

TEMPLE LAW REVIEW

© 2022 TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF
HIGHER EDUCATION

VOL. 94 NO. 2

WINTER 2022

ARTICLES

ADDRESSING SEXUAL MISCONDUCT IN THE UNITED STATES MILITARY: AN ORGANIZATIONAL APPROACH

*Laura T. Kessler**

ABSTRACT

Sexual assault and harassment are ongoing problems in the military. This Article examines this problem from an organizational perspective. Social science research finds that organizational climate and composition strongly predict the occurrence of sexual harassment. A positive organizational climate decreases the prevalence of sexual harassment, reduces retaliation against those who report it, and lessens its job-related and psychological impacts. In contrast, organizations that tolerate sexual harassment are associated with greater levels of harassment and worse outcomes for victims. Workplaces where men significantly outnumber women are also associated with increased rates of sexual harassment.

Building on this social science research, this Article proposes a set of legal and policy reforms designed to improve the representation of women in the military and reduce its hypermasculine culture. These reforms include establishing diversity goals and targets, instituting gender-neutral physical fitness tests, and requiring draft registration for all qualified individuals irrespective of sex. As this Article's analysis demonstrates, these organizational reforms would serve the interests of the country and are arguably mandated by the Constitution.

* Professor of Law, University of Utah, S.J. Quinney College of Law; kesslerl@law.utah.edu. Inspiration and ideas for this article grew out of my previous research with Sagen Gearhart on sexual harassment and military justice reform published in the *University of Pennsylvania Journal of Law & Public Affairs* and many excellent conversations with students in my research seminar on sexual harassment, violence, and law. I would like to thank Rachel Arnov-Richman, Shima Baradaran Baughman, Deborah Dinner, Sagen Gearhart, Julie Goldscheid, and Jana Singer for their comments on earlier drafts of this Article. Alexa Horn, Dylan Raymond, and Alice Vaden provided outstanding research assistance. Thank you also to Beth Jennings and the other outstanding librarians of the S.J. Quinney Law Library for their support of this research. All errors are my own.

The military is an ideal institution to examine the organizational underpinnings of sexual misconduct. It is one of the largest work organizations in the United States, and the Department of Defense collects and reports extensive, reliable data on diversity and sexual misconduct.

TABLE OF CONTENTS

INTRODUCTION.....	177
I. THE HISTORY OF WOMEN’S INTEGRATION IN THE MILITARY	186
II. SEXUAL MISCONDUCT IN THE MILITARY.....	193
<i>A. Two Decades of Data on Sexual Assault and Harassment</i>	193
<i>B. Devaluing Women</i>	201
1. The Marine Corps Example.....	204
2. Demographic Challenges.....	210
<i>C. The DOD’s Response</i>	212
III. ADDRESSING SEXUAL MISCONDUCT IN THE MILITARY: AN ORGANIZATIONAL APPROACH.....	213
<i>A. Recruiting, Promoting, and Retaining Women</i>	215
<i>B. Gender-Neutral Physical Fitness Standards</i>	219
1. A Brief History of Military Physical Fitness Testing	221
a. Basic Fitness Tests	221
b. Occupation-Specific Fitness Tests	222
c. The Recent Army Experiment	228
2. Gender-Normed Physical Fitness Tests Harm Both Male and Female Service Members	233
3. Gender-Normed Physical Fitness Tests May Be Unconstitutional.....	237
<i>C. Gender-Neutral Selective Service Registration</i>	242
1. The History of the Selective Service System.....	242
2. Male-Only Registration Harms Both Men and Women.....	246
3. Male-Only Registration Is Unconstitutional	248
CONCLUSION.....	252

INTRODUCTION[†]

The #MeToo movement has brought attention to the failure of institutions, such as workplaces and universities, to address sexual harassment.¹ The movement started in the

[†] A prefatory note: Feminism has always been uncertain and divided on the issue of women and war. One position, which is perhaps less predominant today, is that war is the ultimate masculine exercise; indeed, masculinity is formulated by and through war. See JEAN BETHKE ELSHTAIN, *WOMEN AND WAR* 233–41 (1987); CYNTHIA ENLOE, *DOES KHAKI BECOME YOU?: THE MILITARISATION OF WOMEN'S LIVES* (1983). Others note that militaries are not only a form of state-sponsored violence around the world; they are responsible for a kind of national domestic violence by diverting funding from social welfare expenditure. See Cynthia Cockburn, *War and Security, Women and Gender: An Overview of the Issues*, 21 *GENDER & DEV.* 433, 436 (2013). For those taking these positions, the concern is less focused on whether women can perform military roles than whether they should seek them in the first place. An alternate view is that women should have equal access to participate in the military as men because lack of participation has both material and social consequences. See generally IT'S OUR MILITARY, TOO!: *WOMEN AND THE U.S. MILITARY* (Judith Hicks Stiehm ed., 1996). Limiting women's opportunities in the military (especially for combat) blocks access to promotion and translates into a second-class citizenship, given the symbolic ties between military service and citizenship. Jean Bethke Elshtain has characterized these competing feminist positions as “no more war” and “the right to fight.” ELSHTAIN, *supra*, at 240.

Both sides of this debate have merit, I think. For me, this causes a great deal of ambivalence. Where I land on this issue, as reflected in this Article—and perhaps not entirely satisfactorily or persuasively, and admittedly perhaps more due to my own professional trajectory and proclivity for assimilation—is that women should be free to opt for inclusion within male-dominated institutions and structures of power if that is what they desire, whether due to conviction or circumstance. And as long as some women will adopt this strategy, we should work to degender the structure. See Claire Duncanson & Rachel Woodward, *Regendering the Military: Theorizing Women's Military Participation*, 47 *SEC. DIALOGUE* 3, 11–13 (2016). What I present here, therefore, is a modest proposal of institutional redesign for a demasculinized and degendered military, and perhaps consequently, a military rid of the sexual violence that is so endemic in this institution. Law has been central to the masculinization of the military, and it will be central to its undoing.

1. #MeToo is a social and political movement against sexual harassment and abuse. The phrase “Me Too” was coined, and the #MeToo movement founded, in 2007 by Tarana Burke, a Black woman who 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/XJ36-EBRD>]. The #MeToo movement spread virally in 2017 after actress Alyssa Milano posted a message on Twitter saying, “[i]f 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://nyti.ms/2HR1jgY>]. The movement also spurred an increase in sexual harassment claims in the United States. See Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), <https://www.eeoc.gov/newsroom/eeoc-releases-preliminary-fy-2018-sexual-harassment-data> [<https://perma.cc/9X95-AYVY>] (“[C]harges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017.”); Andrew Murphy & Terran Chambers, *Litigating Harassment in the #MeToo Era*, 76 *BENCH & BAR MINN.* 12, 13 (2019) (“The attention to sexual harassment coincided with a less publicized but steady uptick in the number of sexual harassment allegations in the workplace . . .”).

entertainment industry² and expanded to many industries and professions, from law³ to medicine,⁴ high tech,⁵ the service industry,⁶ retail and fashion,⁷ gaming,⁸ and even the oil industry.⁹ However, “women in the military have remained in the shadows.”¹⁰ Although women in the military have been speaking about sexual harassment and assault for decades, from the Tailhook sexual assault scandal in the early 1990s to the Marines United revenge porn scandal in 2017,¹¹ their efforts have been largely left out of the national sexual misconduct awareness movement.¹² As Iraq war veteran and spokesperson for the Service Women’s Action Network¹³ explained in a *Time Magazine* op-ed, “the military brass . . . pay lip service” to the problem, “when, as scandal after

2. See Garcia *supra* note 1; Carlsen et al., *supra* note 1; see also Holly R. Lake, *#MeToo Movement’s Impact on Law and Policy in Hollywood*, 42 L.A. LAW. 52 (2019).

3. Philip Bogdanoff, “Me Too”: *Sexual Misconduct in the Legal Profession*, 32 OHIO LAW. 12, 13–14 (2018).

4. Nigel Chiwaya, *New Data on #MeToo’s First Year Shows ‘Undeniable’ Impact*, NBC NEWS (Oct. 11, 2018, 1:54 PM), <https://www.nbcnews.com/news/us-news/new-data-metoo-s-first-year-shows-undeniable-impact-n918821> [<https://perma.cc/59S8-ENW2>] (explaining that the #MeToo movement began with media and Hollywood and then expanded to industries ranging from medicine to tech to retail).

5. *Id.*

6. See Amy-Xiaoshi DePaola, *The #MeToo Movement and Everyday Industries, Part 2*, DANIEL W. REYNOLDS NAT’L CTR. FOR BUS. JOURNALISM (Sept. 19, 2018), <https://businessjournalism.org/2018/09/the-metoo-movement-and-everyday-industries-part-two/> [<https://perma.cc/CM4Z-PSV7>] (talking about the #MeToo movement expanding into different service industries).

7. Leah Bourne, *In the Shadow of #MeToo, Designers Find New Ways To Get Political at Fashion Week*, GLAMOUR (Feb. 8, 2018), <https://www.glamour.com/story/me-too-new-york-fashion-week-fall-2018> [<https://perma.cc/VKY4-CY9D>] (“Models, who are often underage or don’t have proper advocates, have long experienced harassment behind closed doors, with little recourse. . . . Brands are finally prioritizing inclusive casting. . . . while having open dialogues surrounding the fair treatment of models this fashion week, something made possible by the #MeToo movement.”).

8. Liz Lanier, *Is the Games Industry Getting Its #MeToo Movement*, FORBES (Aug. 28, 2019, 11:44 AM), <https://www.forbes.com/sites/lizlanier/2019/08/28/is-the-games-industry-getting-its-metoo-movement/#3b2f86175202> [<https://perma.cc/2YWY-SPAA>].

9. Erin Douglas, *Will Oil Industry Finally Start Talking About #MeToo?*, HOUS. CHRON. (Apr. 17, 2019, 11:32 AM), <https://www.houstonchronicle.com/business/energy/article/After-Anadarko-will-Big-Oil-finally-start-13773157.php> [<https://perma.cc/N3BU-4BTW>].

10. Jennifer Steinhauer, *A #MeToo Moment Emerges for Military Women After Soldier’s Killing*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/11/us/politics/military-women-metoo-fort-hood.html> [<https://perma.cc/K6PS-5UDQ>].

11. See *infra* Parts II.A, II.B.1.

12. See Hope Hodge Seck, *Veterans’ Group Calls on Troops To Own the ‘Me Too’ Movement*, MILITARY.COM (Jan. 7, 2018) [hereinafter Seck, *Veterans’ Group Calls on Troops*], <https://www.military.com/daily-news/2018/01/07/veterans-group-calls-troops-own-me-too-movement.html> [<https://perma.cc/9FFE-S2K7>] (“[T]he military . . . has been addressing the realities of sexual assault in the ranks for years, [but] has been largely absent from the [#MeToo] movement.”).

13. Service Women’s Action Network is “a member-driven community network advocating for the individual and collective needs of service women” representing “350,000 service women and 2 million women veterans in the United States.” *About*, SERV. WOMEN’S ACTION NETWORK, <https://www.servicewomensactionnetwork.org/about> [<https://perma.cc/G4SX-GHKZ>] (last visited Feb. 1, 2022).

scandal shows, sexual predators in the military continue to harass and assault with impunity.”¹⁴

But the recent, tragic murder of a twenty-year-old enlisted woman may finally be bringing greater attention to the issue of sexual violence and harassment in the military.¹⁵ Vanessa Guillén was an arms repair specialist at Fort Hood, Texas.¹⁶ She revealed to family and friends that she had been sexually harassed by a fellow soldier at Fort Hood but did not file an official report for fear of reprisal.¹⁷ On April 23, 2020, Guillén was reported missing; her remains were found near the Leon River in Bell County, Texas, on June 30, 2020.¹⁸ A federal complaint identified Specialist Aaron Robinson as the murderer.¹⁹ As police approached Robinson, he killed himself with a pistol.²⁰ Details of the murder were provided by Robinson’s girlfriend, Cecily Aguilar.²¹ Aguilar claimed that Robinson repeatedly struck Guillén on the head with a hammer until he killed her.²² He hid Guillén’s body in a large box, and with the help of Aguilar, dismembered and burned Guillén’s body.²³ Guillén’s family reported that Robinson was the soldier sexually harassing her.²⁴ Immediately after her disappearance, soldiers began sharing their accounts of sexual assault and harassment on social media,²⁵ and in July 2020, after Vanessa Guillén’s body was found, survivors of sexual assault and harassment in the military began sharing their stories using the hashtag #IAMVanessaGuillen.²⁶

14. Antonietta Rico, *Why Military Women Are Missing from the #MeToo Moment*, TIME (Dec. 12, 2017, 11:27 AM), <https://time.com/5060570/military-women-sexual-assault/> [https://perma.cc/J725-8QKX].

15. See Michael Barbaro, *The Daily, A #MeToo Moment in the Military: What Happened to 20-Year-Old Specialist Vanessa Guillen, and How the United States Responded.*, N.Y. TIMES, at 04:38 (July 31, 2020), <https://www.nytimes.com/2020/07/31/podcasts/the-daily/vanessa-guillen-military-metoo.html> [https://perma.cc/RHR5-EXX8].

16. See *id.*

17. Kyle Rempfer, *Army Says Fort Hood Meets Harassment Standards, but Review Didn’t Include Vanessa Guillen’s Unit*, ARMY TIMES (July 29, 2020), <https://www.armytimes.com/news/your-army/2020/07/29/army-insists-fort-hood-meets-harassment-standards-but-didnt-review-vanessa-guillens-unit/> [https://perma.cc/3RB2-28BG]; see also Johnny Diaz, Maria Cramer & Christina Morales, *What To Know About the Death of Vanessa Guillen*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/article/vanessa-guillen-fort-hood.html> [https://perma.cc/AG6N-VH2E] (detailing events and circumstances surrounding Specialist Guillén’s death).

18. Diaz et al., *supra* note 17.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See Acacia Coronado, *‘The Military’s #MeToo Moment:’ Fort Hood Victims Speak Out*, AP NEWS (Oct. 7, 2020), <https://apnews.com/article/army-media-social-media-sexual-assault-texas-c7277011ba4b7300bf7a9708b0ca82b2> [https://perma.cc/2E35-XR34].

25. *Id.*

26. Diana Stancy Correll, *I Am Vanessa Guillen Act Unveiled To Reform How Military Addresses Sexual Misconduct*, MIL. TIMES (Sept. 16, 2020), <https://www.militarytimes.com/news/your-military/2020/09/16/i-am-vanessa-guillen-act-unveiled-to-reform-how-military-addresses-sexual-misconduct/> [https://perma.cc/N2M9-TKCF]; see also Coronado, *supra* note 24 (“Many victims have become connected by sharing their experiences using the hashtag #IAMVANESSAGUILLEN.”).

