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## Rape, Consent, and the U.S. Military

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RAPE, CONSENT, AND THE U.S. MILITARY

by

Siris Fernandez  
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## ABSTRACT

### RAPE, CONSENT, AND THE U.S. MILITARY

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The military's sexual assault prevention and response program is unable to effectively eliminate or even minimize occurrences of sexual assault in the service. This program focuses primarily on the elimination of sexual assault through yearly mandatory education on the current policies and procedures that occur when a victim comes forward. The Sexual Assault Prevention and Response (SAPR) program is reactionary and unequipped to tackle a culture that continues to promote a climate in which sexual assault and harassment exist without fear of retaliation. This thesis explores these issues and provides suggestions for changes in future revisions of the SAPR program. First, the SAPR program relies heavily on the victim's actions while simultaneously creating a complex and largely ineffective response to the accusations from one service member to another. Second, affected service members risk being ostracized in their primary communities if they come forward with claims of assault. These primary communities vary from their shop, command, squadron, and base and can overlap. Third, consent can only be truly utilized in spaces where a person is able to have complete bodily autonomy over themselves. Consent, as seen through this lens, functions as one of the ways in which service members are set up for failure when they report sexual assault or harassment. In a military environment the voluntary limits of personal freedoms are accepted and understood by service members as a reasonable cost for the benefits received. However, those benefits are insufficient

when a service member finds themselves unable to report without also accepting the risk of losing everything gained under their contracted service.

This thesis is dedicated to strength and resilience  
of survivors and victims

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## CHAPTER I

### INTRODUCTION

Sexual assault plagues the military. Preventative measures, like the creation of detailed policies and yearly presentations, create a visible yet ineffective response. Impactful change is rare, only prompted by public scrutiny and outcry at the most violent instances of continued harm. Service members sign their lives away when they join the military, training to become part of the United States' measures for defending democracy. So why is sexual assault a common part of a service member's expectancy within the military? Why is retaliation among peers and superiors common after a report is made? Why, after everything a service member endures to make a report, can the results validate the act but not the intent? To address these questions, this thesis explores the background of these policies and their applications, provides information on methods of consent, and analyzes the problems faced by service members in the military, ultimately arguing that service members are unable to consent while they are under contract.

The background section of this thesis establishes a baseline of knowledge of the inner workings of sexual assault prevention and response within the military. Sexual harassment, specifically within the Navy, is also addressed as a way to further distinguish the institutional barriers that service members navigate after an assault. Ambient sexual harassment, the environmental impact of sexual assault and sexual harassment within the military community, is presented to bridge two separately defined aspects of military life. Finally, established military policies are discussed alongside current and proposed future policies that address some of the systemic and cultural problems highlighted through individual examples of a service member's experiences.



The information section of this thesis reviews the policies enacted and updated to accurately reflect the definition of consent which are also reflected in the Sexual Assault Prevention and Response (SAPR) directives. Consent defined legally varies between states and the federal government, and it also shapes and impacts how consent is communicated to others. Three forms of consent are introduced. First, affirmative consent, commonly communicated as “yes means yes,” is taught in college and other higher education spaces and promotes the agency and responsibility of all parties to hear and articulate a verbal yes. Second, critical consent displays the nuanced concepts of consent non-heterosexual spaces within the BDSM community. Taking into account psychological entanglements and social power dynamics, this unique perspective highlights the unintentional ways that consent still promotes gender norms and minimizes the importance of power dynamics within sexual practices. Finally, the practices of transformative justice and restorative justice emphasize the ways that healing from violence can be inhibited by institutions within the criminal justice system. Consent, with these varied methods of education and communication, emphasizes the influence of context, as well as how sexual assault harms and impacts entire communities.

In conclusion, the analysis section explains how the established prevention and response measures for sexual assault in the military are unable to effectively combat sexual assault because service members are unable to consent under contract. This claim is supported with examples from the Navy’s SAPR program, which was designed in a way that relies heavily on the victim’s willingness to accept risk and ostracization in order to seek justice. These restrictions that service members face are emphasized by the fact that consent can only be genuinely utilized in spaces where a person is not being pressured to act or not act by outside forces. Because of this, the cultural and institutional structures making up the military create an

environment in which consensual sexual practices are inaccessible due to the unique nature of a service member's employment within the military. This claim is supported articulated through a textual and discourse analysis methodology that interprets both the details of the materials themselves, as well as contextual knowledge emphasized by the public's response to the way the system has failed service members. Ultimately, this thesis argues for a reformation of SAPR educational materials, additional training that emphasizes personal agency and responsibility, and improved methods of response that prioritize healing of those who have been harmed.

## CHAPTER II

### BACKGROUND: UNDERSTANDING MILITARY SEXUAL HARASSMENT POLICIES

The current military SAPR program was enacted in 2004 as a responsive and preventative measure to establish and implement policy, procedures, and guidelines and to model programs, delegate authority, and assign responsibilities for the prevention of and response to sexual assault in the Department of Defense (DoD) (*DoD Directive 6495.01*). “Sexual assault,” as defined by the DoD directive, “is intentional sexual contact that is characterized by the use of force, threats, intimidation, or abuse of authority; this definition also includes instances when the victim does not or cannot consent. The term includes a broad category of sexual offenses, including the following specifically defined by the Uniform Code of Military Justice (UCMJ): rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts” (*ibid.*, 19). Unless otherwise specified, this thesis utilizes the DoD terminology for ease of readership and consistency across military branches.

In order to understand and critique the flaws in the military’s current definition of consent, it is imperative to contextualize the military’s established procedures for preventing and responding to sexual assault and sexual harassment, as well as reporting options and future policy changes. Specifically, this thesis posits that a service member is unable to consent within the current reporting structure for sexual assault, which is further underscored by the structures of military culture and their impact on how cases of sexual assault or harassment are handled. This background information establishes a comprehensive understanding of the programs that a service member is expected to navigate if they are the victim of sexual assault. To create rhetorical cohesiveness, the DoD Directive for SAPR defines a victim as a person, “who asserts

direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault” (*DoD Directive 6495.1* 19). By looking through the experiences of service members who have navigated these policies, a more realistic understanding emerges of how effective the prevention and response to sexual assault is in the military. In order to contextualize the background needed to understand these policies, five key areas will be explored. First, the establishment of and current operation of the SAPR program as well as its individual advocacy positions. Second, the command managed equal opportunity (CMEQ) program and its responsibility to investigating instances of sexual harassment. Third, the two reporting options, restricted and unrestricted, and their purposes and procedures. Fourth, the introduction of ambient sexual harassment, which will highlight the environmental influence of sexual harassment. Fifth, personal experiences of former military service member will be used as examples to see how written policy is implemented when a report is made. Finally, the background will also include newly introduced policy changes that have been or will be implemented into the preventative measures against sexual assault.

### *Sexual Assault Prevention and Response (SAPR)*

The Sexual Assault Prevention and Response Office (SAPRO) oversees the Department of Defense’s sexual assault policy. SAPRO works hand-in-hand with each branch of the military, as well as with the civilian community to develop prevention and response programs. As an authoritative oversight across departments, SAPRO unifies the prevention and response programs of the Army, Marine Corps, Navy, Air Force, and National Guard by establishing an appropriate level of challenge and common application across these service branches (*DoD Directive 6495.1* 8). According to the DoD SAPRO website, 54 initiatives have been enacted to

improve the prevention and response to sexual assault since 2012 (“Home | SAPR”). Working on policy and strategy in an oversight and advisory role, SAPRO’s policies are gender-responsive, culturally competent, and recovery-oriented and support those victimized. As the core of all military sexual assault prevention and response programs, this section reviews how SAPRO’s policies, strategies, and approaches have influenced the branches of military service.

In January 2005, the Department of Defense (DoD) presented SAPRO to Congress as a comprehensive means of distributing and maintaining policy on prevention and response to sexual assault and a single point of accountability for sexual assault reporting and policies within the DoD. This policy provided a foundation for the DoD to improve the prevention of sexual assault, significantly enhance support to victims, and increase reporting and accountability. Military Services collaborated to create the Task Force Report for Care of Victims of Sexual Assault to ensure this policy’s rapid and effective implementation. The Task Force provided instruction to more than 1,200 sexual assault response coordinators (SARCs), chaplains, lawyers, and law enforcement members to create a team of trained first responders. In addition, the Military Services has educated more than one million service members and established sexual assault program offices at all major military installations. The overarching elements of sexual assault prevention and response policy became permanent with the approval of the Sexual Assault Prevention and Response Program (*DoD Directive 6495.01*). SAPRO serves as the DoD's single point of authority for sexual assault policy and ensures that each service's programs comply with DoD policy. The mission of prevention and response quickly obtained approval of the Sexual Assault Prevention and Response Program Procedures (*DoD Instruction 6495.05*), making all elements of the Department's sexual assault policy permanent.

SAPRO's policy for mission-critical initiatives is established as a broad policy parameter of the DoD to assure compliance with military law. The policies established by SAPRO reinforce prevention efforts, strengthen victim protections, and establish Sexual Assault Prevention and Response Personnel procedures. The DoD's strategic approach to combatting sexual assault is guided by five critical focus areas: prevention, victim assistance, investigation, accountability, and assessment ("Home | SAPR"). These focus areas work to foster a culture that prevents sexual assault, delivers consistent and high-quality care, develops special investigations and prosecutors through trauma-informed training, holds offenders appropriately accountable through the military justice system, and assesses the state of the problem and progress of the success of the program (ibid). While SAPRO is the source of policy and regulation, each branch of service has its own hierarchical system that maintains the prevention and response for its service members.

The activities of individual branches are standardized by the SAPRO program and one method of maintaining accountability is through the DoD's Annual Report on Sexual Assault in the Military. The report provides an update on efforts to counter sexual assault and harassment in the military, including sexual assault reporting information and updates on efforts to prevent and respond to sexual assault each fiscal year (October 1 to September 30). According to the data found in the FY 2020 report, the number of sexual assaults reported by service members for incidents that occurred during military service increased by 1% (54 reports) between 2019 and 2020. The military services received 6,290 sexual assault reports in 2020, an increase over the 6,236 reported in 2019 (*DoD Annual Report on Sexual Assault in the Military, FY 2020 22*). Of the women who reported penetrative sexual assault, 59% were assaulted by someone of a higher rank, and 24% were assaulted by someone in their chain of command. In 2020, the DoD articulated a mission to take action in the following areas: sexual assault reporting, unit climate,

sexual assault prevention, and victim assistance (ibid., 33). This yearly review summarizes the information across branches, while at the same time establishing an internal system of accountability (see appendix B). Because this information is collected internally, it is prudent to note that the data collected about the military service members reporting sexual assault cannot be compared with data collected by a non-government system which could refute or confirm the numbers reported by the DoD.

To further understand how these systems operate, it is helpful to consider the Navy's Sexual Assault Prevention and Response Program (SAPR). SAPR is the Navy's implementation of SAPRO policies and guidelines, specifically tailored for the Navy and designed to operate within the Navy's day-to-day operations onshore and at sea. SAPR's mission is to prevent and respond to sexual assault, eliminating it from the ranks through a balance of focused education, comprehensive response, compassionate advocacy, and just adjudication to promote professionalism, respect, and trust while preserving Navy mission readiness (“Home | SAPR”). The program's operating procedures and areas of accountability enhance the safety and well-being of all persons by focusing on the victim and what is necessary and appropriate to support recovery for a service member to be fully mission capable. SAPR, according to its mission statement, provides gender-responsive, culturally competent, and recovery-oriented care (*DoD Directive 6495.01* 1). Similar to the procedures and policies for SAPRO, SAPR is responsible for handling reporting, education, and advocacy training within the Navy.

During boot camp, a Navy service member's introduction to the SAPR program consists of four hours of education reviewing positions within the program, consent, reviews of policies, and the most rudimentary information of the types of reporting options and definitions of sexual assault and sexual harassment. As with every course during boot camp, a recruit assimilates into

military culture, learning to understand what rules apply to their new career and life. Within contracted service, a Navy service member, active duty or reservist, must attend an annual SAPR training session and other mandatory general military training (GMT) to refresh the information first taught within boot camp. A standard military enlistment contract requires a set amount of years as active duty and an average of four years of inactive reserve service. In contrast, a typical enlistment contract for the Reserves or National Guard requires an average of six years of part-time service. Throughout a service member's time in the military, the yearly trainings are given by specifically qualified individuals. Each Command's SAPR Victim Advocate reviews a standardized training guide provided by the SAPR program, highlighting how to make a report, differentiating between restricted and unrestricted reports, and discussing sexual assault and sexual harassment.

Service members can also work for the SAPR program as Sexual Assault Response Coordinators (SARCs) and SAPR Victim Advocates (VAs). A SARC ensures that effective victim response is available at all times, manages and supports all cases of sexual assault, oversees and trains SAPR VAs, trains key SAPR personnel, and supports prevention and awareness training at each command. SARCs coordinate sexual assault victim care and sexual assault response when a sexual assault is reported. They supervise SAPR VAs but may be called on to perform victim advocacy duties. Similarly, the SAPR Administrative Victim Advocate (AVA) serves as the liaison between the victim and the command's executive level. The AVA has direct access to the commanding officer. They are responsible for promoting responsive command management of alleged assaults and ensuring that the commanding officer communicates victims' concerns and needs. Both SARCs and AVAs work with the victim to



communicate to the command or other authoritative figures. They advocate for the victim and ideally create open communication channels between all parties.

Victim Advocates (VAs) in the SAPR program provide non-clinical crisis intervention and ongoing support, as well as referrals for adult sexual assault victims. SAPR VAs are trained civilian employees or unit volunteers committed to providing services that support and foster independent decision-making so that victims are empowered to find their own path to healing. The responsibilities of a VA are to respond immediately to victims of sexual assault, provide information and explain reporting options, help victims work through barriers, accompany victims during medical, investigative, and legal procedures, and make referrals for military and community assistance (*DoD Directive 6495.01* 18). They are the first responders and usually introduce the SAPR Program to victims. The Unit VA may be an active-duty service member or a civilian. For military volunteers, the role of VA is a collateral duty—defined by the Navy as a responsibility designed to improve an overall process (*ibid*). When acting as a VA, they report directly to the installation’s Sexual Assault Response Coordinators (SARC) when reporting disclosures of sexual assault and do not report to an immediate superior or the commanding officer. While all of these roles can take active participation within victims reporting, the SAPR VA is the immediate point of contact for any service member within their Unit.

