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### **Sexual Harassment is Not a Crime: Aligning the Uniform Code of Military Justice with Title VII**

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### SEXUAL HARASSMENT IS NOT A CRIME: ALIGNING THE UNIFORM CODE OF MILITARY JUSTICE WITH TITLE VII

*Laura T. Kessler\* & Sagen Gearhart\*\**

*Sexual harassment and sexual assault are ongoing problems in the military. The Department of Defense responded in 2019 with sweeping changes in how the military handles sexual misconduct, including a proposal to criminalize sexual harassment in the Uniform Code of Military Justice (UCMJ). This Article, co-authored by an expert on workplace sex discrimination and a former military officer, responds to this proposal. We argue that sexual harassment, however reprehensible, is not criminal conduct. Moreover, criminalization is likely to undermine the military's efforts to prevent and punish sexual harassment by raising the stakes for the involved service members, thereby deterring reporting, and by imposing a high evidentiary standard. Building on these insights, we propose a set of reforms to the UCMJ aimed at aligning the military justice system with civil employment discrimination law. These proposals include assigning independent authority to investigate and discipline sexual harassment outside the chain of command, using administrative actions that employ a civil burden of proof to adjudicate sexual harassment complaints, and making compensatory damages available to service members for economic and psychological injuries caused by sexual harassment. The military maintains that preserving good order and discipline justifies its*

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*independence from the reach of civil courts and law. Federal courts have obliged by holding that Title VII does not cover uniformed military personnel. In exchange for this independence, the military justice system must provide the basic protections of the civilian justice system.*

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## INTRODUCTION

In the United States, women have held formal positions in the military only since World War II.<sup>1</sup> It has been a mere forty years since the last branch of the military stopped using female-only units.<sup>2</sup> Positions in ground combat units officially opened to women just six years ago, in 2015.<sup>3</sup> This groundbreaking decision was the latest in a long line of developments

<sup>1</sup> See JUDITH A. BELLAFAIRE, *THE WOMEN’S ARMY CORPS: A COMMEMORATION OF WORLD WAR II SERVICE* 3–5 (1993) (stating that Congress introduced and passed the bill allowing women to serve in the military in 1941).

<sup>2</sup> BETTIE J. MORDEN, *THE WOMEN’S ARMY CORPS, 1945–1978*, at 395–96 (1990).

<sup>3</sup> Andrew Swick & Emma Moore, *The (Mostly) Good News on Women in Combat*, CTR. FOR NEW AM. SECURITY (Apr. 19, 2018), <https://www.cnas.org/publications/reports/an-update-on-the-status-of-women-in-combat> [<https://perma.cc/J974-NV4L>].

diversifying the military, including racial integration beginning in 1948<sup>4</sup> and the 2011 repeal of the policy barring openly gay, lesbian, or bisexual persons from military service.<sup>5</sup> Through all of these transitions and integrations,

<sup>4</sup> See KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 12–15 (2019) (documenting a history of racial segregation and discrimination in the United States military and desegregation in the Truman era). Although racial minorities have volunteered or been recruited into military service since the American Revolution, the military was a racially segregated institution until the mid-twentieth century, justified by widely accepted “separate but equal” ideology. *Id.* at 12. Responding to pressure by civil rights leaders to integrate the military, in 1948, President Truman initiated a purposeful desegregation effort with Executive Order 9981. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) (establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces).

<sup>5</sup> See generally Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (providing for the repeal of the ban on gay men, lesbians, and bisexual people serving openly in the military, to be effective sixty days after the President, Defense Secretary, and Chairman of the Joint Chiefs of Staff provided certification that repeal “is consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention.”). Until its repeal in September 2011, America’s “Policy Concerning Homosexuality in the Armed Forces,” commonly known as “Don’t Ask, Don’t Tell,” provided that:

A member of the armed forces shall be separated from the armed forces . . . if . . . the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . [,] stated that he or she is a homosexual or bisexual . . . [,] [or] has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b) (2008). After 2011, the policy change on LGBTQ service was swift and consequential. On May 17, 2016, the Senate confirmed Eric Fanning as Secretary of the Army, the first openly gay head of a service. Michael S. Schmidt & Charlie Savage, *Eric Fanning Confirmed as Secretary of the Army*, N.Y. TIMES (May 17, 2016), <https://www.nytimes.com/2016/05/18/us/eric-fanning-army-secretary.html> [<https://perma.cc/785Z-SSFQ>]. In his role, Fanning helped lift restrictions on transgender people serving in the military. Karen Ocamb, *Army’s Out Leader Eric Fanning Helps Guide End to Trans Military Ban*, ADVOCATE (Nov. 1, 2016, 3:37 PM), <https://www.advocate.com/transgender/2016/11/01/armys-out-leader-eric-fanning-helps-guide-end-trans-military-ban> [<https://perma.cc/4AFY-GQUK>]; see also U.S. DEP’T OF DEF., DTM 16-005, MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS, ATTACHMENT 1 (June 30, 2016) [hereinafter DTM 16-005] (“Transgender Service members will be subject to the same standards as any other Service member of the same gender . . .”). However, after his election, President Trump replaced Fanning and reinstated the ban on transgender individuals serving in the military, which the Supreme Court allowed to go into effect without explanation. See *Trump v. Kamoski*, 139 S. Ct. 950, 950 (2019) (“[T]he District Court’s December 11, 2017 order granting a preliminary injunction is stayed . . .”); Lolita C. Baldor, *Senate Confirms Former Ranger as New Army Secretary*, AP NEWS (Sept. 27, 2019) <https://apnews.com/article/0b4b666c180e491497ac93e52c44e367> [<https://perma.cc/VT79-ESTJ>]. For a general discussion of the legality of the transgender ban and the long arc of discrimination against LGBTQ people in the military, see Michele Goodwin & Erwin Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, 114 NW. U. L. REV. 751 (2019).

sexual harassment and sexual assault have remained ongoing problems. According to the Department of Defense, an estimated 20,500 service members experienced unwanted sexual contact or a penetrative sexual assault in 2018.<sup>6</sup> One in four female service members reported an experience of sexual harassment.<sup>7</sup> These figures represent a substantial increase from the previous survey in 2016,<sup>8</sup> and 2019 saw even further increases.<sup>9</sup>

In light of the #MeToo movement and recent attention it has brought to the failure of institutions such as workplaces and universities to address sexual harassment,<sup>10</sup> it is worth examining the military's record in this realm.

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<sup>6</sup> U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2018, at 3 (2019) [hereinafter DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT], [https://www.sapr.mil/sites/default/files/DoD\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [<https://perma.cc/4RX8-QV65>]. Of the 20,500 service members reporting that they experienced unwanted sexual contact, 13,000, or 63%, were women, even though women make up only 16% of active duty service members. *Id.*

<sup>7</sup> *Id.* at 9.

<sup>8</sup> Specifically, from 2016 to 2018, reports of unwanted sexual contact increased by 38% and sexual harassment by 13%. *Id.* at 3, 12.

<sup>9</sup> See U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2019, at 6, 12 (2020) [hereinafter DOD FY 2019 REPORT ON SEXUAL ASSAULT, MAIN REPORT], [https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1\\_DEPARTMENT\\_OF\\_DEFENSE\\_FISCAL\\_YEAR\\_2019\\_ANNUAL\\_REPORT\\_ON\\_SEXUAL\\_ASSAULT\\_IN\\_THE\\_MILITARY.PDF](https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF) [<https://perma.cc/B7VF-7VF3>] (reporting a 3% increase in sexual assaults involving service members and a 10% increase in formal sexual harassment complaints from 2018 to 2019).

<sup>10</sup> #MeToo is a social and political movement against sexual harassment and sexual abuse. The phrase "Me Too" was coined, and the #MeToo movement founded, in 2007 by Tarana Burke, a Black woman who had also founded Just Be Inc., a nonprofit organization that helps victims of sexual assault and harassment. Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/Z89L-6CUL>]. The #MeToo movement spread virally in 2017 after actress Alyssa Milano posted a message on Twitter saying, "if you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." *Id.* The tweet opened the floodgates to twelve million stories of sexual abuse, assault, and harassment on Twitter, Facebook, Snapchat, and other social media platforms. *Id.* The movement led to high-profile firings, especially in Hollywood, as well as much criticism and backlash. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/W2LC-G7MV>]. The movement also spurred an increase in sexual harassment claims in the United States. See Andrew Murphy & Terran Chambers, *Litigating Harassment in the #MeToo Era*, BENCH & B. MINN., Oct. 2019, at 13 ("The attention to sexual harassment coincided with a less publicized but steady uptick in the number of sexual harassment allegations in the workplace . . ."); U.S. Equal Emp. Opportunity Comm'n, Press Release, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data*, EEOC.GOV (Oct. 4, 2018), <https://www.eeoc.gov/newsroom/eeoc-releases-preliminary-fy-2018-sexual-harassment-data> [<https://perma.cc/YLC8-3H9F>] ("[C]harges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017.").

This issue is more urgent than ever, with more women serving in the military than at any time in our country's history. In 2017, women made up 16% of the overall active duty force, compared with 9% in 1980 and just 1% in 1970.<sup>11</sup> The historic transformation of the military in 2015 allowing women to serve in combat positions<sup>12</sup> officially opened about 220,000 military jobs to women.<sup>13</sup> Women can now “drive tanks, fire mortars and lead infantry soldiers into combat. They [are] able to serve as Army Rangers and Green Berets, Navy SEALs, Marine Corps infantry, Air Force parajumpers and everything else that was previously open only to men.”<sup>14</sup> Yet, sexual harassment negatively affects women's entry into these elite combat units and their performance within them. Moreover, the policy change admitting women to one of the military's last bastions<sup>15</sup> of male exclusivity and supremacy has sparked debate and resistance from within the military,<sup>16</sup>

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<sup>11</sup> Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, PEW RSCH. CTR. (Sept. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/09/10/the-changing-profile-of-the-u-s-military/> [<https://perma.cc/R6NR-6VZU>]. The percentage of officers who are women has also steadily grown since the 1970s; in 2017, women represented 18% of commissioned officers, up from 5% in 1975. *Id.* See also OFF. UNDER SEC'Y DEF. FOR PERSONNEL & READINESS, U.S. DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2018 SUMMARY REPORT, at 37 & APP. D, tbl.D-19 [hereinafter DOD FY 2018 POPULATION REP.], <https://www.cna.org/research/pop-rep> [<https://perma.cc/85S3-TM4A>] (choose “FY 2018 Executive Summary”) (reporting the same numbers for 2018).

<sup>12</sup> See Swick & Moore, *supra* note 3.

<sup>13</sup> Matthew Rosenberg & Dave Philipps, *All Combat Roles Now Open to Women*, *Defense Secretary Says*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2015/12/04/us/politics/combat-military-women-ash-carter.html> [<https://perma.cc/XD3P-RV83>]. “Officially” is used here, because, in fact, women have been placed into combat situations in Afghanistan and Iraq since 2001. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Of course, the ultimate last bastion of male exclusivity is male-only draft registration. See 50 U.S.C. § 3802(a) (“[I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who . . . is between the ages of eighteen and twenty-six, to present himself for and submit to registration.”).

<sup>16</sup> The Marine Corps requested a waiver from the decision for certain front-line combat jobs—which was denied—and statistics suggest that the Marine Corps has dragged its feet integrating women into combat positions. Kate Germano, Opinion, *Separate is Not Equal in the Marine Corps*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/sunday-review/marine-corps-women-segregation.html> [<https://perma.cc/9QXJ-UQBM>]; Hope Hodge Seck, *Overruled on Women in Combat, Marine Corps Prepares to Integrate Units*, MILITARY.COM (Dec. 3, 2015), <https://www.military.com/daily-news/2015/12/03/overruled-on-women-in-combat-marine-corps-prepares-to-integrate.html> [<https://perma.cc/Z2UA-P45B>] (“The U.S. Marine Corps lost its bid to keep some combat fields closed to women . . . .”); Shawn Snow, *Where Are the Female Marines?*, MARINE CORPS TIMES (Mar. 5, 2018), <https://www.marinecorpstimes.com/news/2018/03/05/where-are-the-female-marines/> [<https://perma.cc/4WVF-CWG4>] (“The Marines were the only branch to ask for a waiver when the Pentagon ended the policy that excluded women from combat jobs.”).

Congress,<sup>17</sup> and the general public,<sup>18</sup> exposing the negative attitudes about women's service that make addressing sexual assault and harassment so difficult. For example, such hostility was on display in 2019, when it was discovered that some 30,000 active duty and veteran Marines had used a private Facebook group called "Marines United" to share thousands of nude photographs of female service members.<sup>19</sup>

In the past decade, the Department of Defense has worked to advance a military culture free from sexual assault and harassment, making considerable investments in policies and actions to prevent and respond to sexual misconduct.<sup>20</sup> Among other actions, the Department of Defense has increased its training, data collection, and reporting on sexual assault and harassment in the military and has proposed adding sexual harassment as a criminal offense in the military penal code. Yet, it seems these efforts have not borne fruit; indeed, sadly, sexual assault and harassment in the military grew markedly worse during the Trump administration.<sup>21</sup>

As we articulate in this Article, the military's responses to the #MeToo movement, although well-intentioned, are at once too punitive and too meager. Making sexual harassment a crime could raise the stakes for the involved service members (both the alleged perpetrator and victim) and thereby deter reporting and resolution of incidents of sexual misconduct. Criminalizing workplace sexual harassment, which is a serious yet distinct phenomenon from rape and sexual assault, is also out of step with established Supreme Court doctrine on sexual harassment in civilian workplaces, which

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<sup>17</sup> For example, the decision to allow women to serve in combat positions was immediately blasted by Congressperson Duncan Hunter, R-Cal., a member of the House Armed Services Committee, who alleged the policy change would erode the ability of the military to fight. Tom Vanden Brook & Jim Michaels, *Military Will Open All Combat Jobs to Women, Defense Secretary Announces*, USA TODAY (Dec. 3, 2015, 9:07 PM), <https://www.usatoday.com/story/news/nation/2015/12/03/women-in-combat-defense-secretary-ash-carter/76719938/> [<https://perma.cc/HJH6-TN7N>].

<sup>18</sup> The Center for Military Readiness, a nonprofit organization opposed to gender integration of combat units and service by gay and transgender people, argues that integrating women endangers male morale and military performance, leads to sexual assaults on female service members, and decreases military effectiveness. *Are Military Social Experiments Increasing Sexual Assaults on Men and Women?*, CTR. FOR MIL. READINESS (Sept. 10, 2019), <https://www.cmrlink.org/issues/full/are-military-social-experiments-increasing-sexual-assaults-on-men-and-women> [<https://perma.cc/ER2K-YKEH>].

<sup>19</sup> See Paul Szoldra, *An Internal Investigation Spurred by a Nude Photo Scandal Shows Just How Deep Sexism Runs in the Marine Corps*, TASK & PURPOSE (Dec 4, 2019, 4:27 PM), <https://taskandpurpose.com/marines-united-study> [<https://perma.cc/42TY-XNKS>] (“[S]ome 30,000 active-duty Marines and veterans . . . shared thousands of nude photographs of female Marines, and in some cases cyber-stalked them, revealing personal details and describing where the women worked and lived on base.”).

<sup>20</sup> See discussion *infra* Section II.B.

<sup>21</sup> See sources cited *supra* notes 8–9 and accompanying text.

emphasizes prevention rather than punishment, however imperfect that framework may be.<sup>22</sup> Furthermore, criminalization is at odds with the latest feminist thinking about the most effective responses to sexual violence and harassment, which has centered around the idea that more collaborative, less adversarial responses can more productively address the cultural and systemic nature of sex discrimination within institutions.<sup>23</sup>

Yet, there is no question that sexual harassment in the military is a serious, ongoing problem that requires a response. Training and data

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<sup>22</sup> This preventive approach, particularly the affirmative defense shielding employers from liability for workplace sexual harassment, has been critiqued by employment discrimination and critical legal scholars. *See, e.g.*, LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 168–215 (2016) (discussing the origins of the affirmative defense in sexual harassment cases and how courts, in applying the defense, equate “symbolic structures” such as ineffective antiharassment policies with legal compliance); Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 312–25 (2001) (discussing the mismatch between the affirmative defense, which requires victims to report sexual harassment or risk losing their claims, and the many rational reasons that victims do not report sexual harassment); L. Camille Hébert, *Why Don't “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 733 (2007) (“[E]xpecting women to react to sexually harassing conduct in a way that is different than the manner in which they have been socialized . . . punishes women for acting in precisely the ways that they are generally expected to act.”); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1244–45 (2006) (discussing both that harassers disproportionately target women of color because of their heightened vulnerability in the workplace and that women of color are less likely to report sexual harassment than are white women); Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1048 (2017) (“[T]he Supreme Court has carved out a broad affirmative defense to employer liability for sexual harassment that, in practical effect, requires victims of harassment to report in virtually all circumstances or risk losing their claims.”).

<sup>23</sup> *See, e.g.*, LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 97 (2018) [hereinafter GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*] (“[T]he criminal legal system can deliver only punishment, which does not provide some people with the reparation they seek . . . . Although the United States has largely rejected the use of restorative justice . . . the rest of the world has not been as hesitant.”); Julie Goldscheid, *#MeToo, Sexual Harassment and Accountability: Considering the Role of Restorative Approaches*, 36 OHIO ST. J. DISP. RESOL. (forthcoming 2021) (manuscript at 13), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3645439](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645439) [<https://perma.cc/J4QT-ETRA>] (“The adversarial character of anti-discrimination law imposes high costs, both economic and psychological, on plaintiffs . . . .”); *see also* Leigh Goodmark, *Opinion, Stop Treating Domestic Violence Differently From Other Crimes*, N.Y. TIMES (July 23, 2019) [hereinafter Goodmark, *Stop Treating Domestic Violence Differently*], <https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html> [<https://perma.cc/62ZH-VJ6D>] (“The effectiveness of the criminal legal response to domestic violence is a sensitive subject. Questioning it is a harder sell politically than reconsidering our responses to drug or property crimes. But intimate partner violence should be included in criminal justice reforms.”).



collection without more fundamental institutional changes will fall short of what is necessary to address the United States military's serious sexual misconduct problem, especially given the organization's discriminatory culture that devalues women.

This conflict between the clear need for a tougher response to sexual harassment in the military and concerns about the potential harms of criminalization poses a dilemma. Title VII of the Civil Rights Act of 1964,<sup>24</sup> the federal law that prohibits employment discrimination based on sex and sexual orientation, does not apply to uniformed members of the Armed Forces.<sup>25</sup> Rather, the Uniform Code of Military Justice (UCMJ) is the federal law that forms the foundation of the military justice system.<sup>26</sup> If sexual harassment is to be addressed in the military justice system, it must be through criminal law. The UCMJ is a criminal code of justice; there is no civil legal system in the military. Some have argued for unification, whereby Title VII would apply to military service members, but this is unrealistic. The federal courts have long held that Title VII does not apply to the Armed Forces, and Congress has not disrupted this interpretation of Title VII.

With these tensions and realities in mind, this Article explores a middle ground: reforming the military justice system to better align with civil employment discrimination law on sexual harassment. This approach raises a range of complex legal problems, including the need to decide what body of law, burden of proof, procedures, and remedies will control criminal sexual harassment prosecutions in the military. While we cannot hope to present a fully redesigned UCMJ in the scope of one Article, we begin here to sketch the contours of a modernized UCMJ. The military justice system has already undergone significant "civilianization" over time;<sup>27</sup> it can and should be pushed further to reflect civilian antidiscrimination norms.

Although our attention turns primarily to sexual harassment in this Article, we also speak to the collective concerns about sex-based harms generally, including rape and sexual assault. In doing so, we acknowledge that there is a spectrum of sexual harms in the military and that a culture of hostility toward women's service forms the foundation for most sexual harms. Importantly, we also acknowledge that sexual misconduct in the military affects service members of all gender identities and sexual orientations. Therefore, although we focus primarily on women, male service members identifying as gay or bisexual and transgender service members should benefit from the analysis and reforms presented in this Article, even

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<sup>24</sup> Title VII of the Civil Rights Act of 1964, § 717(a), 42 U.S.C. § 2000e-16(a).

<sup>25</sup> See discussion *infra* notes 172-176 and accompanying text.

<sup>26</sup> 10 U.S.C. §§ 801-946.

<sup>27</sup> See Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 *passim* (1970) (recounting the growth and development of the civilianization of military justice, beginning in World War I).

if their experiences of sexual violence may not be perfectly coextensive with those of female service members.

Part I situates sexual harassment and assault in the military within the military's history and place in America, discussing the potential role of the military to foster social integration and equality in American society.

Part II provides an overview of sexual misconduct in the military and evaluates the military's insufficient response. Specifically, Section II.A examines statistics from the military's latest internal surveys on sexual harassment and assault, which demonstrate that the Department of Defense is still struggling to reduce rates of sexual misconduct in the military. We also discuss the persistence of a culture both inside and outside the military that devalues female members' service, particularly their participation in ground combat units. Section II.B analyzes the military's "CATCH" program, which gives sexual assault victims the option of anonymously disclosing the identifying information of alleged perpetrators to aid in the identification of repeat offenders, as well as the DOD's announced proposal to add a penal article to the UCMJ directly criminalizing sexual harassment. Section II.C details the inadequacies of these responses. Although CATCH and criminalization may appear to be bold steps, our analysis demonstrates that these initiatives fall short. At best, they mask deeper, structural problems in the military justice system's responses to sexual assault and harassment; at worst, they undermine the DOD's efforts in this area.

Finally, Part III turns to solutions. We outline an updated regulatory framework for the UCMJ that would bring the military's legal response to sexual harassment in closer alignment with civil employment discrimination law. These proposals include assigning independent authority to investigate and discipline sexual harassment outside the chain of command, using administrative actions that employ a preponderance of the evidence standard to adjudicate sexual harassment complaints, and making compensatory damages available to victims for economic and psychological injuries caused by sexual harassment. For the most part, all of these reforms can be implemented within the parameters of the military justice system, balancing the military's desire to remain independent of civilian courts and law with the rights of service members to be free of discrimination.

## **I. THE MILITARY, EQUALITY, AND AMERICAN SOCIETY**

As we argue in this Part, eliminating discrimination and sexual misconduct in the military has broad implications for American society. Participation in this central American institution is a marker of full

citizenship.<sup>28</sup> The military is also one of the United States' largest and most influential employers. In 2020, there were roughly 1.35 million men and women serving on active duty.<sup>29</sup> Service members are tasked with cooperating with one another, often over extended periods, and in diverse groups that at least aspirationally place everyone on the same plane irrespective of racial, ethnic, or sexual hierarchies. This aspiration, however incompletely realized, makes the military an institution with significant potential to foster equality in American society.<sup>30</sup>

The military has played a uniquely integrative function in our country. At the same time, it has also served as a site of struggle over civil, women's, and LGBTQ rights and continues to reflect institutionalized inequalities. This Section discusses this history, highlighting the military's potential as an engine of equality in American society, despite its historical and continuing challenges.

### A. Civil Rights

The American civil rights movement arguably gained momentum because of the American people's close relationship with military service.<sup>31</sup> During World War II, America faced the racist ideology of the Nazis. This

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<sup>28</sup> See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 415 (1857) (“[W]hy are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? . . . [H]e is not, by the institutions and laws of the State, numbered among its people . . . [H]e is not therefore called on to uphold and defend it.”); Jane Dailey, *The Sexual Politics of Race in World War II America*, in *FOG OF WAR: THE SECOND WORLD WAR AND THE CIVIL RIGHTS MOVEMENT* 145, 149 (Kevin M. Kruse & Stephen Tuck eds., 2012) [hereinafter *FOG OF WAR*] (“The connection between bearing arms in defense of a community and being vested with full rights within it . . . ha[s] been linked in America since the nation’s founding.”); see also Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1550 (2010) (“*Dred Scott* expressly equated disarmament with enslavement and lack of citizenship.”).

<sup>29</sup> DEF. MANPOWER DATA CTR., U.S. DEP’T OF DEF., ACTIVE DUTY MILITARY STRENGTH REPORT (Oct. 31, 2020), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) [<https://perma.cc/QW4S-8K34>] (choose “October 2020” from “Active Duty Military Personnel by Service by Rank/Grade (Updated Monthly)”). Including civilian military personnel, the Department of Defense claims 3.2 million employees on its roster. Henry Taylor, *Who is the World’s Biggest Employer? The Answer Might Not Be What You Expect*, *WORLD ECON. F.* (June 17, 2015), <https://www.weforum.org/agenda/2015/06/worlds-10-biggest-employers/?link=mktw> [<https://perma.cc/35MP-C5G6>].

<sup>30</sup> See generally Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 25 (2000) (“The idea of compelling people to get along may sound paradoxical and potentially counterproductive. But the success of integration in the armed forces—probably the most successful natural experiment in institutional integration that this country has seen—suggests that people can in fact be ordered to get along.”).

<sup>31</sup> See Robert P. Saldin, *Strange Bedfellows: War and Minority Rights*, 173 *WORLD AFF.* 57, 57 (2011) (“War, what is it good for? Well, minority rights for one thing . . . . Minority groups that have contributed to war efforts have been rewarded with expanded rights.”).

encounter exposed America's own problem with racism, making segregation at home increasingly untenable.<sup>32</sup> In 1946, in response to an increase in racial violence and tension across the United States, President Truman established a Commission on Civil Rights.<sup>33</sup> Among other recommendations, the Commission suggested desegregating the military.<sup>34</sup> The Commission's final report, entitled *To Secure These Rights*, highlighted the close relationship between racial segregation in the military and unequal social conditions for African Americans in American society, observing:

[A]ny discrimination which, while imposing an obligation, prevents members of minority groups from rendering full military service in defense of their country is for them a peculiarly humiliating badge of inferiority. The nation also suffers a loss of manpower and is unable to marshal maximum strength at a moment when such strength is most needed.<sup>35</sup>

Noting that "[t]he war experience brought to our attention a laboratory in which we may prove that the majority and minorities of our population can train and work and fight side by side in cooperation and harmony," the Commission urged that "[w]e should not hesitate to take full advantage of this opportunity."<sup>36</sup> President Truman did so by executive order, not believing Congress would pass a bill to integrate the military.<sup>37</sup> Thus, the process of

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<sup>32</sup> *Id.* at 59 ("World War II . . . undermined racial supremacism in America . . . . [T]he US had a weakness in that its denunciations of Hitler's racist ideology were blatantly hypocritical in the face of Jim Crow. This awkward fact led to increased attention on 'the color line' . . . ."); see also MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 9 (2000) ("The purpose of the war would leave its victors with new obligations. And if the war was, at least in part, a battle against racism, then racial segregation and disenfranchisement seemed to belie the great sacrifices the war had wrought."); Harvard Sitkoff, *African Americans, American Jews, and the Holocaust*, in *THE ACHIEVEMENT OF AMERICAN LIBERALISM: THE NEW DEAL AND ITS LEGACIES* 181, 181–96 (William Chafe ed. 2003) (reviewing how the horrors of the Holocaust and the United States' involvement in World War II proved central to the development of the civil rights movement).

