remarks in order to assimilate into the military culture. “The less you speak out, the more likely you are to fit in and rise to the top” asserts a former female officer.<sup>122</sup> As Benedict explains, when women are sexually victimized in military units, they must still remain in the same units or deploy with the same military members who attacked or harassed them, “not unlike sending a rape victim to prison with her rapist.”<sup>123</sup>

## 2. Disincentives to Reporting Sexual Victimization

Fear of retaliation and victim blame are ways in which victims are silenced in the military culture. The NIJ’s study of college women published in 2000 estimates that less than five percent of sexual assault victims report the crime to law enforcement.<sup>124</sup> Of the military women who reported they experienced sexual misconduct in fiscal year 2012 and chose not to report it, 47% indicated a fear of retaliation or reprisal. Another 43% of those military victims who did not report said they were influenced by the negative experiences of other victims.<sup>125</sup>

Taking on the role of “victim” when you are the victim of a sexual assault or harassment in the military includes a host of additional disincentives not experienced by those in the civilian sector. For example, once a formal report is made, a formal investigation is initiated, and the allegations quickly become

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<sup>117</sup> *Id.* at 6 (motivations for rape include “anger, sexual sadism, and the need to dominate and destroy”).

<sup>118</sup> Abrams, *supra* note 95, at 217, 226–27.

<sup>119</sup> Morris, *supra* note 110, at 701, 710, 720 (describing masculinity and hyper-masculinity in military culture).

<sup>120</sup> See Hlad, *supra* note 93.

<sup>121</sup> *Id.*

<sup>122</sup> Bhagwhati, *supra* note 112.

<sup>123</sup> BENEDICT, *supra* note 113, at 209–10.

<sup>124</sup> NCWSV Study, *supra* note 45, at 23.

<sup>125</sup> DoD FY 2012 Sexual Assault Report I, *supra* note 3, at 27.

known to other military members. Where the military culture tends to regard the victim as a threat to the unit, their factual accounts are often scrutinized, seeking ways to either blame the victim<sup>126</sup> or uncover a victim's motive to fabricate. Moreover, when a formal investigation and court-martial are pending, victims are typically ordered not to discuss the incident with anyone else. As a result, they are unable to comment upon the pending investigation or to correct rumors within the unit. When these women members report sexual misconduct, they often experience social isolation from their peers, and may even be targets of harassment from supervisors, as well as the friends and family of a perpetrator.<sup>127</sup>

Another disincentive within the military culture for military victims to report is they may have observed first hand or heard about other victims who came forward to report sexual misconduct by another military member, and experienced adverse consequences to their military careers. Studies confirm these fears. Military members who reported sexual assaults were surveyed, and 31% experienced social retaliation, with an additional 26% experienced both professional and social retaliation.<sup>128</sup>

One former military female who served as a law enforcement agent recalls being raped by another military member during military training. She explains the reason she remained silent for years following the rape was because she repeatedly heard her fellow law enforcement peers doubt victim accounts.<sup>129</sup> Once she came forward and reported the rape, she saw her performance evaluations decline from "stellar performer" to "unsatisfactory."<sup>130</sup> Of her ten years on active duty and

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<sup>126</sup> For example, when the Fowler Commission investigated the Air Force Academy scandal in 2003, military officials criticized the victims' behavior:

[I]f I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn't justify my being attacked or robbed, but I certainly increased the risk of doing what I did . . . . Are you the one girl going to Denver for an overnight in a hotel with five guys? Probably not a good idea.

See *Pentagon Panel Will Examine Air Force Sex Assault Policies*, N.Y. TIMES, Feb. 17, 2003, at A16, available at <http://www.nytimes.com/2003/02/17/us/pentagon-panel-will-examine-air-force-sex-assault-policies.html>; see also *supra* note 60 and accompanying text (outlining the facts behind the USAFA scandal).

<sup>127</sup> DoD FY 2012 Sexual Assault Report I, *supra* note 3, at 27.

<sup>128</sup> *Id.*

<sup>129</sup> Quil Lawrence & Marisa Peñaloza, *Sexual Violence Victims Say Military Justice System is "Broken,"* NPR (Mar. 21, 2013), <http://www.npr.org/2013/03/21/174840895/sexual-violence-victims-say-military-justice-system-is-broken> (interviewing Myla Haider, formerly of the Army's Criminal Investigation Division [CID]). Ms. Haider came forward to report when she learned the military member who raped her was being investigated for serial rape, and she felt compelled to do the right thing and report she was also raped by him. *Id.*

<sup>130</sup> *Id.* ("When I reported it, it was a very small part of my life. But by making that choice, my reporting of it took over my life, ruined my career and wound up, ultimately, getting me kicked out of the Army.").

years spent investigating criminal cases, she says she “never met one victim who was able to report the [sex] crime and still retain their military career.”<sup>131</sup>

The professional retaliation feared by military victims can also take the form of formal disciplinary action or administrative separation from the military. Victims of sexual assault could potentially be disciplined for adultery or fraternization, both criminal offenses under the UCMJ.<sup>132</sup> Survivors of “military sexual trauma”<sup>133</sup> experience high rates of post-traumatic stress disorder. Functioning in a male-dominant culture with untreated psychological trauma often creates additional challenges for military victims.<sup>134</sup> Some find themselves involuntarily discharged from military service for unsatisfactory performance or personality disorders.<sup>135</sup> With a virtual minefield of adverse consequences for survivors of military sexual trauma lurking in the shadows, it should come as no surprise that an overwhelming majority of military members are unwilling to come forward and report sexual misconduct perpetrated by another military member.