#### *Command Managed Equal Opportunity (CMEO)*

While SAPR assists service members who are sexually assaulted in reporting and receiving resources, SAPR does not assist in cases of sexual harassment. Instead, the Command Managed Equal Opportunity (CMEO) is the management tool utilized by commanders to ensure equal opportunity, prevent unprofessional behavior, and provide an environment free from

unlawful discrimination, harassment, and sexual harassment. Sexual harassment is defined under Article 120 of the Uniform Code of Military Justice as bullying or coercion of a sexual nature and/or the unwelcome or inappropriate promise of rewards in exchange for sexual favors (UCMJ). A harasser may be the victim's supervisor, a supervisor in another area, a co-worker, a client, or customer. Harassers or victims may be of any gender (ibid). Commanders manage the complaint process; the chain of command is the primary and preferred channel for identifying and correcting discriminatory practices. The objective of the Navy's CMEO program is to promote an environment free from personal, social, or institutional barriers that prevent service members from rising to the highest level of responsibility possible. Leadership, defined here as someone of a higher rank or position of responsibility, is called upon to strive for the creation of an inclusive climate where persons feel free to raise concerns about harassment or prohibited discrimination and are confident that those concerns will be addressed with safeguards against retaliation.

The CMEO program is a tool for the prevention of unprofessional behavior. Leadership has the authority and responsibility to ensure that the Navy Core Values of honor, courage, and commitment are integrated into daily business through policy, communication, training, education, enforcement, and assessment. The Secretary of the Navy's instruction on sexual harassment (SECNAVINST 5300.26E) establishes that all commands must be staffed with a minimum of one CMEO program manager. The appointed CMEO processes and resolves unlawful discrimination and sexual harassment complaints and ensures that human relations and equal opportunity matters are taken seriously and acted upon as necessary (*SECNAV INSTRUCTION 5300.26E 2*). Appointed CMEO Managers assist Commanders in all Equal Opportunity/Sexual Harassment (EO/SH) matters, including functioning as the single point of

contact for EO/SH issues like discrimination, harassment, and sexual harassment. Initiating and managing the Informal Resolution System (IRS) and Formal Complaint Process, the CMEO program manager serves as the coordinator for the command climate assessment. These specific processes and instructional guidelines supply insight into what is required for a CMEO to report and attempt to resolve cases of reported sexual harassment. The CMEO works as the investigator and the problem solver, addressing discrimination and sexual harassment complaints within the workplace.

While the SARC and SAPR VA representatives assist those assaulted or raped, the CMEO's role is to work with service members who believe they have been subjected to harassment or discrimination in determining available resolution options. They process all harassment and denied discrimination reports utilizing the NAVPERS 5354/2 equal opportunity forms and procedures established in the naval policy; provide command statistics regarding discrimination, harassment (including discriminatory harassment, sexual harassment, hazing, and bullying) and fraternization within the command; organize a data analysis team to identify trends and risk factors for destructive behaviors; and work to track, monitor, report and provide status updates on harassment and prohibited discrimination complaints to the respective Command Climate Assessment (CCS).

Because of the separation of how sexual assault and harassment cases are reported, perpetrators can continue to act unseen. They aren't being held accountable, further encouraging their actions which results in increased acts of violence and aggression (Schell et al. 2). By categorizing acts differently, limits are created for the person making the report and the structure maintaining order. Sexual harassment, as previously defined, is a wide range of acts that can be done over time and can vary in severity. This variation does not imply that some acts are less

harmful but rather that there that some acts will likely be more impactful to a victim than others. By not filing all acts under the same location within a unit, there is a limit to recognition of the progression a service member endures within sexual harassment and sexual assault.

In order to illuminate the dangers of this uncoordinated offices and separate reporting procedures, consider two incidences of sexual harassment that escalated to sexual assault at Fort Hood Army Base. Specialist Vanessa Guillén, last seen in her squadron's headquarters parking lot at Fort Hood, was reported missing on April 23, 2020. The following day, on April 24, the U.S. Army Criminal Investigation Command posted a news release asking for the public's help finding her (Diaz et al.). Thousands of soldiers searched buildings, barracks, fields, training areas, lakes, and trails at Fort Hood. Human remains were found on June 30 near Leon River in Bell County, Texas and were confirmed on July 3<sup>rd</sup> to be Specialist Guillén. Prosecutors announced that Specialist Guillén was killed by another soldier who tried to dispose of her remains. The soldier was identified as U.S. Army Specialist Aaron Robinson.

In the case of Specialist Vanessa Guillén, her violent end was magnified by public outrage at the response of the Army, bolstered by the continued efforts of the Latinx community and female service members who advocated for more impactful changes to a system that failed to protect Guillén. The murder of Guillén by Robinson and his girlfriend, Cecily Anne Aguilar, was publicly scrutinized due to the length of time it took to notify the family of her missing status and the problems Guillén was facing with sexual harassment (ibid). In the wake of her death, family members spoke about their conversations with Guillén and her fear of retaliation that kept her from reporting the sexual harassment that she experienced numerous times.

Just months after Guellén's murder, in August 2020, Sgt. Elder N. Fernandes was found hanging from a tree about 30 miles from Fort Hood. Ten days prior, he accused a superior of

sexual harassment (Mervosh and Ismay). In both cases, sexual harassment and fear of retaliation played a role in the final moments of their lives. These experiences are especially impactful because of the loss of life; still, many other cases remain unadjudicated. In the cases of Fernandes and Guillén, sexual harassment foreshadowed sexual assault. Currently sexual harassment and sexual assault cases are reported separately; because of this, the reporting options for sexual assault and harassment will be analyzed as both of these cases display a possibility for preventative measures through restructured reporting that focus on stopping harassment before it escalates to assault.

### *Restricted & Unrestricted Reporting*

During a Navy service member's yearly SAPR training, the differences between filing a restricted or an unrestricted report are emphasized. Restricted reporting allows sexual assault victims to confidentially disclose the assault to specified individuals and to receive healthcare treatment—including emergency care, counseling, and the assignment of a SARC and SAPR VA— without triggering an official investigation. The victim's report to healthcare personnel, SARCs, or SAPR VAs is not reported to law enforcement or the victim's command (which would initiate the official investigative process) unless the victim consents or there is an established exception in accordance to applied federal or state laws. A service member can only speak to a finite list of people if they wish to keep a report restricted, including the SARC, SAPR VAs, their legal counsel, and Navy Medicine. In the case of restricted reporting, a healthcare provider is any person authorized to provide direct patient care in Medical or Dental, DOD Safe Helpline Staff, or a military chaplain. SAPR VAs and SARCs will also encourage the victim to consider talking to a close friend, while simultaneously warning that the report can potentially

become unrestricted if that person tells others. However, if a sexual assault is disclosed to someone other than the authorized confidential sources, the Command will be notified, thus transforming the report to from restricted to unrestricted which triggers a law enforcement investigation.

When a service member chooses to proceed with a restricted report, they are advised by a SAPR VA on the benefits and limitations of restricted reporting. The reporting selection is noted on a Victim Reporting Preference Statement. The victim is offered ongoing advocacy, support, and both emotional and physical medical care. Forensic medical evidence may be collected and stored for up to twelve months; restricted cases are closed after twelve months. A victim may change their report to an unrestricted report at any time. SAPRs consider the benefits of restricted reporting as giving time and space for the victim to make informed decisions, managing the control of the release of personal information, developing increased trust from the victim in the “system,” granting the victim agency as they decide when to report, and affording the ability to select which medical care, support, and advocacy services they receive (SAPR). Restricted reporting creates a barrier of protection for the victim while also establishing a fragile circle of knowing that can be easily broken through informal or ill-advised communication. Essentially, restricted reporting requires a person who has been through a traumatic experience to navigate a complex system that should protect them but instead infringes on the actions of others, taking the choice of maintaining a restricted report away from the victim.

Unrestricted reporting allows a person who is sexually assaulted to access healthcare and counseling and to request an official investigation of the allegation using existing reporting channels, including Base Security, Naval Criminal Investigative Service (NCIS), Command, Sexual Assault Response Coordinator (SARC), Ombudsman, Medical, Local Law Enforcement,

Chaplain, or Clinical Counselor. When a sexual assault is reported through unrestricted reporting, SAPR VAs support the victim by offering information, victim advocacy, medical care, support groups, counseling, and accompaniment to legal appointments. The Command is notified to activate safety actions (if warranted) or to temporarily move the victim and/or alleged offender. An unrestricted report can also start law enforcement notifications or investigations if deemed worthy of reporting by the notified commander. The victim is also connected with a local Sexual Assault Nurse Examiner (SANE) who can conduct a sexual assault forensic exam (SAFE). An unrestricted report is “unrestricted” because actions can be taken without the restriction of being cautious of the reporting being made public. An unrestricted report can also expose the victim to retaliation and ostracization if the chain of command is notified of the report.

As previously noted, the Navy handles the reports and the investigations of sexual harassment and sexual assault separately, with different protocols for navigating the reporting process and the data collection of each report. Despite sexual assault and harassment functioning as different forms of violence, the separation of these reporting processes limits the protection of a service member who is being sexually harassed from becoming the victim of sexual assault. Similarly, the separation of reporting sexual harassment and assault can prevent a person from being reprimanded for their behavior long before the escalation of action to the point of crisis. The relationship between sexual assault and harassment can further explain the correlation of increased acts of aggression through the impact of sexual assault and harassment on the military environment.

### *Ambient Sexual Harassment*

Service members who are sexually harassed are at significantly greater risk of sexual assault (*DoD Annual Report on Sexual Assault in the Military, FY 2020*). Directed by SAPRO, the RAND Military Workplace Study reviewed the relationship between sexual assault and sexual harassment in the U.S. Military by providing a new and independent evaluation of sexual assault, sexual harassment, and gender discrimination, by redesigning previous DoD surveys (Schell et al. ix). This report identifies how the sexual harassment of others in a service member's work environment affects their own risk of being sexually assaulted. The risk is calculated by the resulting amount of ambient sexual harassment present in the workplace, which enhances the prediction of sexual assault by including additional risk factors and environmental changes. Ambient sexual harassment refers to the percentage of colleagues in the surveyed persons workplace who are sexually harassed. This is done by not asking about an individual's own experiences but instead the instances of sexual harassment they'd seen happen to others (*ibid.*, x). Within their study, RAND states that the observed relationship between sexual harassment and sexual assault in the military can be explained through the re-evaluation of previously obtained data on sexual harassment within the military (*ibid.*).

First, they establish a definition overlap (see appendix A). Under DoD Instruction 1350.2, the definition of sexual harassment includes "physical conduct of a sexual nature" that is so severe or pervasive that "a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive" (2). Congruently, DoD Directive 6495.01 summarizes the UCMJ definition of sexual assault as "intentional sexual contact characterized by the use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent"



(19). In other words, the same incident can be categorized as both sexual harassment and sexual assault; realistically, both definitions could be easily correlated.

Second, they explain that the individual characteristics that increase risk for sexual harassment victimization may simultaneously increase the risk for sexual assault. These risk factors include being of a younger age, having a lower pay grade, and being unmarried. The populations at higher risk for being targeted for both sexual harassment and sexual assault correlate because of the age that a service member enters into the military. Young people, ages 18-34, are the highest risk years for rape and sexual assault within the military (*The Criminal Justice System: Statistics / RAINN*). The relationship between sexual harassment and sexual assault can be explained, in part, by these types of factors that increase service members' risk of both harassment and assault.

Third, they illuminate how sexual harassment and sexual assault are manifestations of an environment. These environmental factors include risk factors shared by coworkers, such as command climate, unit group dynamics, or local cultural norms (Schell et al. 9). In these environments, employees may come to a shared expectation that sexual harassment is tolerated and even expected. The DoD *2014–2016 Sexual Assault Prevention Strategy* suggests that a “unit or command where women are objectified or demeaned or inappropriate comments about race or sexual orientation go uncorrected” may create the impression that service members can “get away with other acts against women or men, including sexual assault” (6). Risk factors, like weak oversight or leadership, breakdowns in good order and discipline, and a permissive attitude toward demeaning or abusive behavior, can add to the environmental strain within the military community. Over time, harassers learn that those in their professional environment

accept their behaviors, reducing their inhibition and allowing them to engage in more-extreme behaviors that eventually can escalate to sexual assault.

RAND, while searching for an environmental explanation of the relationship between sexual harassment and sexual assault risk, pursued an analytic strategy designed to control the first and second explanation of increased instances of sexual harassment. Instead, the strategy allowed the report to determine to what degree the relationship between sexual harassment and sexual assault persists after accounting for definitional overlap and shared risk factors for the two events. They posit that the answer is the relationship between ambient sexual harassment and sexual assault. Ambient sexual harassment was first defined and studied in civilian workgroups (Schell et al. 3). This approach eliminates inflation of the relationship when a single workplace event counts as both sexual harassment and sexual assault. Within the military, ambient sexual harassment is used to reassess previously collected data and to avoid conflating an individual service member's ambient sexual harassment exposure with their personal sexual harassment experiences (*ibid.*, 8). The designation of ambient sexual harassment eliminated the correlation caused by shared individual risk factors while ensuring that an individual's risk factors contribute to only one estimate (sexual harassment) but not the other (sexual assault). The separation was necessary because sexual assault and sexual harassment are highly correlated at an individual level, as many incidents of sexual harassment also qualify as sexual assault.

The rate of sexual harassment was also divided and identified through three levels of a service member's environment: unit (based on each member's assigned unit identification code), installation (based on the postal code of the duty unit as proxy), and major command (based on the major command code for service members in the Army, Navy, and Air Force, or the monitored command code for service members in the Marine Corps) (*ibid.*, 9). The influence of

ambient sexual assault was observed by comparing how a service members' risk of sexual assault would be expected to change between an environment characterized by a typically low rate of ambient sexual harassment to an environment with a generally high rate and how these associations vary by service branch. While risk factors (e.g., date of birth, race/ethnicity, marital status, lower pay grade) are relatively good predictors of sexual assault risk, there is still a fair amount of variance in an individual's personal risk. The additional clarity of assessing ambient sexual harassment benefited sexual assault risk prediction models by including additional risk factors, including other features of service members' work environments. The RAND study found that the rates of ambient sexual harassment varied substantially at the units, installations, and significant commands in which military members serve. In this instance, only 7% of servicewomen were sexually harassed; the rate was six times higher in other comparable settings. Ambient sexual harassment of men spanned from 2% to 17%, an eightfold difference in risk (Schell et al. 14). Ambient sexual harassment against women and men was strongly associated with the risk of sexual assault, even after controlling for many other sexual assault risk factors. Women service members' risk of sexual assault increased by more than a factor of 1.5 when they worked in environments with above-average rates of ambient sexual harassment against women or men, compared with the sexual assault risk for women working where the rates were below the DoD average. Men's risk of sexual assault increased by a factor of 1.8 (ibid., 17).

