Comment

COMBATING A DIFFERENT ENEMY: PROPOSALS TO CHANGE THE CULTURE OF SEXUAL ASSAULT IN THE MILITARY

“[T]he U.S. government and its military aspire to preserve the dignity and promote the fair treatment of service members across lines of gender and military rank, an aspiration thwarted by the persistence of sexual exploitation and assault within the services.”—Prof. Elizabeth L. Hillman

I. THE STARTLING TRUTH ABOUT MILITARY SEXUAL ASSAULT

Military members agree to sacrifice their lives for their country; yet, United States military women are more likely to be raped by a fellow military member than killed by enemy fire in Iraq. The irony is that a deployed female military member must find ways to protect herself not just against the enemy, but also against her comrades-in-arms. Statistics justify these fears; military sexual assault rates are twice as high as civilian rates and the majority of the assailants in the military setting are fellow

1. Sexual Assault in the Military Part Three: Context and Causes: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform, 111th Cong. 1 (2009) [hereinafter Hearings 2009] (statement of Elizabeth L. Hillman, Prof., Univ. of Cal. Hastings Coll. of Law). Hillman argued that the current military approach to preventing sex crimes is hindered, in part, because United States military law is “dominated by legal precedents involving sexual violence and racialized images.” See id. (connecting prevalence of sexual offenses to military law). The disproportionate number of important precedent cases involving sex crimes has shaped the military legal culture by making male sexual violence and female vulnerability appear to be the norm. See id. at 5-6 (describing how prevalence of sex crimes cases in military precedence influences military legal culture and military justice system).

2. See Sexual Assault in the Military: Hearing Before the Subcomm. on Nat’l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov’t Reform, 110th Cong. 1 (2008) (statement of Jane Harman, Cong. Rep.). Of the female veterans seen at one Veterans Administration health center, forty-one percent were victims of sexual assault and twenty-nine percent were raped, all while in the military. See id. (discussing extent of military sexual assault and criticizing official response).

3. See HELEN BENEDICT, THE LONELY SOLDIER 167-68 (2009) (recalling stories of deployed military women protecting themselves from rape by fellow military members). Deployed female soldiers reportedly carried knives not for protection against the enemy, but for protection against rape by men in their units. See id. at 168 (quoting former soldier, Mickiela Montoya, who indicated that she “wasn’t carrying the knife for the enemy, [she] was carrying it for the guys on [her] own side”).
service members. Moreover, the problem is not limited to women; military men are also victims of sexual assault.

Compounding the already devastating consequences of sexual assault is the unique military environment: women veterans who are sexually assaulted while in the military are nine times more likely to develop post-traumatic stress disorder than military women who are not. On a broader

4. See Hearings 2009, supra note 1, at 1-2 (statement of Helen Benedict, Prof. of Journalism, Columbia Univ.) (noting that “one in six women is raped or sexually assaulted in her lifetime, according to the National Institute of Justice”) (endnote omitted); Helen Benedict, The Scandal of Military Rape, Ms., Fall 2008, at 40, 42 (“In 2007, the Department of Veterans Affairs reported that [twenty] percent of female veterans seen at its facilities nationwide said they had been raped or sexually assaulted while serving. Other veterans studies put the incidence of rape at [thirty] percent: nearly one-third of all women in the military force.”); U.S. Dep’t of Def., Department of Defense FY08 Report on Sexual Assault in the Military app. c, tbl.5 (2009), available at http://www.sapr.mil/content/ResourcesReports/AnnualReports/DoD_FY08_Annual_Report.pdf [hereinafter FY08 Report] (providing military sexual assault statistics for fiscal year 2008). In fiscal year 2008, the Department of Defense (DoD) received 2,265 unrestricted reports of sexual assault in the military, of which 1,158 reports (51%) were military-on-military. See FY08 Report, supra, at 34(providing statistics on unrestricted reports of military sexual assault). For the same year, the DoD received 753 restricted reports of military sexual assault of which 393 reports (52%) were military-on-military. See id. at 40, app. C., tbl.5 (providing statistics on restricted reports of military sexual assault). These statistics represent sex crimes against adults including “rape, aggravated assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses.” Id. at 33 (explaining military’s sexual assault offense definition). Additionally, although military members are also sexually assaulted by non-military civilians, this Comment is concerned only with sexual assault where both the victim and the offender are military members. For further discussion of the differences between restricted and unrestricted reports of military sexual assault, see infra notes 54-55 and accompanying text.

5. See FY08 Report, supra note 4, at app. C., tbl.5 (providing statistics for military sexual assault by victim and assailant gender). In fiscal year 2008, the DoD received 123 unrestricted reports of sexual assaults classified as male-on-male and fourteen classified as female-on-male. See id. (detailing statistics of unrestricted reports of military sexual assault). Of the restricted reports made that same year, eighty-three involved male victims. See id. (citing restricted reports of military sexual assault statistics). Data regarding the gender of assailants in these restricted reports is not provided.

6. See U.S. Dep’t of Def., Task Force Report on Care for Victims of Sexual Assault 32 (2004), available at http://www.sapr.mil (follow “Reports & Resources” hyperlink; then follow “Reports” hyperlink; then “Task Force Report on Care for Victims of Sexual Assault, April 2004” hyperlink) [hereinafter Task Force Report] (describing impact of sexual assault on military victims); Alina Suris et al., Sexual Assault in Women Veterans: An Examination of PTSD Risk, Health Care Utilization, and Cost of Care, 66 Psychosomatic Med. 749, 755 (2004) (finding differential impact of military sexual assault on development of post-traumatic stress disorder). Sexual assault “destabilizes a victim’s sense of control, safety and well being, particularly if the victim lives in the same building, is assigned within the same command, and frequents the same base support and recreation facilities as the offender.” Task Force Report, supra, at 32 (explaining how sexual assault uniquely affects military victims). Additionally, “[w]ithin the military, sexual assault often involves continued victim-assailant contact after the incident.” Ann M. Vallandingham, De-
scale, military sexual assault affects more than just the individual victim; it also negatively impacts mission readiness and destroys the trust needed among service members responsible for protecting each others' lives.\footnote{See Sexual Assault in the Military Part Two: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform, 110th Cong. 6 (2008) [hereinafter Hearings Part Two 2008] (statement of Kaye Whitley, Dir., Office of the Sec'y of Def., Sexual Assault Prevention & Response Office) (stating that military sexual assault negatively impacts victims and mission readiness); FY08 REPORT, supra note 4, at 7 (recognizing impact of sexual assault on military members and mission readiness).
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Given the high demand on the military in Iraq and Afghanistan today, preservation of military readiness is vitally important.\footnote{See Military Readiness: Impact of Current Operations and Actions Needed to Rebuild Readiness of U.S. Ground Forces: Hearing Before the H. Comm. on the Armed Services, 110th Cong. 2-3 (2008) (statement of Sharon L. Pickup, Dir., Def. Capabilities and Mgmt., Gov't Accountability Office) (stating that mission requirements in Iraq and Afghanistan have significantly impacted military readiness).}

Furthermore, sexual assault is incompatible with the military services' core values of honor, integrity, and respect.\footnote{See U.S. Dep't of Def., DoD 5500.7-R, Joint Ethics Regulation § 12-501 (1996), available at http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/dir550007.pdf (detailing primary ethical values DoD employees should follow in their official duties); TASK FORCE REPORT, supra note 6, at 4 (describing importance of military core values in achieving military mission).}

Military leaders recognize that sexual assault runs counter to these values and insist that change is needed.\footnote{See Gina Cavallaro, Outgoing Army Secretary Looks Back, ARMY TIMES, July 27, 2008, at 24 (quoting former Army Secretary Pete Geren stating, "[t]he fact that within an organization like the Army... where people will die for one another just because they wear the same uniform, how can you have a situation where soldiers rape soldiers? It's such an outrage on the whole Army ethic."). Geren further stated that "[i]t's going to require continued emphasis from leaders at all levels to bring about the culture change." Id. (proposing that military culture needs to change to end military sexual assault).}

Congress and the Department of Defense (DoD) have attempted to address military sexual assault through training, victim response, and changes to the military's sexual offenses statute.\footnote{For a discussion of the DoD and legislative response to military sexual assault, see infra notes 51-80 and accompanying text.}

Whether these efforts are actually reducing the rate of military sexual assault is unclear, however, because the number of reported sexual assaults continues to climb.\footnote{See Helen Benedict, The Pentagon's Annual Report on Sexual Assault in the Military, or, How to Lie with Statistics, HUFFINGTON POST, Mar. 20, 2009, http://www.huffingtonpost.com/helen-benedict/the-pentagons-annual-repo_b_177563.html (stating that “no one can tell if an increase in reported sexual assaults means more assaults or more reports”); see also Jennifer S. Knies, Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target, ARMY LAW., Aug. 2007, at 1, 6 (arguing that training and response will likely have limited preventative effect on military sexual assault).}
Moreover, studies show that such “easy quick fix solutions” are unlikely to prevent sexual assault.\[13\]

Researchers and commentators have discussed the response to sexual assault victims and the prosecution rates in sexual assault cases—two elements which come into play after the crime has occurred.\[14\] In contrast, this Comment addresses the source of the problem—the contemporary United States military culture.\[15\] Feminist legal scholars have posited that various structural aspects of the culture subordinate military women.\[16\] This Comment specifically links sexual assault to the military policies and leaders’ actions that must be changed to improve the military culture and end sexual violence within the ranks.\[17\]

13. Moira Carmody & Kerry Carrington, Preventing Sexual Violence?, 33 AUSTL. & N.Z. J. OF CRIMINOLOGY 341, 343 (2000) (explaining why popular solutions to prevent sexual violence are ineffective). Sexual violence is difficult to prevent because it is frequently unreported and the victims often lack the social resources to help them respond to it. See id. (describing barriers to preventing sexual violence). Additionally, intimate sexual violence, where the attacker is an acquaintance of the victim, “remains relatively invisible and normalised in everyday relationships” and is not adequately addressed through standard crime prevention strategies. See id. at 343-44 (arguing effective sexual violence prevention requires unique approach). Finally, legislative reform has “virtually negligible preventative value, as it represents an intervention after, not before the incident.” Id. at 344 (explaining shortcomings of legislative reform efforts).