### 3. The MSA Culture

The same warrior ethos embedded in the larger military institution which yields sexist comments, hostile attitudes toward victims, shame, and fear of retaliation also lives within the MSA culture. Although progress has been achieved under law to admit women within its institutional structure, the MSAs have been reluctant to fully integrate female students.<sup>136</sup> Congress has taken note: “[T]he same conflicted chain-of-command structure that exists in the military also

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<sup>131</sup> *Id.*

<sup>132</sup> See 10 U.S.C. § 934 Art. 134 (2011).

<sup>133</sup> The term “military sexual trauma” [MST] is specific term used to describe sexual assault and “repeated, threatening sexual harassment” which occurs during military service. See Jenny K. Hyun, Joanne Pavao, & Rachel Kimerling, *Military Sexual Trauma*, PTSD RESEARCH QUARTERLY 1 (Spring 2009) (noting the prevalence of MST among the Veterans Healthcare Administration’s outpatient population surveyed in 2007 was 21.5% among females and 1.1% among males).

<sup>134</sup> MST is associated with a variety of other mental health conditions including anxiety disorders, depression, eating disorders, bipolar disorder and substance use disorders, as well as increased numbers of medical conditions such as liver disease, obesity, hypertension and pulmonary disease. *Id.* at 2. See also *Military Sexual Trauma VA Claims*, SERVICE WOMEN’S ACTION NETWORK, <http://servicewomen.org/military-sexual-trauma-va-claims/> (last visited Mar. 20, 2014).

<sup>135</sup> See generally Dep’t of Def. Instruction on Enlisted Administrative Separations, No. 1332.14 (Jan. 27, 2014); see also, Melissa Ader et al., *Casting Troops Aside: The United States Military’s Illegal Personality Disorder Discharge Problem*, VETERANS LEGAL SERVICES CLINIC 4 (2012), available at [www.law.yale.edu/documents/pdf/News\\_&\\_Events/VetPersDisorderPaper.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/VetPersDisorderPaper.pdf) (asserting the United States military discharged over 31,000 military members with personality disorders since 2001, many of which appeared to be in violation of the DoD regulation).

<sup>136</sup> Abrams, *supra* note 95, at 3 (explaining that “those responsible for enforcing [change] have not come to recognize the ways in which the systematic devaluation of women pervades their attitudes and institutions”); see also Snyder, *supra* note 105, at 196.



exists at our prestigious service academies."<sup>137</sup> As a former Air Force cadet who dropped out of the USAFA after being raped by another cadet explains: "People have to understand, this is nothing like a normal college . . . Upperclassmen are your superiors. You have to listen to them and obey their rules. You can't tell them to get out. I didn't feel safe."<sup>138</sup>

What can be found within the MSA culture is the use of gender pejoratives and negative attitudes toward female students.<sup>139</sup> For example, at the USMA, even though academy leadership has spoken out against use of the word "trou" as "demean[ing to] female cadets," there are still cadets and graduates who dismiss the word as harmless jest, some going so far as calling it "an endearing term."<sup>140</sup> However, when female cadets at USMA were surveyed, a majority stated that they hear the word several times daily and use of the word perpetuates feelings of separateness between the male and female cadets.<sup>141</sup>

Following the USAFA scandal in 2003, the academy's superintendent publicly acknowledged the hyper-masculine culture at the academy was "conducive to sexual harassment, which leads to sexual assault and in some cases rape."<sup>142</sup> When students in the MSAs engage in sexist behaviors and show hostility toward the inclusion of females, it reinforces to their peers and more junior students that such behavior is acceptable within the military culture. In June 2013, fifteen male cadet members of the USMA rugby team were administratively disciplined for sending inappropriate e-mails.<sup>143</sup> The e-mail communications, downplayed by USMA public affairs as "locker room trash," illustrate the pervasive nature of misogynistic attitudes held by those postured to be the military's future leaders.<sup>144</sup> The USMA rugby team e-mails illustrate the MSA

<sup>137</sup> 158 CONG. REC. H2822-01 (2012) (statement of Rep. Speier).