The association between ambient sexual harassment and sexual assault risk differed for women and men in each branch of service. Women serving in the Navy had, on average, the highest correlation between ambient sexual harassment and sexual assault. A significant correlation was found only in the Navy for men. Navy men serving in environments with above-average ambient sexual harassment rates had double the risk of being sexually assaulted than

Navy men working where the rates were below average. This report's unique contribution in explaining sexual assault risk compared to the currently accepted models of sexual assault risk slightly improved the model's prediction of women's sexual assault risk and offered substantial improvements in the prediction of men's sexual assault risk. Understanding ambient sexual assault calls for an expanded environmental perspective on how sexual assault and harassment unintentionally correlate and can benefit from the increased study of influence and their relation to the prediction of future behavior of service members.

### *Enduring a Report*

Despite the mandatory yearly SAPR training, there are minimal guarantees after a report of sexual assault or harassment is made, and the reporting process is inconsistent. In a September 30, 2021, episode of the Council of Foreign Relations *Why It Matters* podcast, host Gabriella Sierra discusses "Sexual Assault in the U.S. Military." Sierra reviews the controversial military justice system and the current policy that gives commanders authority over the prosecution, often allowing perpetrators to evade accountability. Episode guests, Heather Sexton (retired Captain of the Missouri Army National Guard), Don Christensen (retired Colonel of the U.S. Air Force), and Meghann Myers (Pentagon Bureau Chief), speak on the consequences experienced by survivors, as well as how the armed services' high number of sexual assault cases undermines military readiness.

At Sierra's prompting, Myers walks listeners through how a sexual assault case might be handled. First, she reviews the difference between unrestricted and restricted reports. Myers states that a restricted report is "basically for data collection purposes" and does not result in an investigation, unlike an unrestricted report. An unrestricted report, she continues, prompts a local

investigation unit to do a criminal investigation, a practice that would look familiar to a civilian. “The big difference in the military,” Myers states, “is rather than the case being referred to a prosecutor in a district attorney's office, the commander of that unit gets to decide whether charges are pressed” (Sierra). The commander of the unit gets to decide if the report goes to trial, instead of an independent and unbiased judge and a jury trial. Within the military justice system, the commander has the authority to overturn the verdict or the sentencing of a trial if they feel it is not warranted.

In the present military justice system, the commander has the ultimate power in deciding the outcome of an investigation. Myers explains that the investigation and prosecution all occur within the military community. Problematically, a victim’s private life and sexual history are reviewed and investigated. The current system centers the commander’s opinion in the investigation, affording them the power to pursue or overturn a verdict in sentencing; they can see and view everything within the case, forcing the victim to not only relive a traumatic experience but also disclose personal information. The DoD Annual Report on Sexual Assault in the Military for FY 2016 estimates that 76.1% of victims did not report their experiences of sexual assault. Of those who did, 64% of service members say they were retaliated against after reporting (33). In that report, one in three women who reported sexual assault was forced out of the military within a year of reporting. Over 20% of reporters had a less than fully honorable discharge, demonstrating that retaliation has longstanding career consequences ranging from status at discharge to the withholding promotions and social retaliation.

The Military Justice system is rooted in a tradition of maintaining order within ranks and through the command hierarchy. As such, the commander, who has the ultimate authority, is accountable for the good order and discipline of the unit. They are the first to be praised when

everything is running smoothly but can easily be blamed for not having control over the actions of a few (Fleming 525). Because of this, there is a reasonable temptation to underreport or to try and handle things internally without blemishing the unit and the commander. This conflict of interest is further complicated when there is a rape and the person in charge, who likely has no extensive training beyond the military SAPR program, must decide whether or not there will be a trial. Many who advocate for the current system believe that taking cases out of the chain of command undermines the commander's authority and compromises the core structures of military life. With low trust and satisfaction in the system, less than half of female survivors feel well supported by their chain of command (*DoD Annual Report on Sexual Assault, FY 2018* 21).

As reported on the *Why it Matters* podcast, retired Captain Heather Sexton's own experience illuminates the ongoing conversation of sexual assault within the military. Sexton, a former Captain in the Missouri Army National Guard, speaks about her assault during the preparation for a big event in Utah in 2017. The female barracks, she describes, were at the end of a long, dark sidewalk that she did not feel comfortable walking along on her own. She was the highest-ranking person there and the only female in her unit. To protect herself, Sexton asked one of her team members to walk her back to the barracks, which she admits felt a little embarrassing but necessary. Sexton was sexually assaulted by the team member that she had asked to walk with her. She reported the assault to a chaplain and the victim advocate the following day. She soon discovered that, because she was presently located in Utah, the state laws did not correlate to Missouri's laws, the state out of which her National Guard unit was based. She was removed from her location in Utah and instructed to redo her report in Missouri. The atmosphere during the second report, Sexton describes, was worse because the report she had made was now public knowledge to everyone with whom she and her perpetrator worked. In

response to Sexton's report, unnamed leadership immediately transferred the perpetrator to a new unit, the same unit to which she was to report the assault.

In a small unit working with everyone aware of what happened, Sexton describes her difficult experience of encountering both those who supported her as well as those who did not. The reporting process took two years before the outcome was reached. An investigative team validated her claim of sexual assault but also said it could not determine the perpetrator's intent (Sierra). They wrote, "the Investigative Team finds, by a preponderance of the evidence, that on or about 29 April 2017, there was physical contact between the reported perpetrator and victim involving the reported perpetrator grabbing the victim's groin and breast and stomach," in the report prepared by the Army's Office of Complex Investigations ("Editorial"). "However, the Investigative Team found insufficient evidence to determine the reported perpetrator's intent of the physical contact. Thus, we were unable to establish that intentional sexual contact occurred" (Sierra).

Sexton recounts that this verdict was given to her in the middle of the day without any warning. The results of a lengthy two-year investigation were accompanied by a "letter of concern" from Brigadier General David Boyle, the Joint Task Force Commander of the Missouri National Guard, reprimanding her for not being more professional on that night and violating the Guard's alcohol and "fraternization" policies. The verdict was received in January, and Sexton left the National Guard by April. *Why It Matters* reached out to the Missouri Army National Guard, and they replied that they were prohibited from commenting on personnel matters or investigations. Sexton's experience demonstrates the mistreatment of service members during sexual assault reporting and investigation procedures, as well as how they profoundly affect a career. This example of an unsatisfying acknowledgement of the act while not being able to

establish the accused intent displays an unfortunate possibility of reporting. Within the military, the act of reporting, even with the risk that a service member endures, the justice system is only able to take action against the accused if the verdict has been reached and the person found guilty. Restricted and unrestricted reports are only the beginning of the process for victims who have been assaulted in the military. By handling reporting internally, many cases are kept from the public eye, which is fueled by the desire to keep up an appearance of strength and assurance designed to keep the public's faith. Unfortunately, Sexton's experience represents how reporting under the current system, where few options are available to victims of sexual assault who follow protocol, leaves many service members without justice.

### *Resulting Changes in Policy*

Since 2006, numerous changes have been made to the law and procedure governing rape and sexual assault prosecutions in the military (see appendix C). These changes are intended to assist military prosecutors to obtain a higher rate of conviction, gradually adjusting to better capture the complexities of cases for reported sexual assault. Introduced to the Senate in April 2021, the Military Justice Improvement and Increasing Prevention Act is designed to reform the charges and convening of court-martial for certain offenses under the UCMJ and to increase the prevention of sexual assaults and other crimes in the military. The bill prioritizes how the military prosecutes serious crimes by moving the decision to prosecute from the chain of command to independent, trained, professional military prosecutors; additionally, it provides several new prison prevention provisions enacted through better training for commanders and increased physical security measures to ensure that a commander still can provide strong leadership and ensure a thriving command climate (S. 1520). Led by U.S. Senator Kirsten



Gillibrand of New York, this proposal attempts to eradicate sexual assault from the military. As of February 2022, this bill is still being debated within the Senate. Likewise, in the House, the Vanessa Guillén Military Justice Improvement and Increasing Prevention Act was introduced in June 2021 and was incorporated into the National Defense Authorization Act by President Biden in December 2021.

Instances with violent ends, like those resulting in the deaths of Guillén and Fernandes, have increased public visibility, and as such call attention to the ways that sexual harassment directly influences increased predictions of likelihood for sexual assault and violence. In December 2020, after an Army internal investigation into the Fort Hood base, fourteen officials were relieved or suspended from their positions. The investigation found “major flaws” at Fort Hood and specifically noted a command climate “that was permissive of sexual harassment and sexual assault,” according to Ryan D. McCarthy, the Secretary of the Army (Mervosh and Ismay). The final verdict determined that the issues at Fort Hood were directly related to leadership failures in creating a climate of respect and dignity for every soldier. The leadership, within this investigation, was held directly responsible for the actions of everyone within the unit (Castro et al. 54).

Fort Hood, the nation’s third-largest Army base, was at the center of controversy amidst a rash of homicides, suicides, and violent crimes in 2020. Further conveying the depths of the impact of this investigation, an internal investigative report found that the Army’s two decades of constant war since the Sept. 11 attacks created a climate in which military readiness was valued over all other responsibilities, which has come at the detriment of integrity and respect between soldiers (Mervosh and Ismay). This has created a culture where “good order and discipline” and hierarchy rule, making it challenging to advocate for accountability. This lack of

decorum within military culture makes it extremely hard for women to seek and obtain justice for the ongoing problems of harassment and assault. The expectation is that military women must be tough enough to face harassment. An act of speaking out is met with blame for entering a male-dominated workplace.

The removal of leadership after the adjudication of the Fort Hood cases displays a shift in response to sexual assault and harassment, possibly setting a tone for future investigations. The removal of leadership within the Army aligns with a recommendation made to combat a continuous culture of sexual assault. Respect for leadership within the military is instilled from the beginning of a service member's career when they are at the very bottom of the power hierarchy. Because of this, the removal of power from the commander at the head of the chain of command is a decision that has been previously scrutinized. Taking away any power held by the authority was feared to be a display of weakness or an attempt at undermining the person in that position. In order to function within military culture, the hierarchy operates with rigidity and inflexibility even when the current structure may be causing harm (Fleming 519). Prior to the newly proposed laws, the actions of allies of the United States like Australia, Germany, Canada, Great Britain, and Israel contradicted this claim by prosecuting major crimes outside the chain of command with professional military prosecutors (Seitz-Wald).

Under this new change in law, commanders no longer are involved in military sexual harassment or assault investigations. Instead, the decision to prosecute sexual assault and sexual harassment is made outside the reporting service members' chains of command, and they are offered protection against retaliation. The Vanessa Guillén Military Justice Improvement and Increasing Prevention Act (VGMJIIPA) also criminalizes sexual harassment within the code of the UCMJ, a decision that is intended to add to the severity of response to sexual harassment.

Finally, these changes also establish annual reporting on retaliation to Congress, similar to the annual reporting done for reports made for sexual assault. The potential benefits that these modifications in policy possess are unfortunately at the cost of the loss of service members who had suffered through the system. Instead of working to prevent sexual assault by taking on the military institution as is, impactful change requires more than responding to events when they can no longer be ignored but also prioritizing the smaller cases that end quietly when a person stops reporting or leaves the military entirely.

Structural reform proposed in the Vanessa Guillén Military Justice Improvement and Increasing Prevention Act has the highest potential impact for fixing the military justice system, improving the culture and climate within the military, and ensuring that service members receive access to justice within a system they have sworn to protect. The new changes enhance the victims' rights by giving them the right to be notified of the actions taken and punishments administered, as well as the right to be informed of any plea agreement or separation instead of a trial agreement (H.R. 4104 12). As of February 2022, the reforms written within the have not yet been applied to the UCMJ. Although the bill was signed in December of 2021, the established start time written within H.R. 8270 is set to take place on the first day of the first month, beginning after the two years following the enactment of this act (16).

In summary, the current policies to prevent and respond to sexual assault in the military all stem from the SAPRO, which oversees the sexual assault policy. Each branch of the military has its own program that is best suited to work with the needs of service members. Specifically, the Navy uses the SAPR program to control the education and advocacy of victims within the unit. While the language of policy and the declaration of mission statements create a description of the ideal goal of eradicating sexual assault, the reality is that many who endure the process of

reporting sexual assault or harassment are not supported. The prevention and response of sexual assault not only relies on structural changes but also cultural change. To understand the complexities of writing and enacting policies against sexual assault and how the military's own policies enforce service members, it is critical to understand consent within sexual practices and its application to the military environment.

## CHAPTER III

### INFORMATION: CONSENT

Consent is the ownership and advocacy of boundaries cultivated through bodily autonomy. To understand how consent applies to the military and sexual assault against service members, this section reviews consent in three different contexts. First, the concept of affirmative consent will be introduced, addressing the implications of higher education teaching "yes means yes" as a policy. This introduction is followed by a discussion of queer and BDSM consent practices, utilizing a non-heterosexual lens to acknowledge enactments of power dynamics. Finally, an application of these consent theories is offered through an exploration of transformative and restorative justice. The use of different pedagogical applications of consent within structural institutions that advocate for the individual compared to communities where the individual is part of a larger community highlights how consent varies within context. Since there is no unified approach to consent, these three examples demonstrate the different forms and lessons of consent and summarize the limitations of consent that are often ignored but can be overcome through self-reflection and self-awareness. By reviewing consent in various practices, both institutionally structured and not, the position of a service member under contract can be more accurately assessed.

The legal definition of consent is employed when determining whether an act is legally considered a crime. In order to demonstrate the lack of consistent definition in consent, three examples of consent definitions include those used by The Rape, Abuse & Incest National Network (RAINN), Planned Parenthood, and the UCMJ. RAINN defines consent as an agreement between participants to engage in sexual activity that should be clearly and freely communicated ("Legal Role of Consent | RAINN"). Similarly, Planned Parenthood defines

sexual consent as an agreement to participate in sexual activity. Consent and personal boundaries go hand in hand, checking in before, during, and after a sexual act to ensure that communication is done continually and honestly (Planned Parenthood). Finally, the Uniformed Code of Military Justice (UCMJ) defines consent under Article 120 as “a freely given agreement to the conduct at issue by a competent person. Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions” (UCMJ). Each of these definitions creates a different legal boundary between what is considered consensual and what is not. With competing definitions of consent, how can a service member be expected to have a clear understanding of how to define their own sexual experiences?