14. See Liz Kelly, Jo Lovett & Linda Regan, A Gap or a Chasm? Attrition in Reported Rape Cases ix-xi (2005), http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf (listing reasons for attrition in reported rape cases based on cases withdrawn from criminal justice system); Paul Schimpf, Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military, 185 MIL. L. R EV. 149, 151 (2005) (proposing adoption of absolute privilege for communications between military sexual assault victims and victim advocates). See also Vallandingham, supra note 6, at 224-27 (proposing designation of peer resources who are lower-ranked military members with limited confidentiality to receive reports of sexual assault from victims).

15. See generally Carmody & Carrington, supra note 13, at 341-42 (describing victim care and law reform as tertiary levels of intervention that occur after sexual assault). Efforts that address the response after a sexual assault has occurred, such as victim care and offender prosecution, may have a preventative effect on future sexual assault. See id. (stating tertiary intervention may “contribute to the prevention of further harm or the reduction in repeat offending”). Such efforts, however, lack potential to serve as primary prevention to prevent sexual assault before it even occurs. See id. (explaining that reform efforts aimed at post-assault activities “do not embody a primary preventative potential”).


17. For a discussion of the proposed reform to current United States military policies and leaders’ actions, see infra notes 171-80 and accompanying text.
Part II summarizes the history of sexual assault in the military and the extent of the problem today. Part III discusses the military’s response to sexual assault by surveying recently instituted victim reporting options and training programs for service members as well as recent changes to the sex offenses statute of the Uniform Code of Military Justice (UCMJ). Part IV identifies the contemporary United States military culture as the source of military sexual assault and critiques the official response to date as incapable of remediying this culture. Part V presents three proposals that aim to end military sexual assault by reforming current policies and addressing actions of military leaders that influence the culture. Finally, Part VI urges multi-pronged legal efforts to combat sexual assault in the military through changes that will affect its culture, such as executive action to demarginalize women’s military service, legislative action to end the combat exclusion, and administrative action to hold commanders accountable for implementing the sexual assault prevention and response program.

II. RECENT HISTORY OF MILITARY SEXUAL ASSAULT

Military sexual violence, though a problem for many decades, has garnered increased public attention over the past twenty years because of several sex scandals. Although the military has adopted a “no tolerance” policy toward sexual assault, statistics indicate that it still plagues the

18. For a discussion of the origins of contemporary military sexual assault and its impact on today’s United States military, see infra notes 23-51 and accompanying text.

19. For an analysis of the DoD and legislative response to contemporary sex scandals in the United States military and the revision of the statute governing military sex offenses, as well as discussion of the debate generated by the revision, see infra notes 52-80 and accompanying text.

20. For an analysis of the contemporary United States military culture as the source of the sexual assault problem and an evaluation of the current approach’s effectiveness in eliminating military sexual assault, see infra notes 81-118 and accompanying text.

21. For a discussion of the policy changes the military should implement to reduce the conduciveness of its culture to high rates of sexual assault, see infra notes 119-70 and accompanying text.

22. For a discussion of proposed legal avenues for changing the contemporary United States military culture, see infra notes 171-80 and accompanying text.

23. See Benedict, supra note 3, at 7 (noting history of military sexual violence); Schimpf, supra note 14, at 155 (recounting several military sexual assault cases that drew national attention). Sexual violence in the military is not a new phenomenon:

The sexual persecution of women has been going on in the armed forces for generations, as decades of studies have revealed. A 2004 study of veterans from Vietnam and all the wars since, who were seeking help for [Post-Traumatic Stress Disorder], found that 71% of women said they were sexually assaulted or raped while serving. And a 1995 study of female veterans of the Gulf and earlier wars found that 90% had been sexually harassed.

Benedict, supra note 3, at 7 (footnotes omitted).
ranks. While opinions about the effectiveness of the official response to military sexual assault vary, all concerned agree that military sexual assault is a vastly underreported crime that needs to end.

A. Military Sex Scandals and the Official Response

In the past twenty years, no branch of the United States military has escaped the embarrassment and devastation of appalling sex scandals. In 1991, widely reported accounts of the Tailhook Convention, the annual aviators’ convention, revealed that Navy officers engaged in excessive drinking, debauchery, and sexual abuse. Shortly thereafter, in 1996, reports surfaced about the sexual harassment and rape of female trainees by their drill instructors at the Army’s Aberdeen Proving Grounds. Then, in 2003, allegations of sexual assault and reprisal against victims at the Air Force Academy captured the attention of the national media as well as Congress.

24. See Memorandum from the Sec’y of Def. to Secretaries of the Military Dep’ts et al. (Apr. 13, 2009), available at http://www.sapr.mil/contents/SAAM/OSD_03306-09.pdf (“The Department of Defense has a no-tolerance policy toward sexual assault.”); see also Benedict, supra note 4, at 42 (describing scope of military sexual assault problem through reported cases, estimates of unreported cases, and studies of female veterans).

25. Compare FY08 Report, supra note 4, at 63 (stating that DoD is committed to ending sexual assault and interpreting increase in sexual assault reports as indication that efforts are working), with Benedict, supra note 4, at 41-42 (arguing that DoD response has failed to adequately address military sexual assault because of low prosecution rates, increasing reports of sexual assault, and vast underreporting of sexual assault).

26. See generally Schimpf, supra note 14, at 155 (describing how recent military sexual assault cases led to DoD and congressional response).

27. See Task Force Report, supra note 6, at 95 (providing chronology of military and DoD response to sexual misconduct); Michael R. Gordon, Pentagon Report Tells of Aviators’ ‘Debauchery’, N.Y. TIMES, Apr. 24, 1993, Sec. 1, at 1 (discussing Pentagon report about official investigation into Tailhook scandal). The victims included eighty-three women and seven men, who reported being “groped, pinched and fondled on their breasts, buttocks and genitals.” See Gordon, supra (describing assaults). Women were assaulted by approximately 300 men when they were forced to walk through a hallway known as the gauntlet. See Vojdik, supra note 16, at 347 (describing attacks on women at Tailhook Convention).

28. See Task Force Report, supra note 6, at 94 (stating that several Army drill sergeants were convicted on rape and sexual harassment charges at Aberdeen); Tim Weiner, One Sergeant Pleads Guilty as Army Widens Sex Inquiry, N.Y. TIMES, Nov. 13, 1996, at A1 (describing investigation and prosecution in sexual misconduct cases at Aberdeen training base). One Aberdeen drill sergeant faced charges involving twenty-one victims, six of whom he allegedly raped. See Elaine Scioli, Rape Witnesses Tell of Base Out of Control, N.Y. Times, Apr. 15, 1997, at A14 (describing trials at Aberdeen).

29. See Pentagon Panel Will Examine Air Force Sex Assault Policies, N.Y. TIMES, Feb. 17, 2003, at A16 (describing military response in wake of sexual assault allegations at Air Force Academy). The cadets’ alleged retribution for reporting sexual assault led members of Congress to request an investigation. See id. (describing congressional leaders’ call for Pentagon action after Academy cadets’ accusations surfaced). Some military officials responded by focusing on victim responsibility,
Although the DoD responded after each of these scandals, it recognized the need to take increased action when the media reported that several military women serving in deployed locations were sexually assaulted.\footnote{30} In February 2004, the Secretary of Defense responded to reports about sexual assault of military members in Iraq and Kuwait by directing the Under Secretary of Defense for Personnel and Readiness to review how the DoD cares for victims of sexual assault.\footnote{31} The task force identified, among other problems, inconsistent sexual assault programs throughout the DoD and recommended establishing a single office responsible for sexual assault matters.\footnote{32} Heeding this advice, the DoD created the Joint Task Force on Sexual Assault Prevention and Response (JTF-SAPR) which focused on care for victims, prevention training, and system accountability.\footnote{33} In 2005, the JTF-SAPR transitioned into a permanent office—the Sexual Assault Prevention and Response Office (SAPRO)—which serves as the “single point of responsibility for sexual assault policy matters” today.\footnote{34}

In addition to these steps taken by the DoD, Congress intervened and, in the 2005 National Defense Authorization Act, directed the Secretary of Defense and the military services to develop policies and procedures to rather than offender accountability, making comments such as: “if I walk down a dark alley with hundred-dollar bills hanging out of my pockets, it doesn’t justify my being attacked or robbed, but I certainly increased the risk by doing what I did,” and “[a]re you the one girl going to Denver for an overnight in a hotel with five guys? Probably not a good idea.” \footnote{Id. (quoting responses of two military officials to sexual assault allegations).}

\footnote{30. See Schimpf, supra note 14, at 155-56 (recounting media reaction to sexual assault allegations by deployed military women). The media generally “depicted a military institution that fostered an environment of sexual assault and treated victims callously.” \textit{Id.} at 156.}

\footnote{31. See \textit{Task Force Report}, supra note 6, at v, vii (providing official memorandum establishing initial task force and responsibilities to investigate military and DoD sexual assault programs and policies). The ninety-day review was focused on sexual assault prevention, reporting, victim support, and offender accountability. \textit{See id.} at vii (describing method of review undertaken by initial DoD sexual assault task force).}

\footnote{32. See \textit{id.} at 23, 46 (identifying inconsistent and incomplete sexual assault prevention policies and programs throughout military services and recommending single point of accountability).}


\footnote{34. See \textit{Hearings Part Two 2008}, supra note 7, at 6 (statement of Whitley) (“In 2005, the JTF-SAPR transitioned into SAPRO . . . which is responsible for policy and oversight.”); DoD \textit{Instruction} 6495.02, \textit{Sexual Assault Prevention and Response Program Procedures} 3, \textit{para.} 5.3 (June 23, 2006), \textit{available at} \url{http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf} (designating SAPRO as DoD’s “single point of responsibility for sexual assault policy matters”).}
prevent and respond to sexual assault involving military members.35 In response, the DoD issued two important documents: (1) a directive containing the policy for sexual assault prevention and response; and (2) an instruction providing guidance for the policy’s implementation.36 The statute also required that the DoD provide an annual report to Congress on military sexual assaults that occurred during the preceding year and on action taken in substantiated cases.37

B. The Suffering of Military Sexual Assault Victims Today

Despite Congressional and DoD prevention and response efforts, military members continue to be sexually assaulted in alarmingly high numbers.38 In fiscal year 2008, there were 2,908 reports of sexual assault involving military members, an increase of eight percent from the previous year.39 Additionally, reports of sexual assault by those deployed to Iraq and Afghanistan increased by twenty-six percent.40 Studies of veter-


36. See DoD Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program 2-3, para. 4 (Oct. 6, 2005, Incorporating Change 1, Nov. 7, 2008) (providing that DoD’s aims include eliminating military sexual assault, providing response to victims, and ensuring strong awareness and prevention programs); DoD Instruction 6495.02, supra note 34, at 1, para. 1 (stating that this instruction “[i]mplements policy, assigns responsibilities, provides guidance and procedures, and establishes the Sexual Assault Advisory Council”).