<sup>33</sup> Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 7, 1946).

<sup>34</sup> DUDZIAK, *supra* note 32, at 84–86; KAMARCK, *supra* note 4, at 14; see also Lisa Vox, *How Executive Order 9981 Desegregated the U.S. Military*, THOUGHTCO. (Oct. 18, 2019), <https://www.thoughtco.com/executive-order-9981-us-military-desegregation-45360> [<https://perma.cc/765U-XZYJ>].

<sup>35</sup> PRESIDENT'S COMM. ON CIV. RTS., *TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS* 8 (1947).

<sup>36</sup> *Id.* at 47.

<sup>37</sup> See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948): ("It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale."). The order also

integrating the United States Armed Forces officially began in 1948.<sup>38</sup>

Some military leaders<sup>39</sup> and rank-and-file service members resisted the order, and de facto segregation persisted for some time.<sup>40</sup> However, political scientists and historians frequently cite African American service during World War II as a chapter in our country's history that significantly shaped the civil rights movement.<sup>41</sup> The military was one of the first testing grounds and victories of the modern civil-rights era.<sup>42</sup> According to historians, in the decades after World War II, the United States military became one of the most racially diverse institutions in the country, offering social mobility to generations of Black Americans.

The potentially positive influence of the military on racial equality in the United States continues to the present. For example, in 2003, the military played a leading role in advocating for affirmative action in higher education. In *Grutter v. Bollinger*,<sup>43</sup> a Supreme Court case addressing the constitutionality of race-conscious law school admissions at the University of Michigan, several former top military officials filed an amicus brief arguing that “a highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse enlisted ranks is essential to the military’s ability to fulfill its principal mission to provide national

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established the President’s Committee on Equality of Treatment and Opportunity in the Armed Forces, tasked with studying the potential impact of integration on military efficiency. See KAMARCK, *supra* note 4, at 14.

<sup>38</sup> Most of the actual enforcement of the order was accomplished by President Dwight D. Eisenhower’s administration from 1953–1961, including the desegregation of military schools, hospitals, and bases. The last of the all-Black units in the United States military was abolished in September 1954. DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 42–50 (2007).

<sup>39</sup> See KAMARCK, *supra* note 4, at 14 (“[S]ome military leaders [on Truman’s commission] advocated for maintaining the status quo due to concerns about inefficiencies that might arise from ‘impaired morale in mixed units.’”).

<sup>40</sup> See DUDZIAK, *supra* note 32, at 87 (discussing resistance to racial integration well into the 1950s); Craig Westergard, Note, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215, 219 (2019) (noting that Black service members were consistently assigned to low skill jobs and had limited roles in the infantry until the 1960s); cf. Jason Morgan Ward, “*A War for States’ Rights*”: *The White Supremacist Vision of Double Victory*, in *FOG OF WAR*, *supra* note 28, at 126–44 (discussing racial violence in and around integrated Southern military bases in the 1940s).

<sup>41</sup> See, e.g., Saldin, *supra* note 31, at 66 (“African American service in World War II and Korea helped shape the evolving civil rights movement.”).

<sup>42</sup> See Kevin M. Kruse & Stephen Tuck, *Introduction*, in *FOG OF WAR*, *supra* note 28, at 4 (“African Americans demanded equal rights in return for their contribution to the defense economy, their loyalty to the war effort, and their sacrifices as soldiers—and as mothers and wives of soldiers.”).

<sup>43</sup> 539 U.S. 306 (2003).

security.”<sup>44</sup> Justice O’Connor, writing for the majority, embraced the argument, noting that the “most selective institutions,” including military academies and flagship state universities, are “training ground[s]” for leaders, and, therefore, “must remain both diverse and selective.”<sup>45</sup> The justices repeatedly referenced the military brief during oral argument,<sup>46</sup> and the Court’s majority opinion upholding the policy under the Fourteenth Amendment contained more citations to the military brief than to any of the more than one hundred other briefs submitted to the Court.<sup>47</sup>

This history of the military’s role in American race relations is an admittedly complex story. We do not wish to paint an overly sanguine picture of racial progress in the military or to downplay the military’s continuing challenges in the realm of meaningful diversity. The racial integration of the military was the culmination of a long period of Black protest, that is, of the “long civil rights movement.”<sup>48</sup> It did not spring into being overnight or necessarily emerge from a widespread epiphany of race consciousness by white people. Abundant exemplary scholarship also recounts the American military’s central place in colonial conquest,<sup>49</sup> even as the military was

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<sup>44</sup> Consol. Brief of Lt. Gen. Julius W. Becton, Jr., et al., as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554, at \*5.

<sup>45</sup> *Grutter*, 539 U.S. at 331, 332.

<sup>46</sup> Transcript of Oral Argument at 7–10, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 U.S. Trans. LEXIS 26.

<sup>47</sup> Jonathan Groner, *In ‘Grutter v. Bollinger’ Amicus Avalanche, One Brief Stood Out*, LEGAL TIMES (July 2, 2003, 12:00 AM) <http://www.law.com/almID/900005535864/> [<https://perma.cc/893L-QGPA>].

<sup>48</sup> See Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1235 (2005) (telling a “truer” story of the “long civil rights movement” that “took root in the liberal and radical milieu of the late 1930s, was intimately tied to the ‘rise and fall of the New Deal Order,’ accelerated during World War II, stretched far beyond the South, was continuously and ferociously contested, and, in the 1960s and 1970s, inspired a ‘movement of movements’ that ‘def[ies] any narrative of collapse.’”).

<sup>49</sup> See, e.g., ODD ARNE WESTAD, *THE GLOBAL COLD WAR: THIRD WORLD INTERVENTIONS AND THE MAKING OF OUR TIMES* 396 (2007) (“[T]he Cold War was a continuation of colonialism through slightly different means.”); Bruce Cumings, *The Wicked Witch of the West is Dead. Long Live the Wicked Witch of the East*, in *THE END OF THE COLD WAR: ITS MEANING AND IMPLICATIONS* 90 (Michael J. Hogan ed., 1992) (“[W]hat the Cold War was really about for Americans [was] interventions in the Third World, from Korea through Iran, Guatemala and Cuba, to the debacle in Vietnam.”); Penny Von Eschen, *Civil Rights and World War II in a Global Frame: Shape-Shifting Racial Formations and the U.S. Encounter with European and Japanese Colonialism*, in *FOG OF WAR*, *supra* note 28, at 182 (“[T]he term ‘cold war’ [is] a misnomer for the peoples of Asia, Africa, Latin America, and the Middle East, where democratic challenges often met with violent suppression by either [U.S.] proxies or covert operatives, or both.”). There are numerous works examining the military’s role in American colonial history in specific contexts. See, e.g., KEVIN K. GAINES, *AMERICAN AFRICANS IN GHANA: BLACK EXPATRIATES AND THE CIVIL RIGHTS ERA* (2006);

promoting racial equality in its ranks at home.<sup>50</sup> Finally, we would be remiss not to acknowledge the Department of Defense's recent involvement in the militarization of the police and the dispersal of the Black Lives Matter protests.<sup>51</sup> As these examples demonstrate, there is no straight line from racial integration to antiracism; rather, more often than not, organizational reform has yielded new forms of racism and racial thinking. Nevertheless, we think the history summarized here demonstrates that the military, as an institution with a central role in defining American citizenship, has the potential to promote broader equality in American society. As such, it is an institution that should be of special concern when thinking through societal responses to sexual harassment.

### *B. Women's Rights*

As with racial integration, the history of women in the military suggests a connection between women's integration in the military and gender equity in the civilian sector.

While women fought in our nation's conflicts from the very beginning,<sup>52</sup> they were not given formal roles in the Armed Forces until World War II.<sup>53</sup> Women participated in some branches of the military as early as the turn of the twentieth century, serving primarily as nurses and in clerical occupations.<sup>54</sup> Traditional, sexist attitudes excluded them from other occupations.<sup>55</sup> This pattern of exclusion changed substantially during World War II, when many military occupations opened to women, including "airplane mechanics, air traffic controllers, instructors and other specializations with the

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DOUGLAS LITTLE, *AMERICAN ORIENTALISM: THE UNITED STATES AND THE MIDDLE EAST SINCE 1945* (3d ed. 2008); MARILYN B. YOUNG, *THE VIETNAM WARS: 1945–1990* (1991).

<sup>50</sup> See DUDZIAK, *supra* note 32, at 12–14 (discussing the connections between domestic civil rights reform and America's military activities promoting democracy around the world during the Cold War).

<sup>51</sup> See, e.g., Paul D. Shinkman, *Trump Tests the U.S. Commitment to an Apolitical Military*, U.S. NEWS (June 8, 2020, 6:53 PM), <https://www.usnews.com/news/national-news/articles/2020-06-08/trump-tests-the-us-commitment-to-an-apolitical-military> [<https://perma.cc/9TYK-UKXH>] (discussing President Trump's threat to deploy the U.S. military against Black Lives Matter protesters).

<sup>52</sup> See Linda Grant De Pauw, *Women in Combat: The Revolutionary War Experience*, 7 *ARMED FORCES & SOC'Y* 209, 210 (1981) (noting that an estimated 20,000 women served in the Colonial Army in the Revolutionary war, with several hundred serving as uniformed combatants); Kaia Danyluk, *Women's Service with the Revolutionary Army*, *COLONIAL WILLIAMSBURG INTERPRETER*, Fall 1997, at 8–13, <https://cwfpublishings.omeka.net/items/show/84> [<https://perma.cc/SYU5-E4ZB>] (describing the role of female "camp followers" in the Colonial Army).

<sup>53</sup> See BELLAFAIRE, *supra* note 1, at 3–5.

<sup>54</sup> See KAMARCK, *supra* note 4, at 23.

<sup>55</sup> *Id.*

exception of direct combat roles,” and a small group of women even served as pilots in a special sex-segregated unit of the Air Force.<sup>56</sup>

After observing the contribution of female civilian contract workers in the First World War, Congresswoman Edith Rogers of Massachusetts introduced a bill in 1941 to establish a Women’s Army Auxiliary Corps (WAAC).<sup>57</sup> Army Leadership did not want women to be fully integrated into the Regular Army. Therefore, as a compromise, the WAAC was established as a separate entity designed to work “with” the Army rather than as a part of it.<sup>58</sup> Support for the bill came in large part as a result of the attack on Pearl Harbor and the prospect of a war on two fronts.<sup>59</sup> Military generals feared there would be manpower shortages.<sup>60</sup> Rather than spend time training men, they decided it would be more efficient to place already highly-skilled women in essential service jobs like switchboard operations and typing.<sup>61</sup> Congress approved the bill on May 14, 1941, and it was signed into law by President Roosevelt.<sup>62</sup>

Resistance to the integration of women into the Armed Forces emerged from the beginning. In 1943, the wartime Office of Censorship, an agency charged with reviewing soldiers’ mail, noted that 84% of letters mentioning the WAAC were unfavorable.<sup>63</sup> Male soldiers tended to question the morals of women in military service, and “male folklore” held that WAACs were prostitutes assigned to “keep men happy.”<sup>64</sup> Negative perceptions of women in military service spilled into the civilian sphere, making WAAC recruitment more difficult.<sup>65</sup> Anti-WAAC perceptions derived from the commonly held view that women should not serve in traditionally male organizations. Moreover, male soldiers’ families were not anxious for their sons, husbands, and brothers to be “freed” from more comfortable military jobs for combat.<sup>66</sup>

Women in the WAAC were not treated as equal members of the Armed Forces, even though they were permitted to serve overseas. Because they were not part of the Regular Army, they were ineligible for retirement

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<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 23.

<sup>58</sup> BELLAFIRE, *supra* note 1, at 3–4.

<sup>59</sup> *See* KAMARCK, *supra* note 4, at 23.

<sup>60</sup> *Id.*

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

<sup>62</sup> BELLAFIRE, *supra* note 1, at 5.

<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g., id.* at 4–5 (noting statements of a congressman opposing the WAAC, who asked: “Who will then do the cooking, the washing, the mending, the humble homey tasks to which every woman has devoted herself; who will nurture the children?”); *id.* at 16–17 (discussing resentment of soldiers’ and their families toward the WAACs).



or veterans' benefits.<sup>67</sup> They served mostly under temporary arrangements and under restrictive policies;<sup>68</sup> in essence, they were an auxiliary resource.<sup>69</sup>

Following World War II, Congress finally ended women's exclusion from formal military service with the passage of the Women's Armed Services Integration Act of 1948,<sup>70</sup> giving them a permanent place in the military. The Act, however, also imposed quotas limiting the proportion of women to 2% of the enlisted force and 10% of officers<sup>71</sup> and instituted unequal treatment for women in other respects.<sup>72</sup>

Some branches of the military were quicker than others in disbanding their female-only components. For example, the Navy disbanded its female-only reserve branch or the "WAVES" (Women Accepted for Volunteer Emergency Service) in 1948.<sup>73</sup> In contrast, the Army maintained the female-only Women's Army Corps (WAC) (the Regular Army successor to the

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<sup>67</sup> See KAMARCK, *supra* note 4, at 23; see also BELLAFIRE, *supra* note 1, at 4 (explaining that WAACs were not provided with overseas pay, life insurance, medical coverage, or death benefits granted to Regular Army soldiers, and that female WAACs officers officially received less pay than male officers of similar rank).

<sup>68</sup> ELLEN C. COLLIER, CONG. RSCH. SERV., IB79045, WOMEN IN THE ARMED FORCES CRS-2 (1982).

<sup>69</sup> In 1943, due to the success of the WAAC, the Army asked Congress for authorization to integrate the WAAC as a component of the Regular Army. With this integration, women would serve as actual, if segregated, members of the Armed Forces in the Women's Army Corps (WAC). *Creation of the Women's Army Corps*, ARMY.MIL: WOMEN IN THE ARMY, <https://www.army.mil/women/history/wac.html> [<https://perma.cc/A8TE-BENX>] (last visited Dec. 10, 2020). As such, one may argue that the WAC was the precursor to Congress's largescale integration of women in 1948.

<sup>70</sup> Pub. L. No. 80-625, 62 Stat. 356; see also MORDEN, *supra* note 2, at 48.

<sup>71</sup> KAMARCK, *supra* note 4, at 24. The officer quota excluded nurses. *Id.* at 24 n.122.

<sup>72</sup> Specifically:

[W]omen required parental consent for enlistment under the age of 21 (the age of consent was 18 for men); women could not hold a permanent rank above lieutenant colonel/commander . . . [and] male spouses had to demonstrate dependency in order to receive female servicemembers' dependent's benefits and/or the female servicemember had to be the family's primary source of support for her children to be considered dependents.

*Id.* at 24. Around this time, the military also developed guidelines for investigating homosexuality among women soldiers and stepped up investigations of alleged lesbians. See MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 180-84* (2009). Canaday argues that the lesbian witch hunts were closely related to generalized anxieties about gender in the military following women's permanent integration; that is, the military engaged in widespread investigations of alleged female homosexuality to "police[] . . . women in the service as a class." *Id.* at 213.

<sup>73</sup> Naval Hist. & Heritage Command Comm'n & Outreach Div., *The First Waves*, THE SEXTANT (July 29, 2016), <https://usnhistory.navylive.dodlive.mil/2016/07/29/the-first-waves/> [<https://perma.cc/LZJ9-Q2FZ>].

WAAC)<sup>74</sup> until 1978.<sup>75</sup> By this time, maintaining a segregated, female-only branch of the Army was widely viewed as discriminatory, even by the Department of Defense, which drafted the legislation abolishing the WAC.<sup>76</sup>

Once assimilated into the Armed Forces, the military still prohibited women from serving in combat arms units.<sup>77</sup> Such units included Infantry, Special Forces, Armor, and Artillery. These units have the primary function of engaging enemy forces in direct combat. Under the combat exclusion policy, women were limited to occupations like Transportation, Ordnance, Quartermaster, Military Intelligence, or Military Police, whose purpose is to provide ancillary or supporting services. The combat exclusion policy had existed since women started service in World War II, primarily due to conceptions deeming it inappropriate for women to engage in combat.<sup>78</sup>

Despite resistance to women's full integration into the Armed Forces, women's involvement in World War II presented a far-reaching challenge to systemic sex discrimination in American society. Integration allowed women to prove their abilities so that civilian employers were "hard-pressed to deny jobs to women solely because of sex."<sup>79</sup>

As labor historians have documented, women's involvement in the wartime labor force during World War II also contributed to their economic gains and integration into traditionally male-dominated workplaces and occupations.<sup>80</sup> When men went off to war by the millions, women stepped into the civilian and war economy jobs that men left behind, taking their place on assembly lines and in defense plants for aircraft manufacturers,

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<sup>74</sup> On July 1, 1943, Franklin D. Roosevelt signed Public Law 78-110, which converted the auxiliary WAAC to the WAC, making it a part of the Regular Army and giving full benefits to women. *See Creation of the Women's Army Corps, supra* note 69; Act of July 1, 1943, ch. 187, Pub. L. No. 78-110, 57 Stat. 371.

<sup>75</sup> MORDEN, *supra* note 2, at 395–97.

<sup>76</sup> *Id.* at 395–96 (reporting broad acceptance of the legislation abolishing the WAC by the Secretary of Defense, Secretary of the Army, active and retired WACS, and Congress, and that one Senator stated, in support, "Imagine . . . a separate personnel system for Blacks or Catholics or Chicanos. The country would not stand for such a thing.").

<sup>77</sup> *Id.* at 128; Women's Armed Services Integration Act of 1948, Pub. L. No. 80-625, 62 Stat. 356.

<sup>78</sup> *See* BELLAFAIRE, *supra* note 1, at 6 (discussing the suitability of women for noncombatant jobs).

<sup>79</sup> ROBERT L. GOLDICH, CONG. RSCH. SERV., NO. 80-27F, WOMEN IN THE ARMED FORCES: PROCEEDINGS OF A CRS SEMINAR HELD ON NOVEMBER 2, 1979 AND SELECTED READINGS (1980). This is not to diminish the fact that even formal sex discrimination in the workplace continued into the 1970s. *See* KATHERINE TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE 110 (2016) (discussing ongoing union campaigns to address pay equity, sexual harassment, job training, childcare, and job safety in the 1970s); *id.* at 126 ("In the late 1970s, nearly half of working women were in occupations that were at least 75 percent female . . .").

<sup>80</sup> *See generally* KAREN ANDERSON, WARTIME WOMEN: SEX ROLES, FAMILY RELATIONS, AND THE STATUS OF WOMEN DURING WORLD WAR II (1981) (exploring the impacts of World War II on the occupational distribution of women and their long-term economic advancement).

automakers, shipbuilders, and steelmakers, for example.<sup>81</sup> They were pressed into service as taxi drivers, shuttling injured sailors from Navy ships to hospitals in cities like Seattle.<sup>82</sup> Women of all walks of life joined the civilian workforce in blue and white collar jobs, ranging from streetcar operators, construction workers, and agricultural workers to government and office workers.<sup>83</sup> All in all, an estimated six million women joined the civilian workforce during World War II.<sup>84</sup>

Ultimately, the war did not fundamentally transform women's status in American society.<sup>85</sup> Women's workplace presence was met with resistance by employers and unions.<sup>86</sup> After the war, both private and public employers pushed women out of the workplace<sup>87</sup> and back into the home.<sup>88</sup> Moreover, because

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

<sup>82</sup> Susan Paynter, *As WWII Raged, Seattle's First Female Cab Drivers Made History*, SEATTLE POST-INTELLIGENCER (March 15, 2011, 4:15 PM), <https://www.seattlepi.com/news/article/As-WWII-raged-Seattle-s-first-female-cab-drivers-1144290.php> [<https://perma.cc/8CCT-ZF8D>].

<sup>83</sup> Annette McDermott, *How World War II Empowered Women*, HIST. (Oct. 10, 2018), <https://www.history.com/news/how-world-war-ii-empowered-women> [<https://perma.cc/K7N4-4MCL>].

<sup>84</sup> *Id.* In addition, educational institutions admitted women into traditionally male fields of science, medicine, and technology. Locally, women also served on juries for the first time in several states, replaced male political party workers, and won election to state offices. See SUSAN M. HARTMANN, *THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940s*, at 210 (1982).

<sup>85</sup> See ANDERSON, *supra* note 80, at 173 (“Despite the temporary gains of the war years, women's status within the labor force was not much better than it had been before the war.”).

<sup>86</sup> See *id.* at 23–31, 35, 44–47, 52–61, 64–65 (documenting how in Seattle, Detroit, and Baltimore, for example, employers and unions only reluctantly opened their doors to women, especially in previously male-dominated workplaces and occupations). Even worse, Black women continued to be objects of discrimination based on race as well as gender. *Id.* at 36–42.

<sup>87</sup> See *id.* at 161, 164–69 (discussing reconversion layoffs of women after the war); RUTH MILKMAN, *ON GENDER, LABOR, AND INEQUALITY* 119–38 (2016) (discussing the “defeminization of basic industry” at the end of World War II, using the auto industry as a case study); Sheila Tobias & Lisa Anderson, *What Really Happened to Rosie the Riveter? Demobilization and the Female Labor Force, 1944-47*, in *WOMEN'S AMERICA: REFOCUSING THE PAST* 354, 354–73 (Linda K. Kerber & Jane De Hart Matthews eds., 1982) (discussing private and public discrimination against women workers in the reconversion period and suggesting that the war's liberative potential was thwarted by postwar politics). For discussions of the post-war “purges” of women by unions, see Nancy Gabin, *Women Workers and the UAW in the Post-World War II Period: 1945–1954*, 21 LAB. HIST. 5 (1979) and Lyn Goldfarb, *Separated & Unequal: Discrimination Against Women Workers After World War II (The U.A.W. 1944-54)* (Women's Work Project, A Union for Radical Political Economics, n.d.) (unpublished pamphlet, on file with Healy Library Archives and Special Collections, Univ. Mass., Boston). These works, and others, refute the “turning point” theory, which attributes women's economic gains and increased labor force participation in the post-war period to their involvement in the wartime economy. Other scholars, however, defend the theory's salience. See ANDERSON, *supra* note 80, at 8–10 (discussing disagreements among historians and economists over the turning point theory).

<sup>88</sup> ANDERSON, *supra* note 80, at 175–78; ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 62–70 (1988). Institutions of higher education

military service determined eligibility for valuable governmental benefits, it helped define deserving (mostly male) and undeserving (mostly female) beneficiaries in the post-war welfare state.<sup>89</sup> Yet, however temporary, wartime opportunities in the civilian labor force contributed to the breakdown of social structures relegating women to the home and set the stage for more fundamental social changes in gender roles and legal developments in the 1960s.<sup>90</sup>

With the women's rights movement and the shift to an all-volunteer force in 1973, women's integration into the military rapidly accelerated, facilitated by Supreme Court decisions,<sup>91</sup> federal legislation,<sup>92</sup> and policy

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reverted to preferring men after the war, with male veterans receiving preference in college admissions; women were increasingly present on campuses as wives of male college students and departmental clerical workers. See HARTMANN, *supra* note 84, at 106–07; cf. MAY, *supra*, at 78 (discussing college as a route to marriage for middle-class white women in the post-war years; many women dropped out of college upon marrying).

<sup>89</sup> See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 94 (2002) (“[T]he GI Bill, like the Social Security programs, was instrumental in shaping the postwar economy and society by reinforcing traditional gender norms in its distribution of benefits.”). This dynamic played out inside the military as well. See JENNIFER MITTELSTADT, *THE RISE OF THE MILITARY WELFARE STATE* 117–31 (2015) (tracing the demise of robust military social welfare benefits to the influx of women, minorities, and poorer service members in the early years of the all-volunteer military; conservative critics, echoing attacks on welfare recipients, painted the new soldiers as a class of freeloaders).

<sup>90</sup> See ANDERSON, *supra* note 80, at 174 (“The influx of large numbers of married women into the labor force marked an important turning point for women, involving as it did the implicit rejection of the idea that a woman’s household responsibilities could not be reconciled with outside employment.”); ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 17 (2001) (“In this period of rapid and dramatic change in women’s workforce roles, older notions of protection for women workers began to crumble and occupational segregation by sex became the target of attack.”); see also McDermott, *supra* note 83 (“[A]fter their selfless efforts during World War II, men could no longer claim superiority over women. Women had enjoyed and even thrived on a taste of financial and personal freedom—and many wanted more. Though progress was slow over the next two decades, serving their country in the military and at home empowered women to fight for the right to work in nontraditional jobs for equal pay and for equal rights in the workplace and beyond.”). Kessler-Harris also argues that women’s experience in World War II had long-lasting impacts on notions of gender within the women’s rights movement, as “a new consensus emerge[d] among women leaders” that women should “drop claims to gender difference.” KESSLER-HARRIS, *supra*, at 17.

<sup>91</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (holding that the policy requiring female service members to prove the dependency of their spouses was unconstitutional, thus entitling female service members to the same dependent benefits as male service members for their spouses and children).

<sup>92</sup> See, e.g., Act of May 24, 1974, Pub. L. No. 93-290, 88 Stat. 173 (codified as amended at 10 U.S.C. § 505) (reducing the minimum age of consent for women to enlist to be consistent with the age of consent for men); Act of Oct. 7, 1975, Pub. L. No. 94-106, § 803(a-c), 89 Stat. 537 (current version at 10 U.S.C. § 7442) (allowing women to attend the military service academies).

directives from the Department of Defense and the services.<sup>93</sup> In the 1990s, Congress banned the use of gender quotas for any military occupation, although women's exclusion from most combat occupations continued.<sup>94</sup>

In 1993, Secretary of Defense Les Aspin lifted the combat exclusion policy on nearly all aviation roles, which allowed women to serve as attack aviation pilots for the first time.<sup>95</sup> However, the prohibition of women in ground combat roles remained in place. It was not until 2013 that Secretary of Defense Leon Panetta announced plans to rescind the combat exclusion policy; he directed all branches of the Armed Forces to conduct assessments on how to integrate women into all career fields by 2015.<sup>96</sup> In 2015, Secretary of Defense Ash Carter formally announced that all military occupations would be opened to women.<sup>97</sup>

In an influential essay published in 1978, Harvard sociologist Maury Feld predicted that the inclusion of significant numbers of women in the military would inevitably increase women's social, political, and economic equality in American society.<sup>98</sup> Ending the masculine monopoly on state-sponsored violence, he argued, would have a radical impact on conventional perceptions of women within the social system, disrupting the "cultural complex" which makes women appear to be "a natural object of men's own aggressive impulses."<sup>99</sup> The military's ongoing problems with sexual harassment and sexual violence suggest that Feld underestimated the resilience of sexism. Women's integration has not necessarily undermined

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<sup>93</sup> For example, in 1972, the DOD opened the Reserve Officers' Training Corps (ROTC) to women, and in 1975, it repealed a policy permitting involuntary separation of pregnant women from the military. KAMARCK, *supra* note 4, at 26.