Similarly, rape, sexual assault, and sexual abuse have different legal definitions. Sexual contact without consent—including but not limited to vaginal or anal penetration, oral sex, and genital touching—is a form of violence that can be defined as rape, sexual assault, or sexual abuse. In the United States, the legal definitions of rape and sexual assault vary (Planned Parenthood). While some states use these terms interchangeably, others define them distinctly. Both RAINN and Planned Parenthood repeatedly outline the ways that legal definitions can change, going so far as to list each state’s legal definition for ease of access.

The interpretation and application of consent is not only limited to legal definitions. Three methods of consent: the liberal notion of consent, affirmative consent, and critical consent all vary in their explanation of and education of consent. Understanding these varied contexts, the definitions of teaching and practicing consent, and the critiques of each model broaden the understanding of what invoking consent means and the centrality of context, allowing

exploration of questions like: why are there multiple definitions for consent; how do these definitions help or hinder a person from understanding what happened to them; what kind of situation forces a person to give up consent; how do power dynamics impact the ability to ask for and give consent; how can a more nuanced understanding of consent impact the military's sexual assault prevention and response program and its ability to communicate consent to service members?

### *Consent as Mainstream Legal Standard*

Consent as a legal standard establishes what a governing authority is able to acknowledge when defining sexual assault and sexual harassment. An individual living in a state may not be aware of the difference in definitions until they are forced to interact with laws defining, for example, the age of consent, which varies depending on the state (e.g., in California, the age of consent is 18 and in Alabama, the age of consent is 16) (“United States Age of Consent”). Furthermore, the minimum age of the victim, the age below which an individual cannot consent to sexual intercourse under any circumstances, also varies from state to state (e.g., in Louisiana, the age is 13 with a 3-year age differential between victim and defendant) (ibid). The variations of legality within states alter interpretation and communication of personal experiences.

There are three main ways that states analyze consent concerning sexual acts: affirmative consent, freely given consent, and capacity to consent. Affirmative consent evaluates whether the person expressed by overt actions or words an indication of agreement for sexual acts. Freely given consent considers whether the consent offered of the person's own free will and is not induced by fraud, coercion, violence, or threat of violence. Finally, capacity to consent investigates whether the individual had the capacity or legal ability to consent. The person's

ability to consent to sexual activity legally is based on several factors that vary from state to state which are used in criminal investigations to determine if a person engaged in sexual activity can consent (“Legal Role of Consent | RAINN”). If elements are not met within the state's mandated factors, they may charge the perpetrator with a crime. Some of the factors which can contribute to a person’s capacity to consent are age, developmental disability, intoxication, physical disability, the relationship of victim and perpetrator, unconsciousness, and vulnerable adults.

Comparatively, consent, defined by Planned Parenthood, is as easy as remembering the acronym “FRIES:” freely given, reversible, informed, enthusiastic, specific. Consent that is freely given is a choice made without pressure, manipulation, or under the influence of drugs or alcohol. Consent is reversible because it can be taken back at any time. Informed consent can only occur if the person consenting fully understands their situation; for example, if someone says they will use a condom and they do not, there is not full consent. Enthusiastic consent is when a person says yes to something they want to do, not something they feel expected to do. Finally, specific consent means that saying yes to one thing does not automatically mean yes to another (Planned Parenthood). Any sexual activity (including oral sex, genital touching, and vaginal or anal penetration) that occurs without consent is sexual assault or rape.

Legal definitions limit consent as they severely hinder a more in-depth understanding of boundaries and bodily autonomy. The rigidity of legal definitions highlight how acts can be interpreted as an act of sexual violence no matter what the person who has been harmed feels. By looking beyond how consent is defined within established structures there is an opportunity to recognize consent through the violation of a person’s bodily autonomy but also to further understand how consent can be applied under the ambiguity of sexual practices.



*Consent and Power*

In addition to these mainstream examples of consent education, another way that consent can be understood is by taking examples from different cultures and minority groups. This understanding of consent transforms the power dynamics is articulated by Catharine MacKinnon, American radical feminist legal scholar, activist, and author. Her work focuses on women's rights and sexual abuse and exploitation, including sexual harassment, rape, prostitution, sex trafficking, and pornography. In her essay, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," MacKinnon argues that the liberal model of consent actively participates in the domination of women and provides cover for misogyny. "Feminism has no theory of the state," she begins, "it has a theory of power: sexuality is gendered as gender is sexualized" (635). She articulates how power cannot be separated from women's experiences, especially in cases of sexual assault, emphasizing that the unequal power relations between men and women create a context wherein consent is always coercive. MacKinnon's dichotomy creates a quagmire, highlighting how a patriarchal society and gender norms have impacted and shaped women's thinking while simultaneously emphasizing that decisions made under these influences are not really their decision at all. The actions done within an indirect, pervasive culture cannot, by definition, be done by free will or without influence. MacKinnon specifies the complex position women find themselves in, where small actions of an individual are connected and influenced by a more significant force.

The selective blindness of liberal feminism, as defined by MacKinnon, views sexism as an illusion or myth to be dispelled, and more recently, the act of an individual and not a representation of society. MacKinnon explains, "true feminism sees the male point of view as fundamental to the male power to create the world in its own image and the image of desires"

(640). Instead of treating the overbearing influences of sexism as unintentional, sexism is seen as a representation of society and the result of intentional decisions done by men in power. This point of view is vital to the dismantling of a society whose influence is reliant on one perspective. By removing the illusion or the romanticized views of liberal feminism, what is left is a larger more complex position to build towards true equality. The act of intentional self-awareness depends on taking time to realize that truth beyond what is being taught and comprehending what counts as truth when produced only to benefit the powerful. Realizing the intentional acts that influence our lives is only the beginning, and a vital process follows it. This can only be achieved by looking past traditional social norms and realistic expectation of how things are commonly interpreted. For example, instead of looking at established definitions of consent as the most accurate reflections of personal bodily autonomy, it is imperative to consider the institutional structures and historical influences prior to those definitions in order to create a more detailed understanding of their universal application.

MacKinnon states, "Justice will require change, not reflection – a new jurisprudence, a new relation between life and law" (658). Radical change influenced by Mackinnon could mean going beyond creating new laws within the structure but remaking it all together to create a new way of living. MacKinnon critiques the types of feminism that moves within misogynistic structures, assessing the limitations of these systems, calling into question the so-called forward-thinking changes and their restrictions within patriarchal society. With power and consent being so tightly woven, the act of separating them comes at the cost of removing the illusion of choice to see just how influenced cultural ideas are. Different methods of teaching and communicating consent have influenced culture which has in turn influenced the military. However, the

assumption of a person's ability to consent as something that is easily transferrable to military policies is instead further limiting a service member.

*Consent Education: "Yes Means Yes"*

Affirmative Consent is the approach to consent that is taught throughout higher education (Novack 303). Following the introduction to the Campus Accountability and Safety Act to the Senate in 2014, many states have proposed or established affirmative consent laws and policies, referred to by their proponents as the "Yes Means Yes" movement (ibid). Higher education, defined as various types of postsecondary learning, includes undergraduate college students whose age groups are similar to a large part of enlisted military members. According to the 2020 Demographics Profile published by the Department of Defense (DoD), "over one-half (51.6%) of Active Duty enlisted personnel are 25 years of age or younger, with the next largest age group being 26 to 30 years (21.0%)" (2020 Demographics Profile 34). "One quarter (23.3%) of Active Duty officers are 41 years of age or older, followed closely by Active Duty officers 26 to 30 years old (23.2%)" (2020 Demographics Profile 35). Students and service members, through in different communities, are taught about consent in similar ways. Affirmative consent education is interrogated by sociologist Stacey Novack and American legal scholar Janet Halley in their studies of campus rape culture. Each critiques higher education spaces by offering analysis of the system, as well as benefits and drawbacks predicted through the reformulation of university investigative rules to shift the burden of proof from the accuser to the accused.

Affirmative consent's recognizable shorthand, "yes means yes", replaced a previous model in which consent was narrated as "no means no" and relied on the person whose consent was being violated to actively speak up and vocalize a "no." Affirmative consent has provoked a

shift in sexual ideology and politics on college campuses, centralizing consent through a shared responsibility of all sexually engaged parties to be responsible for asking for and receiving consent. Within higher education spaces, affirmative consent is taught as a measure to decrease the occurrence of sexual violence by shaping sexual interactions of students so that the ambiguity of sexual intention is reduced, and the clarity of communication is optimized (Novack 302). In her research on higher education sex education, Novack explores the concept of "affirmative consent" as a sociological strategy for reducing sexual violence on college campuses. Novack utilizes the psychoanalytic work of Jean Laplanche, a French author and psychoanalyst, to consider how the contract of consent fits when used in contemporary sexual politics and our psychoanalytic understandings of sexual experience (ibid., 305). Institutions, like those of higher education, establish parameters of thinking that can influence the range of perspectives an individual can access when trying to understand and communicate within sexual practice. Affirmative consent, Novack explains, within public and private universities is the standardized language used to educate college students about sexual assault (ibid., 303).

In this model of affirmative consent, sexual encounters should be "unambiguous," with a mutual understanding and agreement of all the acts being done between two or more partners. The asking and receiving of consent is only limited to that one event meaning that consent to future events should not be assumed because of prior ones. The philosophy of affirmative consent advocates for an individual's agency to seek out and hear a verbal "yes" without force or manipulation and without any extenuating circumstances affecting the person who is giving the yes. Despite seeming straightforward, this approach can be challenging in everyday life. Novack writes, "we are faced with the daunting challenge of how to find a language that is roomy enough for the wilder and more diffuse aspects of sexuality and yet clear enough to be social and

relationally meaningful" (ibid., 306). To wait for a verbal yes for any and all actions occurring between two people often can only be neatly defined in theory. Relying solely on a model of affirmative consent begs several questions: what happens when partners do not share the same understanding of what an action entails or when both partners are familiar enough that a "yes" might be assumed—it may seem like affirmative consent may not need to be used in those scenarios, but why not; can consent be something more than just a way to define a breach of a person's boundaries; why is the education of consent used only as a way to ensure violence has not occurred instead of also allowing for there to be methods of communicating the ambiguity of sex?

The demand for unambiguity within sexual encounters reveals just how unstructured, confusing, and mysterious sex can be. To understand these encounters, Novack applies a central tenet of Laplanche's framework. The first step in navigating contemporary sexual politics and understanding the sexual experience is to admit that sexuality is inherently enigmatic and unknowable. So, by constructing the legal language around consent on the expectation of knowing, participants are expected to only act with absolutes and not act without them. "Sexual desire," Novack writes, "is not a unitary entity; it consists of a series of (multiple and contradictory) voluntary and involuntary bodily sensations, mental representations, and intentional states" (306). Accepting that consent cannot be rigidly applied challenges the previously taught models of affirmative consent. For Novack, consent does not ensure that a person is free from coercion or violation; instead, it renders encounters legally permissible and beyond reproach. The law and the policies that narrate the guidelines for consent during a sexual act can then dictate what sexual encounters can look like and shape sexual experiences.

MacKinnon investigates the many ways that dominated and disempowered groups accept and participate in their domination. The power dynamics and societal and gender norms of everyday life are not meant to induce pain and uneasiness but instead reward those who comply. Reiterated by French philosopher Michel Foucault, "what makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse." (119). Within this structure, there is the possibility that the thought of exercising freedom is instead still working within the system and never breaking free. Consent, although speaking of an ideal unambiguous sexual encounter, still operates within a system and power by creating an illusion of individual freedom and control (Novack 308). Consent policies advocate for and seem to amplify a person's awareness of their authority and agency without understanding what power structures shape the form and meanings of their sexual encounters.

The influence of power, as reasoned by MacKinnon, suggests that a person is not a person on their own but a culmination of their surroundings. To view a sexual encounter as an untethered act rigidly defined by the legal language communicating the act negates the possibility of growth fostered by affirmative consent. While this statement does not suggest that rape, sexual assault, and sexual abuse are not very real dangers, within these policies, it is a mistake to see the threat of rape as the only way to define negative outcome of a sexual experience. By only focusing on rape, there is a possibility that psychological threats posed by mutual and consensual sexual experiences can be overlooked. Suppose the only language for communicating unlabeled anxiety of sexual encounters is by defining them as rape or sexual assault. Communicating experiences of sexual encounters that do not immediately align with a yes or no when assessing if the experience was consensual can quickly be compared to the labels

of sexual assault or rape in order to define the encounter more finitely. Following affirmative consent's guideline of an "enthusiastic yes," anything besides continuous consent automatically labels the entire experience as a violation with the intent of harm. This way of thinking leaves ambiguous sexual encounters with the expectation of being labeled under a defined resolution rather than being left indefinite.

The challenge of using language to communicate sexual agreement is that intimacy between participating parties is not universally understood but individually experienced. To ascribe language to sex, words are needed that hint at the elusive and undefinable while also realizing that in order to prosecute sexual assault and rape, there must be terms for clarity, limits, and definition. Novack highlights this missing language writing, "when it comes to sex, we need a language that does both and can bear its own contradictions" (Novack 311). By addressing the need for more than the restrictions and limitations of consent defined by policies, what remains is a desire for what sex is, determined by individuals whose experiences of sexual practice are accessed from a space outside social norms. Novack's view of affirmative consent within higher education suggests an interdisciplinary, nonregulatory, exploratory approach to addressing the problem of sex and sexual violence on college campuses that not only critiques the policies but the way they are written.

Similar to Novack, Janet Halley, in her research on affirmative consent, describes the trends in sexual conduct codes on college campuses and within campaigns for reform of some state-based criminal law. Changes that hinge on consent are praised for the improvement of sexual culture they will produce, as well as the increased leverage they give women in sexual encounters, while simultaneously generating social incentives for men to make sure that women have provided consent before they initiate or continue sexual contact (Halley 258). The emphasis

is not only on the physical change of the legal language but also on how this adjustment can subsequently influence culture. Halley's research pushes for affirmative consent within higher education by promoting the individual freedom to decide the course of one's sexual engagements in order to produce a world in which women enjoy sexual freedom on an equal basis with men. Affirmative consent is distinguished by the advocacy of increased agency for women and the responsibility of both parties to give and receive consent. The limitations of affirmative consent come from the institutions where consent is being communicated and the unintentional ways that power dynamics are reinforced.