39. See FY08 Report, supra note 4, at 33 (providing fiscal year 2008 statistics for reported military sexual assaults). “The Services received 2,265 Unrestricted Reports involving Service members as either the subject and/or victim of sexual assault (a 9% increase from FY07) . . . [and] 753 Restricted Reports involving Service members as victims of sexual assault (a 7% increase from FY07).” Id.

ans reveal the vast extent of the problem: female veterans’ records indicate that between twenty and thirty percent were raped or sexually assaulted while in the military.\footnote{See Benedict, supra note 4, at 42 (stating rates of sexual assault reported in veterans’ studies were between 20%-30%). One study of female veterans who had been sexually assaulted stated that 14% were gang raped and 20% were raped more than once. See Hansen, supra note 38 (citing study that reported 30% of female veterans had been sexually assaulted).} The DoD’s report also indicated that most military victims of sexual assault are young, low-ranking,\footnote{See FY08 Report, supra note 4, at 40-41 figs.2, 3, 6 & 7 (providing age and rank statistics of military sexual assault victims). Of the victims who made unrestricted reports, over 48% were between twenty to twenty-four years old and 62.9% held one of the four lowest military ranks. See id. at 38 figs.2 & 3 (providing statistics for victims who made unrestricted reports). For restricted reports, over forty-seven percent of the victims were between twenty and twenty-four years old and seventy percent held one of the lowest four military ranks. See id. at 40-41, figs.6 & 7 (providing statistics for victims who made restricted reports). In contrast, the highest percentage of sexual assaults reported by deployed military members involved slightly older and higher ranked offenders. See id. at 43-44, figs.10 & 11 (reporting that highest percentage of subjects of sexual assault cases in combat areas were between twenty-five to thirty-four years old and held one of five highest enlisted ranks).} and female.\footnote{See FY08 Report, supra note 4, at app. c, tbl.5 (providing statistics of military sexual assault victims’ gender). Of the 2,265 unrestricted reports, 2,105 were made by females and 160 were made by males. See id. (listing numbers of unrestricted reports by gender). Of the 753 restricted reports, 657 were made by females, 83 by males, and thirteen were listed as unknown. See id. (providing numbers of restricted reports by gender). In addition, Veterans Affairs (VA) specialists have stated that military women are twenty times more likely than military men to experience sexual assault or harassment. See Linda Stewart Ball, VA Panel Discusses Assault, Harassment, DALLAS MORNING NEWS, June 11, 2009, available at http://www.dallasnews.com/sharedcontent/APStories/stories/D98ONRC81.html (citing VA specialists who counsel military veterans). Yet “more than half of veterans seeking treatment at the VA for military sexual assault are men.” Id. (noting extent of male military sexual assault victims). The explanation for this disparity is that there are more men in the military, thus even though women are more vulnerable, more men are victims. See id. (discussing male victims of military sexual assault and reporting barriers).} Most of the offenders are young, low-ranking,\footnote{See FY08 Report, supra note 4, at 39 figs.4 & 5 (providing statistics on subjects of military sexual assault reports). In unrestricted reports, 32.7% of the service member subjects were between twenty to twenty-four years old and 46.4% held one of the four lowest military ranks. See id. (providing age and gender statistics for service member subjects in reported sexual assaults).} and male.\footnote{See FY08 Report, supra note 4, at app. c, tbl.5 (listing numbers of subjects in military sexual assault investigations by gender). Of the 1,438 investigations completed in fiscal year 2008, 1,265 involved male subjects, eighteen involved female subjects, and 155 were reported as gender-unknown. See id. (same).}

Interpretation of such military sexual assault statistics varies greatly, with the DoD viewing the data more optimistically than some commenta-
The SAPRO interprets the increase in reports as an indication of the system’s success, claiming that it shows military members’ trust in the system has improved. Other commentators, however, suggest the increase in reports may actually reflect a rise in the number of sexual assaults—a real possibility given the correlation between increased rates of sexual violence and war. Furthermore, military leaders are still unable to address the majority of sexual assaults because less than ten percent of assaults that occur each year are reported. Even where military leaders were able to act—that is, when sufficient evidence for disciplinary action against the offender was available—only thirty-eight percent of cases were sent to trial by courts-martial. Hence, although the increase in reports is

46. Compare John J. Kruzel & Michael J. Carden, Defense Department Releases Sexual Assault Statistics, ARMED FORCES PRESS SERV., Mar. 17, 2009, available at http://www.defenselink.mil/news/newsarticle.aspx?id=53525 (reporting that increased sexual assault reports are viewed as positive by DoD officials), with Benedict, supra note 12 (criticizing interpretation of increased sexual assault reports as positive result). The SAPRO director stated that “[t]he increase of reports means the [DoD’s] policy of getting victims to come forward is making a difference.” Kruzel & Carden, supra (providing DoD’s interpretation of increased sexual assault reports). In contrast, Benedict argues that the DoD cannot validly interpret the increase in reports of sexual assault as positive because the increase might actually indicate a rise in the number of sexual assaults and only ten percent of sexual assaults are reported. See Benedict, supra note 12 (“The only accurate way to measure military sexual assault is to rely on veterans who are no longer afraid to report it, and those studies indicate no good news at all.”).

47. See Kruzel & Carden, supra note 46 (quoting SAPRO director interpreting increased sexual assault reports as positive).

48. See Madeline Morris, By Force of Arms: Rape, War, and Military Culture, 45 DUKE L.J. 651, 673 (1996) (“In wartime, military rape rates are increased far more above civilian levels than are rates of other violent crime.”) Morris compared rates of violent crime among military men and civilian men in both peacetime and wartime in arriving at this conclusion. See id. at 659 (describing study of violent crime rates including murder/non-negligent manslaughter, aggravated assault, and forcible rape). “In the war context . . . military rape rates in the combat theater studied rose far above civilian levels, while rates of other violent crime did not.” Id. at 664. Thus, “rape is distinct from other crimes of violence in war” because the rate of rape increases more during wartime than the rates of other violent crimes. Id. at 673 (concluding that changes in military rape rates were meaningfully different from changes in rates of other violent crimes during peacetime and wartime). Yet the conclusions of this study were not without criticism. See Diane H. Mazur, A Call to Arms, 22 HARV. WOMEN’S L.J. 39, 55-56 (1999) (critiquing Morris’ study).

49. See FY08 REPORT, supra note 4, at 51 (stating that DoD estimates military sexual assaults are underreported based on reports made through anonymous surveys); see also Katie Couric, Sexual Assault Permeates U.S. Armed Forces, CBS News, Mar. 17, 2009, http://www.cbsnews.com/stories/2009/03/17/eveningnews/main4872713.shtml (stating Pentagon officials recognize sexual assault as most under-documented military crime). Additionally, a 2006 survey revealed that only one-fifth of military men and women who experienced unwanted sexual contact made an official report. See FY08 REPORT, supra note 4, at 51 (citing Defense Manpower Data Center Gender Relations Survey). “Comparatively, in civilian life the FBI puts the rate of unreported rape at 60%.” Benedict, supra note 4, at 42.

50. See FY08 REPORT, supra note 4, at 36 (providing breakdown of disciplinary action taken in completed investigations of military sexual assaults). Of the re-
viewed positively by some officials, the military is certainly far from win-
ing the battle against sexual assault.51

III. THE CURRENT APPROACH TO MILITARY SEXUAL ASSAULT

In 2004, the initial DoD task force developed the foundation for the
sexual assault prevention and response policy.52 To date, the DoD’s focus
has centered primarily on caring for victims and educating military mem-
bers about sexual assault through training.53 Additionally, legislative ef-
forts to combat sexual assault resulted in the revision of the sex offenses
statute of the UCMJ in 2006.54

A. Victim Reporting Options and Service Member Training Programs

Military victims of sexual assault can choose to make either a re-
stricted or an unrestricted report.55 The restricted reporting option al-
main cases, thirty percent were handled through non-judicial punishment and
thirty-two percent through administrative actions and discharges. See id. (same).

51. See U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL RE-
QUESTERS, MILITARY PERSONNEL: DoD’S AND THE COAST GUARD’S SEXUAL ASSAULT
PREVENTION AND RESPONSE PROGRAMS FACE IMPLEMENTATION AND OVERSIGHT CHAL-
LENGES 4-8 (2008), [hereinafter GAO REPORT], available at http://www.gao.gov/
new.items/d08924.pdf (reporting to Congress problems facing DoD sexual assault
prevention and response program). The GAO found that several factors hindered
the DoD’s efforts:

(1) DoD’s guidance may not adequately address some important issues,
such as how to implement its program in deployed and joint environ-
ments; (2) most, but not all, commanders support the program; (3) re-
quired sexual assault prevention and response training is not consistently
effective; and (4) factors such as DoD-reported shortage of mental health

52. See Hearings Part Two 2008, supra note 7, at 6 (statement of Whitley) (stat-
ing JTF-SAPR’s policy “revolutionized the Department’s sexual assault response
structure”). For a further discussion of the initial task force and subsequently
formed SAPRO, see supra notes 31-34 and accompanying text.

53. See David Chu, Undersecretary of Def. for Personnel and Readiness, Spec-
ial Defense Department Briefing on the New Sexual Assault Policy (Jan. 4, 2005),
available at http://www.dod.mil/transcripts/2005/tr20050104-1922.html) (ex-
plaining care for sexual assault victims and prevention education are DoD priori-
ties); Knies, supra note 12, at 6 (explaining DoD has focused mainly on training
and response to military sexual assault).

The UCMJ comprises the United States military’s criminal law which applies to all
military members. See generally Estela I. Velez Pollack, CONGRESSIONAL RESEARCH
SERVICE, REPORT FOR CONGRESS, MILITARY COURTS-MARTIAL: AN OVERVIEW, 1
criminal courts’ features and procedures). For a further discussion of the revised
Article 120, see infra notes 65-80 and accompanying text.