<sup>138</sup> Colleen Long, *Air Force Cadets Speak Out About Assaults*, ASSOCIATED PRESS (Mar. 7, 2003), <http://www.apnewsarchive.com/2003/Air-Force-Cadets-Speak-Out-About-Assaults/id-6b02c694ed13ae5eeb96a764a7ebd1a3>.

<sup>139</sup> The term "corps whore" has been used to describe a civilian female who dates male cadets; the term "pump and dump" in military usage signifies having sexual intercourse with a woman. See *A Glossary of West Point Slang*, COMBAT, <http://www.combat.ws/S4/MILTERMS/WPOSLANG.HTM> (last visited Mar. 20, 2014) ("compiled for the edification of candidates and cadets, their friends and families").

<sup>140</sup> Joe Gould, *T-shirt is Offensive: West Point, Women's Group*, ARMY TIMES (Nov. 28, 2011), <http://www.armytimes.com/article/20111128/NEWS/111280338/T-shirt-is-offensive-West-Point-women-s-group> (Two West Point graduates and owners of a website that sells t-shirts bearing the word "trou" refused to pull the t-shirts when requested, countering that some women have expressed that "it's an endearing term.").

<sup>141</sup> Ben Preston, *Military Gender Roles Still Thorny Problem*, PAC. STANDARD (Apr. 11, 2011), <http://www.psmag.com/culture/military-gender-roles-still-thorny-problem-30079/>.

<sup>142</sup> Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes be Enough?*, 29 WOMEN'S RTS. L. REP. 99, 106 n.2, 106 n.3 (2008).

<sup>143</sup> *West Point Rugby Team Benched over Improper Emails*, ASSOCIATED PRESS (Jun. 3, 2013), <http://bigstory.ap.org/article/west-point-rugby-team-benched-over-improper-emails>.

<sup>144</sup> See Katie J.M. Baker, *Butt Plugs and Bitches: The Emails West Point Doesn't Want You to See*, JEZEBEL (Jun. 11, 2013), <http://jezebel.com/butt-plugs-and-bitches-the-emails-west-point->

problem first identified in the DoD's 2005 report: "misplaced peer loyalty results in a strong tendency in some [MSA students] to ignore problematic behavior among their peers or otherwise explain it away as harmless."<sup>145</sup> The rugby team messages were made public only after a female cadet discovered them and came forward to expose the misconduct.<sup>146</sup>

MSA students who are sexually victimized by other students also experience the same feelings of shame and fear of retaliation as experienced by military victims in the larger culture. The fear that classmates will turn their backs on them and issue blame is particularly pronounced for these young victims. Female MSA students surveyed said the top three reasons for not reporting a sexual assault were: (i) they took care of it themselves or did not think it was important enough to report; (ii) they did not want people to gossip about them; and (iii) they did not want anyone to know.<sup>147</sup> In the latest MSA report, "cadets and midshipmen

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doesnt-w-511519205 (detailing the sexual "highs and lows" of the elite academy's rugby team such as "he made out with trou . . . sloppy trou. Or it might have been a girl [cadet] fucked but im [sic] not sure. Actually it might have been [cadet] girl's roommate . . . . Then he got his dick touched by some rando skank from the hotel lobby he met 15 minutes earlier. Although failing to stick it in is grounds for Bubble territory [ed: "Bubble territory" is on the bubble of being a 'low' for the week, a bad thing, obviously] he rallied."). *Id.* Elsewhere in the emails was the following:

[N]ot only is the fuck a product of his mothers [sic] tit, he was homeschooled by her and breastfed until sophomore year of high school. She taught him how to masturbate correctly and demonstrated on a sausage. She also showed him how to deep throat . . .

*Id.*

<sup>145</sup> DEPT. OF DEF., REP. OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES 23 (2005) (recommending the MSAs "increase opportunities for [students] to engage in constructive interaction with a broader range of peers in order to decrease counterproductive peer loyalty"); see also Courtney A. Franklin, Leana Allen Bouffard & Travis C. Pratt, *Sexual Assault on the College Campus: Fraternity Affiliation, Male Peer Support, and Low Self-Control*, 39 CRIM. JUST. AND BEHAV. 1457, 1465–67 (2012) (explaining how "male peer support," contributes to sexual assault on college campuses and includes male attachment to peers who engage in sexually aggressive behaviors toward females, who provide advice that encourage sexually abusive behavior, and who place pressure on them to engage in sexual relations with dating partners.); see also Baker, *supra* note 143 ("It's cause you are a bunch of individualized bitches. None of you rage together or have tight stories. It's past time to come together as a class and get a fucking identity instead of letting some of your tight individuals (like [cadet]) do all the heavy lifting. Just kidding . . . [cadet] sucks . . . although you do have some solid individuals. The plebes [ed: freshmen on the team] have been here for less than a semester and are already a tighter group as a class than you are. Being on this team means being a Brother. Start acting like it . . .").