Shortly after taking office, President Joseph R. Biden Jr. pledged that sexual misconduct in the military is one of his top priorities.²⁷ On March 9, 2021, he said:

We have to take on sexual assault and harassment and violence against women in the military. Sexual assault is abhorrent and wrong at any time. And in our military, where so much of unit cohesion is built on trusting your fellow service members to have your back, there's nothing less than a threat to our national security.²⁸

President Biden directed Secretary of Defense Lloyd Austin to establish an Independent Review Commission (IRC) to conduct a ninety-day review of sexual assault in the military.²⁹ The IRC's findings and recommendations were released in June 2021, notably recommending that "special victim" offenses, such as sexual assault, sexual harassment, stalking, and domestic violence, be removed from the prosecutorial discretion of unit commanders and placed in the hands of independent military attorneys.³⁰ President Biden endorsed the IRC's recommendations,³¹ and in September 2021, the Department of Defense (DOD) issued a directive to implement them through a series of actions, with the highest priority of removing prosecutorial authority from commanders by 2027.³²

27. Morgan Chalfant & Ellen Mitchell, *Biden Pledges To End 'Scourge of Sexual Assault in the Military'*, HILL (Mar. 8, 2021, 5:22 PM), <https://thehill.com/policy/defense/542195-biden-pledges-to-end-scourge-of-sexual-assault-in-the-military> [https://perma.cc/86RS-X5DH].

28. Joseph Guzman, *Biden Vows To Tackle Epidemic of Sexual Assaults in US Military*, HILL (Mar. 9, 2021), <https://thehill.com/changing-america/respect/equality/542277-biden-vows-to-tackle-epidemic-of-sexual-assaults-in-us> [https://perma.cc/7ZQJ-LYTZ].

29. See Memorandum from Lloyd Austin, Sec'y of Def., to Senior Pentagon Leadership, Commanders of the Combatant Commands, Def. Agency & DOD Field Activity Dirs. on Immediate Actions To Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission (Feb. 26, 2021), <https://media.defense.gov/2021/Feb/26/2002590163/-1/-1/0/APPROVAL-OF-MEMO-DIRECTING-IMMEDIATE-ACTIONS-TO-COUNTER-SEXUAL-ASSAULT-AND-HARASSMENT.PDF> [https://perma.cc/P8SB-KDWA].

30. INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., U.S. DEP'T OF DEF., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY* 3, 4, 8-9 (2021) [hereinafter *HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT*], <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF> [https://perma.cc/H44W-DAVP]. According to the IRC,

special victim crimes are cases that disproportionately impact victims because of who they are, or what motivated the crime. These crimes are often interpersonal in nature, in which the victim and the alleged offender may have a pre-existing relationship or acquaintance. These are also crimes that require greater specialization and a sensitivity to the complex dynamics that are often present in these cases.

INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., U.S. DEP'T OF DEF., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY*, APPENDIX B: *REBUILDING BROKEN TRUST: RECOMMENDATIONS FOR ACCOUNTABILITY IN THE MILITARY JUSTICE SYSTEM* 9 (2021) [hereinafter *HARD TRUTHS, APP. B*], <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF> [https://perma.cc/H44W-DAVP].

31. See Aamer Madhani & Lolita C. Baldor, *Biden Backs Changes in Military Sexual Assault Prosecution*, AP NEWS (July 2, 2021), <https://apnews.com/article/joe-biden-sexual-assault-government-and-politics-63631b41346bbbc871fae3d1b622f607> [https://perma.cc/G56L-6652].

32. See Memorandum from Lloyd Austin, Sec'y of Def., for Senior Pentagon Leadership, Commanders of the Combatant Commands, Def. Agency & DOD Field Activity Dirs. on Commencing DOD Actions and

Remarkably, Congress then passed a modest version of the reform in December 2021.³³ Perhaps now is finally the military's #MeToo moment. It would be long overdue.

Sexual assault and harassment are pervasive problems in the United States military. According to the DOD, an estimated 20,500 service members experienced sexual assault in 2018,³⁴ the most recent year for which prevalence data were collected. One in four female service members reported an experience of sexual harassment.³⁵ These figures represent a substantial increase from the previous survey in 2016,³⁶ and 2019 saw even further increases.³⁷ Moreover, military sexual misconduct affects people of all gender identities and sexual orientations. Service members who identify as sexual minorities—especially male service members identifying as gay or bisexual—experience sexual harassment and assault at disproportionately high rates.³⁸ By the DOD's own account, “[m]ilitary leadership has failed America's daughters and sons, and the Service members know it.”³⁹

The prevalence of sexual assault and harassment in the military is consistent with the military's long history of race, sex, and sexuality discrimination. African Americans were segregated from white troops until after World War II, when President Harry S. Truman ordered racial integration by executive order.⁴⁰ President Truman reached this

Implementation To Address Sexual Assault and Sexual Harassment in the Military (Sept. 22, 2021) [hereinafter Austin Sept. 2021 Memorandum], <https://media.defense.gov/2021/Sep/22/2002859809/-1/-1/0/DOD-ACTIONS-AND-IMPLEMENTATION-TO-ADDRESS-SEXUAL-ASSAULT-AND-SEXUAL-HARASSMENT-IN-THE-MILITARY.PDF> [<https://perma.cc/8W6K-9C5J>].

33. See discussion *infra* note 266.

34. 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://perma.cc/333G-9K44>]. Of the 20,500 service members reporting that they experienced sexual assault, 13,000, or 63%, were women, even though women make up only 16% of active-duty service members. *Id.*

35. See *id.* at 9.

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

37. 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://perma.cc/E3JM-T5P8>] (reporting a 3% increase in sexual assaults involving service members and a 10% increase in formal sexual harassment complaints from 2018 to 2019).

38. See HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 11 (noting that gay and bisexual men experienced sexual assault at a rate nine times higher than heterosexual men); Ashley C. Schuyler, Cary Klemmer, Mary Rose Mamey, Sheree M. Schragar, Jeremy T. Goldbach, Ian W. Holloway & Carl Andrew Castro, *Experiences of Sexual Harassment, Stalking, and Sexual Assault During Military Service Among LGBT and Non-LGBT Service Members*, 33 J. TRAUMATIC STRESS 257, 263 (2020) (finding that LGBT service members remain at an elevated risk of sexual and/or stalking victimization); see also Kerry Beckman, Jillian Shipherd, Tracy Simpson & Keren Lehavot, *Military Sexual Assault in Transgender Veterans: Results from a Nationwide Survey*, 31 J. TRAUMATIC STRESS 181, 185 (2018) (finding, based on a survey of transgender veterans, that 15.2% of female and 30% of male transgender veterans experienced sexual assault during their time in military service).

39. HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 12.

40. Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 7, 1946). 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

decision only after Black civil rights leaders pressured the President to integrate.⁴¹ Women were excluded from serving in the Regular Army until 1948.⁴² Even after 1948, it took many years for women to achieve anything near equal status in the military. Women were prohibited from serving in many occupations, particularly those related to combat arms, until as recently as 2015.⁴³ The military's "Don't Ask, Don't Tell" policy banned openly gay, lesbian, and bisexual individuals from serving in the military until 2010.⁴⁴ More recently, President Donald J. Trump banned transgender service persons from military service,⁴⁵ a ban that President Biden lifted in 2021.⁴⁶

Although Congress extended Title VII⁴⁷ to cover federal employees in 1972,⁴⁸ courts have held that Title VII does not apply to uniformed service members.⁴⁹ Instead, discrimination in the military is governed by military policy and the Uniform Code of

was abolished in September 1954. See DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 42–50 (2007).

41. See Kevin M. Kruse & Stephen Tuck, *Introduction* to *FOG OF WAR: THE SECOND WORLD WAR AND THE CIVIL RIGHTS MOVEMENT* 4 (Kevin M. Kruse & Stephen Tuck eds., 2012) ("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.").

42. Laura T. Kessler & Sagen Gearhart, *Sexual Harassment Is Not a Crime: Aligning the Uniform Code of Military Justice with Title VII*, 6 U. PA. J.L. REF. 414, 427–28 (2021).

43. See discussion *infra* Section I.

44. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

45. See *Military Service by Transgender Individuals*, 82 Fed. Reg. 41,319 (Aug. 30, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-08-30/pdf/2017-18544.pdf> [<https://perma.cc/7N97-JCK4>].

46. Executive Order 14,004 of January 25, 2021: Enabling All Qualified Americans To Serve Their Country in Uniform, 86 Fed. Reg. 7471 (Jan. 28, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-28/pdf/2021-02034.pdf> [<https://perma.cc/7EVB-74JV>].

47. Title VII of the Civil Rights Act of 1964 is the federal law that prohibits employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e. The Supreme Court has expanded Title VII's prohibition on sex discrimination in three significant respects. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court held that sexual harassment that results in a hostile work environment constitutes discrimination because of sex under Title VII. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court recognized that employment discrimination based on sex stereotypes (e.g., assumptions or expectations about how persons of a certain sex should dress, behave, etc.) is unlawful sex discrimination. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex.

48. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e–16).

49. 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, e.g., *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).

Military Justice,⁵⁰ which are in many respects less protective than Title VII.⁵¹ The military has made significant progress over the past fifty years in integrating racial minorities, women, and, more recently, gay and lesbian service members. It has also developed many detailed antidiscrimination policies.⁵² However, in practice, a great deal of discrimination occurs in the military that would be impermissible in the civilian sector.

Legal research and advocacy on sexual misconduct in the military have focused on laws that directly regulate discrimination and sexual misconduct. For example, legal experts have argued that Title VII should protect uniformed personnel.⁵³ Similarly, legal academics,⁵⁴ military experts,⁵⁵ and members of Congress⁵⁶ have proposed amending the Uniform Code of Military Justice so that victims of alleged sexual assault and harassment have the right to an independent adjudication of their complaints and the opportunity to receive monetary compensation for their injuries.⁵⁷ The DOD has proposed adding a stand-alone punitive article on sexual harassment to the Uniform Code of Military

50. 10 U.S.C. §§ 801–946; 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/Q6AQ-TKMS>].

51. For example, military policy and federal case law foreclose the availability of compensatory damages for injuries resulting from discrimination. *See, e.g.*, *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.

52. *See* KRISTY N. KAMARCK, CONG. RSCH. SERV., R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS 6–9 (2019) (summarizing military equal opportunity policy).

53. *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, 2108–09 (1987); 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, 217 (2019). Senator Kirsten Gillibrand (D-NY), a longtime leader on addressing sexual misconduct in the military, recently reported that she is developing legislation on this front. *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/TR7J-V6YL>].

54. *See* Kessler & Gearhart, *supra* note 42, at 472–76.

55. *See id.*

56. *See* Military Justice Improvement Act (MJIA), S. 1789, 116th Cong. (2019) (moving the decision over whether to prosecute certain serious sex-related offenses to independent, trained, professional military prosecutors); I am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. (2020) (requiring each military department to establish an Office of the Chief Prosecutor and transfer charging decisions for sex-related offenses, including sexual harassment and sexual assault, from the commander to the service's chief prosecutor).

57. *See* Kessler & Gearhart, *supra* note 42, at 471–85; 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, 183–85 (2007).

Justice.⁵⁸ These interventions, some of which may finally be implemented,⁵⁹ would go a long way toward addressing sexual misconduct in the military. At the same time, there is a dearth of research in law examining how the military's overall organizational context and culture contribute to its troubling record of sexual assault and harassment.

This Article seeks to fill this void by examining the organizational antecedents of sexual assault and misconduct in the military. It builds on the findings of a substantial body of social science research that finds organizational climate and composition strongly predict the occurrence of sexual harassment. A positive organizational climate decreases the prevalence of sexual harassment, reduces retaliation against those who report it, and lessens its job-related and psychological impacts. In contrast, organizations that tolerate sexual harassment are associated with greater levels of harassment and worse outcomes for victims. Workplaces where men significantly outnumber women are also associated with increased rates of sexual harassment.⁶⁰

The military is a male-dominated organization with a highly masculine climate and a decades-long record of stagnation in reducing incidents of sexual assault and harassment. Sexual misconduct has flourished in this environment. In 2021, women made up just 17.44% of the overall active-duty force⁶¹ and 19.24% of commissioned officers.⁶² The historic transformation of the military in 2015, allowing women to serve in all combat positions,⁶³ officially opened about 220,000 military jobs to women.⁶⁴ Yet, rather than being widely celebrated, this policy change sparked debate and resistance

58. Memorandum from Patrick M. Shanahan, Acting Sec'y of Def., to Sec'ys of the Mil. Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'y of Def. For Pers. and Readiness, Chiefs of the Mil. Servs., Chief of the Nat'l Guard Bureau & Gen. Couns. of the Dep't of Def. on 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/DD5H-ZNEU>].

59. See discussion *infra* note 266.

60. See discussion *infra* Section III.

61. DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., DoD PERSONNEL, WORKFORCE REPORTS & PUBLICATIONS: TABLE OF ACTIVE DUTY FEMALES BY RANK/GRADE AND SERVICE (2021) [hereinafter DMDC 2021 FEMALE ACTIVE DUTY POP. DATA], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports> (scroll down to "Active Duty Military Personnel by Service by Rank/Grade (Updated Monthly)"; then choose "October 2021 (Women Only)") [<https://perma.cc/22M6-C7BR>].

62. *Id.*

63. See Andrew Swick & Emma Moore, *The (Mostly) Good News on Women in Combat*, CTR. FOR A NEW AM. SEC. (Apr. 19, 2018), <https://www.cnas.org/publications/reports/an-update-on-the-status-of-women-in-combat> [<https://perma.cc/VE9B-DV6M>].

64. 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/D859-PTSJ>]. "[O]fficially" is used here because, in fact, women have been placed into combat situations in Afghanistan and Iraq since 2001. *Id.*

from within the military,⁶⁵ Congress,⁶⁶ and the general public,⁶⁷ exposing the negative attitudes about women's service that make addressing sexual assault and harassment so difficult.

As argued in this Article, the prevalence of sexual misconduct in the United States military is symptomatic of a larger organizational environment that is still not fully accepting of women's service. By organizational environment, I mean the decades-long tolerance of sexual misconduct, failure to integrate women into all occupations despite Congress's and the DOD's directions to do so, and the lack of representation of women in the military, especially in leadership positions. Without claiming to address all aspects of the problem, this Article suggests that shifting the military's culture and gender composition are essential components of the military's response to its troubling record of sexual misconduct. President Biden has recently stated he agrees with this assessment, suggesting that the time is ripe for an organizational approach to addressing the military's sexual misconduct problem.⁶⁸

Section I of this Article situates sexual assault and harassment in the military within the history of women's integration. The military has facilitated women's equality in American society in many respects, particularly once it opened up opportunities for women during World War II. Yet, women's integration within the military occurred very slowly and only in the face of great resistance. From this perspective, the military's ongoing challenges with sexual assault and harassment are a continuation of its long history of hostility to women's service.

65. The Marine Corps requested a waiver from the decision for certain frontline 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/8DQP-PGJH>]; 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/5QJV-Q82Y>] (“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/7NZ7-FL7Z>] (“The Marines were the only branch to ask for a waiver when the Pentagon ended the policy that excluded women from combat jobs.”).

66. For example, the decision to allow women to serve in combat positions “was immediately blasted by Representative Duncan Hunter, R-Calif., . . . a member of the 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/9PXD-XA9C>].

67. 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/RKU2-QE9P>].

68. See Chalfant & Mitchell, *supra* note 27 (reporting that Vice President Harris, while attending a press conference on sexual misconduct in the military with President Biden, stated “[r]ecruiting more women to our military, adjusting policies to retain more women, enforcing policies to protect women and ensure they are heard, and advancing more women on fair and equal footing will without any question make our nation safer”).