55. See DoD INSTRUCTION 6495.02, supra note 34, at 12 E2 (explaining re-
stricted reporting option for DoD sexual assault prevention and response pro-
gram). “The restricted reporting option is only available to those sexual assault
allows a victim to access medical care and support services while controlling whether a criminal investigation is initiated, while the unrestricted reporting option makes the details of the assault reportable to law enforcement and commanding officers. The addition of the restricted reporting option was significant given the reluctance among military members to report sexual assault. This development, however, required compromise between the DoD and commanders because the latter generally prefer to know of all criminal offenses occurring within their units. Unfortunately, despite the DoD’s efforts, reports indicate that not all service members understand how to use the restricted reporting option.

The DoD also directed the services to implement periodic training for all service members on the sexual assault prevention and response program, including the reporting options; yet, the training needs considerable reform. While the DoD annual training requirement does not

victims who are service members; however, it may not be an option if the sexual assault occurs outside of the military installation or the victim first reports to a civilian facility and/or a civilian authority.”

56. See FY08 Report, supra note 4, at 9-10 (explaining restricted reporting option). Under restricted reporting, the member’s identity is kept confidential and, although the member may receive an anonymous sexual assault forensic exam, the investigation process is not initiated. See id. at 10 (describing procedures for restricted reports). Commanders are, however, provided some non-identifying information regarding the incident to allow them to ensure the safety of members within their command. See id. (same). In contrast, under unrestricted reporting once a victim reports a sexual assault, the commander is notified and the investigation process begins immediately. See id. (explaining procedures for unrestricted reports). Base personnel, known as the Sexual Assault Response Coordinator (SARC) and victim advocates, “work with the victims to help them understand the reporting options.” See id. (discussing procedures for victim assistance).

57. See Task Force Report, supra note 6, at 28 (detailing barriers to reporting sexual assault). Service members reported fear of reprisal, concern that a victim would not be believed by superiors and other unit personnel, repercussions for the victim’s own misconduct, and distrust in the ability of commanders to effectively respond to a sexual assault. See id. (explaining that some barriers to reporting sexual assaults were “consistent with those in the civilian community while others [were] unique in a military setting”).

58. See GAO Report, supra note 51, at 14 (reporting some military commanders “supported the programs but did not like the restricted reporting option because they felt it hindered their ability to protect members of the unit or discipline alleged offenders”); Task Force Report, supra note 6, at 31-32 (noting tension between encouraging victims to report through restricted reporting and military commanders’ solemn responsibility to hold offenders accountable and to ensure community safety”).

59. See GAO Report, supra note 51, at 22 (finding that despite training not all service members understand restricted reporting option). Of the service members who received sexual assault prevention and response training, 15%-43% at installations within the United States and 13%-28% at overseas installations did not know how to use the restricted reporting option. See id. (same).

60. See Hearings Part Two 2008, supra note 7, at 6 (statement of Brenda S. Farrell, Dir., Def. Capabilities and Mgmt., Gov’t Accountability Office) (reporting that DoD sexual assault prevention and response training program was not “consistently effective”).
specify a format, it does recommend that training for junior enlisted personnel “incorporate adult learning theory, which includes group participation and interaction.”

Regrettably, the services have not always heeded this advice. Contrary to the recommended format, training is sometimes computer-based or takes place in large group settings with no active participation. Compounding this failure to implement recommended training techniques, many service members do not pay attention during the training—likely because “the training relie[s] heavily on power point briefings” and “the material is not engaging.” Moreover, military members do not always take the training seriously, and “some described [it] as a vehicle for units to ‘check the box’ indicating that [the unit] met the training requirement.”

B. Revisions to the Sex Offenses Statute

In 2005, Congress directed the Secretary of Defense to review the UCMJ and Manual for Courts-Martial to determine what changes were necessary to improve the military justice system’s response to sexual assault. As a result of this effort, a revised version of Article 120—address-
ing rape, sexual assault, and other sexual misconduct—became law in 2006.\(^{66}\) The significant revisions included a series of graded offenses, improved definitions, and removal of “without consent” as an element of rape.\(^{67}\) In addition, consent and mistake of fact as to consent became affirmative defenses to the charges of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.\(^{68}\) Significantly, removing the “without consent” element and making consent an affirmative defense effectively shifts the burden of proving consent to the defendant.\(^{69}\)

This new sexual offenses statute has been met with criticism both from scholars who disagree with the change and scholars who believe the change was needed.\(^{70}\) For example, one supporter of the change argues that the revision does not adequately incorporate the advice of reform-

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\(^{67}\) See Jessica L. Cornett, Note, The U.S. Military Responds to Rape: Will Recent Changes be Enough?, 29 WOMEN’S RTS. L. REP. 99, 108-09 (2008) (explaining significance of Article 120 changes). The previous Article 120 addressed rape, but did not include a series of graded offenses, which the new statute delineates based on aggravating factors. See id. at 108 (providing new categories of offenses). Also, the revision “details many definitions with a clarity that was previously lacking” for terms such as “sexual act, sexual contact, grievous bodily harm, and force.” Id. (listing some terms defined in revised Article 120). The previous elements for rape under Article 120 were: “that the accused committed the act of sexual intercourse; and that the act of sexual intercourse was done by force and without consent.” Mark L. Johnson, Forks in the Road: Recent Developments in Substantive Criminal Law, ARMY LAW., June 2006, at 23, 27, n.69 (citing UCMJ Article 120(a)(2005)). The revised definition of rape is:

Any person . . . who causes another person of any age to engage in a sexual act by—(1) using force against that other person; (2) causing grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping [sic]; (4) rendering another person unconscious; or (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct . . . .


\(^{68}\) See 10 U.S.C. § 920(r) (listing consent and mistake of fact as affirmative defenses under specified subsections).

\(^{69}\) See Cornett, supra note 67, at 109 (describing effect of removal of “without consent” element). The defendant must prove consent or mistake of fact by a preponderance of the evidence. See Johnson, supra note 67, at 27 (explaining mechanics of revised Article 120). If the defendant satisfies this burden, the prosecution must overcome the defense beyond a reasonable doubt. See id. (same).

\(^{70}\) Compare Knies, supra note 12, at 1 (contending that revision of Article 120 was needed), with Keith B. Lofland, The Neglected Debate over Sexual Assault Policy in the Department of Defense, 55 NAVAL L. REV. 311, 312 (2008) (criticizing statutory changes to Article 120 as “a result of bad social science and worse policy assumptions flowing from that poor science”).
ers.71 This commentator suggests that for the Article 120 revisions to be truly effective in preventing sexual assault, it should have required affirmative consent of both parties before sexual penetration.72 Moreover, another critic considers elimination of the consent element “a step towards the treatment of rape as a strict-liability offense” because it shifts the burden of proving consent to the defendant.73 Nevertheless, a military appellate court recently held that the revised Article 120 did not, on its face, unconstitutionally shift the burden of disproving an element of the offense to the defendant.74

Despite these recent revisions, however, the structure of the military justice system limits the likelihood that the new Article 120 will prevent sexual assault of military members.75 The military justice system is commander-driven—that is, individual commanders have discretion in deciding whether to pursue criminal charges in response to allegations of sexual misconduct.76 Therefore, the statute’s ability to deter future sexual assaults will largely depend on the decisions of individual commanders.77 Unfortunately, not all commanders are supportive of the sexual assault prevention and response program.78

71. See Knies, supra note 12, at 21 (contending that “Congress failed to truly reform” Article 120). Studies and military appellate courts advocated for a statute focused on consent rather than on force, while Congress “further entrenched” the force element with the revised statute. See id. (describing failure in reform effort).

72. See Knies, supra note 12, at 27-28 (advocating revisions to Article 120 to require affirmative verbal consent before penetration).

73. See Lofland, supra note 70, at 335 (arguing that revisions to Article 120 were improperly based on social and political agendas). See also Johnson, supra note 67, at 28 (describing practical application and constitutional concerns involving Article 120 revision).

74. See United States v. Crotchett, 67 M.J. 713, 715 (N-M. Ct. Crim. App. 2009) (holding that revised Article 120 appropriately places burden of proof for each element on government). Although the facial challenge to the statute failed, the court did not address what result might occur when the statute is applied to the facts of a litigated case. See id. at 714 (limiting extent of holding).

75. See Knies, supra note 12, at 6 (contending revisions to Article 120 are “unlikely to prevent the crime from occurring”). Article 120 is still focused on force despite recommendations by legal scholars and courts to reform rape statutes to require consent to protect sexual autonomy. See id. (describing reform proposals in rape law).

76. See GAO Report, supra note 51, at 15-16 (explaining role of military commanders in controlling military justice system). “In both DoD and the Coast Guard, commanders are responsible for discipline of misconduct, including sexual assault, and they have a variety of judicial and administrative options at their disposal.” Id. These options include trial by courts-martial, non-judicial punishment, and administrative action. See id. at 16 (listing disposition options for discipline of misconduct). For a further discussion of the options available under the UCMJ, see Task Force Report, supra note 6, at 6-8 (describing commanders’ options).

77. See GAO Report, supra note 51, at 15-16 (noting military commanders’ responsibilities in response to criminal conduct).

78. See id. at 15 (stating that some commanders are unsupportive of sexual assault prevention program). At three of the fourteen installations visited, program officials stated that they met resistance from commanders when they at-
half of reported sexual assaults are disposed of with no action taken. Additionally, many sexual assault cases are disposed of administratively through non-judicial punishment, which is described by some as “no more than a slap on the wrist.”

IV. A NEW UNDERSTANDING OF MILITARY SEXUAL ASSAULT

Past efforts to combat military sexual assault, although commendable, have failed to target the source of the problem—the culture. A misogynistic, hyper-masculine culture that subordinates military women predictably leads to high rates of sexual assault. Recognizing that the contemporary United States military culture is masculine and misogynistic makes the link between the culture and sexual assault clear.

tempted to display sexual assault prevention and response materials in work areas and living quarters. See id. at 14 (citing lack of commander support).

79. See FY08 REPORT, supra note 4, at 37, tbl.4 (providing statistics for disposition of completed sexual assault investigations in fiscal year 2008). In nearly half of the completed investigations, commanders could not take action for a variety of reasons including cases that were under civilian court or foreign authority, incidents in which the subject was unidentified, or cases where punitive action was not possible. See id. (same). Notably, no action was taken against 1,074 subjects because the cases were classified as “unsubstantiated or unfounded, lack[ing] sufficient evidence, involved a victim that recanted, or involved a subject or victim who died.” Id. at 36 (providing reasons for no action taken). The classification of these statistics has been cited by one commentator as demonstrating the military’s lack of transparency. See Cornett, supra note 67, at 112 (contending unclear DoD data prevents adequate response to military sexual assault).