<sup>146</sup> See Lolita C. Baldor, *Sexism Part of Military Academy Culture, Pentagon Report Says*, ASSOCIATED PRESS, (Jan. 11, 2014, 4:11 PM), available at <http://usnews.nbcnews.com/news/2014/01/11/22268691-sexism-part-of-military-academy-culture-pentagon-report-says> (quoting the USMA Superintendent: "This is all about leadership . . . [e]very one of these men and women are going to be in charge of organizations that are mixed gender, and they're going to be responsible for the command climate of their organization.").

<sup>147</sup> AY 2011–12 MSA Report, *supra* note 43, at 13.

indicate that they remain concerned that reporting a sexual assault will impact their reputation and social standing with classmates."<sup>148</sup>

In May 2013, a female student at the USNA came forward and reported being sexually assaulted a year earlier by three players on the football team at an off-campus house.<sup>149</sup> The victim learned of the prior assaults upon her from friends and via social media, after the players had boasted to others about having sexual intercourse with the particular student while she was intoxicated. When the female student came forward to report the sexual assaults, she was disciplined for drinking and ostracized by her peers<sup>150</sup>

Some question why any woman would enter the armed forces or attend the MSAs if the military culture remains largely unreceptive to them. These same biases in greater society that seek to shift the focus from perpetrators to victims are also present within the military culture. It is wholly unfair to expect a young woman to surrender an educational or vocational calling in order to avoid the possibility of sexual victimization by co-workers. Women seek to join the military for the same reasons men join: out of a sense of loyalty, service to their nation, and because they have particular strengths and skills well suited to military service. It is society's responsibility to employ effective measures to prevent the sexual victimization of women who follow their passion and are called to serve in the military.

When cultural norms "oppress and objectify women, value the use of power over others, tolerate violence and victim blaming, support traditional views of masculinity . . . and foster secrecy . . . [it] contribute[s] to an environment where sexual violence can occur."<sup>151</sup> A new reform strategy is needed, one that focuses on transforming the institutional culture within the military to view the sexual assault problem not as a gender problem, but a cultural problem. The students currently enrolled in the MSAs are uniquely suited to the task.

#### IV. DEVELOPING TRUE LEADERS OF CHARACTER

The young men and women in today's MSAs who are educated and trained to assume responsibility as tomorrow's future leaders bear a heavy burden to correct the military's decades-long struggle with sexual assault and harassment. For several years, each military department has implemented a variety of training

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<sup>148</sup> Press Release, Dep't of Def., DoD Evaluates Sexual Harassment, Prevention and Response Efforts at Military Academies (Jan. 10, 2014).

<sup>149</sup> Barbara Starr, *Navy Football Players Investigated in Sex Assault Complaint*, CNN.COM (Jun. 2, 2013), <http://www.cnn.com/2013/05/31/politics/navy-football-sex-assault-probe/>.

<sup>150</sup> *Id.*

<sup>151</sup> Hlad, *supra* note 93 (quoting Delilah Rumburg, CEO of the Pennsylvania Coalition Against Rape/National Sexual Violence Resource Center).

programs aimed at eradicating sexual misconduct within their ranks.<sup>152</sup> Still, as some researchers will admit, “little is known about what types of programs are most effective” in preventing future sexual misconduct.<sup>153</sup> The DoD reports, which exhibit a continued increase in military-on-military sexual misconduct, also suggest that the training programs utilized within the military departments have been inadequate to prevent future acts of misconduct. It is time to consider a new approach to education and training of military members.

While institutional change can be challenging, the military has overcome significant institutional changes in the past.<sup>154</sup> It can be done. Education and re-training of military personnel are essential to eliminate the deeply-rooted cultural norms in which sexual misconduct thrives. The Secretary of Defense challenged the MSAs to “create sustainable change to academy culture” by:

. . . identifying new ways to advance a climate of dignity and respect and by more completely integrating sexual assault and harassment prevention into the full spectrum of academy life and learning. The goal of this effort is to . . . lower the prevalence and increase reporting of sexual assault and sexual harassment.<sup>155</sup>

It is the shared responsibility of all future military leaders to model attitudes and behaviors that view female military members as equal peers deserving of respect and protection. How the MSAs choose to empower their students to reject the remnants of a bygone masculinity-driven era and allow for an egalitarian climate of dignity and respect to continue to grow remains to be seen. This section offers a few recommendations.

#### A. Buy-In From Male Stakeholders

The prevention of sexual assault and harassment in the military is not merely a women’s cause. The stakeholders in the fight against military sexual misconduct

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<sup>152</sup> No strangers to mandated training on sexual assault and sexual harassment, 96% of women and 97% of men on active duty indicated they received sexual assault training in FY 2012. See FY 2012 DoD Sexual Assault Report I, *supra* note 3, at 26.

<sup>153</sup> Carmody, *supra* note 9, at 344.