Section II provides an overview of sexual misconduct in the military and evaluates the DOD's insufficient response. Specifically, Part II.A examines statistics from the military's latest internal surveys on sexual harassment and assault, which demonstrate that the DOD is still struggling to reduce rates of sexual misconduct in the military. Part II.B discusses the persistence of a culture both inside and outside the military that devalues female members' service, particularly their participation in ground combat units. Part II.C analyzes the military's recommendation that DOD must develop "climate assessment tools" to identify emerging climate challenges within particularly problematic units. While it is hard to disagree with the idea of getting ahead of problems, this recommendation suggests that DOD fails to grasp the organization-wide issues that make the military a high-risk environment for sexual misconduct.

Finally, Section III turns to solutions. Building on research examining the organizational antecedents of sexual misconduct, this Article proposes a set of legal reforms designed to increase women's representation in the military and reduce the military's hypermasculine culture. The proposed reforms include establishing clear diversity goals and targets, instituting gender-neutral physical fitness standards, and ending male-only Selective Service registration. The Article concludes by arguing that these organizational reforms would serve the interests of the country and are permitted—and in the case of gender-neutral draft registration, required—by constitutional law.

I. THE HISTORY OF WOMEN'S INTEGRATION IN THE MILITARY

The military is in some ways one of America's most progressive institutions. For example, it was one of the first institutions to integrate racial minorities and women in the years after World War II. At the same time, the military has persistently embraced a traditional and, in many ways, "macho" culture. It took a long time to remove the formal barriers making the military inaccessible and inhospitable to women, and as argued in this Article, this process is still incomplete.

Although women fought in our nation's conflicts from the very beginning,⁶⁹ they were not given formal roles in the armed forces until World War II.⁷⁰ The first uniformed women served primarily in special branches or "corps" as nurses and in clerical occupations.⁷¹ Traditional attitudes about women's proper roles and the masculine nature of the military excluded them from other occupations.⁷² 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

69. See Linda Grant De Pauw, *Women in Combat: The Revolutionary War Experience*, 7 *ARMED FORCES & SOC'Y* 209, 210 (1981) (noting that an estimated twenty thousand women served in the Continental Army in the Revolutionary War, with several hundred serving as uniformed combatants); Kaia Danyluk, *Women's Service with the Revolutionary Army*, *COLONIAL WILLIAMSBURG INTERPRETER* (Williamsburg, VA), Fall 1997, at 8–13, <https://cwfpublishings.omeka.net/collections/show/1> (select "date added" and scroll to "Vol.18 No.3 1997 Fall CW Interpreter.pdf - application/pdf") [<http://perma.cc/BL98-USW7>] (describing the role of female "camp followers" in the Continental Army).

70. See JUDITH A. BELLAFAIRE, *THE WOMEN'S ARMY CORPS: A COMMEMORATION OF WORLD WAR II SERVICE* 3–5 (1993).

71. See KAMARCK, *supra* note 52, at 23.

72. See *id.*

specializations with the exception of direct combat roles.”⁷³ A small group of women even served as pilots in a special sex-segregated unit of the Air Force.⁷⁴

After observing the contribution of female civilian contract workers in the First World War, Congresswoman Edith Rogers (R-MA) introduced a bill in 1941 to establish a Women’s Army Auxiliary Corps (WAAC).⁷⁵ 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.⁷⁶ Support for the bill came in large part as a result of the attack on Pearl Harbor.⁷⁷ Military generals, facing a two-front war, feared there would be manpower shortages.⁷⁸ 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.⁷⁹ Congress approved the bill on May 14, 1941, and it was signed into law by President Franklin D. Roosevelt.⁸⁰

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.⁸¹ 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.”⁸² Negative perceptions of women in military service spilled into the civilian sphere, making WAAC recruitment more difficult.⁸³ 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.⁸⁴

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 or veterans’ benefits.⁸⁵ They served mostly

73. *Id.* at 24.

74. *Id.*

75. *Id.* at 23.

76. BELLAFIRE, *supra* note 70, at 3–4.

77. *See* KAMARCK, *supra* note 52, at 23.

78. *See* BELLAFIRE, *supra* note 70, at 4.

79. *Id.*

80. *Id.* at 5.

81. *Id.* at 16.

82. *Id.*

83. *See id.*

84. *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).

85. *See* KAMARCK, *supra* note 52, at 23; *see also* BELLAFIRE, *supra* note 70, 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).

under temporary arrangements and under restrictive policies;⁸⁶ in essence, women were an auxiliary resource.⁸⁷

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 1948,⁸⁸ giving women a permanent place in the military.⁸⁹ However, the Act also imposed quotas limiting the proportion of women to 2% of the enlisted force and 10% of officers,⁹⁰ excluded women from combat positions,⁹¹ and instituted unequal treatment for women in other respects.⁹² Around this time, the military also developed guidelines for investigating homosexuality among female service members and stepped up investigations of alleged lesbians.⁹³

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 1948.⁹⁴ In contrast, the Army maintained the female-only Women's Army Corps (WAC)

86. ELLEN C. COLLIER, CONG. RSCH. SERV., IB79045, WOMEN IN THE ARMED FORCES 2 (1982).

87. 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*, WOMEN IN THE ARMY, <https://www.army.mil/women/history/wac.html#:~:text=Roosevelt%20signed%20the%20legislation%20on,all%2050%20states%20and%20territories> [<https://perma.cc/X6PP-ZN8Z>] (last visited Feb. 1, 2022). As such, one may argue that the WAC was the precursor to Congress's largescale integration of women in 1948.

88. Pub. L. No. 80-625, 62 Stat. 356.

89. See BETTIE J. MORDEN, *THE WOMEN'S ARMY CORPS, 1945-1978*, at 55 (1990).

90. KAMARCK, *supra* note 52, at 24. The officer quota excluded nurses. *Id.* at 24 n.122.

91. Specifically, the Act prohibited the assignment of female members of the Navy or Air Force to duty in aircraft or vessels engaged in combat missions. See Pub. L. No. 80-625, §§ 210, 307, 502, 62 Stat. 356, 368, 369, 373. The exclusion of women from ships in effect barred them from combat positions in the Marine Corps as well, since the Marine Corps is a naval-oriented force; the Army already excluded women from combat positions at this time, eliminating Congress's need to exclude Army women from combat by statute. See NAT'L SEC. & INT'L AFFS. DIV., GEN. ACCT. OFF., GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION, GAO/NSAID-99-7, at 1 (1998), <https://www.gao.gov/assets/nsiad-99-7.pdf> [<https://perma.cc/T9WU-Q658>].

92. For example:

[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.

93. 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.

94. Naval Hist. & Heritage Command Comm'n & Outreach Div., *The First Waves*, FLAGSHIP, Aug. 1-7, 2019, at A2.

(the Regular Army successor to the WAAC)⁹⁵ until 1978.⁹⁶ By this time, maintaining a segregated, female-only branch of the Army was widely viewed as discriminatory, even by the DOD, which drafted the legislation abolishing the Women's Army Corps.⁹⁷

Once assimilated into the armed forces, the military still prohibited women from serving in combat arms units.⁹⁸ Such units included, for example, Infantry, Special Forces, Armor, and Artillery,⁹⁹ which have the primary function of directly engaging enemy forces.¹⁰⁰ Under the combat exclusion policy, women were limited to occupations such as Adjutant, Signal, Transportation, Ordnance, Quartermaster, Military Intelligence, or Military Police, whose purpose was to provide ancillary or supporting services.¹⁰¹ The combat exclusion policy was based on traditional conceptions of women's natural and proper sex roles.¹⁰² Despite resistance to women's full integration into the armed forces, supporters suggested that women's involvement in World War II could present a far-reaching challenge to systemic sex discrimination in American society. According to this line of thought, integration would allow women to prove their abilities so that civilian employers would be "hard-pressed" to deny jobs to women solely because of sex.¹⁰³

And, indeed, as labor historians have documented, women's involvement in the wartime labor force during World War II contributed to their economic gains and integration into traditionally male-dominated workplaces and occupations.¹⁰⁴ 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

95. 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 87; Act of July 1, 1943, ch. 187, Pub. L. No. 78-110, 57 Stat. 371.

96. MORDEN, *supra* note 89, at 395–97.

97. *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, "[i]magine . . . a separate personnel system for Blacks or Catholics or Chicanos. The country would not stand for such a thing").

98. See *supra* note 91 and accompanying text.

99. See KRISTY N. KAMARCK, CONG. RSCH. SERV., R42075, WOMEN IN COMBAT: ISSUES FOR CONGRESS 14–15 (2016), <https://sgp.fas.org/crs/natsec/R42075.pdf> [<https://perma.cc/B987-52PK>].

100. *Id.* at 4 n.28.

101. See MORDEN, *supra* note 89, at 21, 53, 128–29, 322, app. B at 418–26 (discussing the occupations that female Army service members typically were assigned to from the 1940s through the 1970s). The Adjutant General Corps primarily performed administrative functions, such as personnel, recruiting, and postal operations. *Id.* at 73. The Signal Corps was responsible for communications (signals). See REBECCA ROBBINS RAINES, CENTER OF MILITARY HISTORY, U.S., GETTING THE MESSAGE THROUGH: A BRANCH HISTORY OF THE U.S. ARMY SIGNAL CORPS 3 (1996). The role of women in the Signal Corps has been a topic of interest in women's and military history. See ELIZABETH COBBS, THE HELLO GIRLS: AMERICA'S FIRST WOMEN SOLDIERS *passim* (2017) and LETTIE GAVIN, THEY ALSO SERVED 77–100 (1977).

102. See BELLAFAIRE, *supra* note 70, at 6 (explaining that even the head of the WAC thought that "[t]he gaps our women will fill are those in noncombatant jobs where women's hands and women's hearts fit naturally").

103. 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 9 (1980).

104. 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).

manufacturers, automakers, shipbuilders, and steelmakers, for example.¹⁰⁵ They were pressed into service as taxi drivers, shuttling injured sailors from Navy ships to hospitals in cities like Seattle.¹⁰⁶ 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.¹⁰⁷ All in all, an estimated six million women joined the civilian workforce during World War II.¹⁰⁸

Ultimately, the war did not fundamentally transform women's status in American society.¹⁰⁹ Women's workplace presence was met with resistance by employers and unions.¹¹⁰ After the war, both private and public employers pushed women out of the workplace¹¹¹ and back into the home.¹¹² Moreover, because military service determined

105. *See id.* at 6.

106. Susan Paynter, *As WWII Raged, Seattle's First Female Cab Drivers Made History*, SEATTLE POST-INTELLIGENCER (Mar. 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/SNV6-7KEM>].

107. 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/Z39S-8U29>].

108. *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).

109. *See* ANDERSON, *supra* note 104, 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.”); KATHERINE TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE* 110, 126 (2016) (discussing ongoing union campaigns to address pay equity, sexual harassment, job training, childcare, and job safety in the 1970s and noting that “[i]n the late 1970s, nearly half of working women were in occupations that were at least 75 percent female”).

110. *See* ANDERSON, *supra* note 104, 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. *See id.* at 36–42.

111. *See id.* at 161, 164–69 (examining 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, 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 104, at 8–10 (discussing disagreements among historians and economists over the turning point theory).

112. ANDERSON, *supra* note 104, at 175–78; ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 62–70 (1988). Institutions of higher education 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 108, 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).

eligibility for valuable governmental benefits, it helped define deserving (mostly male) and undeserving (mostly female) beneficiaries in the post-war welfare state.¹¹³ 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.¹¹⁴

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,¹¹⁵ federal legislation,¹¹⁶ and policy directives from the DOD and the

113. 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 Army; conservative critics, echoing attacks on welfare recipients, painted the new soldiers as a class of freeloaders).

114. See ANDERSON, *supra* note 104, 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 107 (“[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.

115. 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).

116. 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).

services.¹¹⁷ In the 1990s, Congress banned the use of gender quotas for any military occupation, although women's exclusion from most combat occupations continued.¹¹⁸

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,¹¹⁹ and Congress followed suit by lifting the exclusion for sailors serving on combat Navy vessels.¹²⁰ However, the prohibition of women in ground combat roles remained in place.¹²¹ It was not until 2013 that Secretary of Defense Leon Panetta announced plans to completely 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 2015.¹²² In 2015, Secretary of Defense Ash Carter formally announced that all military occupations would be opened to women.¹²³

Today's military is more integrated along gender lines than at any time in the past, but women's integration has not necessarily undermined the gendered structure of the

117. 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 52, at 26. Notably, these reforms were not without resistance. For example, as late as 1980, conservative thinkers suggested the following:

[U]nder normal circumstances all human societies have had strict delineations of sex roles which exclude women from participation in war or hunting. The reasons for this, . . . are twofold: (1) women could, in fact, perform almost all male roles, but men cannot perform the absolutely crucial female role of bearing and rearing children; and (2) all human societies are male-dominated, due to the greater aggressiveness and physical strength resulting from the male sex hormone. It therefore becomes essential to exclude women from some roles so they will continue to perform those which are theirs alone.

GOLDICH, *supra* note 103, at 7 (summarizing the remarks of George Gilder at a seminar on women in the military convened by the Congressional Research Service).

118. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 543(a)(2), 107 Stat. 1547, 1660 (1993) (codified as amended at 10 U.S.C. § 113 note (Gender-Neutral Occupational Performance Standards)).

119. See Swick & Moore, *supra* note 63; 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.); Memorandum from Les Aspin, Sec'y of Def., to the Sec'ys of the Army, Navy, and Air Force et al. on Policy on the Assignment of Women in the Armed Forces (Apr. 28, 1993) [hereinafter Aspin Apr. 1993 Memorandum].

120. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, §§ 541-542, 107 Stat. 1547, 1660 (1993) (amended 2013).

121. Memorandum from Les Aspin, Sec'y of Def., to the Sec'ys of the Army, Navy, and Air Force et al. on Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994) [hereinafter Aspin Jan. 1994 Memorandum], <https://www.govexec.com/pdfs/031910d1.pdf> [<https://perma.cc/836E-YX3Z>].

122. See Memorandum from Martin Dempsey, Chairman of Joint Chiefs of Staff, and Leon Panetta, Sec'y of Def., to Sec'ys of the Mil. Dep'ts on Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013) [hereinafter Panetta Jan. 2013 Memorandum], <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/F6VV-3ANT>] (recognizing the contributions of the women currently serving in the military and affirming that the goal of the DOD is to remove all gender based, nonperformance related barriers to career advancement for women in service).

123. Memorandum from Ash Carter, Sec'y of Def., 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 Integration Order and Guidance], <https://dod.defense.gov/Portals/1/Documents/pubs/OSD014303-15.pdf> [<https://perma.cc/56E8-GL84>] (formally announcing that there are no exceptions to the 1994 rescission of the Combat Exclusion Rule).

military.¹²⁴ Women constitute just 17% of the total force.¹²⁵ This gender disparity contrasts with a military that is otherwise quite diverse, with roughly half of its enlisted service members being either Hispanic or members of a racial minority.¹²⁶ Moreover, the experiences of women in the military are often inequitable. Although the DOD finally lifted the last remaining combat exclusion in 2015 (for ground combat), all the services have not fully integrated women into combat positions and occupations.¹²⁷ Women represent a small percentage of officers and an even smaller percentage of top military leadership.¹²⁸ Women continue to suffer high rates of sexual assault and sexual harassment in the military.¹²⁹ 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.

II. SEXUAL MISCONDUCT IN THE MILITARY

A. Two Decades of Data on Sexual Assault and Harassment

As discussed in this Part, the 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 1990s¹³⁰ and several high-profile sexual

124. See discussion *infra* Part II.B.

125. See DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61 (reporting that women comprise 17.44% of the total active duty force as of October 2021).