80. Hearings 2009, supra note 1, at 8 (statement of Benedict) (asserting that punishment of majority of sexual assault offenders was mild). In 2007, only one-twelfth of reported sexual assaults went to court-martial. See id. (describing low rates of military prosecution in sexual assault cases). “In 2008, a mere 10.9% of all reported assaults went to court-martial.” Id. See also Couric, supra note 49 (noting that punishment in military sexual assault cases is often inadequate).

81. Cf. Carmody & Carrington, supra note 13, at 354-55 (arguing efforts to prevent sexual assault through education and legal reform have limited potential to successfully change underlying cultural causes).


83. Cf. Morris, supra note 48, at 701-04 (describing “specific set of attitudes that appears to be conductive to rape”). Attitudes toward masculinity, sexuality, rape myths, acceptance of violence against women, hostility toward women, and sex-role stereotyping are all associated with propensity to rape. See id. (explaining factors that increase rape proclivity).
A. A Culture of Domination and Denigration

The contemporary United States military culture has been described by sociologists and legal scholars as misogynistic, masculine, or hyper-masculine.84 “Masculinity is traditionally defined around the idea of power,” therefore the military—serving as both the symbolic and actual source of the nation’s power—is the ideal forming ground for a culture of masculinity.85 Reflecting the masculine military culture, Retired Navy Admiral James Webb commented on the purported virtues of the military by posing the question, “[w]here in the country can someone go to find out if he is a man? And where can someone who knows he is a man go to celebrate his masculinity?”86 Webb further stated that the inclusion of women in the military made male service members “feel stripped, symbolically and actually.”87 Hence, the admission of women into the military disrupted its masculine identity.88

As Webb’s comments demonstrate, the social construction of masculinity is premised as the opposite of femininity; thus, to reinforce masculinity the military firmly draws gender boundaries to maintain this


The warrior mystique pervades military culture and includes . . . fierce competitiveness for promotions and assignments; a “good old boys” network; the notion that women do not belong in combat; an inability or unwillingness on the part of men in the military to see women in the military as equals; the idea that, because the military teaches young men to be violent to protect their country, the country should look the other way whenever those young men are violent even against women, because, after all, boys will be boys, and they are only doing what they have been taught and are expected to do . . . and the idea that female soldiers are not real soldiers.

Id.


86. See Vojdik, supra note 16, at 343 (describing response to women’s integration into United States military).

87. Id. (explaining perceived impact of women’s integration into military). Webb described the military as providing a “ritualistic rite of passage into manhood.” See id.

88. See id. (explaining resistance to military integration).
distinction. Likewise, military members define themselves “in relation to the outsider,” where the outsider is the enemy and anyone who is not hyper-masculine or aggressive. Hence, the military distances itself from persons perceived as not masculine, such as women and homosexuals, which may explain the restrictions on these groups. Consequently, when insecurity about masculinity arises, “nervous men seek reassurances of their masculinity through group rituals that express domination over other groups.” One method of expressing masculinity through domination identified within the culture of both male athletic teams and the United States military is insult talk. As an example, drill instructors at boot camp put down male recruits by feminizing them, calling them “pussies,” “sissies,” or “girls,” to teach them that “to be degraded is to be female.”

This name-calling illustrates that the military’s masculinity is not just a belief; it is a social practice, which is continually reinforced by a culture of domination by the masculine and subordination of the feminine. For instance, military cadence calls, rituals, and jokes frequently devalue wo-

89. See Karst, supra note 85, at 503-04, 509 (discussing how masculinity is defined by society and how restricting access to military service maintains gender line).

90. Hearings 2009, supra note 1, at 2-3 (statement of Benedict) (discussing research on military culture and attitudes towards women). “The masculinity that is definitive of the military in-group is, not surprisingly, defined in contrast to the ‘other’—in particular, in contrast to women.” Morris, supra note 48, at 716.

91. Cf. Karst, supra note 85, at 509 (explaining how ideology of masculinity rationalizes restrictions on women and gays).

92. See id. at 506 (stating that masculinity is expressed through domination of others). For men, the fear of other men seeing them as “weak, feminine, [or] not manly” creates anxiety about losing social status and can lead to the use of “sexual conquests as a form of currency to gain status among other men.” Michael Kimmel, Men, Masculinity, and the Rape Culture, in TRANSFORMING A RAPE CULTURE 141, 145-47 (Emilie Buchwald et al. eds., 2005) (citing masculine fragility as source of sexual violence).

93. See Burke, supra note 84, at 13 (describing use of insults based on femininity in military training). “Trash talking on high school basketball courts and insult talk among teammates off the field have common traits: They establish hierarchies, they involve personal insults or put-downs, often as calls to defend masculinity and honor, and they often degrade objects defined as feminine.” Messner, supra note 82, at 27-28 (describing sexual insult talk among male athletes as domination and subordination).

94. Burke, supra note 84, at 13 (discussing transmission of military culture in boot camp). The feminization of male recruits may be as simple as a drill instructor stating, “Come on, ladies.” See id. (noting gendered-insults used in military training). Although military rules prohibit the use of racial epithets and curses, drill instructors “still routinely denigrate recruits by calling them pussy, girl, bitch, lady and dyke.” Hearings 2009, supra note 1, at 3 (statement of Benedict) (contending misogyny permeates military culture).

95. See Vojdik, supra note 16, at 341-42 (citing military social practices that preserve hierarchy of masculinity over femininity).
men and glorify sexual violence against women.96 Such misogyny permeates military social practices and reinforces the subordination of women.97 As one scholar explained, “masculinity as a social practice rationalizes the inequality and subordination of women within the military and society.”98

B. Recognizing the Culture as the Source of Military Sexual Assault

While feminists differ in their perception of sexual assault, the definitions espoused by some feminist commentators are instructive in explaining the prevalence of such assault in the military.99 The prevailing feminist definition of sexual assault advocates understanding the crime from the victim’s point of view: sexual assault is “an act of the subordina-

96. See Abrams, supra note 16, at 219 n.9 (describing misogynistic behaviors at Naval Academy); Vojdik, supra note 16, at 342 (“A variety of rituals and practices compel males to prove their social identity as men through both symbolic and actual enactments of hyper-masculinity that denigrates women.”). Examples of military cadence calls, which are chanted while marching, include a variation on the song “The Prettiest Girl: The ugliest girl I ever did see / was beating her face against a tree / I picked her up; I punched her twice; / She said, ‘Oh Middy, you’re much too nice.’” and “My Girl Is a Vegetable: My Girl ain’t got no eyes / Just two sockets full o’ flies . . . / Sometimes I even play a joke / Pull the plugs and watch her choke.” Abrams, supra (citing Carol Burke, Dames at Sea, THE NEW REPUBLIC, Aug. 17 & 24, 1992, at 16, 18). One cadence that celebrates sexual violence against women is “The S&M Man,” sung to the tune of “The Candy Man”: “Who can take a chain saw / Cut the bitch in two / Fuck the bottom half / and give the upper half to you.” BURKE, supra note 84, at xi (describing “officially banned songs that nevertheless continued to be performed in small groups”).

97. See Hearings 2009, supra note 1, at 3 (statement of Benedict) (contending military language “not only perpetuates an antagonistic view of women, but teaches it”); Vojdik, supra note 16, at 342-43 (arguing that military language denigrates military women). But see Mazur, supra note 48, at 56 (contending that “[t]he factual support . . . underlying the assumption of hostility against female [military members] . . . consists of a small smattering of trivialities that have no relevance to day-to-day military service by women.”). Misogynist language is so engrained in military culture that conversations among military members are “riddled with sexist and homophobic insults.” See BENEDICT, supra note 3, at 50-51 (noting contempt for women in military). A Marine describing his initial Marine Corps training explained, “The Drill Instructor’s nightly homiletic speeches, full of unabashed hatred of women, were part of the second phase of boot camp: the process of rebuilding recruits into Marines.” Hearings 2009, supra note 1, at 3 (statement of Benedict) (quoting Martin Smith, Iraq Veterans Against the War 2008, in WARRIOR WRITERS: RE-MAKING SENSE 34 (Lovella Calica ed., 2008)).

98. Vojdik, supra note 16, at 341 (explaining how masculinity of military culture operates through social practices).

99. Compare SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 376 (1975) (defining rape as violence), with Catherine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635, 647 (1983) (arguing that rape is male sexuality expressed). Brownmiller contend that rape is a “violent act of degradation and possession . . . designed to intimidate and inspire fear” and urged recognition of aspects of culture that promote rape by men. See BROWNMILLER, supra, at 391 (proposing violence-based understanding of rape).
"domination" of the victim to the assailant. Thus, a person who sexually assaults another is dominating that person, not fulfilling sexual desires. Sexual assault as a means of domination is "what is meant by the oft-repeated but little understood phrase that rape is about power, not sex." If sexual assault is an act of domination, then the prevalence of sexual assault in the military is understandable given its hyper-masculine and misogynistic culture. The culture insists that members prove themselves as masculine, which is often achieved through the domination of others. While some members might be able to achieve domination through legitimate means, others resort to domination through sexual assault. The latter member resorts to violence and denigration of women (or other men) in order to prove his masculinity. Thus, sexual assault is a "natural part of the [military] institution" because of the culture.

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100. See MacKinnon, supra note 99, at 652 (describing rape from "women’s point of view").
101. See Benedict, supra note 3, at 6 (explaining motivations for rape as including "anger, sexual sadism, and the need to dominate and destroy").
102. Id. at 6 (describing rape as domination).
103. See Hearings 2009, supra note 1, at 1-2 (statement of Benedict) (describing military culture). Benedict explained how the military culture combined with psychology of assailants and the nature of war leads some military members to sexually assault others. See id. at 1-3 (identifying misogyny and emphasis on hyper-masculine norms as contributing factors in military sexual assault).
104. See Karst, supra note 85, at 505-06 (identifying ideology of masculinity as source of subordination of others); Vojdik, supra note 16, at 342 ("A variety of rituals and practices compel males to prove their social identity as men through both the symbolic and actual enactments of a hyper-masculinity that denigrates women.").
105. See Karst, supra note 85, at 506-07 (explaining how demonstration of masculinity takes different forms). While some men seek to establish their masculinity through achievement at work or in the community, others may resort to personal violence to assert power over others. See id. (describing variations of masculine domination).
106. See id. at 507 ("A man who finds the path of individual achievement to be rough going may try to express his power by engaging in private violence such as rape or wife-beating."); Vojdik, supra note 82, at 346 (asserting that sexual violence against military women is used to prove manhood).
107. See Vojdik, supra note 82, at 346 (reflecting on military culture). Vojdik explains that sexual violence is "essentially required by the hyper-masculine culture." Id. (citing military culture as source of sexual violence). “Violence against women and the denigration of women is necessary to prove the manhood of the warrior.” Id. For example, at the Citadel, derogatory female terms were used to criticize cadets who were not performing up to standard. See id. at 344-45. (explaining how denigration of women is used to prove masculinity). Additionally, to reaffirm their own masculinity, some male cadets distinguished themselves from other male cadets viewed as feminine, weak, or gay, and chanted cadence calls that celebrated sexual violence against women. See id. at 345 (describing Citadel culture).
C. The Inability of the Current Approach to Change Military Culture

The current approach to prevent and respond to military sexual assault is incapable of effectively addressing the source of the problem—the military culture—for three reasons. First, efforts directed at improving the military’s response to victims, though vitally important, do not help prevent sexual assault. Specifically, while the response victims receive can help improve their recovery, it does not impact the aspects of the military culture conducive to sexual assault.