<sup>94</sup> See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, §543(2), 107 Stat. 1547, 1660–61 (1993) (codified as amended at 10 U.S.C. § 113 note).

<sup>95</sup> See Swick & Moore, *supra* note 3; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991) (codified as amended in scattered sections of 10 U.S.C.).

<sup>96</sup> See Memorandum from Sec'y of Def. Leon Panetta and Chairman of Joint Chiefs of Staff Martin Dempsey to Sec'ys of the Mil. Dep'ts on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/MCR8-8P5Z>] (recognizing the contributions of the women currently serving in the military and affirming that the goal of the Department is to remove all gender based, non-performance related barriers to career advancement for women in service).

<sup>97</sup> See Memorandum from Sec'y of Def. Ash Carter to Sec'ys of the Mil. Dep'ts on Implementation Guidance for the Full Integration of Women in the Armed Forces (Dec. 3, 2015) [hereinafter DOD 2015 Order to Fully Integrate Women], <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf> [<https://perma.cc/M7WP-Q5UJ>] (formally announcing that there are no exceptions to the 1994 rescission of the Combat Exclusion Rule).

<sup>98</sup> See M.D. Feld, *Arms and the Woman: Some General Considerations*, 4 ARMED FORCES & SOC'Y 557, 558 (1978).

<sup>99</sup> *Id.*

the gendered structure of the military or American society.<sup>100</sup> Yet, taken as a whole, the history recounted here demonstrates that women's integration has played a role in challenging societal systems of sex discrimination. While we do not contend that women's participation in the American military pushed American society inexorably toward women's equality, it has contributed to the reformulation of gender roles.

### C. Voting Rights

Young adults ages eighteen to twenty-one enjoy the right to vote as a direct consequence of military service.<sup>101</sup> The Twenty-Sixth Amendment to the Constitution was enacted in 1971 during the Vietnam War, lowering the national minimum voting age from twenty-one to eighteen.<sup>102</sup> This change was a response to the perceived unfairness of sending young draftees to combat without a say in the political process, as reflected in the "old enough to fight, old enough to vote" slogan touted by proponents of lowering the voting age.<sup>103</sup> After Congress passed the Amendment, thirty-eight states

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<sup>100</sup> See discussion *infra* Section II.A; *cf. also* Noya Rimalt, *Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military*, 14 DUKE J. GENDER L. & POL'Y 1097, 1113–17 (2007) (examining the resilience of sexist ideology and practices in the Israeli Defense Forces (IDF) despite decades of women's integration, including a gendered division of labor and sexual harassment in the IDF).

<sup>101</sup> See generally Hilary Parkinson, *Records of Rights Vote: "Old Enough to Fight, Old Enough to Vote"*, NAT'L ARCHIVES: PIECES OF HISTORY (Nov. 13, 2013) <https://prologue.blogs.archives.gov/2013/11/13/records-of-rights-vote-old-enough-to-fight-old-enough-to-vote/> [<https://perma.cc/N8VT-LYYL>].

<sup>102</sup> *Id.*; U.S. CONST. amend. XXVI.

<sup>103</sup> The "old enough to fight, old enough to vote" slogan actually first emerged during World War II, when President Roosevelt lowered the minimum age of draftees to eighteen, causing debate over sending young men off to war without the right to vote. Parkinson, *supra* note 101. In his 1954 State of the Union Address, President Eisenhower said: "For years our citizens between the ages of 18 and 21 have, in time of peril, been summoned to fight for America. They should participate in the political process that produces this fateful summons." Annual Message to Congress on the States of the Union, 1954 PUB. PAPERS 6, 22 (Jan. 7, 1954). Debate intensified during Vietnam due to growing public dissatisfaction over the apparent inequities of the draft, particularly the use of educational deferments that resulted in the disproportionate drafting of young, low-income men. See David Card & Thomas Lemieux, *Going to College to Avoid the Draft: The Unintended Legacy of the Vietnam War*, 91 AMER. ECON. REV. 97, 97–98 (2001) (detailing how deferments for college influenced many young single men to remain in school). In 1970, Congress amended the Voting Rights Act of 1965 to allow eighteen-year-olds to vote in state and national elections. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended in scattered sections of 42 U.S.C. and 52 U.S.C.). Although President Nixon signed the amendments into law, he did so stating that he believed Congress did not have the authority to change the age requirement for state elections. Statement on Signing the Voting Rights Act Amendments of 1970, 1970 PUB. PAPERS 512, 512–13 (June 22, 1970). The

ratified it in only 100 days, the fastest time for any constitutional amendment.<sup>104</sup>

#### D. LGBTQ Rights

Scholars have detailed the historical exclusion of gay men and lesbians from the United States military and the links between changing understandings of sexuality in the military and in American society.<sup>105</sup> A detailed account of this history is beyond the scope of this Article. However, we briefly summarize the latest chapter in this history to highlight the military's potentially positive role in fostering equality in American society, however complex and ambiguous the narrative of progress.

In 2010 President Obama signed the Don't Ask, Don't Tell Repeal Act into law, ending the Department of Defense policy that had banned openly gay, lesbian, and bisexual individuals from serving in the military.<sup>106</sup> This policy change was instituted five years before the Supreme Court held that same-sex couples have a constitutional right to marry.<sup>107</sup> Justice

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Supreme Court considered the issue in *Oregon v. Mitchell* and held that Congress only had authority to lower the voting age in federal elections, but not state elections, producing a result where voters under the age of twenty-one would be able to vote for the President and congressional representation, but not state or local officials. 400 U.S. 112, 150 (1970). This impractical situation resulted in Congress unanimously passing the 26th Amendment in 1971, with the requisite thirty-eight states ratifying the amendment in only 100 days. Parkinson, *supra* note 101.

<sup>104</sup> See Proclamation 8691, 76 Fed. Reg. 40,215 (July 8, 2011) (detailing the Presidential proclamation by President Obama acknowledging the 40th anniversary of the 26th Amendment).

<sup>105</sup> See CANADAY, *supra* note 72, at 55–90.

<sup>106</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654). There were policies prohibiting gay individuals from serving in the Armed Forces since WWII, but the branches did not adopt a unified approach. See NAT'L DEF. RSCH. INST., RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY 41 (2010) (describing inconsistencies among the approaches taken by each service). This led to a 1982 Department of Defense Directive providing a unified rationale for prohibiting gay and lesbian individuals from serving, allegedly because of "military effectiveness." See *id.* at 41 (citing U.S. DEP'T OF DEF., DIR. 1332.14 (1982); DIR. 1332.30 (1986)). In 1993, President Clinton was poised to eliminate the ban entirely via executive order but faced strong opposition from the military and Congress, the latter threatening to add the ban to the Family and Medical Leave Act. See *id.* at 42 (citing a statement by then Senate Minority Leader Bob Dole). A compromise position was reached that came to be known as "Don't Ask, Don't Tell," whereby gay Americans could serve so long as they remained closeted; the military would remove questions about sexual orientation on induction forms and service members would be required to keep information about a same-sex orientation private. See *id.* at 43; see also DAVID F. BURRELLI, CONG. RSCH. SERV., No. 7-5700, "DON'T ASK, DON'T TELL": MILITARY POLICY AND THE LAW ON SAME-SEX BEHAVIOR 1–4 (Dec. 16, 2010) (detailing the history of the Don't Ask, Don't Tell policy).

<sup>107</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

Kennedy, writing for a five-member majority of the Court, explained that the repeal of Don't Ask, Don't Tell "led to an enhanced understanding" of the constitutional definition of marriage.<sup>108</sup>

Presidential administrations often use the military as a canvas on which to project policies they think should represent American values. This understanding of the military's powerful example no doubt motivated the Obama administration to allow open military service by gay, lesbian,<sup>109</sup> and transgender<sup>110</sup> individuals during his administration; President Trump's reversal (on transgender service);<sup>111</sup> and President

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<sup>108</sup> *Id.* at 676.

<sup>109</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654); *see also* DTM 16-005, *supra* note 5 (describing "strength through diversity" as a motivation for allowing transgender people to serve in the military).

<sup>110</sup> In June 2016, during the Obama administration, Secretary of Defense Ash Carter announced a new policy that would allow transgender service members to openly serve in the military. *See* U.S. DEP'T OF DEF., TRANSGENDER SERVICE IN THE U.S. MILITARY, AN IMPLEMENTATION HANDBOOK 2 (2016).

<sup>111</sup> In July 2017, President Trump announced on Twitter that the military would not allow transgender individuals to serve in any capacity. *Factbox: Trump on Twitter (July 26) - U.S. Military, Transgender Individuals*, REUTERS (July 26, 2017), <https://www.reuters.com/article/us-usa-trump-tweet-factbox/factbox-trump-on-twitter-u-s-military-transgender-individuals-idUSKBN1AB1X9> [<https://perma.cc/7A92-ZQMJ>] (providing transcripts of Trump's tweets announcing the transgender service ban). President Trump followed through with his tweets by issuing a presidential memorandum in August 2017 that blocked transgender persons from serving and allowed for their discharge. *See* Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 587 (Aug. 25, 2017) (highlighting the politically divisive issue of the "use of the Departments' resources to fund sex-reassignment surgical procedures," and prohibiting transgender individuals from serving in the military). Legal challenges in federal district court resulted in preliminary injunctions temporarily halting the Trump policy. *See* *Karnoski v. Trump*, Case No. C17-1297-MJP, 2017 WL 6311305, at \*10 (W.D. Wash. Dec. 11, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Stockman v. Trump*, Case No. EDCV 17-1799 JGB, 2017 WL9732572, at \*16 (C.D. Cal. Dec. 22, 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017). However, after Trump's 2017 Memorandum was enjoined, President Trump revoked the 2017 Memorandum and replaced it with a new memorandum banning most transgender persons from service but adding a grandfathering provision and new, narrower exceptions. *See* Memorandum from Sec'y of Def. to President Trump, subject: Military Service by Transgender Individuals (Feb. 22, 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/9YCM-5ZZ8>] (adding exceptions); Memorandum on Military Service by Transgender Individuals, 2018 DAILY COMP. PRES. DOC. 1 (Mar. 23, 2018) (revoking and replacing the 2017 Memorandum). The Trump Administration then moved to dissolve the preliminary injunctions, claiming there had been a significant change to the policy. *See* *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at \*14 (W.D. Wash. Apr. 13, 2018); *Stone v. Trump*, No. GLR-17-2459, 2019 WL 5697228, at \*2 (D. Md. Mar. 7, 2019); *Stockman v. Trump*, 331 F. Supp. 3d 990, 993 (C.D. Cal. 2018); *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 483 (D.D.C. 2018). Several district courts decided it was really the same policy



Biden's decision to reinstate the Obama policy in full immediately upon taking office.<sup>112</sup>

In sum, as we have demonstrated, societies shape their military institutions in their own image, but military institutions also help shape society<sup>113</sup>—for better or worse.<sup>114</sup> In the age of the #MeToo movement and increased focus on sexual assault and harassment, it is therefore worthwhile to consider how a massive organization like the Department of Defense has addressed these problems. A critical examination of the military's record on sexual misconduct is necessary for the health of the military and our country more broadly.

## II. SEXUAL MISCONDUCT IN THE MILITARY

### *A. Two Decades of Data on Sexual Assault and Harassment in the Military*

Perhaps it should not be surprising, in light of the military's complicated relationship with integration and equality, that it continues to struggle with sexual assault and harassment. As we discuss in this Part, the

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and found the preliminary injunctions were still warranted, but the U.S. Supreme Court stayed the injunctions by a 5–4 vote. *Trump v. Karnoski*, 139 S. Ct. 950, 950 (2019). Additionally, the D.C. and Ninth Circuits both reversed decisions that held the preliminary injunctions in place, with the D.C. Circuit vacating the preliminary injunction and the Ninth Circuit remanding for further consideration. *See Doe 2 v. Shanahan*, 755 F. App'x 19, 22 (D.C. Cir. 2019); *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019). The transgender ban went into effect in April 2019 while the legal challenges continued into discovery. *See* GLAD Legal Advocs. & Defs. & Nat'l Ctr. for Lesbian Rts., *Timeline, NO TRANS MILITARY BAN*, <https://notransmilitaryban.org/timeline/> [<https://perma.cc/5C6U-2RPE>] (last visited June 20, 2020).

<sup>112</sup> President Biden reversed Trump's policy just five days after taking office with the Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform. *See* Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021) (revoking President Trump's 2018 Memorandum and directing the Department of Defense "to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination"). The Department of Defense issued policy updates permitting openly transgender individuals to serve in the military on March 31, 2021. U.S. Dep't of Def., Press Release, *DOD Announces Policy Updates for Transgender Military Service*, DOD.GOV (Mar. 31, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2557220/dod-announces-policy-updates-for-transgender-military-service/> [<https://perma.cc/WJJ8-W44U>].

<sup>113</sup> *See generally* MAURY D. FELD, *THE STRUCTURE OF VIOLENCE: ARMED FORCES AS SOCIAL SYSTEMS* (1977).

<sup>114</sup> *See* *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944). In 1942, President Roosevelt signed Executive Order 9066, "giving the army the power, without warrants or indictments or hearings, to arrest every Japanese-American on the West Coast—110,000 men, women, and children—to take them from their homes, transport them to camps far into the interior, and keep them there under prison conditions." HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 416 (2005).

Department of Defense has in recent decades made considerable investments in policies and actions that aim to prevent and respond to sexual misconduct. These efforts have been spurred by heightened awareness about sexual harassment in the United States since the 1990s<sup>115</sup> and several high-profile sexual misconduct scandals that brought public attention to the military's deeply sexist culture. However, despite more than two decades of reform efforts by the military to address the problems of sexual assault and harassment, little has changed.

Concerted efforts to address sexual misconduct in the military began in the early 1990s with the "Tailhook" and "Aberdeen" sexual misconduct scandals.<sup>116</sup> In the Tailhook scandal, United States Navy and Marine Corps aviation officers sexually assaulted eighty-three women and seven men during a 1991 annual convention of the Tailhook Association,<sup>117</sup> a fraternal organization of naval aviators.<sup>118</sup> In the fallout from the scandal, the Secretary

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<sup>115</sup> One might argue that ground zero for this emerging awareness in the United States was Professor Anita Hill's allegation that Supreme Court nominee Clarence Thomas had sexually harassed her from 1981 to 1983 when he was her supervisor at the EEOC, and her riveting testimony in his confirmation hearings before the United States Senate in October 1991. *See 4 Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 41–48 (1991) (statement of Anita Hill, Professor, University of Oklahoma); ANITA HILL, SPEAKING TRUTH TO POWER (1997); Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 662 & nn.1–2 (2006) (discussing the Clarence Thomas-Anita Hill hearings). Although Thomas adamantly denied the allegations and the Senate confirmed him, a nationwide debate ensued about sexual harassment, how to define it, prevent it, and limit employer liability. Less than one year after Justice Thomas's confirmation hearings, reports of sexual harassment to the Equal Employment Opportunity Commission rose by more than 50%. Jane Gross, *Suffering in Silence No More: Fighting Sexual Harassment*, N.Y. TIMES (July 13, 1992), <https://www.nytimes.com/1992/07/13/us/suffering-in-silence-no-more-fighting-sexual-harassment.html> [<https://perma.cc/8SZY-TR7T>].

<sup>116</sup> *See* Michael Winerip, *Revisiting the Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2013), <https://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html> [<https://perma.cc/9TPR-JY9B>]; *see also* Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461, 464 (1996) (discussing the Aberdeen sexual misconduct scandal).

<sup>117</sup> *See* Winerip, *supra* note 116.

<sup>118</sup> Specifically, the Tailhook Association is a U.S.-based, nonprofit fraternal organization of naval aviators. *See* TAILHOOK, <https://www.tailhook.net/> [<https://perma.cc/YRX2-3D6W>] (last visited Nov. 28, 2020). The word "tailhook" refers to a device underneath the rear of certain military aircraft that catches an arresting wire suspended across an aircraft carrier's flight deck to rapidly decelerate the landing plane. *See* Tom Harris, *How Aircraft Carriers Work*, HOWSTUFFWORKS.COM (Aug. 29, 2002), <https://science.howstuffworks.com/aircraft-carrier4.htm> [<https://perma.cc/7XQW-KPUH>].

of the Navy resigned after Congress learned that he had visited a hotel room near the hall where the assaults took place.<sup>119</sup>

The Aberdeen scandal involved sexual misconduct at Aberdeen Proving Ground in 1996.<sup>120</sup> Aberdeen was home to the Army Ordnance Corps Advanced Individual Training (AIT) school, an entry training program for new recruits.<sup>121</sup> The Army began investigating allegations of assault in 1996, with the investigation ultimately resulting in fifty formal complaints of sexual harassment and abuse.<sup>122</sup> Eleven drill sergeants and one officer were implicated for abusing positions of power by forcing trainees to have sex with them. One sergeant had raped nineteen trainees, and an officer had slept with a trainee who had come to him for advice about how to deal with sexual harassment from a drill instructor.<sup>123</sup> Ultimately, four officers were sentenced to prison while eight others were discharged or received nonjudicial punishments; Aberdeen's commanding general and three other officers received reprimand letters.<sup>124</sup> As a result of the incident, the DOD directed all branches of the military to assess their training policies and formed a Federal Advisory Committee on Gender Integration Training, which issued recommendations in 1997.<sup>125</sup>

The Department of Defense first began collecting data on sexual assault and harassment around this time via the Workplace and Gender

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<sup>119</sup> See Eric Schmitt, *Navy Chief Quits Amid Questions Over Role in Sex-Assault Inquiry*, N.Y. TIMES (June 27, 1992), <https://www.nytimes.com/1992/06/27/us/navy-chief-quits-amid-questions-over-role-in-sex-assault-inquiry.html> [<https://perma.cc/8ZMZ-46XH>].

<sup>120</sup> See Neil A. Lewis, *Ex-Sergeant Pleads Guilty to Having Sex with Trainees*, N.Y. TIMES (Apr. 8, 1997) <https://www.nytimes.com/1997/04/08/us/ex-sergeant-pleads-guilty-to-having-sex-with-trainees.html> [<https://perma.cc/8NLS-6HCV>].

<sup>121</sup> *History*, U.S. ARMY ABERDEEN PROVING GROUND, <https://home.army.mil/apg/index.php/about/history> [<https://perma.cc/V6W3-52QY>] (last visited Nov. 28, 2020).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*; see also *United States v. Simpson*, 55 M.J. 674, 692, 698–707, 710 (A. Ct. Crim. App. 2001) (reviewing legal sufficiency of the evidence and affirming Army drill sergeant Delman Simpson's conviction of eighteen rape charges, noting that "the record clearly reflects that the appellant was a sexual predator").

<sup>124</sup> See Steve Vogel, *Scandal-Scarred Army Busts Drill Sergeant in Sex-Crime Clampdown*, L.A. TIMES (May 14, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-may-14-mn-29893-story.html> [<https://perma.cc/E5NW-UD2M>].

<sup>125</sup> See NANCY L. KASSELBAUM & WILLIAM S. COHEN, FED. ADVISORY COMM. ON GENDER-INTEGRATED TRAINING & RELATED ISSUES, DOD-5188, REPORT OF THE FEDERAL ADVISORY COMMITTEE ON GENDER-INTEGRATED TRAINING AND RELATED ISSUES TO THE SECRETARY OF DEFENSE 3–4 (1997), <https://purl.fdlp.gov/GPO/LPS79701> [<https://perma.cc/NNG9-ADA9>] (presenting a set of recommendations to improve gender integrated training, including better screening of recruits, increasing the number of female recruiters and trainers, establishing separate barracks for men and women, enforcing consistent standards for male and female recruits, improving instruction on how men and women should relate to one another professionally, and improving "values" training).

Relations Survey of Active Duty Members (WGRA).<sup>126</sup> The first survey was administered in 1988, and a subsequent survey was conducted in 1995 following the Tailhook scandal. Since 2002, Congress has mandated surveys on racial, ethnic, and gender discrimination,<sup>127</sup> as well as an annual report to Congress on the “status of female members of the armed forces” addressing promotion and retention rates, selection for elite service schools, assignment to male-dominated occupational fields, and incidence of sexual harassment complaints made during that fiscal year.<sup>128</sup> These surveys and reports have generated significant data on gender discrimination and the prevalence of sexual assault and harassment.

Overall, the picture that emerges from this data is a general lack of progress with regard to sexual assault and harassment in the military. That is, despite two decades of data collection and concerted efforts to address the problems of sexual assault and harassment in the military, these efforts have not been successful. Data from the six WGRA surveys between 2002 and 2018 show that 22% to 34% of women and 3% to 6% of men experienced sexual harassment.<sup>129</sup> In the same period, the prevalence rate of sexual assault

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<sup>126</sup> See Valerie A. Stander & Cynthia J. Thomsen, *Sexual Harassment and Assault in the U.S. Military: A Review of Policy and Research Trends*, 1 MIL. MED. 20, 21 (2016) (explaining the history of the WGRA survey and the instruments it uses).

<sup>127</sup> Section 561 of the National Defense Authorization Act of 2003 requires the Secretary of Defense to carry out one of four quadrennial surveys (each in a separate year) “to identify and assess racial and ethnic issues and discrimination, and to identify and assess gender issues and discrimination, among members of the armed forces.” See Pub. L. No. 107-314, 116 Stat. 2458, 2553 (codified as amended at 10 U.S.C. § 481).

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

<sup>129</sup> See RACHEL N. LIPARI & ANITA R. LANCASTER, DEF. MANPOWER DATA CTR., U.S. DEP’T OF DEF., ARMED FORCES 2002 SEXUAL HARASSMENT SURVEY 16 fig. 3.3 (2003) [hereinafter 2002 WGRA SURVEY], <https://archive.defense.gov/news/Feb2004/d20040227shs1.pdf> [<https://perma.cc/66YH-YL9Q>] (reporting that 24% of active duty females and 3% of active duty males reported experiencing sexual harassment in 2002); RACHEL N. LIPARI, PAUL J. COOK, LINDSAY M. ROCK & KENNETH MATOS, DEF. MANPOWER DATA CTR., U.S. DEP’T OF DEF., 2006 GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 4 (2008), [https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Personnel\\_Related/2006-WGRA-Report.pdf](https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Personnel_Related/2006-WGRA-Report.pdf) [<https://perma.cc/66YH-YL9Q>] (reporting that 34% of women and 6% of men indicated experiencing sexual harassment in 2006); LINDSAY M. ROCK, RACHEL N. LIPARI, PAUL J. COOK & ANDREW D. HALE, DEF. MANPOWER DATA CTR., U.S. DEP’T OF DEF., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL HARASSMENT iv (2011) [hereinafter 2010 WGRA SURVEY], <https://apps.dtic.mil/sti/pdfs/ADA541045.pdf> [<https://perma.cc/P39X-UQTR>] (reporting that 21% of women and 3% of men indicated experiencing sexual harassment in 2010); DEF. MANPOWER DATA CTR., U.S. DEP’T OF DEF., 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: SURVEY NOTE AND BRIEFING 4 (2013) [hereinafter 2012 WGRA SURVEY], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> [<https://perma.cc/RX2U-UW4B>] (choose “2012 WGRA Survey Note” from “Active Duty”) (reporting that 23% of women and 4% of men indicated experiencing sexual harassment in 2012); LISA DAVIS, AMANDA

ranged from 4% to 7% for women and 1% to 2% for men.<sup>130</sup> And the problem is actually getting worse.

According to the *Department of Defense 2018 Annual Report on Sexual Assault in the Military*, 20,500 service members reported that they had experienced “unwanted sexual contact” during the 2018 fiscal year,<sup>131</sup> an increase of roughly 38% over the 2016 survey.<sup>132</sup> Of the 20,500 service members reporting that they experienced unwanted sexual contact, 13,000 or 63% were women,<sup>133</sup> even though women make up only 16% of active duty service members.<sup>134</sup> Young women between the ages of 17 and 24 and junior enlisted women were at greatest risk of being assaulted, with nearly 10% of junior enlisted women indicating that they experienced a sexual assault.<sup>135</sup>

In fiscal year 2018, one in four female service members reported experiencing sexual harassment.<sup>136</sup> This figure is consistent with prior studies of sexual harassment in the military going back almost two decades. For example, in 2014, at Congress’s request, the RAND National Defense Research Institute conducted an independent assessment of sexual harassment. Roughly 560,000 active duty and reserve service members were surveyed.<sup>137</sup>

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GRIFKA, KRISTIN WILLIAMS & MARGARET COFFEY, OFF. OF PEOPLE ANALYTICS, U.S. DEP’T OF DEF., 2016 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT xvi (2017) [hereinafter 2016 WGRA SURVEY], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> [<https://perma.cc/RX2U-UW4B>] (choose “2016 WGRA Overview Report” from “Active Duty”) (reporting that 21.4% of women and 5.7% of men indicated experiencing sexual harassment in 2016); RACHEL A. BRESLIN, LISA DAVIS, KIMBERLY HYLTON, ARIEL HILL, WILLIAM KLAUBERG, MARK PETUSKY & ASHLEA KLAHR, OFF. OF PEOPLE ANALYTICS, U.S. DEP’T OF DEF., 2018 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ix (2019) [hereinafter 2018 WGRA SURVEY], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> [<https://perma.cc/RX2U-UW4B>] (choose “2018 WGRA Overview Report” from “Active Duty”) (reporting that 21.4% of women and 5.7% of men indicated experiencing sexual harassment in 2018) (reporting that 24.2% of active duty women and 6.3% of active duty men indicated experiencing sexual harassment in 2018).

<sup>130</sup> See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 3 (reporting sexual assault and prevalence rates from 2006 to 2018); see also Stander & Thomsen, *supra* note 126, at 21 (discussing sexual assault and prevalence rates from 2002 to 2012).

<sup>131</sup> DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 3.

<sup>132</sup> *Id.* at 3, 12; see also Dave Philipps, ‘This is Unacceptable.’ *Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html> [<https://perma.cc/63BR-3X3Y>].

<sup>133</sup> DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 3.

<sup>134</sup> Barroso, *supra* note 11.

<sup>135</sup> See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 10 (“An estimated 9.1 percent of junior enlisted women (E1-E4) indicated experiencing sexual assault . . .”).

<sup>136</sup> *Id.* at 9.

<sup>137</sup> RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: HIGHLIGHTS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 1 (2015), [https://www.rand.org/pubs/research\\_briefs/RB9841.html](https://www.rand.org/pubs/research_briefs/RB9841.html) [<https://perma.cc/2EZB-PQ43>].