126. See BD. ON DIVERSITY & INCLUSION, DEP'T OF DEF., RECOMMENDATIONS TO IMPROVE RACIAL AND ETHNIC DIVERSITY AND INCLUSION IN THE U.S. MILITARY 8 fig.2 (2020) (reporting that in fiscal year 2020, Hispanics comprised 19% and racial minorities 27% of the enlisted force). Of significance to minority representation in the military, in January 2021, U.S. Army General Lloyd Austin became the first African American defense secretary; Austin was nominated by President Biden shortly after Biden's election. Paul Sonne, *Austin Confirmed As Nation's First African American Defense Secretary*, WASH. POST (Jan. 22, 2021, 6:53 PM), https://www.washingtonpost.com/national-security/lloyd-austin-defense-secretary-biden/2021/01/22/b43aa57c-5cd2-11eb-aaad-93988621dd28_story.html [<https://perma.cc/H98U-78WW>].

127. See *infra* Parts II.B.2, III.A.

128. See *infra* Parts II.B.2, III.A.

129. See *infra* Part II.A.; cf. 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 military despite decades of women's integration, including a gendered division of labor and sexual harassment).

130. 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 Equal Employment Opportunity Commission (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); 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). See generally ANITA HILL, SPEAKING TRUTH TO POWER (1997). 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 EEOC rose by more than 50%. Jane Gross, *Suffering in Silence No More: Fighting 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.¹³¹ 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,¹³² a fraternal organization of naval aviators.¹³³ In the fallout from the scandal, the Secretary of the Navy resigned after Congress learned that he had visited a hotel room near the hall where the assaults took place.¹³⁴

The 1996 Aberdeen scandal involved sexual misconduct at Aberdeen Proving Ground,¹³⁵ the Army's oldest active proving ground.¹³⁶ At that time, Aberdeen was home to the Army Ordnance Corps Advanced Individual Training school, an occupational specialty training program for new soldiers.¹³⁷ The Army began investigating allegations of assault in 1996 and ultimately brought fifty formal complaints of sexual harassment and abuse.¹³⁸ More than ten drill sergeants and an officer were implicated for abusing positions of power by forcing trainees to have sex with them.¹³⁹ One sergeant had raped eighteen trainees, and an officer had sex with a trainee who had come to him for advice about how to deal with sexual harassment from a drill instructor.¹⁴⁰ 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

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/VX3C-8EER>].

131. 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/BE2H-VVN2>]; 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).

132. See Winerip, *supra* note 131.

133. Specifically, the Tailhook Association is a U.S.-based, nonprofit fraternal organization of naval aviators. See TAILHOOK, <https://www.tailhook.net/> [<https://perma.cc/9AK3-SKP6>] (last visited Feb. 1, 2022). The word "tailhook" refers to the 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 (Aug. 29, 2002), <https://science.howstuffworks.com/aircraft-carrier4.htm> [<https://perma.cc/8AV4-6RTT>].

134. 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/JN2M-36YT>].

135. 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/2XJ5-8UC9>].

136. *History*, U.S. ARMY: ABERDEEN PROVING GROUND, <https://home.army.mil/apg/index.php/about/history> [<https://perma.cc/2QME-TU88>] (last modified Oct. 10, 2018, 6:58 PM).

137. See U.S. ARMY ABERDEEN PROVING GROUND, *supra* note 136.

138. See, e.g., Lewis, *supra* note 135.

139. See *id.*

140. *Id.*; see also *United States v. Simpson*, 55 M.J. 674, 692, 698–707, 710 (2001) (reviewing legal sufficiency of the evidence and affirming U.S. Army Drill Sergeant Delman Simpson's conviction of eighteen rape charges) ("[T]he record clearly reflects that the appellant was a sexual predator.").

reprimand letters.¹⁴¹ As a result of the incident, the DOD directed all branches of the military to assess their training policies and formed the Federal Advisory Committee on Gender-Integrated Training and Related Issues, which issued recommendations in 1997.¹⁴²

The DOD first began collecting data on sexual assault and harassment in 1988 via the Workplace and Gender Relations Survey of Active Duty Members (WGRA).¹⁴³ A subsequent survey was conducted in 1995 following the Tailhook scandal.¹⁴⁴ Additionally, since 2002, Congress has mandated surveys on racial, ethnic, and gender discrimination,¹⁴⁵ 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.¹⁴⁶ 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 the 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.¹⁴⁷ In the same period, the prevalence rate of

141. 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/9JJU-Z8NL>].

142. See FED. ADVISORY COMM. ON GENDER-INTEGRATED TRAINING & RELATED ISSUES, REPORT OF THE FEDERAL ADVISORY COMMITTEE ON GENDER-INTEGRATED TRAINING AND RELATED ISSUES TO THE SECRETARY OF DEFENSE 1, 3–4 (1997), <https://apps.dtic.mil/sti/pdfs/ADA344122.pdf> [<https://perma.cc/S3LF-WFW5>] (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”).

143. 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).

144. *Id.* (discussing the history of the “WGRS,” i.e., the WGRA); 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 1 (2008) [hereinafter 2006 WGRA SURVEY], https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Personnel_Related/2006-WGRA-Report.pdf [<https://perma.cc/8N3M-NHSR>].

145. 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.” Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458, 2553 (codified as amended at 10 U.S.C. § 481).

146. *Id.*; see 2006 WGRA SURVEY, *supra* note 144, at 1 (“[The WGRA] beg[an] in 2002 [as part of a quadrennial cycle] of human relations surveys authorized in Title 10 U. S. Code Section 481. The quadrennial cycle includes one survey each year, alternately surveying active duty and Reserve component members on gender relations and equal opportunity issues. The cycle repeats itself with one survey per year.”).

147. 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://apps.dtic.mil/sti/pdfs/ADA419817.pdf> [<https://perma.cc/A8GA-MVDH>] (reporting that 24% of

sexual assault ranged from 4% to 7% for women and 1% to 2% for men.¹⁴⁸ And the problem is actually getting *worse*.

According to the most recent DOD survey on sexual assault in the military, an estimated 20,500 service members reported that they had experienced sexual assault during the 2018 fiscal year (13,000 women and 7,500 men),¹⁴⁹ an increase of roughly 38% over the 2016 survey;¹⁵⁰ of those assaulted, 63% were women,¹⁵¹ even though women make up less than 20% of the active-duty force.¹⁵² Young women between the ages of seventeen and twenty-four, and junior enlisted women, are at the greatest risk of

active-duty females and 3% of active-duty males reported experiencing sexual harassment in 2002); 2006 WGRA SURVEY, *supra* note 144, at 67 fig.37 (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), <https://apps.dtic.mil/sti/pdfs/ADA541045.pdf> [<https://perma.cc/QUE6-QJMV>] (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), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> (choose "2012 WGRA Survey Note" under "Active Duty") [<https://perma.cc/H624-KZ9S>] (reporting that 23% of women and 4% of men indicated experiencing sexual harassment in 2012); OFF. OF PEOPLE ANALYTICS, U.S. DEP'T OF DEF., 2016 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT xvi (Lisa Davis et al. eds., 2017) [hereinafter 2016 WGRA SURVEY], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> (choose "2016 WGRA Overview Report" under "Active Duty") [<https://perma.cc/GMB6-XNSE>] (reporting that 21.4% of women and 5.7% of men indicated experiencing sexual harassment in 2016); RACHEL A. BRESLIN, LISA DAVIS & 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> (choose "2018 WGRA Overview Report" under "Active Duty") [<https://perma.cc/GMB6-XNSE>] (reporting that 24.2% of active-duty women and 6.3% of active-duty men indicated experiencing sexual harassment in 2018).

148. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 3 (reporting sexual assault and prevalence rates from 2006 to 2018); see also Stander & Thomsen, *supra* note 143, at 21 (discussing sexual assault and prevalence rates from 2002 to 2012).

149. DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 3. "The next survey will be administered in FY21 and reported out in the FY21 Annual Report to Congress." U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2020, APPENDIX B: STATISTICAL DATA ON SEXUAL ASSAULT 11 (2020) [hereinafter DOD FY 2020 REPORT ON SEXUAL ASSAULT, APP. B], https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_On_Sexual_Assault_FY2020.pdf [<https://perma.cc/Y5J5-BY8V>].

150. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 3; 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/2LGH-V3L7>].

151. DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 3.

152. DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61 (reporting that women constituted 17.44% of the active duty force in October 2021); see also DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., DOD PERSONNEL, WORKFORCE REPORTS & PUBLICATIONS: TABLE OF ACTIVE DUTY FEMALES BY RANK/GRADE AND SERVICE (2018), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports> (scroll down to "Active Duty Military Personnel by Service by Rank/Grade (Updated Monthly)"; then choose "FY 2012 - FY 2018 (Women Only)" and select the last tab ("1809") for FY 2018) [<https://perma.cc/5LNF-BHW3>] (reporting that that women constituted 16.64% of the force in FY 2018).

being assaulted, with nearly 10% of junior enlisted women indicating that they experienced a sexual assault.¹⁵³

The data on sexual harassment paint a similarly stark picture. In fiscal year 2018, one in four female service members reported experiencing sexual harassment.¹⁵⁴ This figure is consistent with prior studies of sexual harassment in the military going back more than two decades. For example, in 2014, at Congress's request, the RAND National Defense Research Institute conducted an independent assessment of sexual harassment.¹⁵⁵ Roughly 170,000 active-duty and reserve service members responded to the survey.¹⁵⁶ The results showed that 22% of women and 7% of men experienced sexual harassment.¹⁵⁷ Of those who experienced harassment, just 33% of men and 46% of women reported it.¹⁵⁸

The RAND study also found that sexual harassment and gender discrimination are highly correlated with sexual assault,¹⁵⁹ as tragically illustrated by Specialist Vanessa Guillén's murder.¹⁶⁰ 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.¹⁶¹ In other words, there has been little progress in the overall rates of sexual harassment in the

153. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 10 (“An estimated 9.1 percent of junior enlisted women (E1-E4) indicated experiencing sexual assault . . .”). Junior service members, more generally, are at the highest risk of experiencing sexual assault. See CONG. RSCH. SERV., MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 68 (2021) [hereinafter CONG. RSCH. SERV., MILITARY SEXUAL ASSAULT], <https://crsreports.congress.gov/product/pdf/R/R44944> [<https://perma.cc/27HK-ZRJV>] (“Of the sexual offense investigations completed in FY2019, 75% of sexual assault victims were age 24 or under . . . [A] majority of the victims were in the grade of E-1 to E-4 (79%) . . .”).

154. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 9. As with sexual assault, junior enlisted members are also the most likely age group to experience sexual harassment. See HARD TRUTHS, APP. B, *supra* note 30, at 5.

155. ANDREW R. MORRAL, KRISTIE L. GORE, TERRY L. SCHELL, BARBARA BICKSLER, COREEN FARRIS, BONNIE GHOSH-DASTIDAR, LISA H. JAYCOX, DEAN KILPATRICK, STEVE KISTLER & AMY STREET, 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://perma.cc/8HEN-HH5W>].

156. *Id.*

157. *Id.* at 3.

158. RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. 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://perma.cc/VV9G-G4SW>].

159. *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), https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF [<https://perma.cc/EU9Y-F8RE>] (“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.”). Recent DOD surveys similarly conclude that “[s]exual assault does not stand alone, but rather exists on a continuum of harm which may begin with sexual harassment and escalate into sexual assault. This is particularly true in the military, where survivors of sexual harassment are at significantly higher risk of later experiencing sexual assault.” HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 4.

160. See *supra* notes 15–26 and accompanying text.

161. 2002 WGRA SURVEY, *supra* note 147, at 18.

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.¹⁶²

In 2019, the DOD conducted a focus-group study on sexual assault and harassment involving 493 active-duty service members in eight locations across the United States.¹⁶³ Participants were asked about the culture of their installations and the influence of gender discrimination and harassment on work culture and morale, among other topics.¹⁶⁴ When asked how and where sexual harassment occurs at their installations, participants described being the subject of lewd comments and inappropriate jokes, repeatedly “being asked out after saying ‘no,’ receiving unwanted shoulder massages,” being gawked at in the gym, and groped, among other sexually harassing behaviors.¹⁶⁵ For example, one junior enlisted female in the Marine Corps explained, “Today I bent over to get something. And I didn’t know there was anybody behind me. Bent over to grab something really quick and a Sergeant is behind me and said, ‘Oh, don’t tempt me.’”¹⁶⁶ Another young woman in the Air Force said, “I’ve been sexually harassed in every job I’ve had thus far, and it’s just a fact of life.”¹⁶⁷ Others discussed the prevalence of staring, gawking, and unwanted touching, especially in the gym. For example,

I historically avoided Marine Corps gyms because I can’t stand Marines looking at me. You’re already an alien because you’re a woman in the Marine Corps and it’s like the moment that you throw on a tank top or you actually start doing some sort of weightlifting, they immediately sexualize you.¹⁶⁸

The 2021 Independent Review Commission (IRC) on Military Sexual Assault confirms that these accounts do not represent isolated incidents; they are the tip of the iceberg. In its report, the IRC noted that “[n]early every junior enlisted Service member

162. 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 PSYCH. 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)).

163. See DEP’T OF DEF., OFF. OF PEOPLE ANALYTICS, 2019 MILITARY SERVICE GENDER RELATIONS FOCUS GROUPS: ACTIVE DUTY iii (2020) [hereinafter 2019 MSGR], <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> (choose “2019 MSGR Focus Groups: Active Duty Report” under “Active Duty”) [<https://perma.cc/GMB6-XNSE>].

164. See *id.* at 36, 55, 59.

165. See *id.* The Military Service Gender Relations (MSGR) study (previously called the Focus Groups on Sexual Assault Prevention and Response (FGSAPR) study), collects qualitative feedback from military members through focus groups, in accordance with reporting the requirements imposed by Congress through the National Defense Authorization Act (NDAA). It is part of an annual assessment cycle on sexual assault and harassment in the military that alternates between focus group and survey methodologies. See DEP’T OF DEF., OFF. OF PEOPLE ANALYTICS, 2017 MILITARY SERVICE GENDER RELATIONS FOCUS GROUPS: ACTIVE DUTY iii & iii n.1 (2018), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/defense-research> (choose “2017 MSGR Overview Report” under “Active Duty”) [<https://perma.cc/GMB6-XNSE>]; Stander & Thomsen, *supra* note 143, at 21.

166. 2019 MSGR, *supra* note 163, at 36.

167. *Id.* at 36–37.