Second, the DoD’s required training is inadequate and indications are that the training may become an even more futile attempt to change the military culture. Studies have shown that attempts to prevent sexual assault through brief educational programs aimed at changing attitudes and behaviors are largely ineffective. Notably, some studies have even found that sexual assault training produced a rebound effect of increasing rape-supportive attitudes.

108. See, e.g., Benedict, supra note 4, at 45 (contending that current efforts are not enough). Benedict asserts that military sexual assault will persist “as long as the military culture remains unchanged.” Id. (proposing that change could begin with commanders and officers).

109. See Carmody & Carrington, supra note 13, at 341-42 (noting that victim response focuses only on post-assault and “do[es] not embody a primary preventative potential”). Victim care after the sexual assault is a tertiary level of intervention that may reduce harm to the victim, but cannot prevent the crime that has already occurred. See id. (describing tertiary level intervention efforts). In contrast, primary level intervention seeks to prevent the assault from occurring at all. See id. (noting that preventative education programs often realized through social policy initiatives seek to provide primary level intervention).

110. See Schimpf, supra note 14, at 159-61 (explaining victim advocates’ ability to aid in sexual assault victim’s recovery). The purpose of victim advocates is to educate sexual assault victims about the legal process and provide emotional support. See id. (describing responsibilities of victim advocates).

111. See GAO Report, supra note 51, at 17 (revealing ineffectiveness of military sexual assault prevention and response training); Horine, supra note 62 (describing plan to transition Air Force sexual assault training to computer-based training).

112. See, e.g., Karen Bachar & Mary P. Koss, From Prevalence to Prevention: Closing the Gap Between What We Know About Rape and What We Do, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 117, 136-37 (Claire M. Renzetti et al. eds., 2001) (concluding that studies show current prevention-education programs are ineffective); Carmody & Carrington, supra note 15, at 352-53 (citing studies that found inconsistent lasting impact of rape prevention programs).

113. See Carmody & Carrington, supra note 13, at 353-54 (describing studies that found unintended rebound effects from prevention education); see also Bachar & Koss, supra note 112, at 133-34 (citing studies that found rape prevention training produced no change or increased rape-supportive attitudes). For example, one study sought to increase victim empathy and decrease rape-supportive behaviors by having male participants listen to an audiotape of a female describing an acquaintance rape. See id. at 133-34 (describing rape prevention study). The outcome was the opposite of what was intended because participants “self-reported greater likelihood of committing a rape or engaging in rape-supportive behaviors.” See id. (noting rebound effect).
Finally, legislative revision of the sex offenses section of the UCMJ is unlikely to change the military culture due to the relative infrequency with which offenders are actually prosecuted under it.\footnote{See FY08 Report, supra note 4, at 36 (noting thirty-eight percent of completed sexual assault investigations were sent to courts-martial in fiscal year 2008); see also Carmody & Carrington, supra note 13, at 344-45 (arguing that Australian law reform efforts have largely failed to prevent sexual assault). Sexual assault law reform has been directed at deterring potential offenders, yet mistreatment of victims and high attrition rates in prosecution means the legal system is more likely to harm victims than to deter offenders. See Carmody & Carrington, supra (describing failure of legal reform efforts).} Under the present system, individual commanders retain the authority to decide whether to pursue courts-martial, thus constraining the military’s ability to respond to sexual assault because authority is dispersed among a large number of individuals who may or may not support the sexual assault prevention program or consider the program a priority.\footnote{See GAO Report, supra note 51, at 13-16 (explaining military commanders’ role in responding to reports of sexual assault and reporting lack of program support by some commanders). The GAO found that most, but not all commanders supported the DoD’s sexual assault prevention and response program. See id. at 13 (finding inconsistent program support). For example, some commanders prevented unit members from receiving the required training and refused to permit the display of program materials within the unit. See id. at 14-15 (describing resistance to program implementation).} Even in those cases that are sent to courts-martial, the inexperience of military prosecutors weakens the ability of the military to hold offenders accountable and to change the culture.\footnote{See Couric, supra note 49 (questioning low prosecution rates in military sexual assault cases). Military officials have acknowledged that sexual assault prosecution and conviction rates need improvement. See id. (quoting Pentagon official). Commenting on this problem, a retired member of the Army’s Judge Advocate General (JAG) Corps stated, “A lot of times what we see in the JAG court is very inexperienced, brand spanking new lawyers being given rape cases . . . .” Id. (quoting Vivian Gembara).} Ultimately, the revision of Article 120 will not change the military culture because the drafters did not consider social and cultural patterns that impact the effectiveness of the law.\footnote{See Penelope Pether, Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project, 24 S. ILL. U. L.J. 53, 63 (1999) (quoting Lisa Frohmann & Elizabeth Mertz, Legal Reform and Social Construction: Violence, Gender, and the Law, 19 LAW AND SOC. INQUIRY 829, 835 (1995)). Pether explains why legal reform that does not account for the influence of cultural stories and experiences on language has limited effectiveness. See id. at 93-94 (concluding legal reform needs to incorporate influence of culture).} Rather than addressing the cultural underpinnings of military sexual assault, the committee that advised Congress on the Article 120 revisions focused on the adequacy of prosecution for sexual misconduct under the old statute.\footnote{See Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice 1 (2005), available at http://www.dod.mil/dodge/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (explaining background and approach to recommending changes). The committee reviewed sex offense provisions of the federal statutes, all the state statutes, and the Model Penal Code. See id. (describing review). The report presented six options for revising the UCMJ,
V. PROPOSALS FOR ENDING MILITARY SEXUAL ASSAULT BY CHANGING THE CULTURE

Military policies and leaders’ actions that subordinate military women reinforce the problematic aspects of the culture that contribute to sexual assault. Therefore, this Comment proposes that the military should focus on reforms that can help change the culture, such as moving military women beyond their mere “token” status through recruiting, retention, and promotion efforts. Also, the United States government should abolish the exclusion on women from combat in order to end the official subordination of military women. Finally, the military needs to recognize male victims of sexual assault by holding commanders who do not support the prevention and response program accountable.

but concluded that change was not necessary. See id. at 1, 3-4 (stating committee conclusions and summarizing various options). Commentators have identified “Option 5” of this report as the basis for the Article 120 revisions ultimately enacted. See Johnson, supra note 67, at 27 (noting Congress employed Option 5 recommendations).

119. See Vojdik, supra note 16, at 346-48 (asserting that military policies maintain subordination of military women and foster harassment and violence); see also U.S. DEP’T OF DEF., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES 8-10 (2005), [hereinafter SEXUAL HARASSMENT AND VIOLENCE], available at http://www.dtic.mil/dtsfs/doc_recd/High_GPO_RRC_tx.pdf (identifying factors that influence military service academy culture and impact sexual harassment and assault). The task force found that the devaluation of military women has a significant impact on the military service academies’ cultures. See id. at 8-9 (describing lack of understanding about women’s integration into military). The culture of the service academies has a “significant impact on sexual harassment and assault.” Id. at 8 (linking culture to sexual violence).

120. See Martha Chamallas, The New Gender Panic: Reflections on Sex Scandals and the Military, 83 MINN. L. REV. 305, 327-29 (1998) (proposing that increasing military women’s representation may change military culture). Tokenism theory “posits that changing the demographics of a group may be the surest way to change the culture, and ultimately the behavior of the majority in the group.” Id. at 328 (explaining tokenism theory).

121. See Blythe Leszczay, Feminism on the Front Lines, 14 HASTINGS WOMEN’S L.J. 133, 138 (2003) (arguing women’s combat exclusion shapes military members’ perceptions of military women as inferior).

122. See GAO REPORT, supra note 51, at 13-16 (finding lack of program support by some commanders); Chamallas, supra note 120, at 372-73 (contending that sexual abuse of military men is kept invisible). If the military culture acknowledged that military men are victims of sexual abuse such acknowledgement may improve the situation for military women. See id. at 373 (describing recognition of sexual abuse of men as potentially “liberating for women”). “When rape and sexual harassment are degendered, in the sense that we acknowledge that men may also be victims . . . some of the major objections to women’s presence in the military may lose their force.” Id.
A. Giving Validity to Women’s Military Service and Enabling Military Women to Change the Culture

Women still comprise only about fourteen percent of the armed forces, which leads sociologists and legal scholars to label their presence in the military as token. This minority status hampers women’s ability to influence the military culture. Thus, altering the demographics of the military, by increasing the number of women in the armed forces, may be the most effective way of changing the military culture. Just as President Truman successfully ordered the racial integration of the military, the President should use the commander-in-chief authority to fully integrate women in the military. Specifically, the President could give validity to women’s military service by directing the DoD to reevaluate recruitment, retention, and assignment policies affecting women.

Research has shown women’s token presence in the military needs to change to transform the culture and end sexual assault. The DoD Task Force on Sexual Harassment and Violence at the Military Service Academies found that some members do not value women as highly as men because “women are a minority, are excluded from some of the highly regarded combat specialties, and are held to different physical fitness standards.” The Task Force recommended increasing the number of women.

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123. See Women Res. & Educ. Inst., Active Duty Service Personnel by Branch of Service (2007), http://wrei.org/Sept_2007_Active.pdf (providing statistics on number of women in military); Chamallas, supra note 120, at 324 (asserting military women’s presence is token). “In the sociological literature ‘tokenism’ is used to describe the situation of a group that is dramatically under-represented in a given organizational setting.” Id. As of September 2007, women comprised about 15.1% of officers and 14.2% of enlisted members. See Women Res. & Educ. Inst., supra (same). Women made up 13.7% of the Army, 14.7% of the Navy, 6.3% of the Marine Corps, and 19.6% of the Air Force. See id. (providing branch specific statistics).