Consent, especially within affirmative consent, is not accurately defined within a single word. Instead, Halley breaks consent into four distinct ways of experiencing and communicating consent: positive consent, constrained consent, subjective consent, and performative consent. *Positive consent* is the internal state of mind of agreeing to something because one positively and unambiguously wants it. Positive consent is the closest to the ideal definition and practical use of consent. *Constrained consent* is the internal state of the mind of agreeing to something because one perceives it as better than the realistic alternatives. *Subjective consent* refers to positive and constrained consent without distinguishing between them. Finally, *performative consent* is the semiotic communication of agreement to something (Halley 265). These distinctions on how consent is experienced and the broader depths of the feminist critique of consent demonstrate that most sex women have with men is under coercive circumstances. The particular conditions subject women to limited options by enabling participants of sexual experiences to distinguish between the sex that women did not desire from the sex bargained for in social negotiations. Conditions impact personal experiences that are amplified by the law's emphasis on punishment



and influenced by the established civil liberties which regulate criminal punishment and severe civil sanctions.

Halley describes affirmative consent as a broad orientation of the political order toward individual equality (Halley 258). The reforms made within higher education spaces to teach and promote affirmative consent, though at first glance may promote shared responsibility to all participating parties, have liberal qualities. “Big-L Liberalism” is defined here as a wide-ranging orientation of political order that focuses on individual equality, where freedom is the highest political good that can only be achieved through commitment to the state (ibid). Opposing this is “little-l liberalism”, which is defined as progressive, emancipatory, and sub-attentively opposed to a social-conservative ideal for social life. The distinction of both Liberalism and liberalism highlight the finite ways in which outwardly facing systems can, internally, make impactful changes in opposing ways. Halley, throughout her essay, articulates that the idea of affirmative consent is planted within Big-L Liberalism. Affirmative consent is the idea of justice within Big-L Liberalism, which is both progressive but isolating as it highlights the individual while removing actions from external influence. Through these qualities the education of affirmative consent creates problems for little-l liberalism because it advocates a continued route for criminalizing unwanted sexual conduct supported by pervasively coercive conditions (ibid). Affirmative consent adheres to the rhetoric of seeking social control through punitive and repressive deployments of state power by criminalizing as a first instead of last resort to achieve social change, continuing the ineffective imprisonment of those most at risk under systemic racism, and relying on traditional gender roles for men and women in heterosexual relations. MacKinnon echoes this same message, saying, “if force were defined to include inequalities of power, meaning social hierarchies, and consent were replaced with a welcomeness standard, the

law of rape would begin to approximate the reality of forced and unwanted sex” (*Women’s Lives, Men’s Laws* 247). Rape, through this understanding, would be demonstrated from the male social superiority where dominance and subordination were unwavering. MacKinnon’s view of an inability to consent because of external power dynamics and her advocacy for the overhaul of the system in its entirety are not reasonably applicable to that extent. Instead, the perspective of consent and its elusiveness can be seen in other ways. For example, the definitions for affirmative consent are simply a remix of the language of sex that has done nothing more than imprisoning those found guilty and removing them from the public. In the military when a report is made the procedure following an Unrestricted report allows for the person to make an Expedited Transfer that immediately removes them from their workplace (*DoD Instruction, 6495.02 Vol 2 6*).

Consent abides the reassertion of dichotomous gender roles, including encouraging male responsibility and female passivity, advocating for the world’s division into two sexes, and reducing an array of human sexualities into a model of male domination and female subordination (Halley 276). Affirmative consent is only feminist in advertisement and not in substance as, internally, it holds all the markers of conservative social values. The undercurrent of affirmative consent displays an example of what can occur when the issue’s root is not adequately acknowledged. Furthermore, it creates a false narrative that if an individual could say no, they would have said no. Assuming that saying yes when internally they have instead convinced themselves they need to say “yes,” it reinvents a victim-blaming mentality of consent through “no means no.” Though affirmative consent is arguably the most forward-thinking and widely implemented policy being used against gender-based violence like rape, sexual assault, and sexual harassment, both Halley and Novack highlight the ways that affirmative consent is

not accessible for women; nor is it universally applied. By working to inflict change within an established institution, affirmative consent continues to adhere to previously held narratives.

*Consent as “Yes, and...”*

In an attempt to address the concerns raised about the efficacy of affirmative consent, an untraditional application of consent has developed. Critical Consent, or consent voiced as “Yes, and..,” challenges affirmative consent to evolve into listening and acknowledging the power dynamics highlighted through the lens of queer and BDSM spaces. Looking back to the origins of consent in the BDSM community, consent became more visible following the heightened awareness of HIV. It was BDSM communities that started writing rules on asking permission and receiving explicit responses. In 1981, the first formal bylaws regarding affirmative consent were written by members of a New York leather collective known as the Gay Male S/M Collective or GMSMC (Harper 8). Mainstream examples and definitions of consent are primarily limited to a heterosexual perspective of sex that relies heavily on gender roles and the expectation of sexual penetration. Planned Parenthood’s explanation of the distinction of using the terminology sexual assault or rape was influenced by that same expectation; that an act would be labeled sexual assault if there was no penetration and rape if there was (“What Is Sexual Consent?”). In this understanding, consent can reaffirm gender roles in ways that do not apply in BDSM spaces as well as for LGBTQIA+ communities. In contrast, critical consent considers sexual activity beyond the heterosexual lens and speaks to a genuinely equal playing field for all parties who can communicate consent—including their limits and their desire—while simultaneously challenging the societal norms of gender roles that impact sexual encounters.

Author of *Queer BDSM Intimacies: Critical Consent and Pushing Boundaries*, Robin Bauer takes a voluntary and crucial step away from the language used to describe and teach Affirmative Consent. The “yes means yes” way of promoting a positive and participatory sexual experience fosters a sense of responsibility on all parties present; still, it also adopts the idea that consent is accessible to everyone. This notion of consent assumes that every person of their own accord and free will can enter into a sexual encounter with another individual. This assumptive thinking is inadvisable, considering, as MacKinnon notes, that women are socialized into consenting to male dominance by growing up in a patriarchal culture (650). Within that culture, giving consent can be viewed as contributing to the effectiveness of that internalized oppression. To establish consent as the distinguishing feature, Bauer writes, “the fact that everyone has grown up with and is constantly surrounded by non-consensual power structures complicates what it means to give consent and makes it hard to establish *valid* consent, not only in BDSM interactions but also in general” (78). Bauer’s take on the inaccessibility of consent echoes MacKinnon’s views of consent and how women are unable to access it within a patriarchal society (648). Through understanding critical consent, it becomes clear that consent and autonomy are not guaranteed.

Power dynamics and hierarchies are social, subcultural, individual, and relationship based. They impact an individual’s ability to negotiate and establish consent by assuming equality and accessibility of consent. This assumption allows for the internalized power dynamics and influences to continue unencountered as an individual’s actions are still unconsciously prompted. Bauer’s highlights these dangers, explaining, “all relationships have power issues and the potential for the abuse of positions of power” (76). The Liberal approach to consent, defined by Halley, assumes that autonomous subjects with free will enter into an easily

agreed-upon contract and that the individual knows what they want and what is best for themselves (Halley 259). This manner of thinking does not consider psychological entanglements of social power dynamics and therefore is not context sensitive. Consent without context views human interactions within a social vacuum. By ignoring context, the decisions made seem only to be affected by the immediate factors visible to all participating parties and only influenced by that moment.

This is not to say that consent within power relations is unattainable. Instead, the realization of unintended influences questions the validity of liberal consent and the claim of consent negotiated in the presence of power. Instead of operating with an assumption that all who consent will be confident in what they want and whom they want it with, there are ways to work within the context of consent without limiting who can access it. Taking the time to acknowledge that power dynamics can occur between two or more people, negotiating beforehand, and communicating feelings of ambiguity afterward are methods that demonstrate applications of critical consent. In these instances, critical consent does not begin at the moment of sexual practice with another person but instead starts long before, with the individual, who has already reflected on their own boundaries, preferences, and limits prior to even engaging with another person or people. In doing so, they establish the boundaries of their consent separate from the power potentially influencing them by others. Self-awareness, the identification of one's own preferences and limits, is a necessary prerequisite for the negotiation and advocacy of boundaries in sexual practices. While this mindset might seem obvious, the explicit communication of consent practices by the BDSM community takes it farther through the advocacy of the self and the community. Working through scenes (e.g., negotiating limits with a

Dominant (Dom) or Submissive (Sub)) takes consent out of the heat of the moment, allowing individuals to expand on limits and minimize external pressures.

A person's agency is defined as the capacity for individualized choice and action. The question of agency does not exist in a binary of possessing or not possessing agency; instead, it asks how to act within a field of limited choices. It is not necessarily dependent on the concept of an autonomous or self-sufficient subject. Instead, it works with the knowledge that institutions and practices influence a person's identity. Similarly, a person's sexual agency is the capacity to choose sexual practices. There is a necessary shift in sexual culture that requires active consent, instead of focusing only on instances that demonstrate a lack of consent or heavily applying responsibility on only one individual. In this application, agency is reconceptualized as possible actions, while simultaneously acknowledging how individuals are shaped by contact with others. Consent, then, becomes a constantly evolving process of boundaries set with the participating individuals and their surroundings.

Critical consent sets itself apart from other consent theories through its advocacy for self-reflection and communication between those involved throughout any sexual encounters. It is negotiated in a power-sensitive way, and, because of the inherent limits to rational control over social interactions, consent is critical in the sense that it remains precarious and provisional. By taking the steps to acknowledge the inherent power dynamics that can occur within race, gender, sexual experience, age, etc., each person is able to communicate and negotiate a sexual experience without unintentionally pressuring or influencing others. Understanding that the consent-making process is ongoing is crucial (Bauer 87). As Bauer describes, critical consent is "an active, ongoing collaboration for the mutual benefit of all involved, helping to establish and maintain each participant's sense of integrity. Rather than reducing sexual consent to a lack of a

no, it is about actively choosing” (Bauer 106). By looking at BDSM and queer cultural approaches to critical consent, which prioritize heightened responsibility and accountability for consequences, a model of increased sexual agency emerges. Critical consent is a step towards recognizing our own interdependence instead of accepting the liberal illusion of personal autonomy and individualism. The military’s definition of consent falls in line with affirmative consent while also assuming that consent is something easily accessible for everyone. While the institutional structure of the military might not have the ability to harbor critical consent practices in it’s entirety, the application of recognizing power dynamics and emphasizing individual agency within a service member’s limitations can create a more effective practice of consent.

### *Justice After Harm*

Building from affirmative consent to critical consent, the importance of personal boundaries and the recognition internal power dynamics promote more thoughtful interactions and communication between all individuals. As individuals work to become more aware of their own agency and the power dynamics, questions emerge about what should occur when someone ignores or transgresses these boundaries. The legal definitions of consent, sexual assault, rape, and sexual harassment are established within the criminal justice system and use the same language to validate the actions done against the victim. Varied definitions influence justice for a victim who has reported due to the limitation of the governing body’s ability to define the act as a breach of consent within their state.

It is not enough to define consent more finitely or educate a person about their agency as the established institution that eventually judges the perpetrator's actions still limits all parties

from participating in the healing after trauma. The legal system has not served the victims of sexual assault and violence. One model of healing from trauma is called transformative justice (Kim 229). This approach goes beyond the current methods of understanding consent within a sexual situation and consent to other people in a larger community. It understands that an individual's actions do not exist in a vacuum, just as no one is free from the influences of the larger society. These practices are being applied to the military to serve as a framework because of the unique community aspect of the military and the relational hierarchy it both creates and is predicated on.

Transformative justice pushes back against one pillar within that society, the criminal justice system. Understanding the faction of punitive justice aids in the unpacking of how transformative justice functions to address the justice concerns raised by consent. The punitive justice system, which focuses on punishing the offender, is the system under which United States operates and is the largest in the world (da Silva et al.). In contrast, transformative justice promotes community-focused alternatives, stepping away from the criminal justice system's authority, shifting the broad social justice landscape towards values, language, and decentralized practices developed by feminists of color. Transformative justice is community-oriented and focuses on the notions of healing, regenerating, reintegration, and repair; it simultaneously concentrates on the healing of the victim and perpetrator, acknowledging the impact of harm that impacts both the individual and the broader community.

Mimi Kim, author of *From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration*, researches racial injustices and examines mainstream responses to domestic and sexual violence. She posits that at one end of the continuum is carceral feminism, defined as the feminist reliance on law enforcement that advocates for



enhancing corporal punishment for feminist and gender issues (Kim 220). The other end of the spectrum holds a growing response to gendered violence alternatives to criminalization through restorative and transformative justice interventions with anti-violence options. Kim's approach calls for a re-imagining of the role of social work concerning social justice and social movements.

Carceral feminism critiques mainstream forms of feminism associated with gendered violence, by pairing considerations of intersectional race and gender as aspects of mass incarceration. With the heightened conversation of sexual assault and rape, the unintended consequences of incarceration and arrests primarily affect young Black males who are already at a high risk of arrest compared to white males of the same age (ibid., 221). Carceral feminism fundamentally centers, by relying heavily on the justice system, the depoliticization of a social movement with politically radical roots. Strengthening criminal legislation and institution investments in policies and practices led by police, prosecutors, and courts, carceral feminism relies on the institutions to continue to advocate for victims of sexual violence while increasing the reliance of the law enforcement as the dominant intervention strategy (Kim 219). Carceral feminism contributed to the shift from gender violence as a social and political problem to a defined crime (ibid., 222). By explicitly placing gender violence within criminal legal language, the collaboration between feminist anti-violence movements and the agenda of law enforcement has been unified under similar goals. Together they worked under the belief that harsher and longer prison sentences will eventually prevent gender-based violence.

Restorative justice and transformative justice have been used to describe a response to gender violence that challenges the typical criminal responses. While the types of processes used to identify restorative justice vary, the focus shifts from the adversely binary of victim and

perpetrator to one that acknowledges the impact of harm not only on individuals but on broader communities. Restorative justice works to elevate the voice of the victim or survivor, recognizes the effects of violence on community members, and allows the perpetrator of harm to understand the multiple levels of impact more fully (Kim 225). The aim, instead of incarceration, is restoration, rehabilitation, and the healthy reintegration of all parties back into the community.