168. *Id.* at 55. The prevalence of sexual harassment in gyms leads many women to feel they must avoid the gym or engage in avoidance strategies such as modifying their exercise routines, wearing wedding rings when not married, attending gyms at off hours, or modifying their gym clothing. See *id.* at 55–56.

with whom the IRC met—women and men—said demeaning language and sexual harassment were regular features of life in their units.”¹⁶⁹

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 0.8% for those who do not identify as LGBT, respectively.¹⁷⁰ Research by experts outside the DOD bears this out, finding that the culture of the military has not caught up even a decade after the 2011 repeal of the Don’t Ask, Don’t Tell policy.¹⁷¹ “[Service members] who identify as LGBT are statistically more likely to experience sexual assault and sexual harassment than those who do not identify as LGBT.”¹⁷²

Military service members who experience sexual assault and harassment often never see a remedy. Military surveys indicate that there is insufficient accountability.¹⁷³ Sexual assault is underreported, meaning that only a fraction of victims report sexual assault to military authorities. In fiscal year 2018, the most recent year that the military collected prevalence data on sexual assault,¹⁷⁴ only one in three service members who

169. HARD TRUTHS, APP. B, *supra* note 30, at 5.

170. See 2016 WGRA SURVEY, *supra* note 147, at xxii. These findings were replicated in the 2018 climate survey, and in fact, the results suggest that the climate has gotten worse for lesbian women. See 2018 WGRA SURVEY, *supra* note 147, at 39–40 (reporting that an estimated 9% of LGB women experienced sexual assault in 2018, a significant increase over 2016 (6.3%), and that among LGB men, an estimated 3.7% experienced sexual assault in 2018 (statistically unchanged from 2016)); see also *id.* at 40.

171. For example, a 2020 study based on in-depth interviews published in the journal *Sexuality Research and Social Policy* found that 59% of respondents did not feel comfortable being out in the military, either because of fear of career repercussions or because of the burden of being a token. See Kathleen A. McNamara, Carrie L. Lucas, Jeremy T. Goldbach, Ian W. Holloway & Carl A. Castro, “You Don’t Want To Be a Candidate for Punishment”: A Qualitative Analysis of LGBT Service Member “Outness”, 18 *SEXUALITY RSCH. & SOC. POL’Y* 144, 148 (2021). Further, survey respondents reported that they experienced hostility from military leaders, for example:

The instructor was reported to use the pejorative term “fags” during class, disclose other people’s sexual minority identity to his students without their permission, and communicate that he believed sexual minorities were more promiscuous than heterosexuals. Classmates notably did not verbally protest the instructor’s behaviors, which may have contributed to the sense that the instructor’s beliefs, as opposed to the aggregate of students’ beliefs, were paramount in creating class climate.

Id. at 150.

172. CONG. RSCH. SERV., MILITARY SEXUAL ASSAULT, *supra* note 153, at 69.

173. This lack of accountability is one of the key takeaways from the ninety-day DOD independent review of sexual assault in the military conducted in spring 2021 at the direction of President Biden and Secretary of Defense Lloyd Austin. See HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 3, 7; HARD TRUTHS, APP. B, *supra* note 30, at 5. Additional evidence can be found in the military’s investigative report of sexual harassment and ultimate murder of Vanessa Guillén, a twenty-year-old U.S. Army soldier by another enlisted soldier at Fort Hood in April 2020. See U.S. ARMY, REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 17, 18, 21, 27 (2020), https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf [<https://perma.cc/MR3R-L79P>] (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, noncommissioned officers’ (NCOs’) (responsible for reporting) themselves taking advantage of subordinate victims, and “universal” fear of retaliation for reporting sexual misconduct).

174. The biennial WGRA, last conducted in 2018, assesses the estimated prevalence, or occurrence, of sexual assault among active-duty members over a year’s time. The DOD was due to administer the WGRA in 2020 but was unable to do so due to the coronavirus (COVID-19) pandemic. The DOD will estimate prevalence

experienced a sexual assault reported it to a military authority.¹⁷⁵ Lack of confidentiality, gossip about cases within units, and fear of retaliation remain persistent barriers to reporting.¹⁷⁶ Additionally, male victims face unique barriers to reporting their experiences given male-specific expectations related to masculinity.¹⁷⁷

In fiscal year 2020, just 4.6% (156 out of 3,358) of sexual assault cases in the Defense Department's jurisdiction investigated with a reportable outcome led to a sex offense conviction.¹⁷⁸ Military surveys indicate that most respondents (64%) who experienced unwanted sexual contact and reported it to a military authority faced retaliation for reporting.¹⁷⁹ In the words of one junior Air Force member, "Who can we go to because, I'll be honest, I went up to the next step of leadership, and guess what they did? They went down to the former leadership, and guess who got in trouble? Me."¹⁸⁰

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.¹⁸¹ Negative consequences for reporting sexual harassment and gender discrimination are similarly routine. Actions taken in response to those who report

rates again in fiscal year 2021. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2020, APPENDIX C: METRICS AND NON-METRICS ON SEXUAL ASSAULT 4 (2020) [hereinafter DOD FY 2020 REPORT ON SEXUAL ASSAULT, APP. C], https://www.sapr.mil/sites/default/files/Appendix_C_Metrics_and_NonMetrics_on_Sexual_Assault_FY2020.pdf [<https://perma.cc/NJW3-7YQJ>].

175. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, 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).

176. See DOD FY 2019 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 37, at 16.

177. 2019 MSGR, *supra* note 163, at vii.

178. See DOD FY 2020 REPORT ON SEXUAL ASSAULT, APP. B, *supra* note 149, at 19 tbl.4, 23. 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, 266–67 (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 noncriminal 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).

179. See DOD FY 2020 REPORT ON SEXUAL ASSAULT, APP. C, *supra* note 174, 19 (reporting that 64% of those who reported a sexual assault said they perceived at least one negative outcome connected with reporting, including professional reprisal, ostracism, and maltreatment); see also HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at app. E, HONORING OUR DUTY TO SURVIVORS OF MILITARY SEXUAL ASSAULT: RECOMMENDATIONS ON VICTIM CARE & SUPPORT 21 ("In several of the IRC's discussions with junior enlisted Service members, individuals described watching as their friends or members of their unit were retaliated against, 'coincidentally' passed over for promotions, or were forced to miss an advance training course after reporting they had been the victim of sexual assault.").

180. 2019 MSGR, *supra* note 163, at 93.

181. See *Embattled: Retaliation Against Sexual Assault Survivors in the US Military*, HUM. RTS. WATCH (May 18, 2015), <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military> [<https://perma.cc/F84X-CC3N>].

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.”¹⁸²

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.¹⁸³ According to the DOD *Annual Report on Sexual Harassment and Violence at the Service Academies, Academic Program Year 2018–2019*, nearly 16% of female cadets and midshipmen experienced unwanted sexual contact during the school year, a significant increase from the estimated prevalence in 2016.¹⁸⁴ In the 2017–2018 school year, 50% of women and 16% of men experienced sexual harassment.¹⁸⁵ 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 quarter to a third of all students are female.¹⁸⁶ 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. Devaluing Women

The military’s culture problem with women has a long pedigree. Indeed, resistance to the integration of women into the armed forces emerged from the beginning.¹⁸⁷ For example, these attitudes were on display during the debate on establishing the WAAC during World War II. It took near-cataclysmic world conflict to persuade Congress that

182. 2018 WGRA SURVEY, *supra* note 147, at x–xi.

183. CONG. RSCH. SERV., DEFENSE PRIMER: MILITARY SERVICE ACADEMIES (2021) [hereinafter CONG. RSCH. SERV., MILITARY SERVICE ACADEMIES], <https://sgp.fas.org/crs/natsec/IF11788.pdf> [<https://perma.cc/Q8S9-SXT3>].

184. See U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2018–2019, at 8 (2020) [hereinafter DOD 2018–2019 SERVICE ACADEMY REPORT], https://www.sapr.mil/sites/default/files/public/docs/reports/MSA/DoD_Annual_Report_on_Sexual_Harassment_and_Violence_MSA_APY1819_Consolidated.pdf [<https://perma.cc/AS6M-5SC2>]. These figures were down in the 2019–2020 school year; however, the decrease occurred mainly in the fourth quarter, as students made fewer reports once the academies sent students home due to the COVID-19 pandemic. See DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2019–2020, at 3 (2021) [hereinafter DOD 2019–2020 SERVICE ACADEMY REPORT], https://www.sapr.mil/sites/default/files/public/docs/reports/MSA/DOD_Annual_Report_on_Sexual_Harassment_and_Violence_at_MSAs_APY19-20.pdf [<https://perma.cc/X2MS-K3FS>].

185. U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2017–2018, at 4 (2019), https://evawintl.org/wp-content/uploads/APY17-18_MSA_Report_FINAL.pdf. This report contains the most recent available data on the prevalence of sexual harassment in the service academies. The 2018–2019 military service academy study did not address sexual harassment prevalence rates, and the 2019–2020 survey could not be accomplished due to the dismissal of cadets and midshipmen in light of the COVID-19 pandemic. See DOD 2019–2020 SERVICE ACADEMY REPORT, *supra* note 184, at 3; DOD 2018–2019 SERVICE ACADEMY REPORT, *supra* note 184, at 11 n.5.

186. See CONG. RSCH. SERV., MILITARY SERVICE ACADEMIES, *supra* note 183, at 1 (reporting that women account for 23–30% of each academy’s student body).

187. See *supra* Section I.

women had a role to play in the military.¹⁸⁸ Even today, women account for only 21% of the military.¹⁸⁹ Very few Americans are “women in uniform.”

According to recent demographic data, only about 1,000 women are in Army combat positions that were closed to women prior to 2015.¹⁹⁰ The Marine Corps still has not fully integrated its basic training, despite directives by the Secretary of Defense and Congress.¹⁹¹ Consequently, only a handful of women have served in Marine Corps combat positions across the entire branch.¹⁹²

The rapid changes to laws and policies governing gender integration have provoked resistance outside the military as well. A 2019 *Wall Street Journal* op-ed titled *Women Don't Belong in Combat Units* is one such example.¹⁹³ In it, a senior fellow at the Manhattan Institute, a conservative think tank,¹⁹⁴ argued that the armed forces are conducting a social experiment by integrating women into combat units and that the military is lowering physical standards as part of a political agenda.¹⁹⁵ The op-ed also lamented the “inevitable introduction of Eros into combat units.”¹⁹⁶ This perspective is not universal,¹⁹⁷ but it represents a real school of thought that does not see women as valuable service members. This hostility to women’s service creates problems in the wider military even beyond the context of ground combat units.

The masculine¹⁹⁸ culture of the military is a serious problem impeding progress in reducing sexual harassment and sexual assault. There continue to be many in the military who do not see female service members as part of the team or who view women as a

188. See BELLAFAIRE, *supra* note 70, at 4 (noting that the bill establishing a Women’s Army Corps failed to receive serious consideration until after the Japanese attack on Pearl Harbor and the prospects of a two-front war emerged).

189. DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61.

190. See Meghann Myers, *Has Combat Arms Gender Integration Been Successful? The Army Will Let You Know in 2020.*, ARMY TIMES (Oct. 11, 2018), <https://www.armytimes.com/news/your-army/2018/10/11/has-combat-arms-gender-integration-been-successful-the-army-will-let-you-know-in-2020/> [<https://perma.cc/4CQ5-W4EE>].

191. See *infra* Part II.B.1.

192. See Gina Harkins, *Top Marine General Wants More Women Serving in Ground-Combat Jobs*, MILITARY.COM (Feb. 25, 2020), <https://www.military.com/daily-news/2020/02/25/top-marine-general-wants-more-women-serving-ground-combat-jobs.html> [<https://perma.cc/H2UK-HB3R>].

193. Heather Mac Donald, *Women Don't Belong in Combat Units*, WALL ST. J. (Jan. 14, 2019), <https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638> [<https://perma.cc/GYP5-Y9YN>].

194. The Manhattan Institute for Policy Research (renamed in 1981 from the International Center for Economic Policy Studies) is a conservative 501(c)(3) nonprofit American think tank. See *About*, MANHATTAN INST., <https://www.manhattan-institute.org/about> [<https://perma.cc/KJ76-HXAK>] (last visited Feb. 1, 2022).

195. See Mac Donald, *supra* note 193.

196. *Id.*

197. See, e.g., Micah Ables, *Women Aren't the Problem. Standards Are.*, MOD. WAR INST. (Feb. 5, 2019), <https://mwi.usma.edu/women-arent-problem-standards/> [<https://perma.cc/2K5U-A9K8>] (offering the opinion of the commander of one of the Army’s first gender integrated mechanized infantry companies, and rejecting assertions posed by Heather Mac Donald). See also Germano, *supra* note 65 (presenting the opinion of a former Marine lieutenant colonel that low expectations of female Marines explain lower performance).

198. See CYNTHIA ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES 235 (2000) (“Masculinity has been intimately tied to militarism. . . . [F]or the military to obtain and keep the number and kind of men in the ranks that officials think they need, military policy makers have to control not only men but women.”).

distraction. This dynamic mostly happens at the small unit level, far removed from official policies and statements of top military leadership.¹⁹⁹ Negative attitudes about women are prevalent and continue to present a serious obstacle for women. For example, female service members report that they feel unfairly judged based on their gender, must work harder than their male peers to prove themselves, and are passed over for promotions because they are perceived as either too feminine or too tough and lacking leader characteristics.²⁰⁰ Not long ago, nude posters and adult magazines were regular fixtures in military barracks and common areas; only in 2013 did the Pentagon direct post exchanges to stop selling adult magazines.²⁰¹ Pornography is also common on long deployments to austere environments with no permissible outlet for sexual contact.²⁰² Current military law prohibits the open display of pornography,²⁰³ but the “macho” culture that fueled this environment has not gone away entirely.²⁰⁴ In sum, there has existed, and continues to exist, a “macho” culture in the military.

The following discussion explores in more depth some of the cultural and organizational factors that render the military a high-risk workplace for sexual misconduct. It begins with the story of the Marine Corps’s continuing and steadfast resistance to integrating women into combat positions, even in the face of directives by the Secretary of Defense and Congress, and then turns to an examination of some of the military’s demographic features that increase the likelihood of sexual assault and harassment.

199. See 2019 MSGR, *supra* note 163, at 22 (“I’ve had one female come to our department, and she wanted to be one of the guys. She tried really hard. And it’s one of those things, not that we’re excluding you, but things happen. Things have changed, and we can’t do certain things around you because we’re not allowed, and rightfully so.”).

200. *Id.* at 24 (“The women in the course did exceptionally well in everything but leadership. . . . Not a single woman in my course had above a 90 . . . I brought it to my command and said, ‘Why do I have an 87 leadership grade? In the last nine months, you’ve never given me one piece of negative feedback. Ranked third in the class.’ After two days, I came back every day to the lead person and said, ‘Can you please explain why you chose this leadership grade for me?’ And nobody could.”).

201. See *Is Porn on Military Bases Really a Big Deal?*, MILITARY.COM (July 2, 2013), <https://www.military.com/spousebuzz/blog/2013/07/why-the-fuss-over-porn-at-the-exchange.html> [<https://perma.cc/E7JD-8SMX>]; Thomas E. Ricks, *The Marine Scandal Confirms the Need To Address the U.S. Military’s Porn Addiction*, FOREIGN POL’Y (Mar. 14, 2017, 10:22 AM), <https://foreignpolicy.com/2017/03/14/the-marine-scandal-confirms-the-need-to-address-the-u-s-militarys-porn-addiction/> [<https://perma.cc/R8VZ-LFAN>].

202. See DAVID VINE, *BASE NATION: HOW U.S. MILITARY BASES ABROAD HARM AMERICA AND THE WORLD* 185 (2015) (noting that “pornography was so valued by troops in Iraq, it was like currency”).

203. See 10 U.S.C. §§ 920c(a)–(c) (prohibiting indecent viewing, visual recording, or broadcasting of “the private area of another person, without that other person’s consent”; forcible pandering, defined as “compel[ing] another person to engage in an act of prostitution”; and indecent exposure, defined as “intentionally expos[ing] private areas indecently”); *cf.* 10 U.S.C. § 917a(a) (prohibiting the knowing and wrongful broadcast or distribution of “an intimate visual image of another person or a visual image of sexually explicit conduct”).