The results showed that 22% of women and 7% of men experienced sexual harassment.<sup>138</sup> Of those who experienced harassment, just 33% of men and 46% of women reported it.<sup>139</sup> The RAND study also found that sexual harassment and gender discrimination are highly correlated with sexual assault.<sup>140</sup> Prior to the 2014 RAND survey, the 2002 WGRA survey found that 24% of women in the military and 3% of men had been sexually harassed.<sup>141</sup> In other words, there has been little progress in the overall rates of sexual harassment in the military in nearly twenty years. Based on these figures, comparative studies suggest that sexual harassment is substantially worse in the military than in civilian workplaces.<sup>142</sup>

The 2016 WGRA included questions addressing sexual orientation and transgender identity for the first time. Overall, 22.8% of service members identifying as LGBT experienced sexual harassment and 4.5% sexual assault, compared with 6.2% and .8% for those who do not identify as LGBT, respectively.<sup>143</sup>

Military service members who experience sexual assault and harassment often never see a remedy. Military surveys indicate that there is insufficient accountability.<sup>144</sup> Sexual assault is underreported, meaning that

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<sup>138</sup> *Id.* at 3.

<sup>139</sup> RAND CORP., 2 SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 50 (Andrew R. Morral, Kristie L. Gore & Terry L. Schell eds., 2015), [https://www.rand.org/pubs/research\\_reports/RR870z2-1.html](https://www.rand.org/pubs/research_reports/RR870z2-1.html) [<https://perma.cc/48BW-KQNA>].

<sup>140</sup> *Id.* at xxii, 92–93; *see also* TASK FORCE ON SEXUAL ASSAULT ACCOUNTABILITY & INVESTIGATION, U.S. DEP'T OF DEF., SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE REPORT 18 (2019) [hereinafter SAAITF REPORT], [https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF\\_REPORT.PDF](https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF) [<https://perma.cc/9FZB-QT9C>] (“Based on surveys conducted by the Department, there is a strong positive correlation between the occurrence of sexual harassment within military units and the occurrence of sexual assault.”).

<sup>141</sup> 2002 WGRA SURVEY, *supra* note 129, at 18.

<sup>142</sup> *See* Remus Ilies, Nancy Hauserman, Susan Schwochau & John Stibal, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607, 624 (2003) (finding, based on a meta-analysis, that the prevalence of sexual harassment is significantly higher in the military than in three different civilian contexts (academic, private sector, and government)).

<sup>143</sup> *See* 2016 WGRA SURVEY, *supra* note 129, at xxii.

<sup>144</sup> The most recent evidence of this is the military’s own investigative report of sexual harassment and ultimate murder of Vanessa Guillén, a 20-year-old U.S. Army soldier, inside a Fort Hood, Texas, armory by another enlisted soldier in April 2020. *See* U.S. DEP’T OF ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 17, 18, 21, 27 (2020), [https://www.army.mil/e2/downloads/rv7/forhoodreview/2020-12-03\\_FHIRC\\_report\\_redacted.pdf](https://www.army.mil/e2/downloads/rv7/forhoodreview/2020-12-03_FHIRC_report_redacted.pdf) [<https://perma.cc/U96L-FMGH>] (detailing the utter failure of the Army’s sexual assault and harassment response and prevention program at Fort Hood, including “hollow” and “perfunctory” responses to reports of sexual assault and harassment, higher than average rates of violent sex crimes, NCO’s (responsible for reporting) themselves taking advantage of subordinate victims, and “universal” fear of retaliation for reporting sexual misconduct).

only a fraction of victims report sexual assault to military authorities. In 2018, only one in three service members who experienced a sexual assault reported it to a military authority.<sup>145</sup> In FY 2018, just 7% (223 out of 3,005) of sexual assault cases in the Defense Department's jurisdiction investigated with a reportable outcome led to a sex offense conviction.<sup>146</sup>

Military surveys indicate that most respondents—67%—who experienced unwanted sexual contact and reported it to a military authority faced retaliation for reporting.<sup>147</sup> A 2015 investigation by Human Rights Watch similarly found a widespread culture of retaliation against service members who report sexual assault in the military. They suffered a host of negative consequences, including adverse changes in work assignments, negative performance evaluations, punishment for minor infractions, bullying, and threats.<sup>148</sup> Negative consequences for reporting sexual harassment are similarly routine. Actions taken in response to those who report sexual harassment and gender discrimination are “frequently negative; for example: being encouraged to drop the issue, discouraged from filing a report, or being treated worse, avoided, or blamed by coworkers.”<sup>149</sup>

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<sup>145</sup> See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 15 (stating that 30% of the estimated 20,500 total service members who experienced a sexual assault in fiscal year 2018 made a report).

<sup>146</sup> See U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2019, APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 32–42 (2020) [hereinafter DOD FY 2019 REPORT ON SEXUAL ASSAULT, APP. B], [https://www.sapr.mil/sites/default/files/3\\_Appendix\\_B\\_Statistical\\_Data\\_on\\_Sexual\\_Assault.pdf](https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf) [<https://perma.cc/A2R9-RQWA>]. For a study examining the causes of the low conviction rate for sex crimes in the military, see Carolyn M. Warner & Mia A. Armstrong, *The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases*, 54 L. & SOC'Y REV. 265 (2020) (finding, on the basis of an analysis of 585 sex-assault report summaries, that the military's low conviction rate for sexual assault is attributable to a number of systemic factors, including “rape culture,” which leads to skepticism about victims' claims; lack of jurisdiction; the high evidentiary standards required for court-martial; the availability of alternative non-criminal dispositions in the military justice system; typical prosecutorial concerns about quality of evidence; and military-specific concerns prioritizing mission readiness and a defendant's otherwise “good military character” over prosecution).

<sup>147</sup> See U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2018, APPENDIX C: METRICS AND NON-METRICS ON SEXUAL ASSAULT 18 (2019), <https://www.secnav.navy.mil/sapro/Reports/04%20-%20FY%2018%20Appendix%20C%20Metrics%20and%20Non-Metrics%20on%20Sexual%20Assault.pdf> [<https://perma.cc/8S7V-R6NR>] (reporting that 67% of those who reported a sexual assault said they perceived at least one negative outcome connected with reporting, including professional reprisal, ostracism, and maltreatment.).

<sup>148</sup> See HUM. RTS. WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY (May 18, 2015), <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military> [<https://perma.cc/EG4N-CLP3>].

<sup>149</sup> See 2018 WGRA SURVEY, *supra* note 129, at x–xi.

Sexual misconduct is also an issue at the three military Service Academies (West Point, Air Force Academy, Naval Academy). The Service Academies are military colleges that produce officers and future leaders for each branch of the Armed Forces.<sup>150</sup> The Department of Defense *Annual Report on Sexual Harassment and Violence at the Service Academies, Academic Program Year 2017–2018* found a 50% increase in sexual assaults over the 2015–2016 school year, with 747 students reporting unwanted sexual contact during the year.<sup>151</sup> Fifty percent of women and 16% of men experienced sexual harassment.<sup>152</sup> These findings are especially troubling because the Academies are considered prestigious institutions, cultivating the military's future leaders. Women are relatively well represented at the Academies; about a third of all students are female.<sup>153</sup> If the institutions creating the future leaders of our Armed Forces are still struggling with sexual assault and harassment, it is a discouraging sign for the military writ large.

### *B. The DOD's Response*

Responding to the worsening statistics on sexual misconduct from the *2018 Annual Report on Sexual Assault in the Military*, then-Acting Secretary of Defense Patrick Shanahan issued a memorandum to the top leadership of the Armed Forces titled "Actions to Address and Prevent Sexual Assault in the Military."<sup>154</sup> His message was urgent:

We must address how we are structured and how we resource efforts to combat this scourge. We must improve our culture to treat each other with dignity and respect and hold ourselves, and each other, more accountable. The essential elements that give rise to dignity and respect must be part of our daily repertoire of interactions. This is a call to action.<sup>155</sup>

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<sup>150</sup> U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2017–2018, at 27 (2019) [hereinafter DOD 2018 SERVICE ACADEMY REPORT], [https://evawintl.org/wp-content/uploads/APY17-18\\_MSA\\_Report\\_FINAL.pdf](https://evawintl.org/wp-content/uploads/APY17-18_MSA_Report_FINAL.pdf) [<https://perma.cc/ZZ62-VWP4>].

<sup>151</sup> *Id.* at 6; Patricia Kime, *Sexual Assaults Rise Nearly 50 Percent at Service Academies*, MILITARY.COM (Jan. 31, 2019), <https://www.military.com/daily-news/2019/01/31/sexual-assaults-rise-nearly-50-percent-service-academies.html> [<https://perma.cc/U2HV-ZBG7>].

<sup>152</sup> DOD 2018 SERVICE ACADEMY REPORT, *supra* note 150, at 4, 6.

<sup>153</sup> *Id.* at 6.

<sup>154</sup> Memorandum from Sec'y of Def. to Sec'ys of Mil. Dep'ts, et al., subject: Actions to Address and Prevent Sexual Assault in the Military (May 1, 2019) [hereinafter Shanahan Memorandum], <https://media.defense.gov/2019/May/02/2002126804/-1/-1/1/ACTIONS-TO-ADDRESS-AND-PREVENT-SEXUAL-ASSAULT-IN-THE-MILITARY.PDF> [<https://perma.cc/4HST-6HS2>].

<sup>155</sup> *Id.* at 1.



The memorandum called for sweeping changes to how the military handles sexual assaults and included six directives.<sup>156</sup>

The first and arguably most significant directive was to adopt the DOD Sexual Assault Accountability and Investigation Task Force's (SAAITF) recommendation that the Joint Service Committee on Military Justice (JSC)<sup>157</sup> should draft a proposal for a specific offense of sexual harassment to be added to the Manual for Courts-Martial.<sup>158</sup> This new article would make sexual harassment a criminal offense under military law, with its own distinct elements.<sup>159</sup> The second directive was to develop "climate assessment tools" designed to allow leaders to identify and address problems in their units.<sup>160</sup> The third directive was to launch a "Serial Offender (CATCH) Program," a program designed to identify repeat offenders.<sup>161</sup> The fourth directive was to develop measures to improve assessment of military recruit character; this was, essentially, a directive to screen out individuals with a history or propensity for sexual misconduct in the military's recruiting process.<sup>162</sup> The fifth directive called for the creation of a working group on training junior officers to address sexual harassment and sexual assault.<sup>163</sup> Finally, Shanahan directed the military to implement the 2019–2023 DOD Sexual Assault Prevention Plan of Action (PPOA).<sup>164</sup> The PPOA is a strategic plan to "guide the Department's prevention efforts at each echelon of the military environment."<sup>165</sup> Among other features, the Plan includes measures

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<sup>156</sup> *Id.* at 1–3; *see also* Tom Vanden Brook, *Shanahan Calls for Reforms as Military Sexual Assaults Rise by 38%; Highest for Young Women*, USA TODAY (May 2, 2019, 12:15 AM), <https://www.usatoday.com/story/news/politics/2019/05/02/military-sexual-assaults-climb-2016-2018-pentagon-army-navy-marines-alcohol/3625405002/> [<https://perma.cc/F8Z9-5Z9T>].

<sup>157</sup> The JSC is charged with keeping the Manual for Courts-Martial and Uniform Code of Military Justice current. *See* U.S. DEP'T OF DEF., INSTR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 1 (Feb. 21, 2018) (defining the roles, responsibilities, and procedures of the JSC in reviewing and proposing changes to the MCM); *see also* JOINT SERV. COMM. ON MIL. JUST., <https://jsc.defense.gov> [<https://perma.cc/8H73-HSMM>] (last visited Nov. 28, 2020) (describing the role and jurisdiction of the JSC).

<sup>158</sup> *See* Shanahan Memorandum, *supra* note 154, at 1; *see also* SAAITF REPORT, *supra* note 140, at 19.

<sup>159</sup> *Id.*; *see also infra* Section II.B.2.b.

<sup>160</sup> *See* Shanahan Memorandum, *supra* note 154, at 2.

<sup>161</sup> *Id.*; *see also infra* Section II.B.1.

<sup>162</sup> *See* Shanahan Memorandum, *supra* note 154, at 2.

<sup>163</sup> *Id.* at 2–3.

<sup>164</sup> *Id.* at 3.

<sup>165</sup> *United States Department of Defense Sexual Assault Prevention and Response: Prevention*, U.S. DEP'T OF DEF., <https://www.sapr.mil/prevention> [<https://perma.cc/5ZLS-65V4>] (last visited Nov. 28, 2020).

to survey the magnitude of sexual misconduct in the military, identify risk factors, implement prevention activities, and continue evaluation.<sup>166</sup>

Although Shanahan's memo was no doubt part of a genuine effort to address sexual assault and harassment, most of the recommendations are not departures from what the military already does on a consistent basis. The Department of Defense already collects data on sexual misconduct and has a firm understanding of the scope of the problem.<sup>167</sup> Reassessment of sexual assault and harassment prevention trainings is nothing new. However, two of the suggested measures represent substantive departures from past military policy and deserve attention. These are implementing the CATCH repeat offender program and making sexual harassment a punitive offense under the UCMJ.

### 1. The CATCH program

The Catch a Serial Offender (CATCH) Program, recently implemented in 2019, is a DOD-wide program designed to track individuals who are reported as "perpetrators" in "restricted" (i.e., anonymous, informal) reports of sexual misconduct. The CATCH program works a bit like a sex-offender registry. An individual submits the name or other identifying information of an alleged perpetrator to an online repository, which military criminal investigators use to check against other restricted reports to see if there is a match.<sup>168</sup> If there is a match, CATCH program representatives will contact the victim and let them know.<sup>169</sup> With this knowledge, the victim has one of two options. They can take formal action against the alleged perpetrator by filing an "unrestricted" report disclosing the victim's and alleged perpetrator's identities and involving the respective chains of command. In the alternative, they can choose to do nothing, in which case they will be contacted again if the alleged perpetrator's name comes up in another report within ten years.<sup>170</sup> If that notification is subsequently made, a

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<sup>166</sup> OFF. OF THE UNDER SEC'Y OF DEF. FOR PERSONNEL & READINESS, U.S. DEP'T OF DEF., PREVENTION PLAN OF ACTION 2019–2023, at 5–7 (2019), <https://www.sapr.mil/sites/default/files/PPoA%20Final.pdf> [<https://perma.cc/3EJ7-TZHG>].

<sup>167</sup> See discussion *supra* Section II.A.

<sup>168</sup> C. Todd Lopez, *New DOD Program Leaves Sexual Predators Nowhere to Hide*, DEFENSE.GOV (Aug. 5, 2019), <https://www.defense.gov/Explore/News/Article/Article/1926005/new-dod-program-leaves-sexual-predators-nowhere-to-hide/> [<https://perma.cc/3AYK-XY7Y>].

<sup>169</sup> *Id.*

<sup>170</sup> *Catch a Serial Offender (CATCH) Program*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE [hereinafter *DOD CATCH Program*], <https://www.sapr.mil/catch> [<https://perma.cc/FJT6-VFCU>] (last visited Nov. 28, 2020). For a victim information flyer summarizing the program, see SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, U.S. DEP'T OF DEF., CATCH A SERIAL OFFENDER (CATCH) PROGRAM VICTIM INFO SHEET,

CATCH Program representative or a sexual assault response coordinator contacts the victim to let them know. Victims can then use the new information to decide whether they want to convert their restricted report to an “unrestricted” report, which will allow a criminal investigation into the assault allegations to go forward.<sup>171</sup>

## 2. Criminalizing sexual harassment

A second significant recommendation made by Secretary of Defense Shanahan in his memo to the Armed Forces was that a punitive article directly criminalizing sexual harassment should be added to the UCMJ.<sup>172</sup> To understand the significance of this recommendation, one must first understand that Title VII of the Civil Rights Act of 1964 does not apply to uniformed members of the Armed Forces. Congress extended Title VII protections to federal employees, including “personnel actions affecting employees or applicants for employment . . . in military departments” in 1972.<sup>173</sup> However, civilian case law has firmly established that the term “military” in this sentence only refers to civilian employees working for the military branches; Title VII does not protect uniformed military personnel.<sup>174</sup> This interpretation is based both on courts’ statutory construction of Title

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[https://www.sapr.mil/sites/default/files/public/images/icons/SAPRO\\_Catch\\_A\\_Serial\\_Offender\\_Program\\_%28CATCH%29\\_Slick\\_Sheet\\_Rd06.pdf](https://www.sapr.mil/sites/default/files/public/images/icons/SAPRO_Catch_A_Serial_Offender_Program_%28CATCH%29_Slick_Sheet_Rd06.pdf) [<https://perma.cc/FD8R-BVBX>] [hereinafter CATCH VICTIM INFO SHEET].

<sup>171</sup> See Lopez, *supra* note 168 (illustrating a victim’s options in the CATCH program with a flow chart).

<sup>172</sup> See Shanahan Memorandum, *supra* note 154, at 1.

<sup>173</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16).

<sup>174</sup> See, e.g., Jackson v. Modly, 949 F.3d 763, 775 (D.C. Cir. 2020); Overton v. N.Y. State Div. of Mil. & Naval Affs., 373 F.3d 83, 89 (2d Cir. 2004); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000); Coffman v. Michigan, 120 F.3d 57, 59 (6th Cir. 1997); Corey v. United States, No. 96-6409, 1997 WL 474521, at \*2 (10th Cir. Aug. 20, 1997); Randall v. United States, 95 F.3d 339, 343 (4th Cir. 1996); Stinson v. Hornsby, 821 F.2d 1537, 1541 (11th Cir. 1987); Roper v. Dep’t of Army, 832 F.2d 247, 248 (2d Cir. 1987); Salazar v. Heckler, 787 F.2d 527, 530 (10th Cir. 1986); Gonzalez v. Dep’t of Army, 718 F.2d 926, 928–29 (9th Cir. 1983); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981); Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978). The Supreme Court has repeatedly denied review of the issue. See Jackson v. Modly, 949 F.3d 763 (D.C. Cir. 2020), *cert. denied sub nom.* Jackson v. Braithwaite, No. 20-19, 2020 WL 6829074 (U.S. Nov. 23, 2020); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978). For critiques of this doctrine, see Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987); Westergard, *supra* note 40.

VII<sup>175</sup> and the policy justification that extending Title VII to uniformed service members would interfere with military leaders' ability to maintain good order and discipline within their units.<sup>176</sup>

There is also an almost complete bar on service members' ability to bring tort or other claims for damages against the United States government for injuries related to military service. This principle is known as the *Feres* doctrine, established in a 1950 Supreme Court case *Feres v. United States*.<sup>177</sup> The doctrine first barred claims under the Federal Tort Claims Act<sup>178</sup> but federal courts subsequently extended it to preclude damage actions for violations of service members' constitutional rights.<sup>179</sup> Like the categorical exclusion of employment discrimination in the military from judicial review under Title VII, the *Feres* doctrine rests on the notion that allowing suits for damages for injuries sustained in military service would degrade the military's ability to maintain order and discipline.<sup>180</sup> Indeed courts have

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<sup>175</sup> Specifically, courts have reasoned that the terms "Armed Forces" and "Military Departments" are defined individually and differently in the definitions section of Title 10 of the U.S. Code, outlining the role of the Armed Forces, and that Congress referenced Title 10 (at least indirectly) in the Title VII provision delineating employees subject to Title VII's coverage. *See, e.g., Gonzalez*, 718 F.2d at 928 (explaining that the different definitions for "armed forces" and "military departments" indicate that Congress intended there to be a distinction between the two terms, "the former consisting of civilian employees the latter of uniformed military personnel").

<sup>176</sup> *See Westergard*, *supra* note 40, at 227–28.

<sup>177</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>178</sup> 28 U.S.C. §§ 1346(b), 2671–2680. The FTCA allows specific types of lawsuits against the federal government and federal employees who have acted within the scope of employment while causing injuries.

<sup>179</sup> *See Chappell v. Wallace*, 462 U.S. 296, 304–05 (1983) (barring claims for constitutional torts for uniformed service members). In *Chappell*, five sailors alleged that seven of their superior officers had discriminated against them because of their race. *Id.* at 297.

<sup>180</sup> *United States v. Brown*, 348 U.S. 110, 112 (1954) ("*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects the maintenance of such suits on discipline . . . .'"). The Court also reasoned that existing statutory disability and death benefits for members of the military "compare extremely favorably" with those provided by workers' compensation statutes, justifying displacement of tort damages. *Feres*, 340 U.S. at 159. The Supreme Court has subsequently upheld *Feres* in a number of contexts. *See Chappell*, 462 U.S. at 305 (unanimously holding that no cause of action exists under the Constitution for tort suits by service members against other service members); *United States v. Shearer*, 473 U.S. 52, 59 (1985) (expanding the *Feres* doctrine to encompass a tort claim arising from the murder of an off-duty service member off-base by another service member, even though the situation did not meet the traditional "incident to service" test); *United States v. Johnson*, 481 U.S. 681, 692 (1987) (holding that the *Feres* doctrine barred a tort suit by members of the Coast Guard injured in a helicopter crash during a rescue mission although the tortfeasor, an FAA air traffic controller, was not a member of the military). *But see Brown*, 348 U.S. at 113 (holding that *Feres* does not bar claims of veterans after they have left military service). *Feres* has been subjected to sustained criticism.

cross-referenced these exceptions and, in doing so, broadly protected the military from the reach of civil law.<sup>181</sup>

In sum, the legal claims civilian employees commonly use to address sexual harassment in the workplace are largely unavailable to uniformed service members. What is left is largely a matter of disciplining the perpetrator rather than compensating the victim.<sup>182</sup> Because of the unavailability of civil remedies for sexual harassment in the military workplace, when military leaders, the Department of Defense, and Congress have sought to demonstrate a level of seriousness about sexual misconduct in the military, the tendency has been to lean toward more serious criminal punishments like courts-martial.<sup>183</sup> To understand why adding a punitive article for sexual harassment to the UCMJ is a significant—and potentially problematic—recommendation, a brief explanation of military law is required.

### a. The military justice system

The military justice system is separate from the civilian legal system. It derives its authority from the UCMJ, a statute enacted by Congress.<sup>184</sup>

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See Westergard, *supra* note 40, at 245 (documenting historical trends that contradict the policy considerations behind the *Feres* doctrine); see also discussion Section III.C. *infra*.

<sup>181</sup> See, e.g., *Johnson v. Alexander*, 572 F.2d 1219, 1223–24 (8th Cir. 1978) (reasoning that the *Feres* doctrine’s concern about military discipline justifies barring Title VII claims in the military).

<sup>182</sup> See Westergard, *supra* note 40, at 231 (arguing that because neither the UCMJ nor Department of Defense Equal Opportunity (EO) Program provides damages to service members who suffer discrimination, there is little incentive for service members to report given the risk of retaliation).

<sup>183</sup> See Greg Rustico, Note, *Overcoming Overcorrection: Towards Holistic Military Sexual Assault Reform*, 102 VA. L. REV. 2027, 2050–51 (2016) (citing various statements of high-ranking officials, including President Obama, pushing for court-martial convictions for sexual assault).

<sup>184</sup> The Uniform Code of Military Justice is codified at 10 U.S.C. §§ 801–946. The United States Constitution authorizes Congress to create a system of military justice. See U.S. CONST. art. I, § 8 (giving Congress authority to raise and support armies, provide and maintain a navy, and providing for organizing, disciplining and regulating them); see also Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today’s Army*, 30 HARV. J.L. & GENDER 151, 176 (2007) (discussing the historical justification for the maintenance of a separate legal system for military personnel); 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-6, Lexis (database updated Sept. 2020) (providing a history of the U.S. military justice system). Traditionally, military commanders had inherent authority to discipline or punish their troops, and this has been incorporated into the UCMJ with respect to nonjudicial punishment. See U.S. DEP’T OF DEF., *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, at I-1 (2019 ed.) [hereinafter MCM], [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) [<https://perma.cc/T22E-F9RZ>] (“Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders.”).

Military courts interpret and enforce it.<sup>185</sup> The original American Code of Military Justice predates the U.S. Constitution.<sup>186</sup> The UCMJ took on its current form after World War II, a conflict in which roughly two million service members were court-martialed.<sup>187</sup> As Commander in Chief, the President implements the UCMJ by executive order in a document called The Manual for Courts-Martial.<sup>188</sup> It contains the Rules for Courts-Martial, Military Rules of Evidence, Punitive Articles, and Nonjudicial Punishment Procedures.<sup>189</sup>

The UCMJ is unique because it serves not only as a system of justice to address offenses, but as a tool for military commanders to maintain order and discipline within a unit. As such, unit commanders have broad responsibility and discretion for deciding whether or not to discipline or charge soldiers in their units. Consequently, unit commanders play a critical role in military law. These are primarily company level officers, who are junior officers with roughly five to ten years of service.<sup>190</sup> Depending on the branch of service and occupation, a company commander could be

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<sup>185</sup> See *Ortiz v. United States*, 138 S.Ct. 2165, 2170 (2018) (“In the exercise of its authority over the armed forces, Congress has long provided for specialized military courts to adjudicate charges against service members.”).

<sup>186</sup> See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 939 (2015) (“In 1775, the Second Continental Congress codified the first American Articles of War, which, among other things, provided for courts-martial for certain prescribed offenses. The 1775 Articles were reaffirmed (as amended) in 1776 and 1786.”).

<sup>187</sup> See SCHLUETER, *supra* note 184, § 1-6(E). Prior to and during World War II, each branch of the military had its own code of justice. Under the leadership of Professor Edmund M. Morgan, Jr., Congress enacted a uniform code with the Military Justice Act of 1950. *Id.* There have been updates to the UCMJ over the years, with the latest significant updates occurring in 2016 as part of the National Defense Authorization Act for Fiscal Year 2017. See *Military Justice Act of 2016: Overview*, OFF. OF THE JUDGE ADVOC. GEN., (Jan. 10, 2019), <https://www.army.mil/standto/archive/2019/01/10/> [<https://perma.cc/R2GW-AYSX>] (summarizing major 2016 changes to the military justice code).

<sup>188</sup> Exec. Order No. 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

<sup>189</sup> MCM, *supra* note 184, at i–xlii. The Rules for Courts-Martial are analogous to the Federal Rules of Criminal Procedure; Military Rules of Evidence are analogous to the Federal Rules of Evidence.