<sup>154</sup> See generally Annie Schamaun, *Executive Order 9981 and the Racial Desegregation of the American Armed Services*, (Spring 2010) (unpublished final project), available at <http://people.ehe.osu.edu/bgordon/files/2012/06/Anne-Schumaun.pdf>. Following the desegregation of the armed forces in 1948, military institutions struggled to eradicate a culture of racism within its ranks. *Id.* at 7 (stating that the Committee in Equality on Treatment and Opportunity in the Armed Services [Fahy Committee] was responsible for ensuring that desegregation of the Armed Services took effect).

Likewise, following the repeal of the DoD’s “Don’t Ask, Don’t Tell” policy in 2012, the DoD appears to have successfully navigated the transition to allow homosexual service members to openly express their sexual orientation. See *Don’t Ask, Don’t Tell is Repealed*, DEP’T OF DEF., [http://www.defense.gov/home/features/2010/0610\\_dadt/](http://www.defense.gov/home/features/2010/0610_dadt/) (last visited Mar. 19, 2014) (webpage dedicated to supporting the implementation of the new policy).

<sup>155</sup> AY 2011–12 MSA Report, *supra* note 43 (memorandum from the Secretary of Defense).

must include both men and women. MSA training programs which alienate males are counter-productive. What is needed is an inclusive, mixed-gender training environment—one that receives buy-in from male students. The male members must be brought in as part of the solution, rather than being alienated as part of the problem. When ownership of the problem is embraced by all students, then the MSAs can begin to make real, honest strides toward invalidating the cultural norms perpetuating sexism and violence.

The MSA student population, like that of the military departments they will soon enter, is comprised largely of male students.<sup>156</sup> Thus, the majority of attendees at mandated sexual assault and sexual harassment prevention training sessions at the MSAs will be male. How do the MSAs ensure the majority of their audience remains receptive and does not reject the message? They consciously shape prevention programs as an inclusive effort, not one misconstrued as blaming the male population as a whole for the problem. The number of military victims is unacceptably high; however, only a small percentage of military members are the perpetrators of the sexual misconduct. To avoid pointing the finger at those whom are necessary to support prevention efforts, training programs must be thoughtfully structured to create inclusivity and get buy-in from all stakeholders.

An inclusive stakeholder approach to training enlists the participation of male military members, not as potential perpetrators, but as those who share in the responsibility to rebuild trust and prevent future acts of sexual misconduct. A straight-forward message which spells out how the military structure as a whole is at-risk when military members prey on military members, more MSA students will feel vested in combating the problem. Making prevention of military sexual misconduct a shared priority across the entire student population is the first step in realizing institutional change at the MSAs.

The MSA leadership makes prevention a shared priority across the student population when it creates greater opportunities for male students to partner with females to promote non-violence and increase positive attitudes toward females. For example, male students can be recruited to lead prevention programs in tandem with their female peers. Male MSA students are well suited to use their status as leaders-in-training to discourage misogynistic attitudes and prevent future misconduct. "There are many male allies—we just need to encourage more of them to speak up."<sup>157</sup> Working as mixed gender teams, male and female MSA students will increase their ability to fully recognize and address inappropriate sexual behaviors in their future military units.

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<sup>156</sup> See 2011 Pop. Rep., *supra* note 90 and accompanying text (outlining the ratio of males to females in the MSAs).

<sup>157</sup> Ann U. Wright, *Ending Violence Against Women Requires a Bigger Role from Men*, HUFFINGTON POST (May 28, 2013), [http://www.huffingtonpost.com/ann-u-wright/ending-violence-against-w\\_1\\_b\\_3346902.html](http://www.huffingtonpost.com/ann-u-wright/ending-violence-against-w_1_b_3346902.html) (detailing the efforts of such initiatives as Men Can Stop Rape, The White Ribbon Alliance, A Call to Men, Futures Without Violence, and Coaching Boys into Men).

The importance of including male stakeholders has been recognized at other undergraduate institutions. For example, Northeastern University's Mentors in Violence Prevention [MVP] project focuses on student athletes and challenges them to reconstruct masculine norms that equate strength with dominance over women.<sup>158</sup> At Louisiana State University, male students who make up the group Men Against Violence [MAV] explore alternative ways of expressing masculinity, question the objectification of women, and examine links between masculinity and violence.<sup>159</sup> When all stakeholders, especially military males, move away from viewing violent and inappropriate sexual behaviors toward military females with apathy and acquiescence and, instead regard it as an affront to their comrades and their military values, then sustainable institutional change is most definitely underway.

### *B. Offer Meaningful Prevention Training*

The MSAs have an imperative responsibility to ensure tomorrow's military leaders are capable of modeling dignity and respect to other military members before leaving the academies. The MSAs ensure the values are adopted by these future officers by offering consistent and meaningful sexual assault and sexual harassment prevention training as part of their education at the MSAs. Definitions of what constitutes "meaningful training" to prevent future acts of sexual misconduct, however, can vary widely.