204. See *HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT*, *supra* note 30, at 21, 29 (describing “command climates where demeaning language and sexual harassment are the norm and go unchecked by the commander and enlisted leaders” and lingering military “subcultures of misogyny” in “real life” and online).

1. The Marine Corps Example

The end of the combat exclusion policy for women has forced the military to grapple with how women should be integrated into jobs that involve potential physical violence. An examination of the Marine Corps's approach to women's integration into combat units provides a window into a wider resistance to women in the military. Although the Marines are not the only service to drag its feet on women's integration,²⁰⁵ they have been the most recalcitrant and vocal of all the services in their opposition to integration and thus provide the most material for analysis.

The Marine Corps is a unique branch of the military (technically part of the U.S. Navy)²⁰⁶ because of its relatively small size and focus on "warrior culture."²⁰⁷ A classic Marine Corps phrase is that "[e]very Marine is a rifleman" first.²⁰⁸ For example, while officers of the Army Judge Advocate General's (JAG) Corps (Army lawyers) attend a condensed several-week course to learn basic soldiering skills like marksmanship and navigation, Marine Judge Advocate officers attend the same intense leadership courses as officers who will lead ground combat units.²⁰⁹

Prior to the 2013 announcement that the ground combat exclusion policy for women would be lifted, the Marine Corps commissioned several studies on the potential impact

205. For example, after the DOD ordered all services to integrate women into combat positions in 2015, *see* DOD 2015 Integration Order and Guidance, *supra* note 123, the Army adopted a "Leaders First" policy, which required a female officer of the same military occupational specialty to lead each combat arms company before any females from basic training could be assigned to the company. DEP'T OF THE ARMY, HQDA EXECUTION ORDER 097-16 TO THE U.S. ARMY IMPLEMENTATION PLAN 2016-01 (ARMY GENDER INTEGRATION) 1 (2016) ("A key element of this Integration Plan is the concept of 'leaders first,' which prescribes the placement of a female Armor or Infantry leader in a unit prior to assignment of female junior enlisted Soldiers of the same branch to that unit."). The effect was to delay integrating women into combat units due to the absence of female officers. *See* David Rosa, *Alaska's First Female Infantryman Has Advice for Other Would-Be Grunts: 'YOLO'*, TASK & PURPOSE (Mar. 21, 2021 10:01 AM), <https://taskandpurpose.com/news/serita-unin-alaska-army-national-guard/> [<https://perma.cc/9JPD-6C7D>] ("For five years after the ban on women in combat units was lifted, Army policy put a wrench in the flow of new female recruits joining those units. The reason was because the Army had a 'leaders first' policy which required two female officers or NCOs of the same military occupational specialty to be in each combat arms company that accepted women straight from basic training. . . . The policy . . . ended up slowing down the influx of junior enlisted women into combat units since there were too few female leaders to go around.").

206. Claudette Roulo, *Why Are Marines Part of the Navy?*, U.S. DEP'T OF DEF. (Feb. 21, 2019), <https://www.defense.gov/News/Feature-Stories/story/Article/1763150/why-are-marines-part-of-the-navy/> [<https://perma.cc/S5XN-DB9U>].

207. *See* Rebecca Jensen, *Opening Marine Infantry to Women: A Civil-Military Crisis?*, MARINE CORPS UNIV. (MCU) J. 132, 143 (2018) (special issue), https://www.usmcu.edu/Portals/218/MCUJ_Special%20Issue_Gender_2018_web.pdf?ver=2018-11-02-081012-970 [<https://perma.cc/U6RE-BYGQ>].

208. *See, e.g.*, Jeff Schogol, *Every Marine a Rifleman No More?*, MARINE CORPS TIMES (May 7, 2017), <https://www.marinecorpstimes.com/news/your-marine-corps/2017/05/07/every-marine-a-rifleman-no-more/> [<https://perma.cc/A7VQ-QCXS>] (discussing viewpoints of why the Marine Corps prides itself as being focused on basic combat skills).

209. *See* *Law Candidates, This Will Make You Reconsider OCS*, U.S. MARINE CORPS OFFICER CANDIDATES SCH. BLOG (Sept. 11, 2017), <https://officercandidatesschool.com/2017/09/11/law-candidate-will-reconsider-ocs/> [<https://perma.cc/5ZX7-KRUQ>].

of women's integration into combat arms units. Surveying 54,000 Marines,²¹⁰ one of these studies, conducted in 2012, found deep opposition to women's integration into combat arms, especially from Marines who had served in ground combat units.²¹¹ For example, 76.5% of surveyed male Marines who had served in infantry units opposed integration.²¹² Male Marines who had not served in ground combat units opposed integration at a rate of 56.4%.²¹³ Opposition varied by rank, with the highest level of resistance coming from male junior officers, at 72.6%.²¹⁴ Such junior officers are the front-line leaders of gender integrated units and are responsible for disciplining misconduct.²¹⁵ Higher-ranking female officers favored integration at about 53%, but higher-ranking female enlisted service members only favored integration at about 37% to 41%.²¹⁶ Perhaps the most telling statistic is that roughly 90% of male Marines had concerns about intimate relationships causing problems in integrated units, and more than 80% were concerned about false allegations of sexual harassment or sexual assault.²¹⁷

After being ordered in 2015 by then-Secretary of Defense Ash Carter to open all units and occupational specialties to women,²¹⁸ the Marine Corps commissioned a study of how integrated recruit platoons performed compared with all-male ones.²¹⁹ The year-long study found that all-male platoons performed far better on raw combat tasks like pulling a wounded Marine from a turret.²²⁰ Based on this study, the Marine Corps

210. DAVID STRAUSS, ANITA HATTIANGADI, WARREN SUTTON & CHRISTINE WHITMORE, CNA ANALYSIS & SOLS., ASSESSING THE IMPLICATIONS OF POSSIBLE CHANGES TO WOMEN IN SERVICE RESTRICTIONS 20 (2012), https://www.cna.org/cna_files/pdf/DRM-2012-U-002586-Final.pdf [<https://perma.cc/6APD-SEKU>].

211. *See id.* at 23–33, 42–43. This study was conducted by DOD contractor Centre for Naval Analysis (CNA), a “nonprofit research and analysis organization.” *About Us*, CNA, <https://www.cna.org/about/> [<https://perma.cc/8YMN-SFPS>] (last visited Feb. 1, 2022); STRAUSS ET AL., *supra* note 210, at 1.

212. *See* STRAUSS ET AL., *supra* note 210, at 43.

213. *Id.*

214. *Id.* at 28.

215. *See* *Marine Corp Ranks*, MARINES, <https://www.marines.com/about-the-marine-corps/roles/ranks.html> [<https://perma.cc/24MM-ZAMQ>] (last visited Feb. 1, 2022) (explaining that second and first lieutenants “lead[] at the platoon or company level”); *see also* Kessler & Gearhart, *supra* note 42, at 449–50 (describing the critical role of unit commanders, who are generally junior level officers, in disciplining misconduct within the military justice system).

216. *See* STRAUSS ET AL., *supra* note 210, at 30 (showing that 41% of female respondents in paygrades E4 to E5 and 37.5% of female respondents in paygrades E6 to E9 said they supported women in combat arms).

217. *Id.* at 56. Sentiment about false reporting is not unique to the Marine Corps. *See* HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 30 (“[T]his sentiment is so pervasive across the force that SHARP has become a verb (e.g., Service members might ‘get Sharped’ or victims may make false accusations and ‘SHARP’ an innocent Service member).”). “SHARP” refers to the Army’s Sexual Harassment Assault Response and Prevention program. *Id.* at 3.

218. *See* DOD 2015 Integration Order and Guidance, *supra* note 123, at 1.

219. *See* Philip Athey, *The Best Plan for Marine Corps Gender-Integration? It Just Paid \$2M To Find Out*, MARINE CORPS TIMES (Oct. 20, 2020), <https://www.marinecorpstimes.com/news/your-marine-corps/2020/10/20/the-best-way-for-the-marine-corps-to-integrate-genders-it-just-paid-2m-to-find-out/> [<https://perma.cc/WE57-BTB3>].

220. *See* NEUROMUSCULAR RSCH. LAB’Y, UNIV. OF PITTSBURGH, UNITED STATES MARINE CORPS GROUND COMBAT ELEMENT INTEGRATED TASK FORCE RESEARCH FINAL REPORT 2, 8, 70 (2015), <https://dod.defense.gov/News/Publications/WISR-Studies/> (choose “USMC - University of Pittsburgh Ground Combat Element Integrated Task Force Research Final Report 15 Aug.pdf”) [<https://perma.cc/HH67-34AV>].

requested an exception from the DOD's directive to integrate women into combat roles, which the DOD rejected.²²¹

The Defense Advisory Committee on Women in the Services (DACOWITS) is tasked with providing advice and recommendations to the DOD on matters relating to women in the armed forces.²²² DACOWITS has repeatedly requested updates from the Marine Corps on its progress in integrating women into combat positions but the Corps continues to drag its feet.²²³ In 2020, Congress stepped in, setting a deadline for the

(finding that, on average, male Marines performed significantly better than female Marines on tests of strength, power, and agility whereas female Marines performed significantly better than male Marines on flexibility, balance, and biomechanical variables); *see also* MARINE CORPS COMBAT DEV. COMMAND, ANALYSIS OF THE INTEGRATION OF FEMALE MARINES INTO GROUND COMBAT ARMS AND UNITS (2015), <https://cmrlink.org/data/sites/85/CMRDocuments/285174854-Marine-Corps-analysis-of-female-integration.pdf> [<https://perma.cc/N78C-KHS3>] (reporting that the commissioned study found “numerous indications of lower performance levels from combat arms females, or female-integrated groups,” creating risks for combat battalions and recommending that the Marine Corps seek an exception to the integration for infantry (combat) positions).

221. *See* Seck, *Veterans' Group Calls on Troops*, *supra* note 12.

222. *Charter - Defense Advisory Committee on Women in the Services*, DEF. ADVISORY COMM. ON WOMEN IN THE SERVS., <https://dacowits.defense.gov/About/Charter/> [<https://perma.cc/FJ9Y-MENW>] (last visited Feb. 1, 2022). In early 2021, the DOD disbanded DACOWITS as part of a planned merger of the committee with a broader advisory committee on diversity, equity and inclusion. *See* Hope Hodge Seck, *DOD Quietly Calls for Shutdown of 70-Year-Old Committee on Women in the Military*, MILITARY.COM (June 24, 2021) [hereinafter Seck, *DOD Calls for Shutdown*], <https://www.military.com/daily-news/2021/06/24/dod-quietly-calls-shutdown-of-70-year-old-committee-women-military.html> [<https://perma.cc/LV27-NHJH>]. However, after an outcry from female veteran Congressmembers, the Pentagon revived the committee. *See* Hope Hodge Seck, *After Outcry from Female Vets in Congress, Pentagon Revives Committee on Women in Service*, MILITARY.COM (Sept. 2, 2021), <https://www.military.com/daily-news/2021/09/02/after-outcry-female-vets-congress-pentagon-revives-committee-women-service.html> [<https://perma.cc/NLH5-PG38>]. DACOWITS has held the DOD's feet to the fire on behalf of military women since 1951. *See id.* Most recently, its work has included efforts to integrate Marine Corps boot camps, studying the effect on women of the new Army Combat Fitness Test, and addressing weak promotion rates of women of color in the military. *See* Seck, *DOD Quietly Calls for Shutdown*, *supra*.

223. For example, in response to DACOWITS's request for the Marines' most recent gender integration plan for the September 2019 quarterly DACOWITS meeting, four years after Secretary Carter ordered that all services must fully integrate women, the Marine Corps submitted a one-quarter-page document cross-referencing its four-year-old gender integration plan. *See* U.S. MARINE CORPS, DEP'T OF THE NAVY, MANPOWER PLANS AND POLICY DIVISION COMMENTS ON DON TRACKER 2019-MRA_MP_MPE-124 (2019), <https://dacowits.defense.gov/Reports-Meetings/2019-Documents/Sept2019CommitteeMeeting/> (choose “Marine Corps Written Response” under “Military Services’ Gender Integration Updates (RFI 5)”) [<https://perma.cc/W2P9-WYLU>].

In its updates on its progress toward gender integration for the December 2019 quarterly DACOWITS meeting, the Marine Corps presented a PowerPoint reporting combined data for the Marine Corps and Navy, which has fully integrated women into almost all occupations since the mid-1990s. *See* MANPOWER & RSRV. AFFS., U.S. MARINE CORPS, DACOWITS QUARTERLY BUSINESS MEETING: MARINE CORPS INTEGRATION IMPLEMENTATION PLAN (MCIIP) (2019), <https://dacowits.defense.gov/Reports-Meetings/2019-Documents/Dec2019CommitteeMeeting/> (choose “Marine Corps Briefing Slides” under “Gender Integration Implementation Plans (RFI 7)”) [<https://perma.cc/SG6H-258P>]. This combination of data made it impossible to know how many female Marines are serving in gender integrated units. Nor did the presentation specify whether women serving in integrated units are in combat positions. After the meeting, a Marines spokesperson, responding to questions about the PowerPoint, clarified that most of the women serving in integrated Marine units are working in support (noncombat) roles, such as motor transport and communications. *See* Philip Athey, *60% More Female Marines, Sailors Serving in Previously All-Male Units than in 2018*, MARINE CORPS TIMES

Marine Corps to integrate its two training depots.²²⁴ In response, the Marine Corps reported it was considering a plan to close its two training depots entirely and open a new gender-integrated base.²²⁵ The Corps maintains that the substantial investments necessary to ready their “aging” depots for integrated basic training may not be worth it.²²⁶ Closing military bases takes years.²²⁷

The Marine Corps’s suggestion that it may close its training depots in the face of an order to integrate women is reminiscent of the “Lost Year” in Little Rock, Arkansas, from 1958 to 1959, when school authorities closed the city’s high schools to avoid a federal court’s integration order.²²⁸ Marine Corps leaders close to the issue tend to agree with this assessment. In news reports, an Army infantry commander and a former Marine Corps colonel responsible for training female Marine recruits suggested that this was just

(Dec. 6, 2019), <https://www.marinecorpstimes.com/news/your-marine-corps/2019/12/06/60-more-female-marines-sailors-serving-in-previously-all-male-units-corps-says/> [<https://perma.cc/D6RC-X78R>].

When asked again for an update on integration for the June 2020 quarterly DACOWITS meeting, the Marine Corps reported that a lack of barracks capacity and drill instructors was hindering its ability to move forward with gender-integrated training. See MARINE CORPS TRAINING & EDUC. COMMAND (TECOM), U.S. MARINE CORPS, MARINE CORPS RESPONSE COMBINED RECRUIT TRAINING AT MARINE CORPS RECRUIT DEPOT UPDATE (2020), <https://dacowits.defense.gov/Reports-Meetings/2020-Documents/June2020RFIs/> (choose “Update: Gender Integration of USMC Recruit Training (RFI 5)”) [<https://perma.cc/J29L-7D3U>]. Subsequently, the DACOWITS submitted an “RFI,” i.e., request for information, on gender integrating Marine Corps’s recruit training, stating:

In 2019, the Committee repeated its 2018 continuing concern regarding Marine Corps recruit training. Full gender integration across military occupations and positions relies on integration at all levels of training. DACOWITS believes initial training is foundational to Service members’ readiness. Although the Committee is encouraged by the Marine Corps’ movement toward integration, we stand by the concerns documented in the 2018 and 2019 DACOWITS reports and will continue to monitor efforts to integrate women within Marine Corps recruit training.