<sup>190</sup> See Stew Smith, *Military Commissioned Officer Promotions*, THE BALANCE CAREERS (July 17, 2019), <https://www.thebalancecareers.com/military-commissioned-officer-promotions-4055887> [<https://perma.cc/7XW8-7VEN>] (noting that promotion to the rank of Captain in all of the services typically takes four years and that nearly 100% qualify); see also KIMBERLY JACKSON, KATHERINE L. KIDDER, SEAN MANN, WILLIAM H. WAGGY II, NATASHA LANDER, S. REBECCA ZIMMERMAN, RAND CORP., RAISING THE FLAG: IMPLICATIONS OF U.S. MILITARY APPROACHES TO GENERAL AND FLAG OFFICER DEVELOPMENT 53–55, 55 fig.4.2 (2020), [https://www.rand.org/pubs/research\\_reports/RR4347.html](https://www.rand.org/pubs/research_reports/RR4347.html) [<https://perma.cc/3HAS-VETR>] (reporting that from 2008 to 2018, the average years in service of rising Army officers in grade O-3/Captain was three years and O-4/Major was eleven years, respectively); U.S. DEP’T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS para. 2-7, at 7–8 (Sept. 9, 2020) (defining time in grade required for promotion to captain).

responsible for 80 to 200 soldiers and 4 to 5 subordinate officers.<sup>191</sup> Unit commanders “lead military organizations and are primarily responsible for ensuring mission readiness, to include maintaining good order and discipline within military units.”<sup>192</sup> They have the primary responsibility of leading their unit and setting mission priorities, but they also manage personnel administratively and have broad discretion to discipline troops, including bringing criminal charges under military law.<sup>193</sup> In a sense, unit commanders are workplace supervisors, HR managers, and prosecutors all in one.<sup>194</sup>

When a soldier is suspected of misconduct, their unit commander has three broad options to address the issue.<sup>195</sup> The first is to take “administrative action,” which is the first measure a commander typically will turn to when addressing minor offenses.<sup>196</sup> Administrative action may include oral or written counseling, admonition, reprimands, training, withholding of privileges, or a combination of these measures.<sup>197</sup> Some of these measures may be more or less formal, and administrative actions are technically considered “corrective” actions rather than punishment.<sup>198</sup> However, some

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<sup>191</sup> See, e.g., *Military Units*, U.S. DEP’T OF DEF., <https://www.defense.gov/Experience/Military-Units/Army/#army> [<https://perma.cc/DQR4-LAKK>] (last visited Dec. 10, 2020) (noting that a typical Army Company is commanded by a Captain and comprised of 3 to 4 platoons of up to 200 personnel).

<sup>192</sup> ROLE OF THE COMMANDER SUBCOMMITTEE, U.S. DEP’T OF DEF., REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 2 (2014) [hereinafter *ROLE OF THE COMMANDER SUBCOMMITTEE REPORT*], [https://responsesystemspanel.whs.mil/public/docs/Reports/02\\_RoC/ROC\\_Report\\_Final.pdf](https://responsesystemspanel.whs.mil/public/docs/Reports/02_RoC/ROC_Report_Final.pdf) [<https://perma.cc/SHJ9-RC9G>]. This subcommittee was created by the Secretary of Defense on Sept. 23, 2012 as directed by Section 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013.

<sup>193</sup> See U.S. ARMY, *CRIMINAL LAW DESK BOOK: PRACTICING MILITARY JUSTICE 1–2* (2018) (“Commanders have a wide variety of options available to them to deal with disciplinary problems. These options include administrative actions ranging from an informal counseling . . . to punitive options such as punishment under Article 15, UCMJ, and trial by court-martial.”).

<sup>194</sup> See *id.* (“Prosecutorial discretion lies with the commander and not the judge advocate, a concept unfamiliar to civilian practitioners who are more accustomed to prosecutorial discretion being entrusted to a prosecuting attorney.”).

<sup>195</sup> However, commanders have wide latitude not to take any action if they deem it unnecessary. See MCM, *supra* note 184, at II-28 (R.C.M. 306(c)(1)) (“A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.”).

<sup>196</sup> See *id.* (R.C.M. 306(c)(2)) (“Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.”).

<sup>197</sup> *Id.*

<sup>198</sup> The Manual for Courts-Martial states that administrative actions are “corrective measures that promote efficiency and good order and discipline” and “are not punishment.” *Id.* at V-2 (¶ 1.g.), II-28 (R.C.M. 306(c)(2)). However, some administrative measures such as letters of reprimand have been criticized as actually being *de facto* punishment in practice without

administrative actions can have serious consequences for a service member's career progression by creating a permanent stain on their personnel file.<sup>199</sup> Commanders can also initiate "administrative separation" proceedings, which can result in a service member's removal from the military.<sup>200</sup> Commanders have broad discretion to take corrective actions,<sup>201</sup> even for more serious administrative actions like a formal written reprimand placed in a soldier's personnel record.<sup>202</sup> Such written reprimands must only meet federal records standards,<sup>203</sup> be "true and just,"<sup>204</sup> and supported by a preponderance of the evidence.<sup>205</sup> Soldiers can apply to restrict access to unfavorable records if they can show rehabilitation and the support of their commanding officer,<sup>206</sup>

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significant due process protections, and even Congress states that "punitive administrative action" can result following sex-related offenses. *See* Captain Mark E. Bojan, *Bad Paper: Reforming the Army Reprimand Process*, 224 MIL. L. REV. 1150, 1154 (2016) (citing National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1745, 127 Stat. 672 (2013)).

<sup>199</sup> *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION paras. 3-4(a)-(b), at 4 (Apr. 10, 2018) [hereinafter ARMY REG. 600-37] (authorizing a General Officer Order of Reprimand); *see also* Bojan, *supra* note 198, at 1170 ("[T]here is a widely-held belief—by judge advocates who advise commanders, by soldiers generally, and by civilians—that an OMPF-filed reprimand is a 'career-killer.'").

<sup>200</sup> *See* Bojan, *supra* note 198, at 1180–81 ("The consequences of administrative separation are severe, and may include loss of benefits, reduction in grade, and a characterization of discharge of other than honorable (OTH) upon discharge or separation.").

<sup>201</sup> *See* MCM, *supra* note 184, at II-28 (R.C.M. 306(c)(2)).

<sup>202</sup> *See, e.g.*, ARMY REG. 600-37, *supra* note 199, para. 2–5(a), at 2 (authorizing commanders to "take appropriate action(s) . . . concerning members of their commands" with reference to unfavorable information placed in a soldier's personnel record).

<sup>203</sup> *Id.* at 3–2(c) (providing that the unfavorable information "must meet [federal records standards] of accuracy, relevance, timeliness, and completeness.").

<sup>204</sup> *Id.* at 6–3(a)(4) (providing that soldiers who believe the unfavorable information filed in their personnel record is "untrue or unjust" may submit an appeal requesting the removal of the information and that such appeals must be supported by "clear and convincing evidence").

<sup>205</sup> *Id.* at 6–3(b)(1)(a) (providing that unfavorable information referred to a soldier's personnel record is investigated and evaluated by a review board (the Department of the Army Suitability Evaluation Board (DASEB)), which determines if there is "credible evidence to support a finding, by preponderance of the evidence, that the unfavorable information is valid"). The DASEB can close a case if it determines that the information is already adequately reflected in the soldier's personnel file or is not of such a serious nature or type that it should be filed in the record. *Id.* at 6–3(c)(2)(a)–(c). It can also decide that the unfavorable information is of such a serious nature that it should be made a part of the soldier's record. *Id.* at 6–3(b)(1)(b). In making its determination, the DASEB "will consider serious individual incidents, as well as a pattern of lesser incidents, that may reflect unfavorably on the Soldier's character, integrity, trustworthiness, or reliability." *Id.*

<sup>206</sup> For example, in the Army, a soldier who believes the unfavorable information in their personnel record has "served [its] intended purpose[]" may request that the unfavorable information be transferred to the "restricted" portion of their personnel file. *Id.* at 6–3(a)(5).



although in practice this remedy is rare.<sup>207</sup>

The next form of action a commander can take is “nonjudicial punishment” under Article 15 of the UCMJ. Colloquially referred to as an “Article 15” or “NJP,” this is a form of punishment typically used for minor offenses under military law, somewhat analogous to misdemeanor offenses in civilian criminal law.<sup>208</sup> This is considered a punitive rather than corrective measure, but the punishment is “nonjudicial” because the soldier will not be facing court-martial, and punishment under Article 15 does not result in a federal criminal conviction.<sup>209</sup> The Manual for Courts-Martial states that nonjudicial punishment under Article 15 is meant to act as a disciplinary measure when administrative corrections are inadequate but a commander wishes to “promote[] positive behavior changes . . . without the stigma of a court-martial conviction.”<sup>210</sup> This gives a commander the ability to punish soldiers for minor offenses without the more time-consuming and (career-killing) process of a court-martial.<sup>211</sup> Interestingly, Article 15 of the UCMJ does not proscribe a particular burden of proof; rather, different branches of the military have set their own standards as a matter of policy.<sup>212</sup> For example, the Navy uses a preponderance standard for Article 15 punishments, whereas the Army and Air Force use a “beyond a reasonable doubt” standard as in

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Among other requirements, the soldier’s chain of command at the time of the imposition of the reprimand must support the record(s)’ transfer. *Id.* at 7–2(e)(3). Such transfers are made upon a finding of substantial evidence that the purpose of the document has been served and transfer is in the “best interest of the Army.” *Id.* at 7–2(d)(1)(b)–(c). Once transferred, restricted records will “not normally serve as the sole basis for promotion” decisions. *Id.* at 7–2(d)(3)(e).

<sup>207</sup> See Bojan, *supra* note 198, at 1175–76 (noting that appeals are limited to soldiers grade E-6 and above, and stating that appeal standards are “exceedingly high,” with remedies beyond appeal to the DASEB being even more “rarified”).

<sup>208</sup> What constitutes a “minor offense” is, again, up the commander’s discretion, but they are typically offenses under a punitive Article (Articles 77–134) where the maximum penalty would not include dishonorable discharge or confinement for 1 year. See MCM, *supra* note 184, at V-1–V-4 (outlining the procedures, limitations, and maximum punishments for nonjudicial punishment).

<sup>209</sup> See *id.* at V-1 (“Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in Servicemembers without the stigma of a court-martial conviction.”).

<sup>210</sup> See *id.*; see also Katherine Gorski, Comment, *Nonjudicial Punishment in the Military: Why a Lower Burden of Proof Across All Branches is Unnecessary*, 2 NAT’L SEC. L.J. 83, 91 (2013).

<sup>211</sup> Gorski, *supra* note 210, at 89.

<sup>212</sup> See *id.*; see also LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 155–56 (2010) (noting the silence of Article 15 on the burden of proof standard and summarizing burdens commonly adopted by each military branch).

criminal courts-martial.<sup>213</sup> There are maximum penalties under Article 15, but these could include forfeiture of pay or a reduction in rank.<sup>214</sup>

Finally, commanding officers may recommend charges for court-martial.<sup>215</sup> Three types of courts-martial exist, though all are criminal in nature. The first is a Summary Court-Martial, where the unit commander alone hears evidence and decides guilt or innocence, and the soldier is not afforded counsel or a jury. Summary Courts-Martial are limited in scope and reserved for minor offenses.<sup>216</sup> Next is a Special Court-Martial, which is analogous to a civilian misdemeanor offense and proceeding. Sometimes a military judge sitting alone will hear the case; other times a trial counsel and jurors become involved.<sup>217</sup> The last kind of court-martial is a General Court-Martial and would be analogous to a civilian felony judicial proceeding. General Courts-Martial entail a military judge, counsel, and jurors, as well as a preliminary hearing before neutral officers to determine if there is probable cause to believe that the accused committed the offense.<sup>218</sup> A guilty verdict by General Court-Martial is a federal criminal conviction under the United States Code and can be reported on the guilty party's record.<sup>219</sup> The offenses triable by court-martial are listed in Articles 77–134 of the UCMJ, referred to as the

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<sup>213</sup> See SCHLUETER, *supra* note 184, § 3-5(A)(2); Gorski, *supra* note 210, at 87, 89–90.

<sup>214</sup> See 10 U.S.C. § 815(b) (noting that, while maximum punishments depend on the rank of commanding officer and rank of the individual being punished, forfeiture of pay is typically limited to not more than one half of one month's pay for two months, and reduction of rank can be to the lowest rank for enlisted personnel, except for noncommissioned officers, where rank cannot be reduced more than two pay grades).

<sup>215</sup> See MCM, *supra* note 184, at II-48–II-49 (R.C.M. 407(a)(4), –(6)).

<sup>216</sup> *Id.* at II-198 (R.C.M. 1301(b)) (noting that the function of the summary court-martial is to “promptly adjudicate minor offenses under a simple disciplinary proceeding” and to “thoroughly and impartially inquire into both sides of the matter,” ensuring that the “interests of both the Government and the accused are safeguarded and that justice is done.”).

<sup>217</sup> See *id.* at II-51–II-52 (R.C.M. 502(d)(1)(B)) (detailing the activities of trial counsel in Special Courts-Martial); *id.* at II-50 (R.C.M. 501(a)(2)) (detailing the composition of the body presiding over a Special Court-Martial).

<sup>218</sup> *Id.* at chs. III–VIII (R.C.M. 301–813) (describing the court-martial process).

<sup>219</sup> Court-martial convictions are recorded and reported to the Criminal Justice Information Services (CJIS) Division of the FBI for inclusion in the FBI's criminal history database (the National Crime Information Center (NCIC) database) for dissemination to state and local law enforcement agencies. See U.S. DEP'T OF DEF., INSTR. 5505.11, FINGERPRINT REPORTING REQUIREMENTS 6 (Oct. 31, 2019); *About NCIC*, NATIONAL CRIME INFORMATION CENTER (NCIC), <https://www.fbi.gov/services/cjis/ncic> [<https://perma.cc/PD37-MYYP>] (last visited Jan. 21, 2021). Additionally, a dishonorable or bad conduct discharge, which are punishments for a court-martial conviction, must be indicated by a “character code” on a servicemember's DD-214, the official record of service frequently requested by civilian employers. See U.S. DEP'T OF DEF., INSTR. 1336.01, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY 10, 13 (Aug. 20, 2009).

“Punitive Articles.” Each Article lists the elements for the offense at issue.<sup>220</sup> In all types of courts-martial, guilt must be proved beyond a reasonable doubt.<sup>221</sup>

### **b. A punitive article for sexual harassment**

Former Secretary of Defense Shanahan’s recommendation to add a punitive article for sexual harassment is significant because, unlike sexual assault—which is specifically punishable as a crime under Article 120—sexual harassment does not have an associated punitive article.<sup>222</sup> This has meant that a service member could not be directly court-martialed for engaging in sexual harassment, even though the Department of Defense has a strict no-tolerance policy related to sexual harassment. Therefore, conduct that would otherwise constitute sexual harassment can be tried as a punitive offense by court-martial only by shoehorning it into the elements of other UCMJ offenses.<sup>223</sup> Essentially, it is a prosecution of conduct that may be interpreted as sexual harassment in a civilian workplace but which violates another crime under the UCMJ.<sup>224</sup>

One of the more common punitive articles used to prosecute sexual harassment is Article 93, “Cruelty and Maltreatment.”<sup>225</sup> Article 93.a. states that “[a]ny person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”<sup>226</sup> Article 93.c.(2) does provide clarification that “sexual harassment may constitute this offense.”<sup>227</sup> However, because the maltreated individual must be “subject to the orders” of the accused, the sexual harasser must have formal or informal authority

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<sup>220</sup> See MCM, *supra* note 184, at IV-1–IV-151 (Articles 77–134) (codified at 10 U.S.C §§ 877–934) (listing and describing the offenses that may be tried by court-martial).

<sup>221</sup> *Id.* at II-134 (R.C.M. 918(c)); *id.* at A8-7.

<sup>222</sup> SAAITF REPORT, *supra* note 140, at 18.

<sup>223</sup> See Hollywood, *supra* note 184, at 178–79.

<sup>224</sup> See J. Richard Chema, *Arresting “Tailhook”*: *The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1, 43–58 (1994) (exploring the use of existing UCMJ articles to punish sexual harassment—such as articles on maltreatment, rape, carnal knowledge, sodomy, assault, indecent assault, abusing a position of authority, fraternization, conduct unbecoming of an officer and a gentleman, violating general orders, extortion, and use of indecent language—and the mismatch between the offense of sexual harassment and the articles examined in many instances).

<sup>225</sup> MCM, *supra* note 184, at IV–29 (Art. 93) (codified at 10 U.S.C. § 893).

<sup>226</sup> *Id.* The elements of the offense are: “(1) that a certain person was subject to the orders of the accused, and (2) that the accused was cruel toward, or oppressed, or maltreated that person.”

<sup>227</sup> *Id.* Further, sexual harassment is defined in this subsection to include “influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors” (i.e., “quid pro quo” sexual harassment) and “deliberate or repeated offensive comments or gestures of a sexual nature” (i.e., “hostile work environment” sexual harassment).

over the victim.<sup>228</sup> This may address classic quid pro quo sexual harassment or sexual harassment by a supervising officer, but it precludes prosecution of peer-to-peer harassment in the normal course. This limitation is especially problematic, since sexual misconduct in the military occurs most often between junior enlisted service members who are peers or near peers in rank.<sup>229</sup> Such imprecision demonstrates the problem of having to fit sexual harassment into existing punitive articles that do not specifically address sexual harassment.<sup>230</sup>

Furthermore, sexual harassment has at times been tried by court-martial under UCMJ Article 92, “Failure to Obey a Lawful Order or Regulation,”<sup>231</sup> since sexual harassment is prohibited by regulation in all branches of the Armed Forces.<sup>232</sup> However, only violations of “punitive” regulations can be charged as a “failure to obey” offense under Article 92.<sup>233</sup> “Punitive” in this context refers to the fact that not all regulations are meant to result in criminal punishment for a failure to follow them.<sup>234</sup> Military regulations contain a vast array of general guidelines of a technical, advisory,

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<sup>228</sup> *Id.* (Art. 93.c.(1)) (“Any person subject to his orders’ means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the UCMJ or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless of whether the accused is in the direct chain of command over the person.”).

<sup>229</sup> See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 23 (“Alleged perpetrators are often the same rank, or slightly higher, than the victim.”).

<sup>230</sup> See Hollywood, *supra* note 184, at 178–83 (“Although the UCMJ offers some possibilities for prosecuting sexual harassment, until Congress chooses to expressly prohibit sexual harassment in the punitive articles of the UCMJ, many prosecutions will fail for lack of an appropriate provision, ‘leaving military prosecutors to leap Herculean legal hurdles.’”).

<sup>231</sup> See, e.g., United States v. Murray, No. 201800163, 2019 WL 6608798, at \*2 (N-M. Ct. Crim. App. Dec. 5, 2019). Article 92.a(1) states that “[a]ny person subject to this chapter who . . . violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct.” MCM, *supra* note 184, at IV–27 (Art. 92) (codified at 10 U.S.C. § 892). The elements of the offense are: “(a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation.” *Id.*

<sup>232</sup> See U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (July 24, 2020) [hereinafter ARMY REG. 600-20]; U.S. DEP’T OF AIR FORCE, POL’Y DIR. 36-27, EQUAL OPPORTUNITY (Mar. 18, 2019); U.S. DEP’T OF NAVY, U.S. NAVY REGS., 1990, art. 1166 (Sept. 14, 1990).

<sup>233</sup> See MCM, *supra* note 184, at IV-28 (¶ 18.c.(1)(e)) (“Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for performing military functions may not be enforceable under Article 92(1).”).

<sup>234</sup> See U.S. v. Nardell, 45 C.M.R. 101, 103 (C.M.A. 1972) (“No single characteristic of a general order [or regulation] determines whether it applies punitively to members of a command. . . . The order in its entirety must demonstrate that rather than providing general guidelines for the conduct of military functions it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident.”).

or organizational nature.<sup>235</sup> Because due process requires fair notice that an act is criminal before prosecution,<sup>236</sup> military courts have required clear, direct language of prohibition in regulations for a criminal conviction under Article 92.<sup>237</sup> This principle has generated a split among the services as to whether military regulations proscribing sexual harassment are punitive.

For example, the Navy-Marine Corps Court of Criminal Appeals has determined that the Navy regulation prohibiting sexual harassment is punitive, thus allowing violations of the Navy's sexual harassment regulation to be charged under Article 92.<sup>238</sup> Recently, the Air Force Court of Criminal Appeals came to a similar conclusion.<sup>239</sup> Conversely, a 1990 Army appellate

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<sup>235</sup> See Captain John B. DiChiara, USAF, *Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations*, 17 A.F. L. REV. 61, 62–63 (1975).

<sup>236</sup> See *Parker v. Levy*, 417 U.S. 733, 757 (1974).

<sup>237</sup> See DiChiara, *supra* note 235, at 63.

<sup>238</sup> *United States v. Olivares*, No. 201800125, 2019 WL 1076454, at \*4 (N-M. Ct. Crim. App. Mar. 7, 2019) (en banc) (per curiam), *review denied*, 79 M.J. 187 (C.A.A.F. 2019) (“We find that the term *sexual harassment* [in Article 1166, U.S. Navy Regulations] is sufficiently precise as to be capable of serving as a code of behavior that service members can be expected to follow. . . . We find, therefore, that the military judge erred by determining that Article 1166 is not a punitive general regulation.”). *Olivares* was an interlocutory appeal concerning a charge that the defendant said to a PO2 “‘let me see that ass’ [then] kissed her and touched her buttocks.” *Id.* at \*4. See also *United States v. Murray*, No. 201800163, 2019 WL 6608798, at \*3 (N-M. Ct. Crim. App. Dec. 5, 2019) (reasoning that the holding in *Olivares* equally applies to the Marine Corps as a component of the Navy); *United States v. Rosario*, NMCCA 201500251, 2015 WL 9942096, at \*3 (N-M. Ct. Crim. App. Feb. 27, 2015) (upholding the conviction of a Marine sergeant under Article 92 for repeatedly expressing his romantic interest in a corporal, asking her how often she has sex with her husband, making a copy of her apartment key and threatening to “come over,” and kissing her and sticking his tongue in her ear, among other unwelcome conduct; “considering all the relevant facts . . . we have no difficulty concluding that a person of ordinary intelligence could reasonably understand the regulation [Marine Corps Manual and Navy Instruction 5300.26] proscribed the appellant’s conduct.”); *United States v. Jackson*, NMCCA 200900427, 2010 WL 2059046, at \*3 (N-M. Ct. Crim. App. May 25, 2010) (upholding special court-martial for violation of Navy regulation prohibiting sexual harassment and UCMJ Articles 92 and 120).

<sup>239</sup> *United States v. Da Silva*, No. ACM 39599, 2020 WL 3468282, at \*10 (A.F. Ct. Crim. App. June 25, 2020) (upholding the conviction of an Air Force recruiter under Article 92 for making sexual advances on two female recruits after driving them to remote locations in his car; military case law, regulations, policies, and recruiter training, as well as Title VII regulations, put the defendant on fair notice that his conduct constituted “making sexual advances” and sexual harassment, subject to criminal sanction); *United States v. Pope*, 63 M.J. 68, 72–74 (C.A.A.F. 2006) (upholding the conviction of an Air Force recruiter under Article 92 for coming on to three recruits, ages sixteen, seventeen, and eighteen; Air Force Instruction AETCI 36-2002 proscribing hostile work environment sexual harassment “provided ample discussion of the types of behavior prohibited by the regulation and a reasonable person would have been on notice that misconduct of the sort engaged in by Appellant was subject to criminal sanction.”).

decision, *United States v. Asman*,<sup>240</sup> held that the Army regulation prohibiting sexual harassment is not punitive in nature. The DOD and the Army have subsequently issued many regulations and instructions clearly defining and proscribing sexual harassment, and the other services have held that sexual harassment is chargeable under Article 92, calling the continued viability of *Asman* into question. However, the Court of Appeals for the Armed Services (the highest military court) has declined to weigh in. Thus, it seems that charges under Article 92 for sexual harassment remain unavailable in the Army. Prosecuting sexual harassment under Article 134, the “catch-all” of the UCMJ prohibiting conduct prejudicial to “good order and discipline,”<sup>241</sup> has been largely unsuccessful.<sup>242</sup> In sum, sexual harassment in the Armed Forces has been ineffectively addressed through a patchwork of policies and ancillary criminal provisions in the UCMJ.

### C. Assessing the Military’s Response

The CATCH program and the criminalization of sexual harassment are steps in the right direction. But these reforms fall short in fundamental respects and are therefore unlikely to effectively address—and may even exacerbate—sexual harassment in the military. In the discussion that follows, we highlight the features of these proposals that are commendable, while noting several critical shortfalls that render them impractical, ill-fitting, and ineffective. We offer this analysis with the hope that the military will correct

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<sup>240</sup> See *United States v. Asfeld*, 30 M.J. 917, 922 (A.C.M.R. 1990) (reasoning that U.S. Dep’t of Army Reg. 600-21, the precursor to the current Army regulation prohibiting sexual harassment, Reg. 600-27, was non-punitive, because it was only incorporated by reference into the Army’s main EEO regulation, Army Reg. 600-50).

<sup>241</sup> Jane Gross, *Justice in the Military Has Its Reasons*, N.Y. TIMES (Mar. 1, 1998), <https://www.nytimes.com/1998/03/01/us/justice-in-the-military-has-its-reasons.html> [<https://perma.cc/ZW5J-CGBY>] (“Article 134 is the catch-all of this nation’s military justice system, a compendium of 55 offenses that the armed forces say are ‘prejudicial to good order and discipline’ or likely to ‘bring discredit’ on the service.”).

<sup>242</sup> See, e.g., *United States v. Peszynski*, 40 M.J. 874, 879–880 (N-M. Ct. Crim. App. 1994). (overturning a conviction of a service member who subjected female co-workers at a Pizza Hut aboard a Naval air station to “a nearly constant stream of sexually suggestive comments and other forms of sexually suggestive behavior,” including “making frequent reference to their breasts and buttocks,” “ask[ing] them out socially,” “star[ing] leeringly at their bodies,” and “touching or stroking” them in a “sexually suggestive” manner, over a five month period, even though “[e]ach victim made it clear to the appellant that she wanted him to stop”; such “[c]omments and gestures . . . are not inherently criminal or even necessarily pejorative in nature; they are basically neutral. As such, they do not serve as an adequate standard by which to determine criminal behavior.”); cf. *United States v. Creighton*, No. Army 20010208, 2003 WL 25945393, at \*2 (A. Ct. Crim. App. Jan. 22, 2003) (overturning a conviction of an unmanned aerial vehicle instructor for engaging in an unprofessional relationship with trainees, including driving two females in his car off base and engaging in sexual intercourse with a trainee, finding “no convincing evidence” that his conduct was prejudicial to good order and discipline).

these flaws in its existing programs and undertake additional reforms responding to sexual harassment.

### 1. The downsides of anonymous reporting

The CATCH program incorporates several features that may enhance the military's ability to identify and address sexual misconduct. However, it also has several design flaws, which we discuss here. Without more fundamental reforms in the military justice system, such as assigning independent authority to investigate and discipline sexual harassment outside the chain of command<sup>243</sup> and making compensatory damages for sexual harassment available,<sup>244</sup> our assessment is that CATCH does not add much to the military's response to sexual misconduct.

Assessing CATCH in its most favorable light, feminist experts on sex crimes and violence against women have highlighted how mandatory arrest and “no-drop” prosecution policies require victims to hand over power to a potentially unfriendly justice system in order to obtain redress.<sup>245</sup> In this regard, the CATCH design is congruent with these feminist critiques. It gives victims more agency and control over the process by offering them a way to report sexual harassment without exposing themselves to a full-blown adversarial process. A victim's ability to report anonymously may be even more critical in the military than in civilian workplaces, given that retaliation for reporting sexual misconduct in the military is rampant.<sup>246</sup> Indeed, the military's most recent workplace gender relations survey finds that service members value the option of restricted reporting. “Without the option to make a restricted report, only 11% of women . . . responded that they would have sought out civilian confidential resources, and nearly half of women . . . responded that they would not have submitted a report [of sexual assault] at all.”<sup>247</sup> The CATCH program is also an excellent data collection tool, enabling the military to track the prevalence of sexual misconduct and identify repeat offenders.