At a minimum, MSA training should incorporate two basic components. First, it must inspire military members, particularly those disenfranchised by prior training efforts, to understand the scope of the damage sexual misconduct inflicts upon the individual and military units. Second, it must invite all members to examine and assess the military culture in an honest, critical manner. This means going beyond mere awareness training.

Military-on-military sexual misconduct is a reprehensible attack on a fellow military member.<sup>160</sup> Additionally, the misconduct constitutes an inside assault on the trust military members must possess for one another when they train and fight

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<sup>158</sup> Founded in 1995 in Boston, Massachusetts by Jackson Katz. See *Mentors in Violence Prevention*, NORTHEASTERN UNIV., <http://www.northeastern.edu/sportinsociety/leadership-education/mvp/> (last visited Mar. 19, 2014).

<sup>159</sup> Founded in 1995, with purpose combat stalking, domestic violence, rape, hazing, and hate crimes, and other forms of violence at Louisiana State University. See *MEN AGAINST VIOLENCE (MAV) LEGAL RESOURCES*, <http://mavinc.org/about/> (last visited Apr. 26, 2014).

<sup>160</sup> See Molly O'Toole, *Military Sexual Assault Epidemic Continues To Claim Victims As Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012), [http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department\\_n\\_1834196.html](http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html) (reporting Army Sergeant Rebekah Havrilla's experience of seeing "[s]uicide bombers in pieces, [people] pulling dead American soldiers out of Humvees—I have seen a lot of stuff people should never see . . . It was part of my job; death was something I had to deal with. I never, ever thought I was gonna have to deal with my supporters being the ones that did the most damage.").

together within military units. Thus, the overall harm caused by sexual misconduct in the military is a severe blow to the readiness of military units. The MSAs must educate these future leaders about the implications of reduced readiness on the good order and discipline of units.<sup>161</sup> Professional military leaders are trained to take care of their subordinates and to preserve the readiness of their units. Tomorrow's leaders must be trained to appreciate the real harm that results from apathy or indifference to military-on-military sexual misconduct.

The sexual victimization of military members by military members is a leadership challenge a true leader simply cannot ignore. Although what it means to be a "leader of character" may be defined slightly differently among the MSAs in accordance with their military department's individual mission, there are enduring attributes such as duty, honor, respect, and loyalty that are commonly understood to be those values a true leader of character will embody. The USCGA, for example, includes "respect" as one of its core values and explains its ethos as follows: "We value our diverse work force. We treat each other with fairness, dignity, and compassion. We encourage individual opportunity and growth. We encourage creativity through empowerment. We work as a team."<sup>162</sup> At the USNA, the concept of "honor" includes integrity and standing for "*that which is right*."<sup>163</sup>

MSA education and training efforts must reach participants in a truthful and authentic way. One-dimensional sensitivity and awareness programs are not sufficient to carry the prevention message forward. Awareness programs operate under the flawed assumption that when military members gain an increased sensitivity toward gender differences or an increased awareness of sexual violence, it prevents sexual violence.<sup>164</sup> "It is somewhat naïve to think that a few hours of awareness raising will transform deeply embedded cultural norms and practices about gender relationships."<sup>165</sup> If it can be agreed that the solution to military sexual misconduct problem requires cultural change, then it is due time for the military to move beyond awareness training.

The DoD approach to prevention training has yet to look critically at changing its own culture. While training has addressed at-risk groups and provided strategies for females to avoid at-risk behaviors, often the focus is on building women's refusal skills. The cultural bias of affixing blame upon military victims is

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<sup>161</sup> See Admiral James A. Winnefeld, Vice Chairman of the Joint Chiefs of Staff, Remarks at the 26th Annual Joint Women's Leadership Symposium (Jun. 6, 2013) (terming sexual assault and harassment in the military an "insider attack . . . lethal to . . . [the U.S. military's] culture" of discipline).

<sup>162</sup> *USCG Core Values*, USCGA, <http://www.cga.edu/about2.aspx?id=40> (last visited Apr. 26, 2014) (USCGA's three core values are honor, respect, devotion to duty).

<sup>163</sup> *Honor Concept*, USNA, <http://www.usna.edu/honorconcept.htm> (last visited Apr. 26, 2014).

<sup>164</sup> Carmody, *supra* note 9, at 345.