Transformative justice moves beyond the dependence on current criminal justice and prison systems by recognizing that interpersonal forms of violence occur within the context of structural conditions, including poverty, racism, sexism, homophobia, ableism, and other systemic forms of oppression (ibid., 227). By emphasizing community or collective responses, it is not solely up to the individual to bear the role of a casualty of violence. Advocates of transformative justice emphasize that there is an alternative method of violence prevention and intervention that steps away from the criminal justice system and instead focuses on what can be done by the community. Transformative justice shifts the social justice landscape towards values, language, and de-centralized practices reflective of developments mainly by feminists of color. Currently, when someone commits an act of harm, the criminal justice system's goal is to remove them from the community. This act, coupled with a set amount of time removed, has been intended to incentivize them to rejoin society and adhere to the rules of law. Transformative justice does not want that person to leave the community; instead, it requires the individual to stay and work to repair the damage done by their act of harm and to take ownership for their actions. Examples of practiced healing after sexual violence, while not officially documented, involve consistent communication, therapy with licensed professionals, and unlimited time to promote self-reflection and understanding the impact of harm. Likewise, communities are held accountable because, even if an individual is not directly involved with the violence, they are

also still complicit in the society that allowed the violence to occur. For example, when this model is applied to the military, continued sexual harassment can alter the climate of a person's work environment, and within the military community, leadership are often looked at to take responsibility of the behaviors of service members of lower rank (Castro et al. 54). Instead of defaulting to the hierarchy of the military to address instances of harassment, a transformative justice approach can be applied to the community to emphasize personal responsibility to the people around them.

Transformative justice and its ideals could be misunderstood as dismissing the severity of the crime by separating it from the current criminal justice system. Advocates for the established criminal justice system, like carceral feminism, are skeptical of transformative or restorative justice because of the assumption that current systems prevent or minimize sexual assault or harassment. Unfortunately, the vast majority of perpetrators will not go to jail within the current carceral system. Only 310 out of every 1,000 sexual assaults are reported to the police, which means more than 2 out of 3 go unreported (*The Criminal Justice System: Statistics / RAINN*). In college, only 20% of female students report, and in the military 43% of female victims and 10% of male victims reported (ibid). While punitive justice works to remove the perpetrator from the immediate environment, that only occurs if a report is made and if the person is found guilty within the court of law.

Furthermore, the act of removal is not enough. The Barnard Center for Research on Women's video series on transformative justice features adrienne maree brown, Mia Mingus, Stas Schmiedt, Ann Russo, Esteban Kelly, Martina Kartman, Priya Rai, and Shira Hassan (Barnard Center for Research on Women). Together they define what transformative justice can mean to a survivor when healing is enacted throughout the community. Transformative justice

goes down to the root of the system of harm, not only acknowledging and working to resolve the act that has occurred but then working more deeply to stop the harm from happening again. Taking the time to acknowledge that the person who has committed this harm can transform is the core of transformative justice (Barnard Center for Research on Women). Seeking justice through transformative or restorative means does not dismiss acts of harm against an individual with the removal of incarceration as the method of punishment. Instead, it relies on the active work of the community to acknowledge the healing of the person who has been harmed while also trying to educate and communicate the impacts of harm to the person who has done the harming. The community, responding to the harm, is focused not only on the individuals involved in the act of harm but also on their own contribution to the system that has created this act of harm. For example, a person who has sexually assaulted someone is likely to have sexually harassed others. By allowing more minor acts of harassment to pass without deterrence, the behavior continues to escalate. Transformative and restorative justice emphasize the duty people have to each other to stop acts that harm others within the community.

Communities that heal using transformative justice also focus on the context of the environment that allowed the violence to happen and escalate to the point of crisis. Within transformative justice, not only is the person who is committing the act at fault, but this practice also responds to violence by challenging the oppressive systems and normalized violence that cultivates within every one of us. Everyone within the community is held accountable for supporting and maintaining gender violence and providing opportunities for resistance. Restorative and transformative justice advocates for healing, reintegration, and repair to the destruction done by the perpetrator to the victim and the community. It is not enough to punish or strip away the rights through imprisonment; instead, restorative, and transformative justice

destroys structural forms of violence and the entangled dependency of justice that relies on decades of mass incarceration policies. Though transformative justice is unable to be completely applied to the military, practices like an keeping all parties within the same command to work on ongoing and reflective healing instead of separating both the accused and the victim can influence not only their own healing experiences but their immediate community.

Consent, through its many interpretations and methods, creates the opportunity for future influence with the military. Currently service members are assumed to be able to consent of their own free will but as they are under contract that assumption is incorrect. Instead of adhering to the liberal notion of consent and the educational practices of affirmative consent the military should go further to recognize the limitations they have places individuals under so that consent is no longer an unreachable standard.

## CHAPTER IV

### ANALYSIS: CONSENT IS NOT ACCESSIBLE UNDER CONTRACT

Consent and the military work against each other because of the opposing factors that are required for each to exist. Consent within sexual practices is established through the identification of boundaries and defined by a person's bodily autonomy. The military and the service members contracted within it, are not seen as individuals but as the sum of a much larger part. This analysis assesses how a service member is unable to consent sexually because of the unique qualities that define what it means to be in the military, combined with the culture and institutional structures that make up a military environment and the unique barriers that prevent a service member from seeking justice after an assault has occurred.

Current prevention and response measures for sexual assault in the military are not adequately designed for service members where the risks associated with reporting can further inflict trauma or create hostile working conditions that impact work and personal life. This impact can be seen by looking into the culture and structure of the military which have shaped the ways service members are currently restricted under contract. Initially, this analysis separates culture and the institutional structures within the military to understand how the current state of the military's view of sexual assault and consent has been established.

Influenced by MacKinnon's view of consent which cannot be fully accessed within power structures or invoked when a person is under duress or influence (648). This analysis takes steps to understand the expectations of the military's influence on service members and how that influence extends to the creation and upkeep of the current prevention and response program. As this analysis dismantles and establishes the faults within the system, the conclusion will not broadly state that the military is a failure because of the inability to impede sexual assault.

Rather, while the military community has specific features that create an isolating effect, a divisive statement would place any and all choices done by service members into a vacuum and obstruct the influences of the rest of society.

This distinction points to why it is important to first understand the historical presence of sexual assault in military culture and how the variations in language or verbiage create space for understanding the presence of rape within the military. Furthermore, it is critical to elaborate on the structure of the military in order to analyze how hierarchy and policy have influenced the ways that consent is defined and taught in the present system. This analysis paints a picture of what service members experience while they are in the military. Since the influence of sexual assault and harassment still impact others within the same shared environment, it is reasonable to assume that decisions that influenced the past can still impact the future. Service members make up the military and as a person joins the collective, they are assimilating to the culture and providing consistency in an already established structure. Ultimately, by applying the UCMJ's definition of consent with the removal of the assumption of personal bodily autonomy, the inability of a service member to consent within sexual practices is emphasized in current reporting options that rely on victims to risk their contract and social ostracization to come forward. These restrictions to reporting prove that a service member's ability to consent is improperly assumed within the context of sexual practices because of the qualifications that define a service member. This will be done by analyzing the culture, institutional structures, and the limitations that come from the combination of both.

First, culture is discussed as a framework for analyzing the entwining of sexual assault and the military by looking at historical examples of rape and the military, illuminating the stigma and invisibility of male rape, and discussing the consistent reporting of sexual assault

despite an active attempt of prevention and response. The influence of culture throughout the historical growth of the military continues to impact the present discussions of sexual assault. Second, institutional structures are assessed in order to understand the power hierarchy that is a pillar of a military operation and the discriminatory legislation that has been established within the military. The environment that service members in the military operate under is a combination of both culture and institutional structures. Together both work to form a unique community that prevents a service member from accessing consent within sexual practices and healing after trauma. In culmination, the barriers to accessing consent are addressed, exploring what a service member endures, as well as their limitations under contract and in healing. A service member under contract to a military service inherently gives up certain freedoms, like where they will work or live, and by signing away these freedoms consent is not accessible in the same ways they are to a civilian. While it does not explicitly state that the contracted state means a service member no longer has the freedom to consent to any sexual acts, instead this contract restricts the freedom and independence of a service member that limits their ability to report and seek treatment after harm. Under their contract, a service member is no longer in control of certain aspects of their life and must prioritize the needs of the military. For a service member, signing their contract is a key moment in the assimilation to the military, and it is that specific moment that must be addressed when reviewing sexual assault and how accessible consent is to service members. This analysis ultimately argues that there are multiple places of influence that have created the current prevention and response program used by the military that need to be acknowledged before options for future change are suggested.



## *Culture*

Sociology understands culture as the languages, customs, beliefs, rules, arts, knowledge, and collective identities and memories developed by members of all social groups that make their social environments meaningful (Healey and Stepnick 53). Military organizations represent a specific occupational culture that is relatively isolated from society. Military people work in separated barracks and bases, and they also frequently live there (sometimes with their spouse and children). Cadets and recruits get their training in specific schools and academies, where a sense of uniqueness is emphasized, and military personnel wear uniforms that make them, in an obvious way, distinct from most other workers. Military organizations require significant investment from their personnel; during active duty, personnel are on a permanent, 24-hour call with somewhat idiosyncratic working shifts; their leave is subject to cancellation; and they can be ordered to far-off places on short notice (Soeters et al. 237). The jobs in the military may be dangerous and potentially life-threatening. Though the modernization of the military, technology has developed the act of war while the requirements of a soldier continue to be rooted within culture. The permanence of repeated training creates assurances and consistency. Generationally some things may change, but, for example, the method of folding a shirt to military standard creates habit and culture on which the military thrives. Culture creates connection and unity, something that the military promotes through phrases like “brothers in arms.” However, culture can also create rigidity and resistance to change because of the way things “have always been done.” Culture is influenced by history and language. How things are said, and the time spent saying them, create connections that deepen meaning especially within the military. As culture shifts, resistance is likely, but the outcome of embracing change can lead to unexpected and beneficial transformation. Before revisions are suggested for the military, and the possible

outcomes of cultural change and resistance, the depth of cultural influence will be addressed. As a service member assimilates to military culture, what influences about consent are also being absorbed? How can culture sway a bias of visibility for sexual assault against service members?

### History of Rape in the Military

Joanna Bourke, professor of history at Birkbeck College, University of London, provides a comprehensive reevaluation of sexual violence in a book aptly titled *Rape*. The rapist, not the victim, is the subject of analysis, as Bourke insists that “rapists are not born, they become” (Bourke 18). The relationship between rape and the military, Burke writes, is that of a violent institution that fosters the environment for rapists and has never truly been separated from the presence of rape (Bourke 10). Her stance on the military and the historical connection to rape infers a possibility of how sexual assault within the institution continue to exist, systemically intertwined. Rape, therefore, is not only just becoming a problem because of the larger number of female service members, but instead, its presence within the military runs deeper. Taking Bourke’s perspective and applying it to this analysis, the battle of sexual assault within the military goes beyond the education of prevention and response. Unconventional methods of healing, like transformative and restorative justice, are able to become so effective because of the flexibility they offer to a rigid system.

In wartime, Bourke writes, rape is often portrayed as inevitable, and historically, the direct and casual relationship of military violence and sexual violence makes it more plausible. In the twentieth century, examples include the rape by German soldiers of women in Belgium during the First World War; the mass rape of Chinese women by Japanese troops in Nanking in 1937; and the rape of German women by Soviet soldiers in 1945. Bourke also adds the explosive

increase of sexual violation during conflicts in Bosnia, Herzegovina, Peru, Rwanda, Bangladesh, Cambodia, Cyprus, Haiti, Liberia, Somalia, and Uganda (Bourke 360). There has been a tendency to ignore or downplay that British, American, and Australian troops have also engaged in sexual violence through personal and official historical retellings. The violence of war is similarly connected to the violence of sexual assault. However, within the chaos of war, acts of violence were permitted through the occupation of land, people, and property.

Assault is not only influenced by the occupation of territory or the liberation of land; it can also be influenced by discrimination of groups barred from joining or identifying as themselves within the military. In 2011, “Don’t Ask Don’t Tell” was repealed within the military (H.R. 2965). Discrimination in its purest form prevented service members from being openly queer without the threat of being discharged. DADT was based on the false assumption that the presence of LGBTQ+ individuals in any branch of the military would undermine the ability of people to carry out their duties. In 2019, former president Donald Trump tweeted that transgender individuals would no longer be able to enter the military and those currently enlisted would not be allowed to continue in their roles. The ban on transgender individual’s service in the military was repealed in 2021 by a presidential executive order, the policy was changed to “enable all Americans who are qualified to serve in the Armed Forces of the United States (‘Armed Forces’) should be able to serve” (“Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform”). Gender identity, whether it aligns with the gender assigned at birth, does not prevent a person from serving in the military. Though the policies have been repealed a history of discriminating minority groups has continued to shape the military through a skewed visual representation of the individuals who comprise the military. Patterns of discrimination or “otherness,” through the act of war or by preventing certain people

from joining their ranks, creates a separation that can influence or promote acts of violence. If the military's acts of aggression can be reasoned through war or discrimination, then an individual's own acts of harm are a more confined version that is defined by personal biases.

### Biased Visibility of Assault and the Military

When discussing sexual assault in the military, women are the most visible victims, but they are not the only ones. Sexual abuse between male members of the armed forces has been mislabeled as "hazing" or dismissed as male bonding. Normalized within military culture, especially in the Navy and Marines, it is still challenging to discuss because of the ostracization that can follow a report (Schell et al. 15). Currently, UCMJ does not specifically define or prohibit hazing, though the actions that occur during a hazing event have been charged as assault or cruelty and mistreatment. This missing language not only prevents men from receiving help, but it also creates an assumption that it is not something that can be reported, or that it is normal to be treated that way. However, to confront the weight of the historical and ongoing existence of rape in the military, male rape must be addressed. As sexual assault continues to be a topic of scrutiny for the military, it is largely focused on women as the primary victims. However, the issue of rape has been a part of the military since before women were allowed to join. Rewritten as hazing or dismissed as a key factor in male bonding, sexual assault for men continues to have minimal visibility within the military which affects the current state of the prevention and response of sexual assault.

Research done internally by the DoD on sexual assault of women in the military brings attention to the lack of research that focuses on the assault of male service members and advocates for the importance of cultural variables when examining the rape of men in a military

context. Male rape myths like “men don’t get raped,” “male on male rape is about homosexuality,” “male rape isn’t serious,” and “a male cannot be raped by a woman” are all woven into a culture that prides itself on embracing and projecting masculine traits of strength and stoicism (O’Brien et al.). This research provides connections between myths of male rape and the cultural aspects of the military through the methods by which they are communicated; in turn, these myths influence the likelihood of reporting and seeking help by victims of sexual assault within the military. The findings of the DoD’s research and Bourke’s observations on the historical patterns of rape and the military are still impacting current issues of sexual assault in the military. Limitations of female service members being able to seek justice after being assaulted display only a small view into the ways that sexual assault have continued to exist within the military.