See DEF. ADVISORY COMM. ON WOMEN IN THE SERVS., DACOWITS’ RFIS FOR SEPTEMBER 2020 (2020), <https://dacowits.defense.gov/Reports-Meetings/2020-Documents/Sept2020CommitteeMeeting/> (choose “September 2020 RFIs”) [<https://perma.cc/GLQ6-HH62>]. The Marine Corps briefing to DACOWITS in September 2020 responded by reiterating its concerns about lack of barrack capacity and drill instructors, and also stated, “[f]acility limitations due to JJAS [the busiest trimester of training], in addition to COVID-19 social distancing requirements, have limited the opportunities for gender integrated training for the remainder of FY20.” MARINE CORPS TRAINING & EDUC. COMMAND (TECOM), U.S. MARINE CORPS, GENDER INTEGRATED MARINE CORPS RECRUIT TRAINING UPDATE 1–2 (2020), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2020/USMC%20RFI%202.pdf> [<https://perma.cc/HS8Z-G6JL>].

224. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 565, 133 Stat. 1198, 1395–96 (2019) (directing the Marine Corps to stop segregating men and women at Parris Island, South Carolina, the service’s oldest boot camp, within five years and the marine’s West Coast training depot in San Diego, California, within eight years).

225. Gina Harkins, *Marines Weigh Closing Parris Island and San Diego To Open New Coed Boot Camp*, MILITARY.COM (Sept. 24, 2020), <https://www.military.com/daily-news/2020/09/24/marines-weigh-closing-parris-island-and-san-diego-open-new-coed-boot-camp.html> [<https://perma.cc/6NL9-QDG2>].

226. See *id.*

227. See *id.*

228. See Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L. J. 1999, 2009 (2011); John A. Kirk, *Little Rock and the History of the Civil Rights Movement*, 9 HISTORICALLY SPEAKING 28, 29 (2007).

another delay tactic;²²⁹ the Marines' main barrier to integrating women, they suggest, is "cultural."²³⁰

Given the prevalence of negative attitudes about women's integration in the Marine Corps, perhaps it should not be surprising that the Corps is the branch with the lowest percentage of female members. Only 9% of Marines are women, the lowest share among the service branches.²³¹ More than fifty women have made it into Marine infantry units, and only three women have passed the Infantry Officer Course.²³² In the summer of 2021, under pressure from Congress and DACOWITS, the Marines graduated its first female platoon.²³³ The women, who trained under semi-integrated conditions at Marine Corps Recruit Depot in San Diego, California, had the top scores in physical fitness and combat fitness above five male platoons in their company.²³⁴

Public scandal also plagued the Marine Corps in 2017, when it was discovered that a large private Facebook group called "Marines United" was sharing nude photos of female service members, as well as posting revenge porn and content about rape.²³⁵

229. Harkins, *supra* note 225 ("The way the Marine Corps has kicked this can down the road consistently, it's a delay tactic in my view . . ."). Kate Germano, a former lieutenant colonel overseeing the Marine Corps's female recruit battalion, says she was fired in 2015 after she pushed for better, more equitable training for women. *Id.* Her book, *Fight Like a Girl*, is based on this experience. KATE GERMANO & KELLY KENNEDY, *FIGHT LIKE A GIRL: THE TRUTH BEHIND HOW FEMALE MARINES ARE TRAINED* (2018) (recounting the author's struggle to achieve equality of performance and opportunity for female Marines against an entrenched male-dominated status quo).

230. See Laurryn Thomas, *Marines May Leave Parris Island To Fulfill Gender Mandate. What Does the Army Do?*, STATE (Oct. 12, 2020, 3:37 PM), <https://www.thestate.com/news/local/article246263550.html> [<https://perma.cc/DZZ2-3597>] (reporting on interviews with Army commanders at Fort Jackson, the Army's gender-integrated installation for basic combat training, about the Marine Corps's plans to close Parris Island) ("[T]he change may be more cultural than facility-related.").

231. Compare DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61, with DEF. MANPOWER DATA CTR., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE AND SERVICE (2021), <https://dwp.dmde.osd.mil/dwp/app/dod-data-reports/workforce-reports> (choose "Active Duty Military Personnel by Service by Rank/Grade (Updated Monthly), June 2021") [<https://perma.cc/22M6-C7BR>] (reporting data showing that in 2021 women constituted 8.9% of the Marine Corps enlisted force, compared with 26.31% of the Air Force, 24.49% of the Navy, and 19.32% of the Army enlisted forces).

232. See Philip Athey, *First Female Infantry Marine Officer Leaves Corps as Commandant Calls for More Women at Infantry Officer Course*, MARINE CORPS TIMES (Feb. 25, 2020), <https://www.marinecorpstimes.com/news/your-marine-corps/2020/02/25/first-female-infantry-marine-officer-leaves-corps-as-commandant-calls-for-more-women-at-infantry-officer-course/> [<https://perma.cc/74WB-YJV3>]; Gina Harkins, *3 Female Marine Officers To Attempt Infantry Officer Course as Another Graduates*, MILITARY.COM (Dec. 16, 2020), <https://www.military.com/daily-news/2020/12/16/female-marine-lieutenant-will-graduate-infantry-officer-course-week.html> [<https://perma.cc/YKU5-49F6>].

233. See Steve Walsh, *Marines Still Under the Gun To Integrate Women Despite Success of First Boot Camp Class*, KPBS (May 17, 2021, 3:00 AM), <https://www.kpbs.org/news/2021/may/17/marines-still-under-gun-integrate-women-despite-su/> [<https://perma.cc/3DWJ-QJG8>].

234. See *id.*

235. Andrew deGrandpre, *Inside Marines United: Infighting Roiled the Group that Sparked the Military's Nude Photo Scandal*, MIL. TIMES (Mar. 13, 2017), <https://www.militarytimes.com/news/your-military/2017/03/13/inside-marines-united-infighting-roiled-the-group-that-sparked-the-military-s-nude-photo-scandal/> [<https://perma.cc/9GTR-GQV4>]; see also 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, 9:27 PM), <https://taskandpurpose.com/marines-united-study> [<https://perma.cc/N8DL-SD7F>] ("[S]ome 30,000

Facing a public backlash, the DOD punished more than one hundred active-duty Marines, with eleven facing court-martial.²³⁶ The scandal spurred the Marine Corps to conduct a study of its organizational culture, which was performed in 2017 by the Marine Corps Center for Advanced Operational Culture Learning.²³⁷ The resulting report provides a revealing window into sexism directed at female Marines.²³⁸

The report found that two perceptions tended to undergird most of the disparate treatment directed at women: that women were “a nuisance or a danger” and that “women make inadequate Marines.”²³⁹ In one of the anecdotes contained in the report, a female Marine recounted reporting to her first unit after basic training:

Straight out of TBS [“The Basic School,” i.e., basic training], came here . . . just so excited to be part of the Marine Corps, sat down, introduced myself to my commanding officer. One of the first things he says to me is, “Well, you’re one of three females here. We had an incident with the last female that was here. So, I’m not going to have this issue where you come in here—where I’m going to need to sit down with you in the future about you sleeping with anybody, am I?” And I just kind of sat there [*laughs*] like, “What do I say to this? Like would you ask a man that?”²⁴⁰

In essence, the report indicated that the behavior exhibited in the Marines United scandal was symptomatic of a deeper cultural issue within the Marine Corps.

As should be clear by this point, the Marines have a record of sex discrimination and a general culture of not fully valuing women’s service. Such “gendered” workplaces, research suggests, makes it more likely that workers will be harassed,²⁴¹ and indeed, this pronounced relationship is borne out in the Marines. The Marines have the highest rates

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.”).

236. DEF. ADVISORY COMM. ON WOMEN IN THE SERVS., U.S. DEP’T OF DEF., MARINE CORPS TASK FORCE ACTIONS TO DATE (2018), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2018/USMC%20RFI%206.pdf?ver=2018-09-06-225053-877> [<https://perma.cc/55A7-AUF2>].

237. See Szoldra, *supra* note 235. Congress also responded to the issue of revenge porn highlighted by this scandal by creating Punitive Article 117a under the Uniform Code of Military Justice, making the “[w]rongful broadcast or distribution of intimate visual images” an offense. 10 U.S.C. § 917a. Senator Elizabeth Warren (D-MA) initiated this change, introducing the Protecting Servicemembers Online Act of 2017 on June 13, 2017. S. 1346, 115th Cong. (2017). Ultimately, the reform was enacted as part of the National Defense Authorization Act for Fiscal Year 2018. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1389 (codified at 10 U.S.C. § 917(a)).

238. See REBECCA LANE, ERIKA TARZI, KRISTIN POST & ERIC GAULDIN, MARINE CORPS ORGANIZATIONAL RESEARCH PROJECT REPORT TO PERSONNEL STUDIES AND OVERSIGHT OFFICE: MARINES’ PERSPECTIVES ON VARIOUS ASPECTS OF MARINE CORPS ORGANIZATIONAL CULTURE 46 (2018), https://www.usmcu.edu/Portals/218/CAOCL/files/MCOCR%20Report%20to%20PSO%2030Mar18_wDem_FINAL.pdf?ver=2019-09-05-135301-060 [<https://perma.cc/37JD-Z4DD>].

239. *Id.*

240. *Id.* at 47–48 (omission in original) (second alteration in original).

241. See THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 126 (2015).

of sexual assault²⁴² and among the highest rates of sexual harassment²⁴³ of all the services.

2. Demographic Challenges

Because of its demographics, the military “workplace” has many of the risk factors traditionally associated with high rates of sexual harassment. A male-dominated workplace is a traditional risk factor for sexual harassment.²⁴⁴ Males make up the vast majority of uniformed service members, with women comprising only about 21% of the enlisted force.²⁴⁵ Among the highest echelons of the military and in combat positions, the numbers are far worse. As of May 2020, only six women had ever reached the rank of four-star general out of roughly one hundred four-star military officers (6%) in the military’s history;²⁴⁶ only recently, President Biden nominated three additional women to this rank, who were confirmed, bringing the total to nine.²⁴⁷ There has never been a female member of the Joint Chiefs of Staff or a female Secretary of Defense.²⁴⁸ The first female Deputy Secretary of Defense was appointed only in 2021.²⁴⁹ As of 2020, five years after ground combat positions opened to women, about one thousand Army women

242. DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 9 (reporting that in 2018, the last year data were collected, an estimated 10.7% of female Marines were sexually assaulted, compared to 7.5% in the Navy, 5.8% in the Army, and 4.3% in the Air Force).

243. See 2018 WGRA SURVEY, *supra* note 147, at 81–82, 116, 148, 182, 226 (reporting that in 2018, an estimated 31.9% of female Marines experienced sexual harassment, compared with 31.4% in the Navy, 24.3% in the Army, 15.4% in the Air Force, and 16.6% in the Coast Guard). In contrast, an estimated 5.7% of male service members in the Marines, 1.5% in the Navy, 6% in the Army, 4% in the Air Force, and 3.7% in the Coast Guard experienced sexual harassment. *Id.*

244. See BEINER, *supra* note 241, at 130.

245. See DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61. Notably, this percentage has remained relatively flat in the past decade and a half; in 2004, women represented about 15% of the enlisted force. See U.S. GOV’T ACCOUNTABILITY OFF., FEMALE ACTIVE-DUTY PERSONNEL: GUIDANCE AND PLANS NEEDED FOR RECRUITMENT AND RETENTION EFFORTS 51 tbl.2 (2020) [hereinafter GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL], <https://www.gao.gov/assets/gao-20-61.pdf> [<https://perma.cc/XU8J-UZMB>].

246. Lori Robinson & Michael E. O’Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces/> [<https://perma.cc/2S6A-7EVV>].

247. The nine female four-star generals by service and year of confirmation are General Ann E. Dunwoody (U.S. Army, 2008), General Janet Wolfenbarger (U.S. Air Force, 2012), General Lori Robinson (U.S. Air Force, 2014), Admiral Michelle Howard (U.S. Navy, 2016), General Ellen Pawlikowski (U.S. Air Force, 2015), General Jacqueline D. Van Ovost (Air Force, 2020), General Maryanne Miller (U.S. Air Force, 2018), Admiral Linda Fagan (U.S. Coast Guard, 2021), and General Laura Richardson (Army, 2021). Of note, Admiral Michelle Howard is the only African American woman ever to have held this rank. See Natalie Brand, *New Policies Make It Easier for Military Women To Serve and Be Moms: “I Don’t Have To Make a Choice”*, CBS NEWS (July 3, 2021, 1:46 PM), <https://www.cbsnews.com/news/motherhood-military-women-new-policies/> [<https://perma.cc/LB33-28WV>].

248. Robinson & O’Hanlon, *supra* note 246.

249. See Hope Hodge Seck, *Biden Taps Kathleen Hicks To Be the Pentagon’s First Female Deputy SecDef*, MILITARY.COM (Dec. 30, 2020), <https://www.military.com/daily-news/2020/12/30/biden-taps-kathleen-hicks-be-pentagons-first-female-deputy-secdef.html> [<https://perma.cc/L72V-QWST>].

were serving in these positions (1% of Army combat soldiers).²⁵⁰ Only a handful of women have served in Marine Corps combat positions across the entire branch.²⁵¹

Sexual harassment also tends to be more common in workplaces with younger individuals.²⁵² The general population of the military tends to be young. For example, just over half of Marine Corps recruits are ages seventeen to eighteen, and 84% are under age twenty-one.²⁵³ Sixty-five percent of Air Force and Army and 69% of Navy recruits are age twenty and younger.²⁵⁴ Junior enlisted women between the ages of seventeen and twenty-four are at the greatest risk of assault; an estimated 9.1% of junior enlisted women (ranks E1–E4) reported that they experienced sexual assault in 2018,²⁵⁵ the last year prevalence data were collected.

In many ways, the military's struggle with sexual assault and harassment can be compared to that of college campuses, where the combination of young age and heavy alcohol use has made it difficult for schools to address the problem.²⁵⁶ Alcohol was involved in 62% of fiscal year 2018 military sexual assault incidents.²⁵⁷ Although alcohol does not by itself cause sexual assault or harassment, the emerging literature on perpetration finds that "men who drink heavily in general and in dating and sexual situations commit more sexual assaults and more severe sexual assaults than other men."²⁵⁸ Like college students, young service members tend to work and socialize

250. See U.S. DEP'T OF THE ARMY, ANNUAL REPORT ON PROGRESS OF THE ARMY IN INTEGRATING WOMEN INTO MILITARY OCCUPATIONAL SPECIALTIES AND UNITS RECENTLY OPENED TO WOMEN 4 (2019), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2019/USA%20RFI%205.pdf> [<https://perma.cc/QTC7-5BSC>] (reporting that since April 2016, 976 women contracted, accessed, or transferred into occupations previously closed to women); see also Emma Moore, *Women in Combat: Five-Year Status Update*, CTR. FOR A NEW AM. SEC. (Mar. 31, 2020), <https://www.cnas.org/publications/commentary/women-in-combat-five-year-status-update> [<https://perma.cc/32F7-R56W>] (providing a detailed accounting of the numbers of women passing combat arms specific training courses across the services as of spring 2020, though numbers remain small).