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

reinforced when training strategies focus on teaching military females how to manage the risks of sexual abuse.<sup>166</sup> A sustainable approach to prevention at the MSA level requires going deeper and seeking to change male behaviors and attitudes.<sup>167</sup>

Prevention training efforts must look to the military bystander's indifference or acquiescence to known sexual misconduct as a breach of loyalty and trust. As the Chairman of the House Armed Services Committee recently commented:

[I see] no meaningful distinction between complacency or complicity in the military's latest failure to uphold their own standards of conduct. Nor do I see a distinction between the service member who orchestrated this offense and the chain of command that was either oblivious to or tolerant of criminal behavior.<sup>168</sup>

Before commissioning as military officers, both male and female students must be taught the skills necessary to intervene when a threat of sexual misconduct is perceived.<sup>169</sup> For example, MSA students can discuss how to respond if they discovered a military peer had posted sexist or hateful comments about women on a social media outlet.<sup>170</sup> Student participants in MSA focus groups have previously reported they are unclear as to exactly what type of offensive behavior constitutes sexual harassment.<sup>171</sup> When the military's future leaders are unsure as to what

<sup>166</sup> *Id.* at 346 (stating that traditional prevention efforts "can result in reinforcing traditional gender expectations using danger and the threat of rape to continue to place responsibility with women for managing men's sexual desires."). For example a "just say no" training strategy propagates traditional gender stereotypes when it fails to deter sexual predators from acting and military victim are regarded as irresponsible and when the misconduct occurs. *Id.*

<sup>167</sup> *Id.* at 344.

<sup>168</sup> *Lawmakers Outraged Over Another Military Sex Case*, ASSOCIATED PRESS (May 15, 2013), <http://www.timesfreepress.com/news/2013/may/15/lawmakers-outraged-over-another-military-sex-case> (statement of Chairman Howard P. "Buck" McKeon).

<sup>169</sup> Victoria L. Banyard, Elizabeth G. Plante, & Mary M. Moynihan, *Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention*, 32 J. COMMUNITY PSYCHOL. 1, 61–79 (2004) (giving results of study of 389 undergraduates at Northeastern University found increased bystander behavior); Jackson Katz, *Reconstructing Masculinity in the Locker Room: The Mentors in Violence Prevention Project*, 65 HARV. EDUC. REV. 2, 163–74 (1995).

<sup>170</sup> The DoD recently initiated efforts to target social media posts that depict female service members in sexually degrading ways. See Tom Vanden Brook, *Sexism Must Be Treated Like Racism, Top Officer Says*, USA TODAY (May 15, 2013), <http://www.usatoday.com/story/news/nation/2013/05/14/hagel-orders-inspection-sexually-explicit-materials/2158819/>. Moreover, on May 8, 2013, the Secretary of Defense ordered each military department to visually inspect all military workplaces, to including the service academies, for potentially offensive or degrading materials. *Id.*

<sup>171</sup> See DEP'T OF DEF., ANN. REP. ON SEXUAL HARASSMENT AND VIOLENCE AT THE U.S. MILITARY SERVICE ACADEMIES: ACADEMIC YEAR 2006–07 6–7 (2007)

A large majority of the young men and women attending the MSAs have limited experience with dating and social interaction between members of the opposite sex in a professional setting.



type of behavior is offensive, it signals an urgent need for education in gender relationships at the MSAs. "Current programmes fail these young people by retreating to simplistic advice. Sexual intimacy is not a simple matter—it is imbued with a multiplicity of expectations about gender . . . ."<sup>172</sup>

These young adults must be given a forum in which to openly voice their opinions and to discuss what is appropriate and what is inappropriate conduct between military members. For example, the Navy's 21st Century Sailor Office has received feedback from sailors that sexual assault and harassment training that utilizes computer-based methods or slide shows are ineffective.<sup>173</sup> However, these same sailors are very positive about small group training, actors demonstrating different scenarios and how to respond.<sup>174</sup> Small group training and active participation programs can be used to advance negotiation skills in gender relationships.<sup>175</sup> Small group training can also be utilized to discuss why references to women as a collection of body parts such as "nice legs" or "great ass" do not show adulation but objectification, which dehumanizes and disempowers women.<sup>176</sup> When comments communicating hatred or subordination of females are tolerated, it sends a message that other forms of hatred and violence may also be tolerable.<sup>177</sup> A discussion centered on examining and challenging particular expressions of masculinity can achieve progress toward a more egalitarian view of gender roles.

Small group training in consent and sexual intimacy skills may also go a long way towards helping MSA students better understand gender relationships. For example, it may also be useful to explore male peer support and the pressure friends may exert on each other to have sexual relations with dating partners. Further inquiry into the differences in communication between men and women in dating relationships can also yield honest, constructive dialogue between students.

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Many MSA students rely on popular culture, movies, television, the Internet, and the like to fill in the missing experiential pieces. *Id.*

<sup>172</sup> Carmody, *supra* note 9, at 352.

<sup>173</sup> See Jennifer Hlad, *Sexual Assault Prevention, Response Training: What Works Best?*, STARS AND STRIPES (Jan. 24, 2014), <http://www.stripes.com/sexual-assault-prevention-response-training-what-works-best-1.263423>.

<sup>174</sup> See *id.*

<sup>175</sup> See Carmody, *supra* note 9, at 346.

<sup>176</sup> Research suggests that regular use of pornography "may condition men to hold adverse beliefs about women, increasing their likelihood of sexual assault. Franklin, Bouffard, & Pratt, *supra* note 145, at 1466. This is all the more problematic in an age which allows instant access to an excess amount of pornography and other media containing unhealthy expressions of masculinity and gender relationships.