Despite these clear benefits, the CATCH program can be criticized on several grounds. As currently designed, the CATCH system permits the military to sit on information demonstrating serious crimes, repeat offenses, and systemic sex discrimination if a victim does not file an unrestricted report. This system irrationally relieves the military of responsibility even if

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<sup>243</sup> See discussion *infra* Section III.A.

<sup>244</sup> See discussion *infra* Section III.C.

<sup>245</sup> See GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE*, *supra* note 23, at 20; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 293–302, 321–23 (2005).

<sup>246</sup> See sources cited *supra* notes 147–149 and accompanying text.

<sup>247</sup> See 2018 WGRA SURVEY, *supra* note 129, at vii.

it knows of the conduct. And by placing the onus on victims to make formal unrestricted reports before the military responds to a complaint,<sup>248</sup> the program unfairly places the burden on victims to take the lead in addressing what is more accurately characterized as a systemic, institutional problem. In practice, this design leaves a victim with fundamentally the same dilemma they had before the military implemented CATCH. If a victim wants the military to investigate a claim of sexual misconduct, they must formally involve their chain of command, presenting the same high risk of retaliation or adverse treatment.<sup>249</sup> While the CATCH system is designed to “empower victims to participate in the military justice process,”<sup>250</sup> it places victims in the difficult position of knowing that a repeat offender could remain at large if they choose not to expose themselves to the military justice system and their chain of command. Ultimately, without more fundamental reform of the military justice system,<sup>251</sup> the CATCH program is unlikely to disrupt the current barriers to making an unrestricted, nonanonymous report.

An extensive body of research in the civilian context documents why people who experience sexual harassment (primarily women) do not report the harassment or delay reporting. One of the primary reasons is shame and embarrassment, which often causes the person to blame themselves for the misconduct.<sup>252</sup> We all want to believe that we have control over what happens to us. When that personal power is challenged by a violation, a victim feels humiliation<sup>253</sup> and shame,<sup>254</sup> often accompanied by an intense fear of exposure.<sup>255</sup> As a result of this discomfort, a person often will decide to keep

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<sup>248</sup> See CATCH VICTIM INFO SHEET, *supra* note 170 (“If you decide to convert your report to an Unrestricted Report . . . the investigator is given your name at this time. A criminal investigation is now started, and the suspect’s commander and your commander are notified.”).

<sup>249</sup> Although conceivably there should be less fear of retaliation if the perpetrator is from a different unit, or even a different branch of service, attaching one’s name to a formal sexual assault complaint is still a significant step for a victim, as it involves direct leadership. Those who file complaints may still be perceived as “making problems.”

<sup>250</sup> See Lopez, *supra* note 168, at 5 (quoting Elizabeth Van Winkle, Executive Director of DOD’s Office of Force Resiliency in discussing the purpose of Sexual Assault Prevention and Response programs).

<sup>251</sup> See discussion *infra* Part III proposing reforms to the military justice system that would remove sexual harassment investigations and punishment decisions from the chain of command, rely on UCMJ administrative actions employing a civil burden of proof to address sexual harassment, and make compensatory damages available to victims.

<sup>252</sup> See Beverly Engel, *Why Don’t Victims of Sexual Harassment Come Forward Sooner?*, PSYCH. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner> [<https://perma.cc/EN36-EZUX>].

<sup>253</sup> *Id.*

<sup>254</sup> See Gershen Kaufman, *The Meaning of Shame: Toward a Self-Affirming Identity*, 21 J. COUNSELING PSYCHOL. 568, 569 (1974).

<sup>255</sup> *Id.*



the information about sexual harassment or assault to themselves, avoid the perpetrator, and try to forget the experience ever happened.<sup>256</sup> Fear is also a significant obstacle to reporting. Fear of not being believed, of being labeled as a troublemaker, of retaliation, and that reporting will not improve the situation all contribute to a victim's decision not to report or to delay in reporting.<sup>257</sup> These fears are entirely rational, as many studies demonstrate that disbelief, refusal, and retaliation are common responses when individuals complain about sexual assault and harassment.<sup>258</sup> Because of their double vulnerability, Black women are even less likely to report sexual harassment than white women.<sup>259</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> See Beiner, *supra* note 22, at 312–25 (discussing studies on the reasons that the vast majority of harassment victims do not report, including fears that they will lose their jobs, that they will not be believed, and that it will not help their situations); Hébert, *supra* note 22, at 724–42 (identifying discomfort and embarrassment, fear of being labeled as a troublemaker, not being believed, threats of termination, fear of retaliation, and concerns about physical safety as reasons, among others, for not reporting sexual harassment); Kessler, *supra* note 22, at 1048 (discussing workplace power dynamics and economic vulnerabilities that lead victims not to report harassment); Engel, *supra* note 252 (“Fear of the repercussions is a huge obstacle women face when it comes to reporting sexual harassment or assault . . .”).

<sup>258</sup> See Mindy E. Bergman, Regina Day Langhout, Patrick A. Palmieri, Lilia M. Cortina & Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 233, 237 (2002) (noting that “organizational responses may function as a continuation of the harassing behavior” and finding, in a study of 6417 military personnel, that reporting sexual harassment “often triggers retaliation”); Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 374 (2020) (“HR professionals frequently discourage women who inquire about filing a complaint from framing their complaints as sexual harassment, instead suggesting that the behavior is not sufficiently severe or pervasive to constitute sexual harassment or that it is simply an instance of poor management or of interpersonal conflict.”); Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCH. 1070, 1072 (1993) (“As with rape, women are commonly blamed for provoking sexual harassment and accounts of their experiences are routinely disbelieved.”); Jeong-Yeon Lee, Sharon Gibson Heilmann & Janet P. Near, *Blowing the Whistle on Sexual Harassment: Test of a Model of Predictors and Outcomes*, 57 HUM. RELS. 297, 318 (2004) (concluding, based on a study of 13,000 federal government employees, that “many cases of harassment do not end after the initial harassment but continue, as the target blows the whistle about the harassment and then suffers retaliation—a result that is entirely consistent with findings from earlier whistleblowing research”); Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC. REV. 83, 98–105 (2005) (finding that complaint handlers in a university setting frequently sided with harassers and told employees who sought their help that their experiences were not sufficiently severe or pervasive to be considered sexual harassment); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 *passim* (2017) (discussing the deeply skeptical orientation toward rape accusers and examining the implications of this credibility discounting for institutional reform and law).

<sup>259</sup> See Hernández, *supra* note 22, at 1244–45.

These psychological dynamics and obstacles are exacerbated in the military setting. Service members are taught discipline, focus, and control from the first day of their training;<sup>260</sup> they are “expected to be disciplined in their actions and words and to maintain control of their emotions and their physical selves at all times.”<sup>261</sup> This culture is inconsistent with admitting vulnerability and violation, especially for female service members who may already feel that they are unwelcome and must prove themselves by being as tough as their male peers.

Additionally, unit cohesiveness is essential, not just for mission efficiency, but also the core military value “[l]eave no one behind.”<sup>262</sup> Service members are trained so that “[n]o soldier, sailor, airman, or Marine will be left on the field of battle,” even if that means disregarding a member’s own safety.<sup>263</sup> Reporting misconduct by another service member in one’s unit disrupts this system of cohesion and sacrifice.

Finally, and importantly, in a military workplace, the chain of command is king, a principle ingrained from the instant an individual first puts on a uniform. Service members are trained to operate within this strict, hierarchal system.<sup>264</sup> Each service member is assigned a commanding officer responsible for addressing that individual’s concerns or problems. “‘Jumping the chain of command’ in most situations is strictly forbidden and may result in formal or informal disciplinary action.”<sup>265</sup> This hierarchy creates severe barriers to reporting sexual misconduct when the alleged perpetrator is a service member’s commander, further multiplied because the victim must rely on the commander for their safety and well-being.<sup>266</sup> In this way, the chain of command in the military functions in many respects as a cage, making it difficult if not impossible to go over a supervisor’s head when the supervisor is the harasser.

These unique features of military culture further entrench and exacerbate common barriers to reporting sexual harassment. In the face of such extreme barriers, CATCH, by itself, does not seem to contribute much to the military’s response to sexual misconduct. We do not doubt that the CATCH will induce increased anonymous reporting, and preliminary data suggest that it has had this effect.<sup>267</sup> Moreover, filing a restricted report

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<sup>260</sup> See SUBSTANCE ABUSE & MENTAL HEALTH SVC. ADMIN., U.S. DEP’T HEALTH & HUM. SVCS., UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE 10 (2010).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 9.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 8.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 13.

<sup>267</sup> See DOD FY 2019 REPORT ON SEXUAL ASSAULT, APP. B, *supra* note 146, at 7 (reporting a 17% increase in restricted (anonymous) reports in FY 2019 compared to FY 2018).

enables victims to access confidential counseling and health services.<sup>268</sup> The CATCH program may also increase perceptions that the military treats victims with dignity and respect by affording privacy, confidentiality, and decisional autonomy. Increased confidence may, in turn, encourage more victims or witnesses of sexual misconduct to come forward.<sup>269</sup> The CATCH system also gives victims time to seek relevant information and support in order to make more informed decisions about participating in an unrestricted (nonanonymous) criminal investigation.<sup>270</sup> This additional time may eventually lead the victim to decide to pursue an investigation and convert a restricted report to an unrestricted one.<sup>271</sup>

But there are serious limitations to restricted reporting. First, the perpetrator cannot be held accountable and may be capable of assaulting other victims.<sup>272</sup> In addition, victims cannot receive a military protective order or request an expedited transfer without making an unrestricted report.<sup>273</sup> Moreover, the victim may continue to have contact with the perpetrator. Finally, although a victim may, at any time, convert a restricted report to an unrestricted report,<sup>274</sup> thereby triggering the investigation process, the delay in switching to an unrestricted report will likely present “significant obstacles” in the investigation.<sup>275</sup> For example, evidence from any crime scene could be lost.<sup>276</sup> More broadly, in the current environment and institutional context—that is, where unit commanders handle sexual misconduct investigations,<sup>277</sup> retaliation for reporting is common,<sup>278</sup> no formal action results from filing an anonymous report, and economic remedies are unavailable to victims—the primary function of CATCH seems to be “catching” data rather than perpetrators. Again, CATCH is a step in the right direction; it provides a mechanism to identify repeat offenders and connect victims with services. But it is not enough. More fundamental reforms to the UCMJ are necessary to create a meaningful response that deters sexual harassment and holds perpetrators accountable.<sup>279</sup>

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<sup>268</sup> *Id.* at 5.

<sup>269</sup> See U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 39 (Sept. 11, 2020).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> See *Restricted Reporting*, U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <https://sapr.mil/restricted-reporting> [<https://perma.cc/5VR5-9VUR>] (last visited Nov. 25, 2020).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> See sources cited *supra* notes 147–149 and accompanying text.

<sup>279</sup> See discussion *infra* Part III.

## 2. Criminalization: too much and too little

The Department of Defense's call to add a punitive article for sexual harassment to the UCMJ is, no doubt, a response to external criticisms and awareness of its failure to effectively address sexual misconduct. Military lawyers have also proposed this reform.<sup>280</sup> However, adding sexual harassment to the UCMJ is quite a bit more complicated than meets the eye. Congress and military courts will have to sort out several significant legal issues, both substantive and procedural, if a direct avenue for criminal prosecution of sexual harassment in the military is to be established.<sup>281</sup>

First, the elements of a criminal sexual harassment offense would have to be defined. The Department of Defense did not elaborate on this when it recommended a new punitive article covering this conduct.<sup>282</sup> While it is true that the military has historically criminalized some behavior that is not criminal in civilian society,<sup>283</sup> this does not provide guidance as to how sexual harassment would be treated as a criminal offense under the UCMJ.

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<sup>280</sup> See e.g., Hollywood, *supra* note 184, at 184–85. Proposals to add a stand-alone article to the UCMJ outlawing sexual harassment go back all the way to the 1980s. See SHIRLEY SAGAWA & NANCY DUFF CAMPBELL, NAT'L WOMEN'S L. CTR., SEXUAL HARASSMENT OF WOMEN IN THE MILITARY 8 (1992) (explaining that the Navy proposed amending the UCMJ in the wake of Tailhook).

<sup>281</sup> Because criminal offenses under the UCMJ are listed in Title 10 of U.S. Code, the Department of Defense cannot unilaterally alter or create new offenses. However, it may make recommendations or propose drafts of new article to Congress. See e.g., SAAITF REPORT, *supra* note 140, at 17–19 (recommending that the Joint Service Committee for Military Justice draft a proposal of a specific sexual harassment offense to be added to the Manual for Courts-Martial).

<sup>282</sup> This is true both in the Memo from Acting Secretary of Defense Shanahan, as well as the underlying recommendation from the Sexual Assault Accountability and Investigation Task Force in 2019. See Shanahan Memorandum, *supra* note 154, at 1 (“Implement the recommendations of the SAAITF Report, including taking steps to seek a stand-alone military crime of sexual harassment.”); see also SAAITF REPORT, *supra* note 140, at 19 (2019) (recommending only that a proposal be drafted with no further details).

<sup>283</sup> For example, adultery is a criminal offense under the UCMJ, albeit narrowed in scope since 2002. See MCM, *supra* note 184, at IV-144–IV-146 (Article 134) (detailing that extramarital sexual conduct may be punished by “[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.”); Exec. Order No. 13,262, 3 C.F.R. 210 (2003) (“To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember.”); see also MCM, *supra* note 184, at IV-145 (Article 134), ¶ 99.c.(1). Similarly, fraternization, gambling with a subordinate, indecent language, and violating orders (e.g., sexual relations onboard a ship), all are potentially subject to criminal sanction under Articles 134 and 92, respectively. *Id.* at IV-127, IV-146–IV-148.

So far, the Department of Defense has defined sexual harassment only as a matter of policy through Directives (“DODD”s)<sup>284</sup> and Instructions (“DODI”s),<sup>285</sup> which establish DOD policies and procedures and are binding

<sup>284</sup> Sexual harassment was first defined by the Department of Defense in 1988 in Directive 1350.2. *See* U.S. DEP’T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM enc. 2 para. 10 (Dec. 23, 1988) [hereinafter DODD 1350.2] (on file with authors). The original directive stated:

DEFINITIONS. . . .

10. Sexual Harassment. A form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- a. submission to or rejection of such conduct is made either explicitly implicitly a term or condition of a person's job, pay, or career, or
- b. submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or
- c. such conduct interferes with an individual’s performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment.

Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

*Id.* This directive was revised in 1995 with the addition of language stating:

[W]orkplace conduct, to be actionable as “abusive work environment” harassment, need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. (“Workplace” is an expansive term for Military members and may include conduct on or off duty, 24 hours a day.)

U.S. DEP’T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM para. E2.1.15.3, at 18 (Aug. 18, 1995), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/135002p.pdf> [<https://perma.cc/QS35-SNCH>].

In 2020, President Trump repealed DODD 1350.2, reissued it as an “Instruction,” and deleted the definition of sexual harassment from the issuance. *See* U.S. DEP’T OF DEF., INST. 1350.02, DOD MILITARY EQUAL OPPORTUNITY PROGRAM (Sept. 4, 2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/135002p.pdf?ver=2020-09-04-124116-607> [<https://perma.cc/KWX3-6XM4>]. Presumably, this action will be reversed by President Biden.

<sup>285</sup> Department of Defense Instruction 1020.03, issued in 2018 and updated in 2020, contains the most current DOD definition of sexual harassment, as follows:

GLOSSARY. . . .

[S]exual harassment. Conduct that:

Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when:

on the services.<sup>286</sup> Notwithstanding federal court precedent holding that Title VII does not apply to Armed Service members,<sup>287</sup> the definition of sexual harassment in these various equal opportunity policy documents is drawn almost directly from Equal Employment Opportunity Commission (EEOC) guidelines and Supreme Court cases interpreting Title VII.<sup>288</sup> Commentators

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Submission to such conduct is, either explicitly or implicitly, made a term or condition of a person's job, pay, or career[; or]

Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the Armed Forces or a civilian employee of the Department of Defense.

Any deliberate or repeated unwelcome verbal comments or gesture of a sexual nature by any member of the Armed Forces or a civilian employee of the Department of Defense.

There is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment. Behavior is sufficient to constitute sexual harassment if it is so severe or pervasive that a reasonable person would perceive, and the complainant does perceive, the environment as hostile or offensive.

Sexual harassment can occur through electronic communications, including social media, other forms of communication, and in person.

U.S. DEP'T OF DEF., INSTR. 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES § G2 at 22 (Dec. 29, 2020) [hereinafter DODI 1020.03].

<sup>286</sup> All of the services have implemented DODD 1350.2 and DODI 1020.03. *See* ARMY REG. 600-20, *supra* note 232, ch. 7 (July 24, 2020); U.S. DEP'T OF AIR FORCE, POLICY DIRECTIVE (AFPD) 36-27 (Mar. 18, 2019); SEC'Y OF THE NAVY INSTRUCTION (SECNAVINST) 5300.26E (2020).

<sup>287</sup> *See* notes 174–176 and accompanying text.

<sup>288</sup> For example, the definition of sexual harassment in DODI 1020.03 is nearly identical to EEOC Guidance on what constitutes discrimination because of sex under the Civil Rights Act of 1964. *Compare* DODI 1020.03, *supra* note 285, *with* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11 (2020)) (“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment . . . .”); *see also* United States v. Olivares, No. 201800125, 2019 WL 1076454, at \*3 (N-M. Ct. Crim. App. Mar. 7, 2019), (“Both the Department of Defense’s and the Department of the Navy’s definitions [of sexual harassment] are very similar to the definition promulgated in 1980 by the Equal Employment Opportunity Commission when it

have suggested that this policy-based definition contained in DODD's and DODI's could be used as the elements of a criminal sexual harassment offense for the Armed Forces.<sup>289</sup> However, as this definition is derived from Title VII, which federal courts have held does not apply to service members,<sup>290</sup> it is not clear how this language would be utilized to prosecute sexual harassment as a crime under the UCMJ. For example, will Title VII case law apply in UCMJ sexual harassment prosecutions?<sup>291</sup> More broadly,

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determined that sexual harassment violated federal laws against sex discrimination . . . ."). Along the same lines, the "severe or pervasive" standard in DODI 1020.03 codifies a key holding of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), that a hostile environment occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" DODI 1020.03 is also derived from the holding of *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), that the plaintiff need not present evidence of a nervous breakdown to prove a hostile work environment sexual harassment claim. So long as the conduct can "reasonably be perceived, and is perceived, as hostile and abusive, there is no need for it also to be psychologically injurious." *Id.* at 22 (citation omitted). Note however that in contrast with Title VII, military policy construes "workplace" very broadly to include any place service members might live, work, train, and socialize together. See DODD 1350.2, *supra* note 284, at enc. 2 para. 10 ("'Workplace' is an expansive term for Military members and may include conduct on or off duty, 24 hours a day."); SAAITF REPORT, *supra* note 140, at 18 (recommending that a specific sexual harassment offense for the military should encompass misconduct that occurs outside the workplace too).

<sup>289</sup> See Hollywood, *supra* note 184, at 185 n.290 (proposing that the elements of sexual harassment be drawn from DODD 2020.03). Indeed, at least one military court took this approach in an Article 92 adjudication. See *Olivares*, 2019 WL 1076454, at \*3 (using the definition of sexual harassment in DODD 1350.2 to determine the meaning of "sexual harassment" in Navy Regulation, Article 1166).

<sup>290</sup> See cases cited *supra* note 174.

<sup>291</sup> Although an extensive discussion of this question is beyond the scope of this Article, we will note that Title VII has already seeped into military law through the DOD's incorporation of Supreme Court precedents and EEOC Guidelines into its directives and instructions proscribing sexual harassment, as well as through the services' implementing regulations. See sources cited *supra* note 288 and accompanying text. Military courts have, in turn, relied on these policies and regulations to expand the scope of Article 92 of the UCMJ to cover sexually harassing conduct. See sources cited *supra* notes 238–239. Recently, an intermediate appellate military court even went so far as to directly reference EEOC sexual harassment Guidelines in concluding that a service member had received fair notice that his sexually harassing conduct could be subject to criminal sanctions under the UCMJ. See *United States v. Da Silva*, No. ACM 39599, 2020 WL 3468282, at \*9 (A.F. Ct. Crim. App. June 25, 2020). We are heartened by these developments, which commentators seem to have overlooked, for they suggest that Title VII already functions as a kind of shadow legal system inside the UCMJ. That is, the military justice system has increasingly come to resemble its civilian counterpart, notwithstanding federal courts' judicial exclusion of service members from Title VII's protections. This suggests that a promising route to bring the UCMJ into alignment with civil employment discrimination law may be through military policy, regulations, and case law rather than direct overhaul of the UCMJ by Congress, which is

will the many recent updates to Title VII be included in the criminal definition of sexual harassment?<sup>292</sup> Although these questions may seem moot given that Title VII does not formally apply to armed service members, the fact remains that the DOD has already fashioned its EEO policies in a manner largely consistent with Title VII and relevant case law. These questions, therefore, cannot be avoided. Moreover, military case law on sexual harassment has involved other UCMJ articles, which have distinct elements.<sup>293</sup>

Questions about the controlling case law in prosecutions under a punitive article for sexual harassment would surely arise if Congress were to criminalize sexual harassment directly through a stand-alone article in the UCMJ. Of course, Congress (and military courts applying and interpreting an updated penal code) could address these questions. Resolving them, although complicated, would not be insurmountable. However, to do so will require a deeper consideration of the relationship of the Armed Forces and the equality norms (established both in law and politics) of our larger democratic society.

The proposal to criminalize sexual harassment directly in the UCMJ also raises significant procedural and practical issues. If the Department of Defense is to take the matter of preventing and remedying sexual harassment in the military seriously, it must reexamine its institutional design and allocation of authority. The dilemma is how to do that in a fair and just manner that strikes a balance between the military's unique mission, organizational structure, and rules, on the one hand, and the protection of service members' right to be free of sex (and sexuality) discrimination, on

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always a politically fraught exercise. More broadly, one cannot but acknowledge that, like all plural legal systems, the United States' civilian legal system and military justice system are not independent; they are "part of the same system in [a] particular social context and are . . . intertwined in the same micro-social processes." Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 873 (1988) (paraphrasing remarks delivered by Francis Snyder at the Bellagio Conference on People's Law and State Law, 1981).

<sup>292</sup> For example, the Supreme Court has held that Title VII's prohibition against sex discrimination includes same-sex sexual harassment, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), as well as harassment on the basis of an individual's homosexual or transgender status. *Bostock v. Clayton Co.*, 140 S. Ct. 1731 (2020). Moreover, under Supreme Court precedent interpreting Title VII, civilian employers are not vicariously liable for sexual harassment if they can establish that they took all reasonable steps to prevent the acts or that they promptly corrected the conduct after it became evident. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778, 807–08 (1998). This defense has been subject to severe criticism by victims' advocates for failing to account for the ways that power, identity, and institutional contexts cause victims not to report. *See* sources cited *supra* note 22 and accompanying text. If Congress codifies a legal standard for sexual harassment in the UCMJ, it will need to decide whether this expansive defense is relevant in a setting where severe power inequalities are inherent in the institutional design and formal policies of the workplace. Of course, Congress could leave these questions for military courts to decide, and perhaps that is the most politically feasible outcome, but that would be a lost opportunity.

<sup>293</sup> *See* Hollywood, *supra* note 184, at 185.



the other. DOD and Congress will also need to consider the practical effect of employing a criminal burden of proof to address sexual harassment. That is, will the proposed legal mechanism of direct criminalization (and, potentially, court-martialing service members for sexual harassment) even work to deter and remedy sexual misconduct? We turn to this second set of questions here.

The latest feminist thinking about legal responses to sexual violence centers around the idea that more collaborative, less adversarial legal models are preferred.<sup>294</sup> This idea has developed out of distinct but converging critiques, including feminist reflections on the failures of criminal legal responses to sexual violence, discomfort with certain aspects of the #MeToo movement, and the effects of America's ever-expanding criminal justice system on people of color. Many feminists have lauded the increased public attention to sexual harassment and gender violence that the #MeToo movement has generated, yet others "have pushed back against the demands for a bigger and better criminal response."<sup>295</sup> The objections to the use (and overuse) of criminal law and new forms of regulation to address sexual violence and harassment exist on a number of levels and emerge from distinct concerns.

Some feminists argue that feminist antiviolence work has contributed to the build-up of policing and mass incarceration in our country.<sup>296</sup> They

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<sup>294</sup> See Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487 *passim* (2016) (drawing on organizational management, conflict resolution theory, and antidiscrimination law to argue that restorative justice practices may better advance the goals of antidiscrimination law than the adversarial legal system); Goldscheid, *supra* note 23 (exploring the use of non-adversarial approaches to address sexual harassment in the workplace); Laurie S. Kohn, *#MeToo, Wrongs Against Women, and Restorative Justice*, 28 KANS. J.L. & PUB. POL'Y 561, 576–85 (2019) (advocating restorative justice for workplace sexual harassment and assault).

<sup>295</sup> Brenda Cossman, *#MeToo, Sex Wars 2.0 and the Power of Law*, in 3 ASIAN Y.B. HUM. RTS. & HUMANITARIAN L. 18, 20 (Javaid Rehman, Ayesha Shahid & Steve Foster eds., 2019).

<sup>296</sup> See, e.g., MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT 111–51 (2000) (telling the story of how feminists were successful in mainstreaming their concerns about rape, but their success was largely achieved through appeal to law-and-order politics scapegoating and criminalizing men of color); GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE, *supra* note 23, *passim* (arguing that domestic violence has been overcriminalized to the detriment of victims and society and urging that we use legal and criminal justice responses as a last resort within much more holistic, therapeutic, resource-based approach to IPV); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 115–39 (2006) (detailing the "long and conflicted history" of women's groups and feminists on issues related to crime and their role in uncritically pushing for increased policing); AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION *passim* (2020) (analyzing ways in which the feminist movements' work to protect women from rape and domestic violence has contributed to mass incarceration); Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the*

point out that people of color, especially of low socioeconomic status, have been disproportionately impacted by the fervor to criminalize domestic violence, for example, including female victims, the very people antiviolence advocates aim to emancipate.<sup>297</sup> Others “[take] issue with” the “negative stance” on “sex and sexuality” implicit in much antiviolence work.<sup>298</sup> Some critics, including those who identify as feminists, argue that the definitions of sexual harassment governing the workplace, universities, and other major societal institutions are too broad, potentially capturing consensual sexual behavior.<sup>299</sup> Finally, feminists working in the antiviolence movement have come to see the ineffectiveness of punitive approaches and adversarial legal processes for addressing sexual violence. That is, advocates now understand that despite the massive body of law and regulatory infrastructures now in place to address sexual assault, violence, and harassment in homes, workplaces, schools, and on college campuses, the system does not prevent violence or protect survivors when it occurs.<sup>300</sup>

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*Paradoxical Pursuit of Criminalization, 1973–1986*, at 2 (Inst. Study Soc. Issues, Working Paper No. 2013-2014.70, 2015), <https://escholarship.org/uc/item/804227k6> [<https://perma.cc/6L9N-J6QK>] (“[A]ttempts to feminize the state led to the unwitting support for policies of mass incarceration, thereby reproducing and re-enforcing hierarchies of gender, race, class and sexuality . . . .”); cf. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 35–54 (2009) (asserting that a number of worrisome trends have occurred in the wake of the “domestic violence revolution,” including that criminal law now imposes “de facto divorce” through its enforcement of easily obtainable protection orders).