Bourke’s examination of the military environment as a fertile ground for rape culture affects the foreign and domestic locations that house military bases, the service members and civilians who work on the base, and the future service members who are being educated and taught how to act just like the groups who came before them. While this argument focuses on how service members and consent have been complexly connected, there is still a more extensive scope of what consent could mean for the military, its relationship to sexual assault, and how it affects the communities around them. Through RAND’s analysis and their identification of ambient sexual assault, the connection can be inferred that the military community’s effects can also affect those living around them (Schell et al. 23). As sexual assault continues to occur, the community will continue to be affected by it. It stands to reason that the community would only be limited to service members given how closed the military community can be; however not everyone working within a base is a part of the military. Civilians and family members are not

immune to the impacts that ongoing or past sexual assault does to a community. The harmful impact of sexual assault to military and non-military community members can, through the influence of transformative and restorative justice, be converted into a source of healing.

Culture influences an individual, and the structures built around that culture help keep everything in place. As the military and prevalence of rape have continued to impact each other, the victims of sexual assault vary in visibility. Foreign countries hosting invading occupants, newly established bases and their surrounding communities, and people who have joined the military inevitably find themselves victim to the imposing and unrelenting force of the military's mission. The institutional structure of the military, dictated by hierarchy and policy influences a service member after the contract is signed. Working to unravel the established policies both will be examined to further understand how a structure can be molded to harm those who are seeking to find justice in the system.

### *Institutional Structure*

The challenge of accurately reporting sexual assault in the military requires looking not only at the official reports made by service members but also the unreported and unofficial allegations of sexual assault. Since the decision to make a report comes with risks to a service member's personal and professional life, the reports made only show a glimpse of the impact of sexual assault within the military. Responding to reporting, even when there is not the end result of a conviction, creates challenges that the current institutional structure for which the military is unable to account. This inflexibility is created to assure that service members are not wrongfully convicted, but it also has created a system that is not able to act without the proof of harm. Here the institutional structure of the military and contagious environmental changes caused by sexual

assault and harassment to the community are considered to be part of the reason why introducing changes to the current prevention and response program can still be ineffective.

The severity of sexual assault is not only felt by the person who has been harmed, but even one instance of sexual assault creates lasting effects throughout the military community. While the impact of sexual assault is harm done to one-person, sexual harassment is a shift in the tone of the behaviors that are allowed within the community. The lasting effects within this environment have a different impact than sexual harassment and create an atmosphere that supports inappropriate workplace behavior and sexual harassment and sexual assault (Schell, Cefalu, et al. 24). The act of being sexually assaulted or harassed by another service member creates multiple levels of harm, and even when it is labeled as fratricide, the depth of its impact on the military environment is paramount. In the military, fratricide refers to a service member killing another service member. Here the use of fratricide helps to emphasize the severity that can occur due to the act of harm done to a sibling, if service members are viewed to be brothers and sisters in arms is should that betrayal be more prominent when seeking justice? The act of harming another service member is not limited to the reference of a coworker harming another coworker; instead, harm impacts and influences the many different identities in a person's life that have created strong ties within the military. This type of violation also harms other individuals in the community, as they witness it and experience the trauma as a bystander. Similarly, an assault or harassment can unknowingly set examples and precedents for future cases. In order to understand how these institutional structures, play within the military, it is important to understand fratricide as a tactic that flourishes within both the hierarchical structure of the military and within military policies.

First, in the hierarchy of the military, leaders are uplifted and centralized, often to the detriment of the individual servicemember. To blame the act on poor leadership, Burke notes, responsibility is removed from individual perpetrators. A serviceperson who has raped someone outside of or within their unit is not only a product of their environment and the violent history of rape and sexual assault that has grown within the unit—they are also a representative of the collective's ability to normalize and ignore any warning signs. Within the military, traits like obedience, leadership, courage, and combat effectiveness were assumed to prove that an individual lacked the natural inclination to sexual misconduct. However, these same traits (e.g., masculinity and aggression) that are so attractive to the military can easily lead a civilian to act without regard for the other person, especially if they feel they have a right to do so. The traits also apply to the silent acceptance of male rape within the military. The permeation of myths of male rape has become embedded within a culture that dismisses feminine traits. As Bourke notes, “good things are many and collective; the despicable are feminine and individual” (Bourke 376). This is in line with Bourke's criticism of affirmative consent, wherein they critique the unintentional harm caused by the reaffirmation of gender roles through the education of consent and the desire to communicate consent in a palatable way. The reinforcement of gender roles through military education on sexual assault also affirms rape myths that men are unable to be raped by women or that being raped by another man can only occur if you are a woman or a gay male.

Second, sexual assault has occurred tenaciously since the creation of SAPRO and prevention and response organizations within each branch. During 2018, 20,500 service members were sexually assaulted or raped, including 13,000 women and 7,500 men. The rate of sexual assault and rape jumped by almost 40% from 2016 to 2018, and for women, the rate



increased by over 50% to the highest level since 2006 (SAPR Demographics Profile). Despite attempts at lowering the amount of sexual violence within the military, it remains pervasive and unyielding. These numbers have continued furthering low trust and satisfaction in the system, and they do not fully represent the number of people who have been sexually assaulted.

Historically many do not come forward to report a sexual assault and cite barriers to reporting that include fear, a distrust in the system, or a lack of understanding of options. Within the military, nearly one in three victims who did not report feared the process would be unfair, or that nothing would be done (Inspector General). This is one example of the impacts that sexual assault can have on a community. Hearing about another service member's own experiences or seeing reports in the news can impact a victim's view of their options after an assault.

Accounting for the recent action by the Senate's Military Justice Improvement and Increasing Prevention Act (S.1520) and the signing of the National Defense Authorization Act (H.R.4350) in 2021 by President Biden, there have been shifts in focus as the rights and protections of the victim come before the established hierarchy of military culture. Influenced by the murder of Specialist Vanessa Guillén in April 2020, there is an opportunity for structural reform within the policies of the UCMJ. Removing commanders from sexual harassment or assault decisions helps to strengthen the position of the victim and establishes preventative assessment measures for a service member who has been accused without waiting for the behavior to escalate. Presently, these policies have not been integrated. The UCMJ still lists the Commander as the deciding authority for whether or not a sexual assault case can move forward, and sexual harassment is not a criminal offense. The implementation of these changes has been given two years, but it is also important to note that policy changes do not necessarily cause

cultural changes. Influencing a culture requires knowledge of its history; those who work within it are at the most at risk of suffering under the current policies.

The creation and implementation of sexual assault prevention and response programs have created policies that define the ways reports can be made and outline definitions of assault and harassment that can help to decipher the actions made against another person. However, policies written are not always universally applied. For example, while the laws are written about consent, sexual assault, and harassment, their application in 2020 was uneven; of the 5,640 unrestricted reports of sexual assault, only 225 (4.0%) cases were tried by court-martial, and 50 (0.8%) offenders were convicted of a nonconsensual sex offense (*2020 Demographics Profile*). With an attempt at changing policy and responses to sexual assault and harassment in the military, there is a need for evidence of conviction for unrestricted cases. Low conviction and prosecution rates add to the risk taken on by a service member when coming forward and can also influence whether or not they wish to report, pointing towards the importance of cultural change occurring alongside of policy change. As sexual assault and the military continue to be intertwined, and as new service members are inducted into the military, the change to policy and to the structure of the military creates a show of longevity and dedication to the future safety and security of service members until contract.

### *Barriers to Addressing Consent*

At the heart of this argument is the impending conclusion that the entire system is not a failure because of the inability to eradicate sexual assault. Stating so would essentially put the military into a vacuum untouched by the rest of society which has largely influenced the people in the military and its laws. It would also dismiss the work of advocates, scholars, and former

and current service members who speak out against the military seeking justice. To dismiss their work as meaningless would not benefit anyone currently working within or outside the system. Nor does it help to say that the system is inherently the problem; there should be no system that does nothing for the service members who are still being assaulted and harassed. This line of thought is similar to the critiques of affirmative consent, which note that it has been foundational in moving conversations of consent forward but that it is a foundation upon which continued development must be built. The culture and structure of the military have provided this same type of base and if this foundation is accepted for the individual, it can be assumed that the military has legally signed away a person's ability to consent under their contract. This begs the question, why is the prevention and response of sexual assault operating under the assumption that a person is free to report it within the military structures? It is imperative to unravel the barriers that a service member has when accessing consent while constrained by the restrictions that are established when they join the military.

### Limitations Under Contract

To join the military a service member must sign a contract before undergoing the assimilation into the culture of their respective branch. By signing their contract, a service member is agreeing to sacrifice personal freedoms like control over the location of their work, personal appearance, physical fitness standards, and separation from loved ones. In exchange, a service member is given insurance, education, and a job for the duration of their contract. They could be moved anywhere to benefit the military and that is easily understood as a large part of what makes the military different from any other job or career. Consent, therefore, is not adequately accessible to service members, because the inability to fully consent is foundational

for military operations. Further, the military's methods of prevention and response for sexual assault are not able to adequately assist in finding justice, because the priority of the military is the mission before the individual. As a service member sacrifices their freedom, they are no longer working for themselves but for the larger military community. Everyone in the military operates by prioritizing the motivations and goals of the collective because these goals take precedence in all situations since the collective is protecting a nation. The needs of an individual are unsuitable within the military when it takes the prioritization from productivity and efficiency.

Consent requires complete personal bodily autonomy and individuality. However, ownership of self is signed away within the contract to join the military. The identity of an individual is no longer prioritized. This method of thinking is similar to how consent operates within restorative and transformative justice models, where the community is connected with healing and acknowledging responsibility when someone does harm. However, within the military, the importance of a cohesive community is the motivation for resolution sought out by removing the perpetrator or the victim from the place or person they have harmed. This "resolution" is done under the guise of allowing the victim to have the space to heal while they are possibly left in a more trying environment. Although on the surface the military's community mindset may seem similar to the community-oriented goals of transformative justice, the overall responses highlight that a service member is only considered valuable if they continue to operate within the unchanging system. Working with both the individual who has been harmed and the person accused of harm can create problems in productivity. Likewise, taking action against an individual who has been accused of harm and removing them from the workplace will also have a similar response as the rest of the immediate community is affected. Instead of attempting to

minimize harm, there is a remaining sense of loss and unease with a lack of closure that may not find a resolution.

By stating that consent is not accessible for service members, one might assume that change is not feasible and therefore unsalvageable; however, while current prevention and response programs for sexual assault and the policies put in place for sexual harassment are not eradicating the problem, they remain critical. The presence of these policies benefits a service member more than if there were not a program in place. Similarly, the suggestions on reforming current policies are also beneficial in creating better accessibility to protection and justice for victims of sexual assault. Not only does the hierarchy of leadership in the military need to be re-addressed, there also needs to be an active and aggressive attempt at reforming cultural norms and the expectations of service members before they join the military. The cultural assimilation during boot camp is not just one that should teach a person how to act within a confident military demeanor. Instead, it should also accentuate ways to be more attentive and mindful to the self, the military community, and those impacted by the military's presence. Reform should not be limited to the recreation of laws but to educating and developing a new leadership who will be tasked with setting an example for incoming service members. Reform can never be without resistance; instead change will be coupled with the act of actively and repetitively educating how these new regulations can benefit the military as a whole.

### Limitations to Healing

Prevention and response of sexual assault does not guarantee justice or healing. The realities of reporting can leave a service member feeling just as or even more lost than if they had said nothing. Both Vanessa Guillen and Heather Sexton's stories differ, but they are similar in

the treatment that has come to be expected within the military for women. In her interview with *Why It Matters*, Sexton spoke about her treatment during two years of waiting on her reported sexual assault investigation. With the perpetrator being immediately transferred within the small unit, everyone knew what had happened. As Sexton describes, the military environment is incredibly isolating, especially when a person is ostracized from the environment. Her experience harkens back to the tensions discussed in the differences between restricted and unrestricted reporting, including how one of the key distinctions is the prevention of information being spread. Under the guise of protection, privacy creates a correlation of minimal options for a service member while also continuously living under the assumption that any unrestricted report means everyone will know, as was the case with Sexton and her unit.

The hiring process of a service member is not limited to the standard onboarding training and paperwork. Assimilation, as an anthropological concept, is the process of individuals absorbing a society's dominant culture, a process that is not dissimilar to a recruit entering bootcamp. Recruits are told that this is their new book of laws, this is their new way of acting within this environment, and this is the best way moving forward to represent the self and the entirety of the military. As with any assimilation, there is no complete rewriting of the past and the culture or mannerisms that come with it. Instead, what is shown is how to live in the path of least resistance and to operate within the new guidelines established through formal or informal means. While continuing to view the expectation of a service member to report their sexual assault or harassment, there is also a reminder that those in the military have become more than just an individual through assimilation.

A service member is more than just an individual; they are a representative of the entirety of the branch and by that extent in the military as a whole. In this case, individual acts of service

members influence the public's restricted view of the military because it is limited. As such it is that much more important to maintain the public's confidence in the military by withholding information that could impact the trust of the public. Retaliation, as it pertains to victims of sexual assault or harassment who have been "outed" as they try to get justice, is found in their peers' responses and leadership. The retaliation is likely to be in defense of the accused by their personal view of the presumed actions or against the victim and their judgment of their actions and how they portray the sexual encounter. 66% of service members who reported retaliation after filing a sexual assault complaint were women. Within those retaliation reports, 73% alleged that their retaliators were in their chain of command ("Evaluation of Special Victim Investigation and Prosecution Capability Within the Department of Defense"). A high percentage of people who come forward face all-encompassing attacks on their personal lives. The life of a service member is not easily separated. Work, school, social, and dating circles have blurred edges within the military which create a dangerous environment for anyone who is trying to report against another well-liked or well-connected part of the group.

Through her attempts at seeking justice, Sexton chose to leave the military months after finding out that the Army validated her sexual assault. Still, the intentions of the perpetrator could not be confirmed. Unfortunately, leaving the military after or facing retaliation for reporting an assault creates other problems. Sexton's investigation took two years to complete, and she spoke of the strained relationship with other members of their unit and leadership throughout that time. It is reported that a third of victims are discharged after reporting, typically within seven months of making the report ("Evaluation of the Separation of Service Members Who Made a Report of Sexual Assault"), With retaliation being the norm, and low conviction and prosecution rates displaying the chances of achieving justice, the military environment is not

conducive to healing trauma. According to the 2016 DoD Inspector General Report, victims receive harsher discharges, with 24% separated under less than fully honorable conditions compared to the 15% of all service members (Veterans Legal Clinic). With this treatment in mind, reporting comes with risks that can follow a service member through their military career unless it is cut short. The depths of a service member's association to the military might not be limited to their personal connection. Bonds made through the military can also impact a person's decision to report. This act has caused service members to not re-enlist or to be discharged creating a severe shift in someone's life. Due to the nature of being in the military, there is more for a service member to lose by coming forward. At the same time, the person who has committed acts of harm is allowed to continue their life.