<sup>177</sup> Martha Chamallas, *Women Warriors*, 20 BERKELEY J. GENDER L. & JUST. 338, 346 (2005) (arguing hyper-masculine military culture "essentially requires" use of sexual violence to denigrate women). The link between masculinity and misogyny has also been identified as the root cause of sexual violence by male athletes. See Michael A. Messner, *The Triad of Violence in Men's Sports*, in TRANSFORMING A RAPE CULTURE 25, 26 (Emilie Buchwald et al. eds., 2005).

A woman may perceive a male is interested in pursuing a committed relationship when he is being flirtatious and treating her kindly, while the man may be acting kind in order to persuade the woman to have a sexual relationship with him.<sup>178</sup> Furthermore, males in small peer groups can be more open to sharing any feelings of anger or humiliation that can arise when a woman refuses to submit to sexual advances.<sup>179</sup>

In small peer groups, students can also discuss recent law and policy changes related to gender roles which may cause resentment. For example, a thought-provoking discussion about the repeal of the combat exclusion<sup>180</sup> within a small group setting may provide future leaders with a safe environment in which to debate the practical implications of such policy decisions and to exchange ideas about the role they expect female military members to play in their future units.

In addition to creating a forum for MSA students to communicate about gender differences and relationships, an essential part of prevention training must also encourage exploration into “old school” perceptions of females in the military, and what is the value, if any, of applying uniform standards regardless of gender. Without an open authentic dialogue about gender differences, especially in the structured co-educational environment of the MSAs, these young men and women are left “ill equipped to make sense of their own feelings.”<sup>181</sup> How are they expected to lead other military members and set the standard if they have not yet grounded their own sense of what is appropriate behavior toward females in the military workplace?

## V. CONCLUSION

Although the men and women of the U.S. military deserve to take great pride in their commitment to selfless service and the defense of their nation, there is a dark side to the military culture which is in dire need of change. A military environment which tolerates military-on-military sexual misconduct betrays the basic, fundamental trust upon which the profession of arms depends. Future military officers, such as those who will graduate the MSAs and take an oath to uphold the rule of law, must also assume responsibility preventing the continuous

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<sup>178</sup> GAVIN DEBECKER, *THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE* 57 (1997) (defining “niceness” as a “strategy of social interaction” using social charm to achieve one’s social or sexual objectives).

<sup>179</sup> See BROOKS, *supra* note 114, at 8.

<sup>180</sup> On January 24, 2013, the Secretary of Defense rescinded the rule that restricted women from serving in combat units. Memorandum from Martin E. Dempsey & Leon E. Panetta on the Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule for Secretaries of the Military Dep’ts (Jan. 24, 2013), available at <http://www.defense.gov/news/WISRJointMemo.pdf>; see generally DAVID F. BURRELLI, CONG. RESEARCH SERV., R42075, *WOMEN IN COMBAT: ISSUES FOR CONGRESS* (May 9, 2013) (noting in the Summary that critics of the repeal of the ban “view such changes as potentially damaging to military readiness”).

<sup>181</sup> Carmody, *supra* note 9, at 345.

sexual victimization of their comrades-in-arms. To transform an institution and accomplish cultural change is no small feat. It will require MSA students to model for all those they will lead healthy attitudes and behaviors toward female military members. Today's MSA students must truly become the change they wish to see in the world.<sup>182</sup>

The current politicization of the military sexual assault problem by lawmakers and the media threatens to diminish the due process rights granted military members under the UCMJ. That cannot be a sustainable approach to prevention. The reactive procedural and substantive reforms which seek to increase prosecutions and punishments for sexual misconduct are short-sighted detours from a long-term solution. The most effective way to prevent further victimization of military members is to inclusively motivate military members to be vested in the fight to stop the sexual misconduct, which requires reexamining and reshaping institutional attitudes toward female military members.

How will the MSAs know if their student population has shifted from an environment that tolerates military-on-military sexual misconduct to one that views female military members as equals deserving of dignity and respect? As one general from the Pentagon astutely observed: "We'll know when . . . a sexist remark is treated with the same absolute disdain and visceral response as a racist slur . . . ."<sup>183</sup> When the most junior among the military's leadership fully appreciates the crucial role they play in transforming the military culture to one that disdains military-on-military sexual misconduct as a grave breach of trust, then the MSAs will have done their part. Together the MSAs' future leaders have the ability to bring the insider threat of sexual misconduct in the military to its long-awaited end.

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<sup>182</sup> This aphorism is widely attributed to Mahatma Gandhi, who fought for institutional change through nonviolence.

<sup>183</sup> Vanden Brook, *supra* note 170 (noting what Major General Patton, Director of DoD Sexual Assault Prevention and Response Office, views as the source of sexual assaults in the military).