<sup>297</sup> See BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION 99–124 (2012) (exploring the rise of the punishment industry in the United States and the consequent mass incarceration of poor women and women of color who break laws to survive abusive relationships); Goodmark, *Stop Treating Domestic Violence Differently*, *supra* note 23 (“Encouraging a larger role for law enforcement also had the unintended consequence of punishing victims.”).

<sup>298</sup> See Cossman, *supra* note 295, at 20; Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 9 (1992) (critiquing the “politics of protection” that “construct[] [the] divide between light and dark, wives and prostitutes, good girls and bad ones”); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 882 (2016) (discussing “the bureaucratic tendency to merge sexual violence and sexual harassment with ordinary sex, and thus to trivialize a very serious problem”); cf. SUK, *supra* note 296, at 106–31 (arguing that privacy law has been reimagined in the form of a vulnerable woman, with consequences that both reinforce harmful gender roles and increase state control of intimate relationships in the home).

<sup>299</sup> See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003); cf. Jeannie Suk Gersen, Nancy Gertner & Janet Halley, Comment Letter on Proposed Title IX Rulemaking, at 14 (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11950> [<https://perma.cc/7LDC-CEKP>] (arguing that President Trump’s proposed Title IX Rule adopted a definition of sexual harassment that was both too narrow and too broad).

<sup>300</sup> Some are therefore turning to other models to address sexual violence, such as restorative justice. See, e.g., Goldscheid, *supra* note 23. Traditionally, restorative justice is an approach

We focus here primarily on the last insight, as it is the most applicable in the military context. It is not clear that punishing sexual harassment as a crime under the UCMJ will deter sexual harassment. Sexual assault has already been punishable as a punitive offense under UCMJ Article 120 for decades, and as recent statistics show, this has not led to a significant reduction of incidents.<sup>301</sup> The same could likely be expected even if sexual harassment receives its own punitive article.<sup>302</sup> Some commentators have noted that military unit commanders are under pressure to deal with sexual offenses assertively, which has translated into seeking more severe judicial punishment rather than nonjudicial punishment.<sup>303</sup> While the optics of seeking stiff penalties for sexual offenses are intended to show that the military is taking the problem seriously, these charges face a higher burden of proof than the same behavior would face when disciplined with nonjudicial penalties.<sup>304</sup> Therefore, cases that could reliably be punished by nonjudicial means are likely to go unpunished after an unsuccessful attempt to prosecute as a punitive judicial offense.<sup>305</sup> This hypothesis is confirmed by a recent study of sexual assault prosecutions in the military, which found that one reason for the military's low conviction rate for sex crimes is the high burden of proof for obtaining a court-martial.<sup>306</sup>

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to justice in which one of the responses to a crime is to organize a meeting between the victim and the offender, sometimes with representatives of the wider community. Today, the term's use in many contexts has rendered its meaning somewhat blurred. However, some of its defining features include resolution of disputes outside of courts (to facilitate truth telling), meaningful accountability, efforts to disrupt (rather than punish) sexual misconduct, and nonjudgmental measures that encourage reflection and acceptance of responsibility. Goldscheid, *supra* note 23, manuscript at 15–19 (defining restorative justice). The modern usage of the term “restorative justice” can be traced to Albert Eglash. DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 21–22 (5th ed. 2015). Albert Eglash was a psychologist in the 1950s working with incarcerated people. He saw the need for his clients to be accountable for their behavior that hurt others and saw its rehabilitation value. He first presented this idea in a 1975 restitution conference paper titled *Beyond Restitution—Creative Restitution*, which was subsequently published in *RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS* (Joe Hudson & Burt Galaway eds., 1977).

<sup>301</sup> See discussion *supra* Section II.A.

<sup>302</sup> Indeed, prosecutions of sexually harassing conduct under UCMJ Articles 92, 93, and 134 does not seem to have had any impact. See discussion *supra* Section II.C.2.

<sup>303</sup> See Seth Michael Engel, *Fostering a Safe Warfighting Environment: Applying Title IX and Student Discipline in Higher Education to the Military's Fight Against Sexual Assault*, 32 *WIS. J.L. GENDER & SOC'Y* 133, 136 (2017).

<sup>304</sup> *Id.*

<sup>305</sup> See *id.* at 160 (arguing that overreliance on court-martial results in failure to punish perpetrators of sexual assault because of the higher burden of proof in court-martial).

<sup>306</sup> See Warner & Armstrong, *supra* note 146, at 294–95. While such constitutional due process concerns justify a high evidentiary standard for criminal convictions, they are out of place when the alleged offense is sexual harassment that does not involve criminal conduct.

Even more problematic, given the unique institutional and cultural obstacles to reporting sexual misconduct in the military—including the imperative of unit cohesion, the expected self-sacrifice of the “leave no man behind” credo, and the chain of command cage<sup>307</sup>—raising the stakes for sexual harassment will likely backfire, resulting in even fewer victims reporting harassment within the military’s existing disciplinary system.

In sum, there is no doubt that adding a dedicated punitive article for sexual harassment to the UCMJ would clarify for all branches what conduct constitutes a criminal sexual harassment offense. This could benefit both victims and alleged perpetrators, creating a uniform, transparent standard for guiding behavior and reducing the potential for both under- and over-regulation. A penal article on sexual harassment would also have expressional value, signaling to all that sexual harassment is impermissible conduct. However, there are significant downsides to this proposal if implemented in isolation. Not only may it backfire by raising the stakes for the involved service members, thereby deterring reporting, but criminalizing sexual harassment is an inappropriate response to conduct that in any other setting would be treated as a civil wrong. To be successful, a UCMJ criminal article on sexual harassment must be paired with other reforms to the UCMJ that will bring the military justice system into closer alignment with Title VII, which we discuss in Part III.

### **III. ALIGNING THE UCMJ WITH TITLE VII**

This Part turns to solutions. Here, we outline an updated regulatory framework for the UCMJ that would bring the military’s legal response to sexual harassment in alignment with civil employment discrimination law. The first proposal is procedural. It seeks to ensure that sexual harassment victims in the military have the same right to an independent investigation and adjudication of their complaints as civilian employees. The second proposal seeks to ensure that the evidentiary standard used to evaluate sexual harassment complaints under the UCMJ is the preponderance of the evidence standard; this can be achieved by relying on existing UCMJ administrative actions. The third proposal seeks to ensure the service members can obtain compensatory damages for economic and psychological injuries caused by sexual harassment. We note that none of these reforms necessitates extending Title VII to service members.

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<sup>307</sup> See discussion *supra* Section II.B.1.

### A. Process: The Right to an Independent Adjudication

When the military receives a report that a service member engaged in sexually harassing conduct so frequent or severe that it creates a hostile or offensive work environment,<sup>308</sup> responsibility for investigating and punishing the conduct should be taken out of the chain of command. That is, military victims of sexual harassment should receive the same protections as civilian victims to an independent investigation, a written record, and independent finder of fact and decisionmaker, as well as standardized procedures, definitions, and recommended penalties for perpetrators.

We note here that our proposal represents an expanded version of the Military Justice Improvement Act (MJIA), first introduced by Senator Kirsten Gillibrand in 2013.<sup>309</sup> The MJIA would take charging discretion away from unit commanders for sexual assaults and some other felony offenses and put it in the hands of outside military attorneys.<sup>310</sup> The stated objective of the MJIA is to “professionalize how the military prosecutes serious crimes by moving the decision over whether to prosecute them to independent, trained, professional military prosecutors.”<sup>311</sup> Senator Gillibrand, along with bipartisan cosponsors, announced that the MJIA would be introduced as an amendment to the National Defense Authorization Act for Fiscal Year 2021.<sup>312</sup>

The MJIA is a step in the right direction, and we support its core reform directing independent prosecution of sexual assault. However, it should be expanded to include sexual harassment under certain

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<sup>308</sup> Or other conduct that would meet the definition of sexual harassment as defined in a new UCMJ article on sexual harassment, including, presumably quid pro quo sexual harassment.

<sup>309</sup> The MJIA has been consistently reintroduced into Congress since 2013. S. 967, 113th Cong. (2013); S. 2992, 113th Cong. (2014); S. Amend. 1578, 114th Cong. (2015); S. 2141, 115th Cong. (2017); S. 1789, 116th Cong. (2019).

<sup>310</sup> Rustico, *supra* note 183, at 2061. While the MJIA and its core reform was not signed into law, it generated a great deal of discussion and has influenced several substantial reforms to the UCMJ’s treatment of sexual assault. One such change is that, now, any “matters that relate to the character of a victim” are barred from consideration when making disposition decisions. *See id.* at 2040–46, 2061. Nor is the good military character of the accused given consideration in sexual assault cases, removing the so-called “good soldier defense.” *Id.* at 2043. Retaliation against service members reporting a criminal offense is also strictly prohibited. *Id.* at 2061 (citing National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1709, 127 Stat. 672, 960–61 (2013)).

<sup>311</sup> Press Release, Sen. Chuck Grassley, Grassley, Gillibrand, Cruz Offer Bipartisan Military Justice Improvement Act Amendment to Defense Bill (July 2, 2020), <https://www.grassley.senate.gov/news/news-releases/grassley-gillibrand-cruz-offer-bipartisan-military-justice-improvement-act> [https://perma.cc/75QD-KSC8].

<sup>312</sup> *Id.*; *see also* Press Release, Sen. Ted Cruz, Sens. Cruz, Gillibrand Reintroduce Military Justice Improvement Act (June 13, 2019), [https://www.cruz.senate.gov/?p=press\\_release&id=4527](https://www.cruz.senate.gov/?p=press_release&id=4527) [https://perma.cc/9HTL-W5VR] (noting that Republican co-sponsors included Senators Ted Cruz, Chuck Grassley, Lisa Murkowski, and Rand Paul).

circumstances, which we describe below. That is, the MJIA does not go far enough, for it leaves discipline for sexual harassment within the chain of command when all evidence suggests that sexual harassment is as persistent a problem in the military as sexual assault<sup>313</sup> and when even the military's own studies find a strong correlation between sexual harassment and assault.<sup>314</sup>

Removing investigatory, charging, and disciplinary discretion for both sexual assault and harassment outside of the chain of command would be a significant change to the UCMJ, because unit commanders have something akin to prosecutorial discretion within their units.<sup>315</sup> Limiting a commander's discretion to discipline certain offenses is antithetical to military thinking, and the Department of Defense has remained opposed to the MJIA.<sup>316</sup> Opponents have argued against such a change, believing it would degrade commanders' ability to maintain order and discipline.<sup>317</sup> The MJIA, in contrast, is concerned with obtaining just outcomes for sexual assault victims by reducing the risk of biased decision-making by interested unit commanders and encouraging victims to report complaints without fear of retaliation.<sup>318</sup>

Our proposal—which would remove a commander's discretion to handle sexually harassing conduct so frequent or severe that it creates a hostile or offensive work environment—represents an intermediate-level intervention that fairly balances the military's interests in preserving the chain of command with justice for service members who suffer the harms of sexual misconduct.<sup>319</sup> In suggesting that the UCMJ be modified in this way,

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<sup>313</sup> See discussion *supra* Section II.A.

<sup>314</sup> See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 6, at 11 (“[U]nhealthy climates marked by sexual harassment, gender discrimination, workplace hostility, lack of unit cohesion, and lack of personal responsibility incrementally increase the risk of experiencing a sexual assault.”); SAAITF Report, *supra* note 140, at 18 (“Based on surveys conducted by the Department, there is a strong positive correlation between the occurrence of sexual harassment within military units and the occurrence of sexual assault. Commands and installations with greater occurrence of sexual harassment often have higher rates of sexual assault.”).

<sup>315</sup> See *supra* notes 193–194 and accompanying text.

<sup>316</sup> ROLE OF THE COMMANDER SUBCOMMITTEE REPORT, *supra* note 192, at 2 (primarily arguing that there was no strong evidence to suggest that removing charging discretion would be effective in addressing sexual assault).

<sup>317</sup> *Id.* at 102 (citing statements of a high-ranking Airforce General who believed that giving commanders “responsibility without authority” would degrade the trust that they must be fair and impartial, ultimately weakening the system and reducing military effectiveness).

<sup>318</sup> Such fears are well founded. See sources cited *supra* notes 147–149 and accompanying text.

<sup>319</sup> Of note, in 2020, Representatives Jackie Spier and Markwayne Mullin introduced a bill in the House of Representatives containing a similar proposal. See I am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. (2020). The Act would require each military department to establish an Office of the Chief Prosecutor and transfer charging decisions for sex-related

we acknowledge that isolated incidents of sexual harassment may escape redress. Where the conduct does not rise to the level of severe sexual misconduct, offenders may have “one bite of the apple,” so to speak, without the incident being removed from the chain of command. However difficult the choice to reform the UCMJ in this way, we suggest that the military’s legitimate interests in preserving the chain of command should permit a commander to address isolated complaints of sexual harassment “in-house.” This authority should be removed as soon as one or more reports suggest that a service member has engaged in serial acts of sexual harassment or severe sexual misconduct. This approach would align the UCMJ with civil sexual harassment law, which defines hostile work environment sexual harassment as unwelcome conduct, because of sex, that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.<sup>320</sup>

This proposal is not a far stretch from existing military law. There are already some mechanisms in place enabling the centralized human resources component of a military branch to initiate involuntary administrative separations of service members outside of a unit commander’s discretion.<sup>321</sup> Such separations can be initiated based on a service member’s official records of misconduct, sometimes referred to as “bad paper.”<sup>322</sup> The DOD is already cataloging incidents of sexual assault and harassment in the CATCH program. Therefore, it is not a giant leap to empower independent military

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offenses, including sexual harassment and sexual assault, from the commander to the service’s chief prosecutor. *Id.*; see also Alex Horton, *Proposed Vanessa Guillén Law Would Transform Military’s Sexual Misconduct Inquiries*, WASH. POST (Sept. 16, 2020, 3:04 PM), <https://www.washingtonpost.com/national-security/2020/09/16/proposed-vanessa-guilln-law-would-transform-militarys-sexual-misconduct-inquiries/> [<https://perma.cc/LLK3-S445>] (reporting that Vanessa Guillén was murdered the day before she was planning to file a harassment complaint against her harasser).

<sup>320</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> [<https://perma.cc/S2DY-6ASC>] (last visited Dec. 18, 2020).

<sup>321</sup> See *Administrative Separation / Boards of Inquiry*, LAW OFFICE OF JOCELYN C. STEWARD, <https://www.ucmj-defender.com/practice-areas/administrative-separation-boards/> [<https://perma.cc/3WGA-VEVG>] (last visited Nov. 4, 2020). This primer discusses Army Human Resources Command (HRC) initiating administrative separation boards for enlisted service members and Boards of Inquiry for officers to decide whether a service member should be permitted to stay in service based on nonjudicial punishment under Article 15 or letters of reprimand (GOMORS). *Id.* See also U.S. DEP’T OF ARMY, REG. 135-175 §§ 2-13 at 14–15, 2-17 at 16, 2-19 at 16–17 (Mar. 30, 2020); U.S. DEP’T OF NAVY, NAVY MILITARY PERSONNEL MANUAL (MILPERSMAN) 1910-010, 1910-100, 1920-010, <https://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1900Separation/Pages/default.aspx> [<https://perma.cc/ZW73-4L2Z>] (last visited Nov. 5th, 2020) (discussing Navy human resources enlisted and officer involuntary separation).

<sup>322</sup> *Id.*

investigators, prosecutors, or centralized human resources offices to use this information to investigate and discipline sexual harassment.<sup>323</sup>

Our proposal to reform the UCMJ and CATCH program to better align with civil employment discrimination law raises a question: Why does Title VII not apply to the military in the first place? Indeed, other experts on discrimination in the military have proposed extending Title VII to cover all military personnel.<sup>324</sup> While the military is a workplace as much as any other, it is also a unique institution justifying an independent legal system. Practical considerations also make extending Title VII to the military

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<sup>323</sup> Another question, which we will leave for another day, is whether a disciplinary response for severe or pervasive sexual harassment should be mandatory or whether a confidential reporting process for sexual harassment should be integrated into the military's existing CATCH program. This is a difficult question and there are persuasive arguments on both sides.

As discussed, *supra*, the CATCH system permits the military to sit on information demonstrating serious crimes, repeat offenses, and systemic sex discrimination if a victim does not file an unrestricted report. This system irrationally relieves the military of responsibility for serious or repeat sexual misconduct even if it knows of the conduct. This may be justifiable in the criminal context in light of notions of prosecutorial discretion. However, in the civilian employment context, the idea that an employer could systematically collect information about sexual harassment without taking any responsive action and avoid Title VII liability is inconceivable by any civil standard.

On the other hand, as we discuss, *supra*, the option of anonymous reporting for sexual harassment (as with sexual assault) could contribute to increased reporting, given that retaliation for reporting sexual misconduct is rampant in the military. *See* sources cited *supra* notes 147–149 and accompanying text. Creating a confidential reporting process for sexual harassment that is integrated with the existing CATCH program would also obviate the need for victims to assess whether the sexual misconduct they experienced fits neatly into particular categories, and it might normalize a culture of reporting sexual misconduct in the military. Finally, because military surveys find a strong correlation between sexual harassment and assault in the military, see discussion *supra* note 314, extending CATCH to sexual harassment would strengthen the military's ability to address sexual assault by helping to identifying service members who often engage in both types of sexual misconduct.

These competing arguments track feminist debates about how best to address sexual violence in the civilian context. There are no easy answers. Given the benefits of CATCH in the current military climate, it may be too soon to recommend that sexual harassment victims be forced to report publicly. However, as an aspirational matter, that is the direction we hope the current reforms are heading. It is our hope that, as a first step, by taking investigations and disciplinary responses for sexual harassment out of the chain of command (along with sexual assault), *at least where a victim voluntarily wishes to make an unrestricted report*, a significant change in culture will result. Victims would feel comfortable reporting sexual misconduct without fear of retaliation by commanders and peers. In turn, the military would be obligated to take responsive action when those reports come to light. While it is likely premature, we think this would ultimately be best.

<sup>324</sup> *See* Michael I. Spak & Alice M. McCart, *Effect of Military Culture on Responding to Sexual Harassment: The Warrior Mystique*, 83 NEB. L. REV. 79, 99 (2004) (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)); *see also* Hollywood, *supra* note 184, at 194–95; Westergard, *supra* note 40, at 232.



unlikely.<sup>325</sup> Reforming the UCMJ in the manner suggested here, on the other hand, would respect the unique nature and interests of the military, because military investigators and prosecutors would have jurisdiction over sexual harassment cases rather than civilian courts. This approach would bring the civilian and military justice systems closer together, modernizing the UCMJ while respecting the military's jurisdictional independence.

*B. Evidence: Using Administrative Actions and a Civil Burden of Proof*

Congress and the military are aware that there is a problem with sexual harassment in the Armed Forces, but the prohibition against suits for torts or Title VII workplace discrimination<sup>326</sup> means that criminal courts-martial have become the preferred method to demonstrate that the military is taking sexual misconduct seriously.<sup>327</sup> This is reflected in the military's treatment of sexual assault, where there has been a push to pursue courts-martial rather than administrative remedies.<sup>328</sup>

The UCMJ is a criminal code by definition, so it is understandable that the military has chosen to view sexual harassment through the lens of criminal law rather than focus on its discriminatory harms.<sup>329</sup> However, as a civil legal concept, sexual harassment is broader than sexual assault; it includes attempting to make work conditions contingent on sexual favors, unwanted sexual attention, and harassing conduct that disparages a person because of sex.<sup>330</sup> Punishing sexual harassment as a crime would no doubt

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<sup>325</sup> As previously noted, there is a long line of Circuit Courts of Appeals decisions holding that Title VII does not apply to uniformed personnel. *See* cases cited *supra* note 174. Given that the Supreme Court does not seem poised to reverse this precedent, it would likely require an act of Congress to bring uniformed service members under Title VII's protection. It is difficult to envision Congress enacting such a significant change to the Armed Forces in our present hyper-partisan political climate.

<sup>326</sup> *See supra* Section II.B.2.

<sup>327</sup> *See* Chema, *supra* note 224, at 6–7 (stating that service members' lack of remedy for sexual harassment under Title VII, as well as the *Feres* doctrine's prohibition on common-law torts, increases emphasis on criminalization of sexual harassment).

<sup>328</sup> *See generally* Engel, *supra* note 303, at 135 (arguing that 1) public and media anger about the military's light treatment of sexual assault through administrative remedies has led to a push to criminally prosecute sexual assault, which results in more acquittals due to the higher burden of proof and difficulty meeting that burden with the typical evidence, and that 2) focusing only on the criminal aspect of sexual assault fails to address the discriminatory harms caused by sexual assault, and thus does not effectively deter sexual assault).

<sup>329</sup> *Id.*

<sup>330</sup> *See* Sarah L. Cook, Lilla M. Cortina & Mary P. Koss, *What's the Difference Between Sexual Abuse, Sexual Assault, Sexual Harassment and Rape?*, THE CONVERSATION (Sept. 20, 2018, 4:03 PM), <https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218> [<https://perma.cc/D6B3-VG9V>];

convey a level of seriousness, but it would be a blunt, inaccurate tool in addressing discrimination.<sup>331</sup> Moreover, criminalization is indicative of the military continuing to view sexual misconduct as a problem of finite bad actors rather than as a systemic, institutional problem facilitated by the military's culture and organizational composition.

To be sure, the military holds service members to a higher standard of conduct than civilians. Thus, the UCMJ criminalizes some conduct that would not otherwise be a crime in the civilian sphere.<sup>332</sup> However, military prosecutors would likely find it difficult to prove cases beyond a reasonable doubt in a court-martial when sexual harassment cases are often based solely on the testimony of the victim and accused.<sup>333</sup>

We acknowledge that using administrative action to address sexual misconduct has been criticized as light treatment—a slap on the wrist, so to speak.<sup>334</sup> This is certainly true in some cases, where unit commanders use less severe administrative actions like oral or written counseling to address substantiated cases of sexual assault.<sup>335</sup> However, there is a spectrum of administrative actions, including more serious forms such as a General Officer Order of Reprimand (GOMOR).<sup>336</sup> It is these more serious UCMJ administrative actions that we suggest using to address sexual harassment. Importantly, as an administrative action, GOMORs use a non-criminal evidentiary standard (the preponderance of the evidence) that is more

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*see also supra* note 320 and accompanying text. Plaintiffs have attempted to address sexual harassment through tort law, for instance, by bringing claims for intentional infliction of emotional distress (IIED), but IIED encompasses actions outside of conduct constituting sexual harassment. *See* Joanna Stromberg, Comment, *Sexual Harassment: Discrimination or Tort?*, 12 *UCLA WOMEN'S L.J.* 317, 337–39 (2003).

<sup>331</sup> *See* Westergard, *supra* note 40, at 230–31 (“Because the UCMJ was designed to approximate the criminal law rather than employment law, it is ill-equipped to resolve disputes over adverse employment actions.”).

<sup>332</sup> *See* Bojan, *supra* note 198, at 1150 n.2 (noting that adultery, for example, is punishable as a criminal offense under UCMJ Article 134).

<sup>333</sup> This assertion is based on the fact that we see a similar issue with sexual assault allegations. There is often insufficient evidence to prosecute assault cases because military prosecutors are evaluating evidence for a court-martial under a criminal burden of proof. *See e.g.*, DOD FY 2019 REPORT ON SEXUAL ASSAULT, APP. B, *supra* note 146, at 17 tbl.4, 27 fig.15 (reporting that, of the 3,716 sexual assault case dispositions considered for possible action by DOD commanders in the fiscal year 2019, only 50 or 1% were determined to be unfounded after legal review, yet 710 or 19% of the cases only provided probable cause to prosecute a non-sexual assault offense, and 1,022 or 28% had insufficient evidence to prosecute any offense).

<sup>334</sup> For example, *The Invisible War* (Chain Camera Pictures 2012), a documentary film chronicling the issue of sexual assault in the military, focused on light treatment of perpetrators with administrative actions such as informal or written counseling.

<sup>335</sup> To be clear, we do not support administrative action for substantiated instances of rape or sexual assault.

<sup>336</sup> *See* ARMY REG. 600-37, *supra* note 199, para. 3-4, at 4–5.

appropriate for sexual harassment offenses than a criminal burden of proof.<sup>337</sup> A GOMOR is where a General Officer (an officer with the rank of General) issues a reprimand or directs a reprimand issued by a subordinate to be filed permanently in a service member's Official Military Personnel File (OMPF).<sup>338</sup> While a "reprimand" might sound innocuous to those outside the military, GOMORs are widely understood and accepted to be a "kiss-of-death" for a service member's career, especially if they are made a permanent part of a service member's personnel file.<sup>339</sup> Receiving this sort of reprimand will, at the very least, stop the career progression of a service member because of the stain left on their record.<sup>340</sup> A GOMOR can also trigger an administrative separation.<sup>341</sup> A discharge based on a GOMOR can be

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<sup>337</sup> The Air Force requires a preponderance of evidence to evaluate conduct supporting a punitive letter of reprimand. *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM para. 4.1.3. (Nov. 26, 2014). The Navy and Marine Corps limit use of punitive letters of reprimand to punishment imposed by court-martial or nonjudicial punishment under Article 15, but a preponderance of evidence standard is used for Article 15 actions in the Navy. *See* U.S. Dep't of Navy, Navy Admin. Message No. 189/14, Inclusion and Command Review of Information on Sex-related Offenses in Personnel Service Records para. 7 (Aug 14, 2014), <https://www.public.navy.mil/bupers-npc/reference/messages/Documents2/NAV2014/NAV14189.txt> [<https://perma.cc/W7W7-UYNN>] (noting that, in the Navy, a punitive letter of reprimand cannot be filed in a service member's personnel file pursuant to a non-punitive administrative action); MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) § 0110 (2012) (stating that, in the Navy, a preponderance of the evidence standard is used for nonjudicial punishment under Article 15). The Army uses a preponderance standard for administrative investigations, which would be the fact-finding context for sexual harassment allegations forming the basis of a punitive letter of reprimand. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 3-10.b., at 24 (Apr. 1, 2016).