The barriers to consent are not limited to the physical or the mental; instead, they are combination of both, leaving a service member with no other reasonable options but to stay silent and continue working. Internalizing the harm instead of healing while also not reporting the person who has done the harm is just one of the many reasons why change is vital. The limitations that a service member has under contract are not unique to them but set the military apart from any other job. Similarly, the limitations of healing within the community are also specific to the military and the community. In the end, rather than adopting similar ways of prevention and response used by civilians, the military can further influence change within the lives of service members while also combating sexual assault and harassment.

#### *Addressing the Future of Consent in the Military*

The military's unique method of operation, combined with the varied definitions of consent, results in unintended complications when preventing and responding to sexual assault or



rape. Under their contract, the service member has agreed to place the community before themselves. However, suppose a service member who has been harmed finds themselves unable to act without risking everything else the military has provided for them. In that case, their contract prevents them from seeking justice after being harmed. The current prevention and response program does not fully comprehend the severity of endangering everything gained through their contracted service. Since a service member cannot seek justice without risk and consent is not accessible if external forces influence a person, as long as the military is seen as the external and influential force, a service member cannot fully consent.

Ultimately, this thesis recommends that the current prevention and response to sexual assault within the military be re-evaluated through the admittance of the limitations service members experience under contract. The institutional structures that currently prevent and respond to sexual assault within the military have created opportunities for change influenced by the various education and practices of consent within and outside of establishments. Just as practices for affirmative consent form the foundational building blocks of higher education, consent education in the military can also use SAPR education as a keystone for abolishing sexual assault. For example, rather than limiting education to a yearly narrated and illustrated presentation, SAPR education should create an environment in which service members are equipped to operate as adults and given responsibility for their actions after nuanced and ongoing discussions of consent and the tools needed for addressing sexual violence within the military.

Similar to how transformative and restorative justice created an ongoing community-focused method of healing, the SAPR program has the opportunity to work with victims while also combatting attempts at retaliation or isolation. Instead of limiting the outcomes to a binary of guilty or not guilty, the community can meet acts of harm with attempts at communication for

the person who has inflicted the harm while also combatting the environmental impacts of ambient sexual harassment. By adjusting the response for someone making questionable comments or acting in ways that might not lead to a verdict, preventative measures can be taken that would lead to counseling in an active attempt to discourage the behavior. Instead of reacting, it would be an active attempt to promote the agency of individuals and increase their responsibility to the community by constructing habits that reform culture which goes beyond policy change and instead provides moments for education and understanding.

Education reform can also provide service members with resources that actively implement comprehensive and cohesive programs, including current information on the options available when making a report after being assaulted. At the same time, improvements in education can incorporate a more in-depth plan of consent, respect, active listening, and being, in general, more aware of the responsibility of individual actions and the impact of those actions on others. The developmental readiness of a new military recruit can be likened to that of an incoming college student, both of which are legally adults but developmentally still gaining knowledge and understanding of their adult responsibilities. Signing a contract of obligation to the military does not instantly provide the life skills that allow them to make decisions in ways in which they are fully cognizant of repercussions. While there can never be life without consequences, there should be less assumption that a service member joins the military knowing the full cultural skillset needed for navigating their new situation.

Though accessibility of consent becomes unattainable within the contracted life of a service member, the conversation does not stop after realizing that consent under contract is not possible. Instead, the military should follow the same model that holds higher education institutions accountable for consent (e.g., a student cannot consent to sex with a professor). The

prevention and response to sexual assault within the military system will not work without understanding the implication of hierarchy and power. Just as critical consent is practiced without a specific organization, BDSM communities promote personal awareness of power dynamics and communication. Critical consent is actively and intentionally separated from the limitations of heteronormativity and the influence of gender roles, which are reinforced through community engagement and responsibility. As the military will continue to be an institutional structure the reality of rape should not restrict the ability to heal. Instead of responding to a report of an act of harm by the removal of the individual from their unit or command their continued presence creates the opportunity for change while also promoting a similar sense of responsibility that aligns with the focus on community the military values of loyalty, duty, and respect. Emphasized by ambient sexual harassment, when an individual does harm the victim is not the only one who is impacted.

Theoretically looking at solutions to preventing and responding to sexual assault within the military are a starting point. Taking into account the critique of scholars like MacKinnon, who highlights the lack of choice or an inevitability of violation because of previously established power dynamics, is the foundation to fully understand the level of impact that the military has on its service members. However, understanding these dynamics allows for the power hierarchies within the military to become more visible when viewing the social construct of laws and relationships that create this unique community. Currently the imposed structures used to mitigate and minimize acts of sexual assault are not only ineffective, but they are also magnified by individuals who, while trying to obtain justice, do not have a place to heal and have nowhere to go if closure cannot be obtained. By using this lens and linking it together with the

adjustments made over time in response to violent acts of harm and the public visibility that influence these changes, the military's methods have largely been reactionary.

The answer for challenging the current system of sexual assault and prevention is not succinct or easy. The first critical steppingstone is establishing an awareness of a service member's inability to consent because of their contractual obligation to prioritize the mission; this is followed by the imperative of acknowledging the environmental influences that surround a service member from the moment they join the military. In the end, consent needs to be re-communicated through more realistic and attainable measures and trainings. The only way to help the service members is to correlate official reports of sexual assault or harassment with concrete results and consequences. This accountability demonstrates one way to establish continued investment in each service member. The only way forward is to focus on the longevity and support of healing during and after a person leaves the military, which must be combined with mindfulness in the education and communication of consent throughout the military and not just at reactionary junctures.

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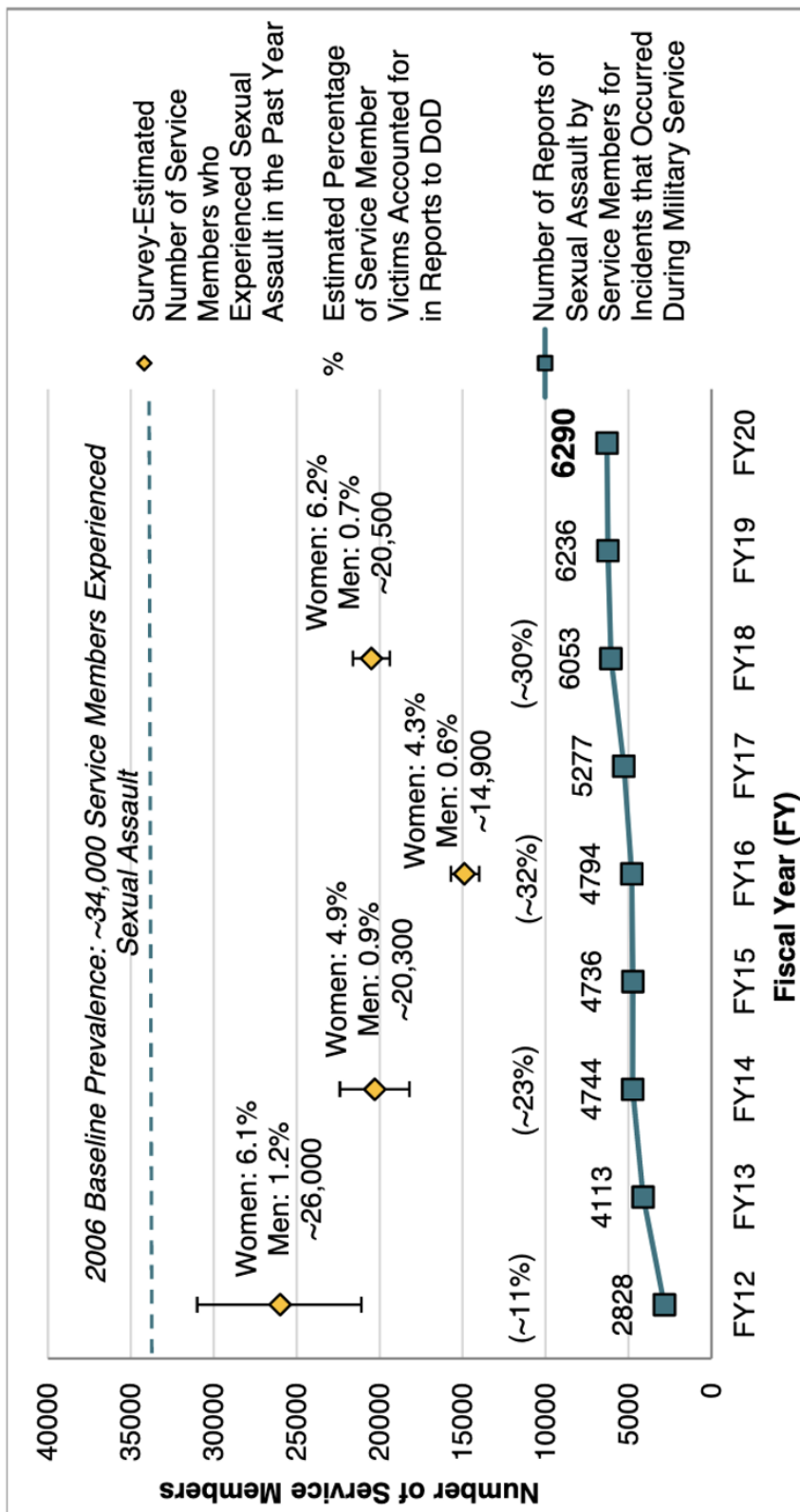
## APPENDIX A

## SUMMARY OF DEPARTMENT OF DEFENSE POLICIES

Identification Number and Type	Title	Purpose
<i>DoD Directive 6495.01</i>	<i>Sexual Assault Prevention and Response (SAPR) Program</i>	This Directive reissues DoD Directive (DoDD) 6495.01 to implement DoD policy and assign responsibilities for the SAPR Program on prevention, response, and oversight to sexual assault.
<i>DoD Directive 1350.2</i>	<i>Department of Defense Military Equal Opportunity (MEO) Program</i>	Regulates the Department of Defense MEO Program and assigns responsibilities for ensuring DoD-wide compliance with the broad program objectives outlined in references. Provides for education and training in EO and human relations.
<i>DoD Instruction 1350.02</i>	<i>DoD Military Equal Opportunity Program</i>	This issuance reissues the 1995 directive as a DoD instruction (DoDI) in accordance with the authority in DoD Directives (DoDD) 5124.02 and 1020.02E to: <ul style="list-style-type: none"> <li>- Establish policy, assign responsibilities, and provide procedures for the DoD Military Equal Opportunity (MEO) Prevention and Response Program.</li> <li>- Establish the functions of the Defense Equal Opportunity Management Institute (DEOMI) and the DEOMI Board of Advisors (BOA)</li> <li>- Reissues and Cancels DoDD 1350.2</li> </ul>
<i>SECNAV INSTRUCTION 5300.26E</i>	<i>Department of the Navy Policy on Sexual Harassment</i>	Provides a comprehensive Department of the Navy (DON) policy for all military and civilian personnel on the identification, prevention, and elimination of sexual harassment and to establish regulations to enforce policy.
<i>DoD Instruction 6495.02 Vol 1</i>	<i>Sexual Assault Prevention and Response: Program Procedure</i>	This Instruction is composed of multiple volumes, each containing its own purpose. In accordance with the authority in DoD Directives (DoDD) 5124.02 and 6495.01: <ul style="list-style-type: none"> <li>- This Instruction establishes and implements policy, establishes procedures, provides guidelines and model programs, delegates authority, and assigns responsibilities regarding the prevention of and response to sexual assault in the DoD</li> </ul>
<i>DoD Instruction 6495.02 Vol 2</i>	<i>Sexual Assault Prevention and Response: Education and Training</i>	This Instruction is composed of multiple volumes, each containing its own purpose. In accordance with the authority in DoD Directives (DoDD) 5124.02 and 1400.25: <ul style="list-style-type: none"> <li>- This issuance establishes and implements policy, establishes procedures, provides guidelines and model programs, delegates authority, and assigns responsibilities regarding the prevention of and response to sexual assault in the DoD.</li> </ul>

APPENDIX B

ANNUAL REPORTING OF SEXUAL ASSAULT



## APPENDIX C

## TIMELINE OF EVENTS

Identification Number	Latest Action	Title	Description
H.R.2965	12/22/2010 Became Public Law	Don't Ask, Don't Tell Repeal Act of 2010	Provides for repeal of the current Department of Defense (DOD) policy concerning homosexuality in the Armed Forces, to be effective 60 days after the Secretary of Defense has received DOD's comprehensive review on the implementation of such repeal, and the President, Secretary, and Chairman of the Joint Chiefs of Staff (JCS) certify to the congressional defense committees that they have considered the report and proposed plan of action, that DOD has prepared the necessary policies and regulations to exercise the discretion provided by such repeal, and that implementation of such policies and regulations is consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention. Provides that, until such time as the above conditions are met, the current policy shall remain in effect.
H.R.4104	06/23/2021 Referred to the House Committee on Armed Services	Vanessa Guillén Military Justice Improvement and Increasing Prevention Act	To reform the disposition of charges and convening of courts-martial for certain offenses under the Uniform Code of Military Justice and increase the prevention of sexual assaults and other crimes in the military.
H.R.4350	09/23/2021 Passed House	National Defense Authorization Act for Fiscal Year 2022	This bill authorizes FY2022 appropriations for military activities and programs of the Department of Defense (e.g., personnel; research, development, test, and evaluation; and procurement of items such as aircraft, missiles, and ammunition). It also prescribes military personnel strengths for FY2022.
H.R.8270	09/16/2020 Referred to the House Committee on Armed Service	I am Vanessa Guillén Act of 2020	This bill addresses the response of the Department of Defense to sex-related offenses committed against members of the Armed Forces, including allowing a member to confidentially allege a complaint of sexual harassment to an individual outside the immediate chain of command of that member.
S.1520	04/29/2021 Read twice and referred to the Committee on Armed Services	Military Justice Improvement and Increasing Prevention Act of 2021	To reform the disposition of charges and convening of courts-martial for certain offenses under the Uniform Code of Military Justice and increase the prevention of sexual assaults and other crimes in the military.



## VITA

Siris Fernandez obtained their undergraduate degree in May of 2020 from Old Dominion University, located at 5115 Hampton Boulevard Norfolk, VA 23529, where they majored in English with a concentration in Journalism. Upon being accepted to the master's program in Humanities at Old Dominion University they used their experience as a U.S. Navy Reservist and a crisis counselor for sexual assault survivors to motivate their research. Siris will graduate in May 2022 with a M.A. in Humanities and a focus in Gender and Sexuality Studies and a Certification in Women's Studies.