124. See Chamallas, supra note 120, at 324 (describing limited ability of tokens to influence organizational culture).

125. See id. at 328 (arguing that changing group demographics by increasing numbers of women and placing more women in leadership and supervisory roles could change military culture).

126. See Karst, supra note 85, at 520 (“In 1948 President Harry Truman, facing an uphill fight for re-election, issued two executive orders requiring ‘equality of treatment and opportunity’ in the federal civil service and in the armed services.”).

127. See Chamallas, supra note 120, at 327-29 (explaining how increasing military women beyond tokens may change military culture).

128. See Sexual Harassment and Violence, supra note 119, at ES-1, 9 (finding that service academy culture contributes to sexual harassment and assault and citing women’s minority status as relevant factor); Benedict, supra note 3, at 225-26 (arguing that promoting more military women and distributing women evenly within units will help change military culture and end sexual violence); Chamallas, supra note 120, at 328-29 (explaining that tokenism theory proposes that changing group demographics can alter group culture and behavior).

129. Sexual Harassment and Violence, supra note 119, at ES-1 (asserting that status of military women contributes to conduciveness of culture to sexual harassment and violence).
men in key leadership positions and the percentage of women at the service academies to counteract such devaluation.130 Similarly, sex-integration in the workplace has shown that when present in substantial numbers, women are viewed as peers and leaders, and the gender line becomes less important.131 Studies indicate that women can influence cultural change within an organization when they comprise about twenty-five percent of organization members.132 Thus, the DoD should focus on recruiting and retaining more women to increase the percentage of military women—currently fourteen percent—to at least twenty-five percent.133 In addition, if more military women were promoted to leadership positions, women would have the ability to directly influence the military culture by addressing misogynistic social practices.134

Many non-military courts have recognized the impact of tokenism on the work environment and the negative behaviors that result.135 The United States Supreme Court “acknowledged the link between tokenism and the prevalence of stereotyping” in a case where the only woman candidate was denied partnership in a large accounting firm.136 In another case involving a “hyper-masculine working environment,” a district court

130. See id. (recommending changes to improve status of military women at service academies).
131. See Karst, supra note 85, at 538-40 (explaining positive change results when number of women in male-dominated workplaces increases). For example, although police forces initially resisted integrating women, female officers’ status among male officers has improved and female officers are viewed as respected peers. See id. at 539-40 (describing changes in attitudes after sex-integration).
132. See id. at 538 n.154 (citing studies on critical mass in social groups).
134. See Benedict, supra note 3, at 225 (“As the number of women in authority increases, they will be less isolated and threatened, and more able to become positive role models and to prevent abuse.”); Chamallas, supra note 120, at 328-29 (arguing women in military leadership positions can help prevent gender bias and allow women to serve as role models for subordinates).
136. Chamallas, supra note 120, at 325 (citing Price Waterhouse, 490 U.S. 228). The woman who was denied a partnership was described by the firm’s partners as aggressive and macho, and some partners told her to take “a course at charm school” and make her appearance more feminine. See Price Waterhouse, 490 U.S. at 233, 235 (describing partners’ reactions towards plaintiff). The Court recognized the utility of expert witness testimony that the plaintiff’s token status as the only woman in the pool of candidates contributed to the discrimination against her. See id. at 236, 255-56 (summarizing expert testimony and accepting use of that testimony).
similarly recognized the connection between tokenism and the presence of stereotyping as combining to create a sexually hostile work environment.\textsuperscript{137} Thus, tokenism is a viable theory in this context, and if the DoD is committed to reducing the military’s sexual assault problem, the DoD needs to counteract the harmful effects of women’s minority status in the military by enlisting and retaining more women and encouraging their promotion to positions of leadership.\textsuperscript{138} Simply increasing the overall number of women is not enough, however; the military services also must make specific efforts to ensure women are evenly distributed among military units so that their presence is significant enough to impact the culture.\textsuperscript{139}

B. Empowering Military Women to Defend the Nation

After World War II, Congress permitted women to be permanent members of the armed forces, but, importantly, military regulations at that time specifically excluded women from combat.\textsuperscript{140} Gradually, Congress repealed portions of the exclusion policy and permitted military women to fly combat aircraft and to serve on navy ships exposed to combat.\textsuperscript{141} This piecemeal reduction of the exclusion policy culminated in 1994, when Secretary of Defense Les Aspin issued a memorandum establishing the current combat exclusion for military women.\textsuperscript{142} The memorandum...
stated that personnel could “be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground . . . .”143 This combat exclusion prevents women from serving in approximately twenty percent of military positions.144

Notably, in upholding the male-only draft registration in *Rostker v. Goldberg*, the United States Supreme Court determined that the purpose of the registration was to prepare for a future draft of combat troops.145 According to Congress, and as recognized by the *Rostker* Court, requiring women to register for military service would necessitate changing the combat exclusion policy, which Congress was not inclined to do.146 Though not ruling on the constitutionality of the combat exclusion, the Court stressed the deference due to Congress and the President in forming and prescribing rules for the military.147 Nevertheless, as many legal scholars have noted—and as the Court has acknowledged—the government must

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143. See id. at 72 (providing Secretary Aspin’s assignment memorandum). The memorandum defined direct combat on the ground:

Direct ground combat is engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.

Id. at 72-73.

144. See *Margaret C. Harrell & Laura L. Miller, New Opportunities for Military Women: Effects Upon Readiness, Cohesion, and Morale* 12 tbl.2.1 (1997), available at http://www.rand.org/pubs/monograph_reports/MR896/ (providing statistics on military positions open to women). The percent of positions open to women are: 67.2% of Army positions, 91.2% of Navy positions, 62% of Marine Corps positions, and 99.4% of Air Force positions. See id. (listing statistics for each service).

145. See *Rostker v. Goldberg*, 453 U.S. 57, 77 (1981) (upholding male-only draft registration as substantially related to government purpose of preparing for supply of combat troops). “Legal feminists disagreed strongly with the reasoning of *Rostker*, particularly the idea that one sex-based form of discrimination (in *Rostker*, women’s exclusion from combat) could be used to justify another (women’s exclusion from draft registration).” Mazur, *supra* note 50, at 53. The Court repeated this reasoning in *Schlesinger v. Ballard* by upholding a statutory promotion scheme that allowed female Navy officers more time for promotion before automatic discharge than male officers. See 419 U.S. 498, 505-06, 508 (1975) (describing differential treatment). The Court concluded that Congress may have rationally believed that women naval officers were disadvantaged in competing for promotion because of the combat exclusion, thus the differential treatment was constitutional. See id. at 506, 510 (finding no constitutional violation).

146. See *Rostker*, 453 U.S. at 77-78 (identifying combat exclusion as Congress’s reason for not including women in draft registration).

147. See id. at 70-71 (describing constitutional authority of legislative and executive branches to determine military composition and rules). Two reasons generally cited for the substantial deference given to the government in constitutional challenges to military regulations are: (1) the constitutional responsibility for administration of the military that is placed on the legislative and executive branches and (2) the view of the military as a separate community because of its unique mission. See John A. Carr, *The Difference Between Can and Should: Able v. United
ensure that military policies serve legitimate ends as opposed to “archaic and stereotypic notions” about men and women.\textsuperscript{148}

Because women are still excluded from direct ground combat, military women do not serve on an equal basis with military men.\textsuperscript{149} Such restrictions on access to combat positions serve the purpose of maintaining the gender line and preserving the military’s masculinity.\textsuperscript{150} That is, the exclusion of women from combat allows the military to “control when, where, and how women are allowed to fight,” thereby reinforcing the view that military women are lesser, second-class military members.\textsuperscript{151}

In addition, the combat exclusion policy precludes women from gaining the requisite combat experience essential to achieving promotion to positions of senior leadership.\textsuperscript{152} Furthermore, “being told that they are unfit for combat training, that they need protection, women are more readily victims of violence of every kind.”\textsuperscript{153} Opponents to women serving in combat typically argue that women are physically incapable of such engagement, will disrupt unit cohesion, and must be protected from capture.


\textsuperscript{149} See Leszkay, supra note 121, at 137 (“Army policy . . . still prevents women from serving in positions that involve ‘direct combat.’”); see also Lizette Alvarez, G.I. Jane Stealthily Breaks the Combat Barrier, N.Y. Times, Aug. 16, 2009, at A1 (noting that military “[w]omen can lead some male troops into combat as officers, but they cannot serve with them in battle”).

\textsuperscript{150} See Karst, supra note 85, at 537 (“The combat exclusion’s main purpose is to express the gender line.”).

\textsuperscript{151} See Leszkay, supra note 121, at 138 (contending that combat exclusion policy influences military members’ view of military women). Leszkay asserts that the combat designation given to certain military jobs is not based on empirical data about women’s capabilities. See id. (discussing combat exclusion policy). Rather, the designation reflects “what the military or Congress determines women’s proper military role to be at any particular moment.” Id. (asserting that combat exclusion serves gender-based purposes).

\textsuperscript{152} See Karst, supra note 85, at 524 (contending that exclusion of women from combat prevents command experience needed). Not only does the combat exclusion hurt military women’s advancement opportunities, the exclusion policy is also significant because of the socialization that the military provides service members. See id. at 527-28 (describing educational impact of military services on members). “Every day the services teach their members, women and men, young and old, that women do not speak with authority about the subject that is the center of the services’ missions.” Id. at 528.

\textsuperscript{153} Kerber, supra note 140, at 121 (quoting Selective Service Registration: Hearing Before the Task Force on Def. and Int’l Affairs of the H. Comm. on the Budget, 96th Cong., 2d Sess. 1-5 (1980) (statement of Judy Goldsmith, Nat’l Org. of Women)). Goldsmith opined that women are more susceptible to violence because the combat exclusion prevents them from receiving self-defense training and the confidence that such training brings. See id. (describing negative effects of combat exclusion).
and rape by the enemy. Nonetheless, military women, possibly in circumvention of the combat exclusion policy, are presently engaging the enemy in Iraq. These military women are repeatedly proving that they are capable of serving in combat.