<sup>338</sup> *See* sources *supra* notes 195–207 and accompanying text; *see also* 7TH ARMY TRAINING COMMAND, U.S. DEP'T OF ARMY, LEGAL ASSISTANCE INFORMATION PAPER: LETTERS OF REPRIMAND AND GENERAL OFFICER MEMORANDUMS OF REPRIMAND [hereinafter ARMY INFORMATION PAPER ON GOMARS], <https://www.7atc.army.mil/Portals/17/Documents/SJA/GOMORandLORwithTemplate.pdf> [<https://perma.cc/FX7J-M4EC>] (last visited Dec. 10, 2020).

<sup>339</sup> *See* Bojan, *supra* note 198, at 1170 n.98 (providing numerous examples of GOMORs having serious negative consequences on career progression in the military).

<sup>340</sup> *See* Bojan, *supra* note 198, at 1170; ARMY INFORMATION PAPER ON GOMARS, *supra* note 338, at 2 ("Receiving a GOMOR may prevent you from being promoted.").

<sup>341</sup> *See, e.g.,* Caez v. United States, 815 F. Supp. 2d 184, 193 (D.D.C. 2011) (upholding involuntary separation of an Army Guard reserve officer after he received a GOMOR for adultery, conduct unbecoming of an officer, and drug use); ARMY INFORMATION PAPER ON GOMARS, *supra* note 338, at 2 (stating that receiving a GOMOR may trigger a review leading to denial of continued service). Given the interests at stake, service members facing administrative separations have due process rights, including the right to notice, present evidence, cross examine witnesses, and appeal; however, commentators have argued that in practice the process afforded is minimal. *See* Major Brian D. Andes, *The End Does Not Justify the Means: Why Diminished Due Process During Reductions in Force is Unjust*, 225 MIL. L. REV. 84, 101–03 (2017) (discussing procedures and due process rights for officers

classified as “other than honorable,” a red flag for civilian employers.<sup>342</sup> As it currently stands, while independent human resources components may initiate proceedings to remove a service member on the basis of a GOMOR,<sup>343</sup> the unit commander of the offending service member remains the person with discretion under the UCMJ to take the initial administrative action.<sup>344</sup> Congress could amend the UCMJ to change this for sexual harassment, giving discretion and authority to initiate administrative action to centralized human resources components of the branches or a review board specifically designed to address sexual misconduct. The goal and effect would be to create a non-criminal mechanism to address sexual harassment outside of the chain of command.

Aggressive use of GOMORs has shown to be effective at stimulating cultural shifts in the military, as exemplified by the case of driving under the influence (DUI).<sup>345</sup> Starting in the 1980s, the military sought to address high rates of alcohol related offenses like DUI by issuing regulations directing that GOMORs be given to service members who had been found driving with blood alcohol content over the legal limit.<sup>346</sup> Given the serious ramifications of GOMORs, the DOD and branch secretaries elevated DUI to a career-ending offense in many cases.<sup>347</sup> Today, due to these policy and enforcement

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facing administrative separations); Bojan, *supra* note 198, at 1152 (“Arguably, GOMORs . . . have become *de facto* punishment not subject to the extensive due process protections of the Uniform Code of Military Justice (UCMJ).”).

<sup>342</sup> See Meghna Chakrabarti, *Life After an Other-Than-Honorable Discharge*, NPR (Dec. 12, 2013, 1:40 PM), <https://www.npr.org/transcripts/250543667> [<https://perma.cc/Y93A-HPSH>] (detailing a conversation with former service members about how an Other than Honorable Discharge negatively affected their civilian lives); see also VETERANS HEALTH ADMINISTRATION, U.S. DEP’T OF VETERANS AFF., OTHER THAN HONORABLE DISCHARGES: IMPACT ON ELIGIBILITY FOR VA HEALTH CARE BENEFITS, IB 10-448 (2017), [https://www.va.gov/healthbenefits/resources/publications/IB10-448\\_other\\_than\\_honorable\\_discharges\\_5\\_17.pdf](https://www.va.gov/healthbenefits/resources/publications/IB10-448_other_than_honorable_discharges_5_17.pdf) [<https://perma.cc/GZ57-JPQ6>] (describing how an Other than Honorable Discharge characterization can negatively affect VA benefits).

<sup>343</sup> See sources cited *supra* note 321.

<sup>344</sup> See MCM, *supra* note 184, at II-28 (R.C.M. 306(c)(2)).

<sup>345</sup> Stephen Gerras & Col. Charles Allen, *Strategic Leadership and Organizational Culture*, in STRATEGIC LEADERSHIP: THE GENERAL’S ART 177, 189 (Mark Grandstaff & Georgia Sorensen eds., 2008).

<sup>346</sup> See *id.* at 190 (recalling that officers would get GOMORs if they were caught driving drunk, “significantly reduc[ing] their chances of subsequent promotion); see also U.S. DEP’T OF ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-7, at 7 (May 22, 2006) (providing a joint regulation shared between all branches of the military, alternatively titled OPNAV 1120.5D, AFI 31-218(I), MCO 5110.1D, and DLAR 5720.1).

<sup>347</sup> See Bojan, *supra* note 198, at 1170, 1195 (stating that GOMORs, which are generally perceived as career killers in the military, are automatically given to service members who receive a DUI); see also USAG Stuttgart Law Center, *How a DUI Forever Changed a Local Soldier’s Career*, ARMY.MIL (Apr. 11, 2016), [https://www.army.mil/article/165772/how\\_a\\_](https://www.army.mil/article/165772/how_a_)

reforms, DUI is arguably taken far more seriously in the military than in many civilian workplaces.<sup>348</sup> As a result of the use of GOMORs in this context, in today's military, it is simply understood that DUI will impact a military career. As a consequence, there is far less cultural acceptance of driving under the influence of alcohol.<sup>349</sup>

If DOD leadership were to issue directives instructing GOMORs to be filed in cases where a preponderance of the evidence supported a finding of sexual harassment, it could create the same sort of cultural shift that was achieved with DUI. While some have expressed concern about due process when using GOMORs, given their serious career ramifications,<sup>350</sup> the simple fact is that criminal burdens of proof are not well-suited to address sexual harassment allegations. Moreover, the use of this punitive administrative action would only result after an investigation into the alleged sexual harassment, with the alleged perpetrator having an opportunity to respond before a GOMOR is filed in their record.<sup>351</sup> Additionally, even though they are classified as administrative actions, GOMORs have a stigma attached to them that is difficult to convey to those outside the military; they are considered far more serious than nonjudicial punishment under Article 15.<sup>352</sup>

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dui\_forever\_changed\_a\_local\_soldiers\_career [https://perma.cc/4FMJ-LCWU] (discussing the long-term negative consequences on a soldier's career after having received a DUI and a general officer letter of reprimand).

<sup>348</sup> This assertion is primarily based on co-author Sagen Gearhart's experience as an Officer in the U.S. Army. While a DUI might have may or may not have some impact on an individual's civilian job, it absolutely will affect a military career.

<sup>349</sup> See Gerras & Allen, *supra* note 345, at 190 (noting that allocation of rewards and status is a powerful motivator of culture change in the military, and that "[t]he power of a mechanism that effects evaluations and promotions cannot be overstated."). Even though "negative impact on promotion" is technically less severe than court-martial or nonjudicial punishment, it may seem more immediate and pressing to the average servicemember, who might see UCMJ punishment as remote or unlikely, and therefore be a better motivator of conduct.

<sup>350</sup> See Bojan, *supra* note 198, at 1153 (expressing concern about a perceived lack of due process for punitive reprimands in the Army).

<sup>351</sup> Department of Defense Equal Opportunity policy mandates a unit level investigation for unrestricted reports of sexual harassment. See DODI 1020.03, *supra* note 285, § 4.4(a)–(b), at 14 (Feb. 8, 2018) (instructing that within 72 hours of receiving a complaint of sexual harassment, the service members commanding officer will forward the complaint to their next superior officer who is authorized to convene a general court-martial and begin an investigation of the complaint); see also ARMY REG. 600-37, *supra* note 199, para. 3-4(d), at 4 (specifying that notice and opportunity to respond must be given to recipients of GOMORs before a filing determination is made).

<sup>352</sup> This is based somewhat on the co-author Sagen Gearhart's experience in the military, but nonjudicial punishment is commonly understood to be a limited punishment, whereas GOMOR's are commonly understood to be very serious. See MCM, *supra* note 184, at V-2 (outlining nonjudicial punishment process under the Uniform Code of Military Justice); see also Bojan, *supra* note 198, at 1175 (stating that filing a GOMOR in a soldier's personnel file "has the same effect as a general officer saying, '[y]our career is over.'").

As seen with DUI, stigma attaches to offenses where service members expect that GOMORs will be used.

### C. Remedies: Compensating Victims, Reining in Feres

Civilian employees who are sexually harassed can sue their employers for employment discrimination, for which compensatory and punitive damages, up to statutorily set limits, are available under Title VII.<sup>353</sup> This includes federal employees.<sup>354</sup> Although not common,<sup>355</sup> employees who are sexually harassed can also file tort claims against their employers or perpetrators.<sup>356</sup> Remedies for sexual harassment (and assault) within the military justice system, in contrast, focus on disciplining the perpetrator. The UCMJ does not provide compensation for the victim or incentivize systemic accountability. As discussed previously,<sup>357</sup> this regulatory framework excluding military personnel from the protections of civil rights and tort law is the result of federal courts' interpretation of Title VII<sup>358</sup> and the Supreme Court's decision in *Feres v. United States*,<sup>359</sup> which federal courts have

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<sup>353</sup> See 42 U.S.C. § 1981(b)(3). Congress amended Title VII in 1991 to allow sex harassment victims to sue for compensatory and punitive damages. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (codified at 42 U.S.C. § 1981). Punitive damages are not available against the government, however. 42 U.S.C. § 1981a(b)(1).

<sup>354</sup> *West v. Gibson*, 527 U.S. 212, 217 (1999) (holding that the Equal Employment Opportunity Commission (EEOC) has the legal authority under § 2000e-16(b) of the 1964 Civil Rights Act to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII).

<sup>355</sup> See Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 974–84 (2020) (discussing difficulties survivors face pursuing tort claims against perpetrators, mainly because lawyers will not take their cases); cf. Martha Chamallas, *Will Tort Law Have Its #MeToo Moment?*, 11 J. TORT L. 39, 45 (2018) (noting that tort claims against sexual assault perpetrators are rare).

<sup>356</sup> Joanna Stromberg, Comment, *Sexual Harassment: Discrimination or Tort?*, 12 UCLA WOMEN'S L.J. 317, 318 (2003) (advocating the use of assault and battery claims to challenge workplace sexual harassment).

<sup>357</sup> See *supra* notes 178–181 and accompanying text.

<sup>358</sup> The federal circuit courts to have considered the question have unanimously held that Title VII does not cover military service members, ostensibly based on concerns over military discipline and Congress's inaction in reversing the judicially-created exemption, see sources cited *supra* note 174, and the Supreme Court has repeatedly denied review of the issue, including as recently as 2020. See *Jackson v. Modly*, 949 F.3d 763 (D.C. Cir. 2020), *cert. denied sub nom.* *Jackson v. Braithwaite*, No. 20-19, 2020 WL 6829074 (U.S. Nov. 23, 2020); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978).

<sup>359</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

expanded over time to prohibit virtually all civil suits against the government by service members.<sup>360</sup>

The primary justifications for the *Feres* doctrine—that sexual misconduct claims will disrupt military discipline and that those who experience sexual harassment can be compensated with military benefits<sup>361</sup>—are especially unconvincing when applied to victims of sexual harassment. Military benefits are not designed to address the psychological and economic harms of sexual harassment, which are significant.<sup>362</sup> Research finds extensive psychological effects, including depression, anxiety, panic disorders, and post-traumatic stress disorder.<sup>363</sup> One national study of 3,006

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<sup>360</sup> In *Feres*, the Supreme Court held that uniformed members of the armed services may not bring suit under the Federal Tort Claims Act for injuries that “arise out of or are in the course of activity incident to service.” *Id.* Since then, the courts have expanded the doctrine to apply broadly to bar suits against the government for injuries sustained in many circumstances far removed from their military duties, including injuries sustained as a result of discrimination otherwise prohibited by Title VII and the Constitution. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 304–05 (1983) (barring constitutional claims for race discrimination); *Martinez v. McCarthy*, No. 20-1746-cv, 2020 WL 7579516, at \*2 (2d Cir. Dec. 22, 2020) (barring Title VII sex and race-based discrimination, harassment, and retaliation claims); *Johnson v. Alexander*, 572 F.2d 1219, 1223–24 (8th Cir. 1978) (barring Title VII race discrimination claim).

<sup>361</sup> Generally, compensation to injured service members is provided pursuant to the Veterans Benefits Act (BVA). *See generally* 38 U.S.C. §§ 101–4335.

<sup>362</sup> *See Gregory C. Sisk, The Peculiar Obstacles to Justice Facing Federal Employees Who Survive Sexual Violence*, 2019 U. ILL. L. REV. 269, 281 (“As with workers’ compensation generally, the VBA is not designed to address th[e] unique violation to personal dignity” caused by sexual violence).

<sup>363</sup> *See* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 187–89 (2005) (reviewing research on psychological effects of sexual harassment); WILLIAM E. FOOTE & JANE GOODMAN-DELAHUNTY, EVALUATING SEXUAL HARASSMENT: PSYCHOLOGICAL, SOCIAL, AND LEGAL CONSIDERATIONS IN FORENSIC EXAMINATIONS 130–31 (2005) (reviewing research on PTSD effects of sexual harassment); Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 166–69 (William O’Donohue ed., 1997) (finding in a national study of more than 3,000 randomly sampled women that those who experienced sexual harassment were more likely to be diagnosed with a range of psychological disorders, including depression, anxiety, and PTSD); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 30 (1993) (citing studies on the psychological impacts of sexual harassment); Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC’Y & MENTAL HEALTH 89, 101 (2011) (finding that harassment early in a person’s career has long-term effects on depressive symptoms in adulthood); Kimberly T. Schneider, Suzanne Swan & Louise F. Fitzgerald, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCH. 401, 412–13 (1997) (finding that sexual harassment, even at relatively low frequencies, exerts a significant negative impact on psychological well-being; “harassment apparently does not have to be particularly egregious to result in negative consequences.”).

adults found that 21.9% of those surveyed who had experienced harassment that met the EEOC definition of sexual harassment were currently experiencing major depressive disorder.<sup>364</sup> Although less well studied, research finds physical symptoms as well, including “stomach and appetite problems, sleep disorders, headaches, and crying spells, just to name some.”<sup>365</sup> Economic and job effects of sexual harassment are also significant. According to one DOD survey, more than half of female and more than one-third of male service members who experienced unwanted sexual contact or harassment indicated that they thought about getting out of their service due to the experience.<sup>366</sup> Likewise, studies in the civilian context also find significant economic effects of sexual harassment, including being demoted, reassigned, or fired after reporting or quitting in response to harassment rather than reporting.<sup>367</sup>

Even accepting the basic principle of *Feres* that “the Government is not liable under the . . . Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service,”<sup>368</sup> the idea that “service” should include the harms of sexual misconduct is at odds with any common or ordinary understanding of the term. Every current and former service member in the military understands that wearing a uniform comes with

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<sup>364</sup> See Dansky & Kilpatrick, *supra* note 363, at 166.

<sup>365</sup> BEINER, *supra* note 363, at 187; see also Dansky & Kilpatrick, *supra* note 363, at 168 (surveying studies finding health effects including headaches, gastrointestinal disturbance, sleep disturbance, fatigue, nausea, and weight loss).

<sup>366</sup> See 2012 WGRA SURVEY, *supra* note 129, at 67–68. An earlier study of the military by independent researchers Magley and colleagues found similar results. Vicki J. Magley, Craig R. Waldo, Fritz Drasgow & Louise F. Fitzgerald, *The Impact of Sexual Harassment on Military Personnel: Is It the Same for Men and Women?*, 11 MIL. PSYCH. 283, 297 (1999) (finding that military personnel who were sexually harassed were less satisfied with work, colleagues, and supervisors; less committed to the military; and experienced reduced work productivity).

<sup>367</sup> Just to provide one very reliable example, the 2016 United States Merit System Protection Board Study of more than 42,000 federal employees found that during the two-year period from 2014 to 2016, as a consequence of sexual harassment, 17% of sexual harassment targets reported using annual leave; 17% reported using sick leave; 13% reported being denied a promotion, pay increase, good performance rating, or good reference; 6% transferred or quit; and 22% reported a decline in productivity. OFFICE OF POLICY AND EVALUATION, U.S. MERIT SYSTEMS PROTECTION BOARD, UPDATE ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: RESEARCH BRIEF 9 (2018), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT> [<https://perma.cc/SJ7L-TMRY>]; U.S. MERIT SYSTEMS PROTECTION BOARD, MERIT PRINCIPLES SURVEY 2016 DATA AND METHODOLOGY 3 (2016), [https://www.mspb.gov/foia/Data/MSPB\\_MPS2016\\_MethodologyMaterials.pdf](https://www.mspb.gov/foia/Data/MSPB_MPS2016_MethodologyMaterials.pdf) [<https://perma.cc/C4BB-YLSZ>] (reporting response rate for the 2016 Merit Systems Protection Principles Survey of federal employees); see also BEINER, *supra* note 363, at 10 (“One of the more reliable series of studies of working populations is that of the USMSPB.”)

<sup>368</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).



risk, including giving one's life, but it can hardly be said that sexual harassment and sexual assault are expected risks of military service, unless one is referring to the risk of rape by an enemy. Sexual harassment does not obviously advance any military mission and in fact undermines the effectiveness of the military given its negative impacts on job satisfaction and performance.<sup>369</sup>

The absence of an economic remedy also fundamentally undermines the DOD's efforts to increase reporting of sexual misconduct.<sup>370</sup> Without any meaningful remedy, service members have almost no incentive to report discrimination, all the more so in light of the common experience of retaliation for making a report.<sup>371</sup> It is easy to see how the cost of reporting outweighs any potential personal or organizational benefits. Moreover, by undermining accountability, the *Feres* doctrine creates the ideal conditions for sexual harassment and other kinds of sexual misconduct to flourish in the military.<sup>372</sup>

To modernize the military justice system, military victims of sexual harassment (and other sexual misconduct, for that matter) should receive the same protections as civilian victims, including the ability to obtain compensatory damages. We note here that this proposal is not beyond the pale; there are multiple avenues to reign in *Feres*. More than one Supreme Court Justice has questioned *Feres*, including some of the Court's more conservative members,<sup>373</sup> and the Court will soon decide whether to hear a case asking it to revisit the

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<sup>369</sup> See NiCole T. Buchanan, Isis H. Settles, Angela T. Hall & Rachel C. O'Connor, *A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the U. S. Military*, 70 J. SOC. ISSUES 687, 689 (2014) ("Sexual harassment affects the organization because targeted employees report decreased performance and organizational commitment, as well as increased withdrawal, turnover, and team conflict.") (internal citation omitted).

<sup>370</sup> See discussion *supra* Sections II.B.1 and II.C.1.

<sup>371</sup> See sources cited *supra* notes 147–149 and accompanying text.

<sup>372</sup> See Dwight Stirling, *The Feres Doctrine and Accountability*, 1 J.L. POL'Y & MIL. AFF 1, 3 (2019) (finding that the *Feres* doctrine has wrought "institutionalized lawlessness" in the military).

<sup>373</sup> See *Daniel v. United States*, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from denial of certiorari) ("[D]enial of relief to military personnel and distortions of other areas of law to compensate [] will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*."); *id.* at 1713 (majority opinion) ("Justice Ginsburg would grant the petition for a writ of certiorari [in a case asking the Court to overturn the *Feres* doctrine.]; Lanus v. United States, 570 U.S. 932, 932 (2013) (Thomas, J., dissenting from denial of certiorari) (reasoning that there is no support for *Feres* in the text of the Federal Tort Claims Act and that *Feres* "has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees."); *United States v. Johnson*, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting, joined by Brennan, Marshall, Stevens, J.J.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)).

doctrine.<sup>374</sup> Moreover, in 2020, Congress took the first step by carving out a limited exception to the doctrine, providing for a settlement process run through the Department of Defense for certain tort suits against the military involving medical malpractice.<sup>375</sup> If the Court does not weigh in to fix the injustice and overbreadth of *Feres*—which it unequivocally should—Congress could expand this new program to include an avenue for monetary compensation for service members who experience sexual assault and harassment.<sup>376</sup>

In sum, the *Feres* doctrine does not serve the military's mission, and by deterring reporting, it undermines the military's efforts to address sexual harassment. As such, eliminating or at least narrowing this doctrine is crucial, along with removing sexual harassment investigations from the chain of command and utilizing administrative actions to punish sexually harassing conduct. If these changes were implemented alongside a dedicated penal article on sexual harassment, the UCMJ would more closely resemble civil employment discrimination law.

## CONCLUSION

Since World War II, the military has evolved significantly to reflect the demographics of the entire country as well as its societal and cultural norms. This progress was achieved through broader recognition and protection of service members' individual rights, including their due process

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<sup>374</sup> See *Doe v. United States*, 140 S.Ct. 2016, 2016 (2020) (granting motion to file petition for writ of certiorari). The case before the Court involves a young woman who was raped by a fellow cadet while on a walk one evening at West Point. According to briefs filed in the case, authorities at West Point failed to adequately respond to the reported rape and in fact encouraged the environment of sexual harassment that led to the student's rape. Receiving no assistance with her ordeal, she withdrew from the academy and filed suit for damages against the U.S. government. See Brief of Federal Courts and Constitutional Law Professors as Amici Curiae in Support of Petitioner, at 1, 22, *Doe v. United States*, 140 S.Ct. 2016 (2020) (No. 20-559).

<sup>375</sup> See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 731, 133 Stat. 1198, 1457-60 (2019) (codified at 10 U.S.C. § 2733a).

<sup>376</sup> Or Congress could take more sweeping action and give service members the same civil rights protections and access to civilian courts as civilian employees. With President Biden's election and democratic gains in the Senate, Senator Kristin Gillibrand announced that she is presently working with civil rights groups to draft such legislation. See Phil Stewart, *Exclusive: Senator Gillibrand Eyes Extending Civil Rights Act Protections to U.S. Troops*, REUTERS (Jan. 18, 2021, 2:59 PM), <https://www.reuters.com/article/us-usa-military-civil-rights-exclusive/exclusive-senator-gillibrand-eyes-extending-civil-rights-act-protections-to-u-s-troops-idUSKBN29N1W8> [<https://perma.cc/J2RF-SJ9R>]. It is unclear whether Congress would pass such a law, however, given its sharp divisions. *Id.* As we have detailed in this Article, a compelling alternative is to permit the military to maintain an independent justice system but, in exchange, require the Department of Defense to provide functionally equivalent civil rights protections to military personnel.

rights<sup>377</sup> and the rights of racial minorities, women, sexual minorities, and, most recently, transgender individuals, to be free of discrimination and fully integrated into the Armed Forces.<sup>378</sup> Slowly, and with struggle, the military has modernized. Yet this process is unfinished. It is time for the Department of Defense to make good on its asserted commitment to sex and gender equality, propounded in its hundreds of reports, studies, investigations, and directives issued in the past thirty years. Confronting the military's decades-old problem with sexual assault and harassment is an urgent issue.

Under Article I of the Constitution, the DOD maintains a separate justice system, largely insulated from the mandates of the civil and criminal justice systems that regulate civilians in the United States. The military's separate legal order has too often reflected cultural and legal norms that are insufficiently concerned with individual rights. Women and other vulnerable groups are particularly at risk when separate legal systems such as the military's embrace overtly racist, patriarchal, and homophobic ideals. In the case of sexual assault and harassment, the UCMJ and its legal processes lack core protections for victims, including the right to an independent investigation and adjudication of sexual assault and harassment complaints and the ability to receive compensation for injuries caused by sexual misconduct.

The Secretary of Defense has the authority to prescribe policies and regulations for DOD employees, including those regulations pertaining to equal opportunity and nondiscrimination.<sup>379</sup> Congress has the authority to establish qualifications for and conditions of service in the Armed Forces.<sup>380</sup> Military courts, authorized by Article I of the U.S. Constitution, have jurisdiction over cases involving military service members.<sup>381</sup> Finally, constitutional rights identified by the Supreme Court generally apply to members of the military,<sup>382</sup> with some limitations.<sup>383</sup> Despite this extensive authority, none of these government institutions has held the military sufficiently accountable to the modern understandings or legal requirements of sex and gender equality.

This gap between the civilian legal system and the military justice system has implications for both the military and American society. Sexual assault and harassment hinder recruitment, undermine service members'

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<sup>377</sup> See *supra* notes 236–237 and accompanying text.

<sup>378</sup> See discussion Part I, *supra*.

<sup>379</sup> 5 U.S.C. § 301.

<sup>380</sup> U.S. CONST., art. I, § 8.

<sup>381</sup> 10 U.S.C. §§ 803, 816–21.

<sup>382</sup> See ANNA C. HENNING, CONG. RSCH. SERV., RL34697, SUPREME COURT APPELLATE JURISDICTION OVER MILITARY COURT CASES 4 (2009); KAMARCK, *supra* note 4, at 12–15.

<sup>383</sup> *United States v. Marcum*, 60 M.J. 198, 208 (C.A.A.F. 2004) (rejecting a facial challenge to the UCMJ Article 125 criminalizing sodomy in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)). *Marcum* involved a former Air Force sergeant convicted for engaging in consensual sex with men under his supervision. *Id.* at 200.

performance, and waste considerable administrative, legal, and intellectual resources, undermining the military's overall effectiveness and mission. Ongoing tolerance of sex discrimination and sexual misconduct in the military also has societal-wide effects, perpetuating inequality in American society.

The good news is that there is already a significant legal and administrative infrastructure in place enabling the military to modernize the military justice system to effectively deter, adjudicate, and punish sexual assault and harassment. Title VII's statutory language and Supreme Court precedent interpreting Title VII are already reflected in DOD policies and directives. The UCMJ already provides for administrative punishments that utilize a civil burden of proof appropriate for sexual harassment claims. Although the Supreme Court has yet to set aside precedent that precludes compensating service members for torts and discrimination they may experience, more than one justice has signaled that the doctrine is ripe for reconsideration, and the DOD has started to make exceptions for certain injuries not incident to service. The military justice system can be modernized from the inside out. And indeed, it must if the military is to justify its continued independence from the civilian legal system.

Taking a critical look at the military's record on the matter of sexual misconduct should not be construed as an assertion that the Armed Forces are inherently objectionable, nor should we believe that critiques of the military are inherently unpatriotic. Such binary stances have become increasingly commonplace now that the average American has little affiliation with the military. Rather, the military is a cross section of America, with all of its strengths and weaknesses. It is this representative nature that makes the military a worthwhile focus of critical discussion and why we should care about how the military addresses sexual harassment and sexual assault.