Military readiness is the common denominator between the issues of sexual assault and women in combat. Sexual assault damages military readiness because victims are psychologically and physically harmed and

154. See id. at 160, 164-65, 167-68 (describing typical arguments against allowing women to serve in combat); see also Elaine Donnelly, Constructing the Co-Ed Military, 14 DUKE J. GENDER L. & POL’Y 815, 835-36 (2007) (citing physical strength of women, readiness, and unit cohesion as justified reasons for excluding women from combat). Some proponents of the combat exclusion cite physical and psychological requirements, unit cohesion, prohibitive costs of modifying equipment and facilities, and the need to protect women from the risk of being captured, injured, or killed. See Pamela R. Jones, Note, Women in the Crossfire: Should the Court Allow It?, 78 CORNELL L. REV. 252, 261-69 (1993) (summarizing exclusionist arguments and responses of opponents); see also James D. Milko, Comment, Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military, 41 AM. U. L. REV. 1301, 1314-25 (1992) (analyzing arguments about combat exclusion as applied to Gulf War experiences).

155. See HARRELL, supra note 142, at 63-65 (describing possible non-compliance with Army assignment policies). The Army definition of direct combat includes “repelling the enemy’s assault by fire.” Id. at 65 n.2 (quoting Army regulation). Army women are assigned to units with a routine mission of self-defense. See id. at 64 (describing Army assignments). “If such missions are included in the definition of repelling the enemy’s assault and thereby interpreted as a routine direct combat mission, then the Army is out of compliance with its assignment policy.” Id. Notably, Army members indicated that the Army’s assignment policy for women based on the combat exclusion “did not reflect the environment in Iraq” and described it as “obsolete” and “archaic.” Id. at 49 (summarizing responses). The study found service members “widely accepted that female service members were necessary to Army operations in Iraq.” Id. at 51 (noting members’ perceptions of need for military women).

156. See Alvarez, supra note 149, at A1 (describing deployed military women engaging in combat and quoting military leaders stating women are as capable as men in combat). Some commanders have resorted to “bureaucratic trickery” by complying with assignment policies on paper, but then utilizing military women in capacities where women have “patrolled streets with machine guns, served as gunners on vehicles, disposed of explosives, and driven trucks down bomb-ridden roads.” See id. (noting accomplishments of deployed military women). “[A]s of 2006, more than 2,000 women who fought in Iraq or Afghanistan had been awarded Bronze Stars, several for bravery and valor in combat, and more than 1,300 had earned the Combat Action Badge.” BENEDICT, supra note 3, at 224 (asserting that military women are succeeding in combat).

157. See FY08 REPORT, supra note 4, at 7 (stating that sexual assault damages military readiness); Karst, supra note 85, at 535 (contending that combat exclusion impedes military readiness). The combat exclusion prevents building the most effective fighting force because not all men are stronger than all women and some combat positions, such as a tanker, are more easily filled by smaller soldiers. See Leszkay, supra note 121, at 160-61 (asserting that “emphasizing sheer physical strength and size to the exclusion of everything else . . . may actually reduce combat effectiveness”).
the victims’ units are disrupted. \(^{158}\) Likewise, the exclusion of women from combat deprives the military of its ability to utilize the most qualified members to accomplish the mission. \(^{159}\) Therefore, the United States government should end the combat exclusion and allow military women to fulfill their sworn duty to support and defend the Constitution. \(^{160}\)

C. Ending the Plight of Male Victims of Military Sexual Assault

Military women are not the only military members in danger of sexual assault—military men are also victims of sexual assault by other male and female service members. \(^{161}\) Yet, some commanders of all-male units have resisted attempts to implement the DoD’s sexual assault prevention and response program under the belief that the program is not relevant or that sexual assault is not a problem in all-male units. \(^{162}\) By obstructing implementation, these commanders prevent the program from changing military culture because the service members in those units do not learn that males are also victims and that ending sexual assault is a DoD priority. \(^{163}\)

The fact that male-on-male sexual assault occurs in the military, where heterosexuality is assumed and indeed enforced, shows that the problem is not due to the services’ sex-integration. \(^{164}\) Rather, such assaults by men who consider themselves heterosexual demonstrate that sexual assault is in fact an act of domination. \(^{165}\) The DoD must recognize that military men are also victims of sexual assault and such crimes occur even when women

158. See FY08 Report, supra note 4, at 7 (describing impact of sexual assault on victim).

159. See Leszkay, supra note 121, at 161 (arguing that women’s combat exclusion hinders military capabilities). The combat exclusion “limits the discretion of military professionals in selecting service members to perform jobs for which they are qualified.” Karst, supra note 85, at 535 (proposing that capabilities should determine qualification for combat positions).

160. See 10 U.S.C. § 502 (2006) (containing oath taken upon enlistment into armed forces); Leszkay, supra note 121, at 169-70 (arguing that women must serve in combat to become equal citizens).

161. See FY08 Report, supra note 4, at app. c, tbl.2 (providing statistics for military sexual assault by victim and assailant gender). For statistics on male victims of military sexual assault, see supra note 5.

162. See GAO Report, supra note 51, at 15 (describing lack of program support). For instance, an official at one military installation reported that some commanders of all-male units have not permitted her to provide the required sexual assault prevention and response training. See id. (describing resistance to program execution).

163. See id. (“Commanders who do not emphasize and prioritize sexual assault prevention and response programs—including those in all-male units—or who do not understand the policies and procedures effectively limit service members’ knowledge about the program and ability to exercise their reporting options.”).

164. See Chamallas, supra note 120, at 372-73 (proposing that recognition of sexual abuse of male victims by other males not based on sexual orientation may improve military women’s situation).

165. See id. at 372 (describing same-sex rapes of men as “power rapes”).
are not present. By doing so, the DoD can help service members understand that military sexual assault is rooted in the current military culture that subordinates those seen as feminine or weak and accepts sexual violence as normal.

The DoD can recognize male victims of sexual assault and change the military culture by holding commanders accountable for implementing and supporting the prevention and response program. The military is effective in changing behavior in other contexts because it uses a strict chain of command; thus, commanders can play a vital role in shaping the military culture. Therefore, the DoD should direct the services to punish any commander who impedes the efforts of program officials or interferes with a service member’s attempt to utilize the restricted reporting option.

VI. Conclusion

The appalling statistics of military sexual assault show that the United States must re-launch its efforts to prevent sexual assaults within the military. The current approach, which is focused on victim response, preventative education, and statutory reform, cannot target the root cause of the problem—the contemporary United States military culture. The goal advocated in this Comment is not to eliminate the military culture; rather, the aim of this proposed reform is to make the culture serve legitimate ends as opposed to reinforcing sexual violence.

The United States government should address military policies and leaders’ actions that subordinate military women and reinforce the hyper-masculine, misogynistic aspects of the culture that contribute to sexual as-

166. See id. at 373 (“[O]nce we understand that sexual abuse is a problem in male-only, as well as integrated environments, we might stop trying to solve the problem of sexual abuse by excluding women.”).

167. See Vojdik, supra note 16, at 346-48 (asserting that subordination of women by military culture fosters sexual harassment and violence).

168. Cf. Benedict, supra note 4, at 45 (proposing that commanders and officers can help transform military culture).

169. See id. (“[S]tudies have shown that commanders who ban pornography, treat their female soldiers with respect and insist that others do likewise significantly reduce sexual persecution.”); see also Mazur, supra note 48, at 469 (describing role of military chain of command in shaping members’ behavior).

170. See BENEDICT, supra note 3, at 227 (recommending improved officer accountability and training).

171. See Benedict, supra note 4, at 45 (contending that current efforts are insufficient).

172. See id. (“[A]ll the well-meaning reforms, meetings, and rules issued in Washington D.C., will never have much effect as long as military culture remains unchanged.”).

173. See Burke, supra note 84, at 21-22 (contending certain aspects of military culture conflict with its mission). “Military culture is made, not born; it has a history; its future should be directed toward serving democratically approved ends.” Id. at 22.
sault. Therefore, this Comment proposes that the President require the DoD to reevaluate its recruitment, retention, and assignment policies to move the status of military women beyond that of mere tokens.

Moreover, Congress can remedy the official subordination of women by eliminating the combat exclusion policy—a policy which truly serves no purpose other than maintaining the gender line. In so doing, the United States government should recognize the contributions military women have already made in the War on Terror. Finally, the DoD needs to recognize male victims of sexual assault by using the military justice system to hold commanders responsible for failing to support the sexual assault prevention and response program. Collectively, these proposed reforms will enable the United States to effectively combat the source of military sexual assault—the destructive aspects of the military culture—

174. See Vojdik, supra note 16, at 346-48 (asserting military policies maintain subordination of military women and foster harassment and violence).

175. See Abrams, supra note 16, at 240 (describing obstacles to changing military culture). Historically, courts have displayed deference to military expertise in areas involving traditionally military concerns; however, it is difficult to distinguish between opinions of military leaders that reflect experience and opinions that are simply judgments based on the homogenous attitudes of an insulated group. See id. at 225 (describing courts’ deference). See Michael J. Frevola, Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services, 28 CONN. L. REV. 621, 658-62 (1996) (describing rationale for judicial deference to military decisions). See generally Leszkay, supra note 121, at 154-57 (describing rationale for courts’ deference on military policies). With the support of the public, elected bodies (Congress and the President) can change the military culture through executive orders or congressional hearings and legislation. See Abrams, supra, at 238 (proposing mechanisms for change).

176. See Chamallas, supra note 120, at 327-29 (explaining how increasing military women beyond “tokens” may change military culture).

177. See Karst, supra note 85, at 577 (describing attempt by DoD in 1979 to end combat exclusion). In 1982, Major General Jeanne Holm noted that “[i]f all women were discharged tomorrow, most of the distinctions [between combat and noncombat jobs] would be abandoned the day after.” See Leszkay, supra note 121, at 138 (quoting JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 395 (1982)).

178. See Leszkay, supra note 121, at 138 (arguing women’s combat exclusion shapes military members’ perceptions of military women as inferior).

179. See Chamallas, supra note 120, at 372-73 (contending that sexual abuse of military men is kept invisible).
and allow all military members to focus on the mission of supporting and defending this country.\textsuperscript{180}

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\textsuperscript{180} See Benedict, supra note 4, at 45 (recommending that transformation of military culture begin with commanders and officers); Chamallas, supra note 120, at 327-29 (proposing that increasing numbers of military women overall and placing more women in leadership positions may change military culture); Vojdik, supra note 16, at 348 (contending that combat exclusion perpetuates sexual violence against military women).

\textsuperscript{181} The views expressed in this Comment are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the United States government.
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