251. See Gina Harkins, *Top Marine General Wants More Women Serving in Ground-Combat Jobs*, MILITARY.COM (Feb. 25, 2020), <https://www.military.com/daily-news/2020/02/25/top-marine-general-wants-more-women-serving-ground-combat-jobs.html> [<https://perma.cc/MZG6-987A>].

252. See BEINER, *supra* note 241, at 122.

253. RES. & FORCE READINESS DIV., CTR. FOR NAVAL ANALYSES, POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2018 SUMMARY REPORT 23–24 (2019), <https://www.cna.org/research/pop-rep> (choose "Summary" then "FY18 Summary") [<https://perma.cc/3LJW-QEB6>].

254. *Id.* at 24. "While these percentages vary slightly [from year to year], the same general distribution typically exists." *Id.*

255. DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 6, 10; cf. DOD FY 2020 REPORT ON SEXUAL ASSAULT, APP. B, *supra* note 149, at 30 (reporting that in fiscal year 2020, the majority (70%) of victims of sexual assault who completed investigations were between the ages of sixteen and twenty-four).

256. See Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. 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/VK8M-JB9Q>].

257. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 11.

258. See INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., U.S. DEP'T OF DEF., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY, APPENDIX C: EQUIPPING THE FORCE AND EMPOWERING PREVENTION: RECOMMENDATIONS TO PREVENT SEXUAL HARASSMENT AND SEXUAL ASSAULT IN THE U.S. MILITARY 32 (2021), <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT->

together, often with alcohol.²⁵⁹ This is consistent with the finding that most of the assaults perpetrated on service members are by peers or near peers in rank.²⁶⁰ That is, active-duty service members are never really outside of the “workplace”; as such, sexual misconduct often occurs during off-duty hours or off base.²⁶¹ Such demographic factors pose an obstacle to addressing sexual assault and harassment,²⁶² much in the same way they have in the college environment.

C. 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.”²⁶³ 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.²⁶⁴

To address the climate issue, the Secretary directed the Under Secretary of Personnel Readiness to “[d]evelop new climate assessment tools” to help identify particularly problematic units and allocate additional resources to those units to ensure “good order and discipline.”²⁶⁵

While it is hard to disagree with the idea of getting ahead of problems, Shanahan’s directive suggests that top military leadership still views sexual misconduct as a problem of discipline to be handled at the unit level by individual commanders. And while President Biden and the DOD have committed to reforming the military justice system

FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF [https://perma.cc/H44W-DAVP] (quoting Antonia Abbey, Rhiana Wegner, Jacqueline Woerner, Sheri E Pegram & Jennifer Pierce, *Review of Survey and Experimental Research that Examines the Relationship Between Alcohol Consumption and Men’s Sexual Aggression Perpetration*, 15 *TRAUMA VIOLENCE ABUSE* 265, 277 (2014)).

259. Cf. DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 11 (reporting that alcohol use is a known risk factor for sexual assault perpetration); ROLE OF THE COMMANDER SUBCOMM., U.S. DEP’T OF DEF., REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 8 (2014) (discussing “alcohol mitigation strategies that affect pricing, outlet density, and the availability of alcohol” as an important, yet neglected, element of the military’s strategy on sexual assault prevention).

260. See DOD FY 2019 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 37, at 20 (reporting that in FY 2018, “the alleged offender’s grade was most often the same as the victim’s or one grade higher”); see also HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at app. D, THE IMPERATIVE OF LEADERSHIP IN THE WAR AGAINST SEXUAL ASSAULT: RECOMMENDATIONS FOR CLIMATE & CULTURE 9–10.

261. See DOD FY 2018 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 34, at 4; 2018 WGRA SURVEY, *supra* note 147, at 47.

262. See HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 30, at 10 (noting that average junior enlisted service members, who are at highest risk of sexual assault, have a “small universe” where they work and spend off-hours together).

263. Shanahan Memorandum, *supra* note 58.

264. *Id.* at 1.

265. See *id.* at 2.

so that military commanders (who themselves often engage in sexual misconduct or routinely sweep complaints of sexual misconduct under the rug) are not the personnel charged with investigating and punishing sexual assault and harassment,²⁶⁶ this is just a minimum, necessary step to bring the military justice system into closer alignment with our country's civilian justice systems.²⁶⁷ The military's many sex scandals and record on sexual misconduct demonstrate a broader culture unwelcoming of women. The DOD must engage in more systemic organizational reform if it is to make headway on reducing sexual assault and harassment.

III. ADDRESSING SEXUAL MISCONDUCT IN THE MILITARY: AN ORGANIZATIONAL APPROACH

This Section turns to solutions. There is abundant evidence that the prevalence of sexual assault and harassment in the military is rooted in its organizational characteristics, including a masculine culture and male-dominated institutional demographics. Therefore, this Section introduces a set of policy recommendations aimed at promoting women's equal representation in the military and shifting the military's culture so that women's service and potential are taken seriously. These policy

266. See Austin Sept. 2021 Memorandum, *supra* note 32. As this Article goes to press, Congress is finally taking a long overdue step in this direction with the passage of the 2022 National Defense Authorization Act (FY22 NDAA), which changes how the military investigates and prosecutes rape, sexual assault, domestic violence, and related offenses under the Uniform Code of Military Justice. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 533(2), 135 Stat. 1541, 1695–96 (2021). Most notably, the Act transfers prosecution decisions to military lawyers (“special trial counsel”) out of the chain of command for these types of offenses. *Id.* at § 531(a), 135 Stat. at 1692–93. The Act also requires the president to issue regulations to include sexual harassment as a standalone offense punishable under the Uniform Code of Military Justice (UCMJ). *Id.* at § 539D(a), 135 Stat. at 1699–1700. Although sexual harassment can presently be prosecuted under some UCMJ articles such as those covering “cruelty,” “failure to obey a lawful order,” and “conduct bringing discredit on the armed forces”—and is prohibited by each service’s personnel policy—it is not a separate enumerated offense under the UCMJ. See Kessler & Gearhart, *supra* note 42, at 454–57, 466 n.291. Creating a separate offense for sexual harassment should clear up any ambiguity about the offense’s elements, create uniformity among the services, and send a strong deterrence message. Finally, the DOD must now track complaints of retaliation by victims of sexual assault or sexual harassment. *Id.* at § 544(a), 135 Stat. at 1710–11. These are just a few the main provisions of the reform.

Still, the FY22 NDAA does not go far enough to ensure independent prosecutorial dispositional authority for sex offenses. First, the Act’s mandate of independent investigation and prosecution of sex offenses will not go into effect for two years. *Id.* at § 539C(a), 135 Stat. at 1699. This generous deadline comes with a worrisome caveat. If the president does not prescribe regulations that put into effect these reforms within two years of enactment, the changes become effective only on the date the regulations are promulgated. *Id.* at § 539C(b)(1)–(2), 135 Stat. at 1699. Second, military lawyers may consider the advice and recommendations on case disposition from the very commanders whose troops are impacted by the proceeding. *Id.* at § 532(a), 135 Stat. at 1695. Third, although commanders must forward complaints of sexual harassment for an independent investigation, this new offense is not included as a “covered offense” to be handled by independent military lawyers. *Id.* at § 532(a), 135 Stat. at 1695. Finally, investigations of sexual harassment are only required “to the extent practicable.” *Id.* In sum, the FY22 NDAA’s provisions requiring dispositional authority for covered offenses to be transferred from commanding officers to military lawyers reflects so many exceptions and compromises that it remains to be seen whether the Act’s purported purpose of serving justice for victims of sexual misconduct will be achieved.

267. See Kessler & Gearhart, *supra* note 42, at 471–87 (proposing military justice reforms that would close the gap between the military justice and civilian legal systems in how sexual misconduct is investigated, adjudicated, and remedied).

recommendations include recruiting and promoting more women, adopting gender-neutral minimum physical fitness standards, and reforming the Selective Service System so that all qualified individuals are required to register for the draft irrespective of sex.

Social science research suggests that organizational climate and composition can impact the prevalence of sexual harassment.²⁶⁸ Organizational climate refers to the extent that sexual harassment is tolerated in a workplace; organizational composition refers to the presence or absence of gender diversity.²⁶⁹ A positive organizational climate decreases the prevalence of sexual harassment, reduces retaliation against those who report it, and lessens its job-related and psychological impacts.²⁷⁰ In contrast, workplaces that tolerate sexual harassment are associated with greater levels of harassment and worse outcomes for victims who experience it.²⁷¹ Workplaces where men significantly outnumber women are also associated with increased rates of sexual harassment, especially in jobs with masculine duties such as the military and law enforcement.²⁷²

Sociocultural theories of sexual harassment, which are close relatives of the organizational theories discussed here, posit that sexual harassment occurs because of the sex-role expectations of men and women.²⁷³ According to this model, sexual harassment “is used to enforce . . . gender norms and [sex-role] stereotypes.”²⁷⁴ Thus, for

268. See Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127, 143 (2007).

269. See BEINER, *supra* note 241, at 130 (summarizing measures used in studies on organizational antecedents and sexual harassment).

270. 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, 688–89 (2014).

271. See BEINER, *supra* note 241, at 128 (“[H]arassment is more likely to occur in workplaces where it appears to be permissible.”); John B. Pryor, Janet L. Giedd & Karen B. Williams, *A Social Psychological Model for Predicting Sexual Harassment*, 51 J. SOC. ISSUES 69, 79 (1995) (finding that men who are highly likely to harass were more likely to act upon their predisposition when the social norms of the workplace permitted it).

272. See BEINER, *supra* note 241, at 130; CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 26 (2016) [hereinafter FELDBLUM & LIPNIC, EEOC SEXUAL HARASSMENT TASK FORCE REPORT], https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [<https://perma.cc/S6S5-V3LG>] (reporting that “sexual harassment of women is more likely to occur in workplaces that have primarily male employees”); John Sibley Butler & James M. Schmidtke, *Theoretical Traditions and the Modeling of Sexual Harassment Within Organizations: The Military as Data*, 36 ARMED FORCES & SOC’Y 193, 213 (2010) (in a study of 18,992 female subjects in the United States military, finding that “when there are fewer women in a work group, the incidence of all forms of harassment is likely to be higher”); Louise F. Fitzgerald, Fritz Drasgow, Charles L. Hulin, Michele J. Gelfand & Vicki J. Magley, *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCH. 578, 586 (1997) (finding that male-dominated workplaces, especially those involving male-oriented tasks, are “significantly implicated in high levels of sexual harassment”); Paula McDonald, *Workplace Sexual Harassment 30 Years On: A Review of the Literature*, 14 INT’L J. MGMT. REVS. 1, 9 (2012) (“[S]tudies consistently indicate that [sexual harassment] is more frequently experienced by women in male-dominated occupations and work contexts (e.g., law enforcement, fire-fighting, construction), more than women in balanced or in female-dominated workplaces.”).

273. See Butler & Schmidtke, *supra* note 272, at 201.

274. See BEINER, *supra* note 241, at 117 (quoting Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 745 (1997)).

example, men and women who do not conform with traditional gender roles, such as “a ‘feminine’ acting man in a predominantly male work environment . . . or a woman who challenges gender norms by being ‘tough enough’ to do a job in a traditionally male-dominated environment,” are more likely to experience sexual harassment.²⁷⁵

The military is a male-dominated workplace with a highly masculine climate and a decades-long record of stagnation in reducing incidents of sexual assault and harassment.²⁷⁶ As social science research would predict, sexual misconduct has flourished in this environment.

Based on the foregoing analysis, this Section suggests reforms that would degender and promote a culture shift in the military. The recommendations are made with the goal of reducing the devaluation of women as members of the armed forces, thereby creating an environment where sexual assault and harassment are less likely to occur and more likely to be addressed effectively when they do occur. Specifically, reforms that improve the gender representation of women in the military and shift its macho culture are important components of the military’s response to sexual assault and harassment.

A. Recruiting, Promoting, and Retaining Women

Many workplaces lack significant female leadership.²⁷⁷ Experts have found that promoting women to leadership roles reduces sex discrimination and leads to more positive perceptions of women in the workforce.²⁷⁸ The military suffers from a lack of female leadership, due in large part to the small percentage of women joining the armed forces.²⁷⁹ Because the military promotes leadership from within its ranks, increasing the percentage of women entering the armed forces is necessary to increase the number of female military leaders. As the DOD has stated, “the military personnel system is a ‘closed’ system. Growth must come from within, and from the bottom up; lateral entries

275. See FELDBLUM & LIPNIC, EEOC SEXUAL HARASSMENT TASK FORCE REPORT, *supra* note 272, at 26.

276. See *supra* Part II.A.

277. See Amy E. Smith, *On the Edge of a Glass Cliff: Women in Leadership in Public Organizations*, 39 PUB. ADMIN. Q. 484, 486–87 (2015) (noting that women are underrepresented in both private and public sector leadership positions).

278. See Cordelia Fine, Victor Sojo & Holly Lawford-Smith, *Why Does Workplace Gender Diversity Matter? Justice, Organizational Benefits, and Policy*, 14 SOC. ISSUES & POL’Y REV. 36, 46–50 (2020) (arguing that gender diversity in leadership decreases direct, indirect, and sex-based discrimination in the workplace); Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won’t End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (Nov. 15, 2017), <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will> [https://perma.cc/J29R-2PB6] (arguing that the best way to reduce sexual harassment is to promote more women to management positions); Janka I. Stoker, Mandy Van der Velde & Joris Lammers, *Factors Relating to Managerial Stereotypes: The Role of Gender of the Employee and the Manager and Management Gender Ratio*, 27 J. BUS. & PSYCH. 31, 38 (2012) (finding that although employees overall prefer male managers, employees with female managers are more likely to prefer females in leadership positions).

279. See DMDC 2021 FEMALE ACTIVE DUTY POP. DATA, *supra* note 61 (reporting that females comprise 17.44% of enlisted personnel and 19.44% of commissioned officers as of October 2021).

play virtually no role. Consequently, the gender structure of the career force is shaped primarily by the proportion of females recruited.”²⁸⁰

An increased focus on depicting women in a variety of roles in military recruiting advertisements would help dispel notions that the military is equivalent to “guys serving in war.”²⁸¹ Military intelligence, medicine, nursing, information technology, and law are all fields that might attract a recruit who is not primarily focused on the warfighting aspects of the military. Simply having more female recruiters could also be helpful, since it could help overcome the military’s image as a male-only organization as well as male recruiters’ hesitations to recruit women.²⁸² Military recruitment has been a consistent struggle across the board, given that fewer and fewer Americans are inclined to join the military and that many of those who might be inclined to join are unqualified for reasons such as weight or drug use.²⁸³

Young women currently represent the largest pool of American citizens qualified to serve and yet not serving.²⁸⁴ The armed forces would greatly benefit from the strengths and diversity of more female recruits. Unfortunately, concerns about sexual assault and harassment are prevalent enough that they cause apprehension in some women considering joining the military, as well as among their parents.²⁸⁵ This is an unfortunate catch-22, as increased numbers of women in the military would likely reduce the prevalence of discrimination leading to sexual assault and harassment. More generally, young women have a lower propensity to serve than young men. In recent youth polls, 8% of women said they would “probably” or “definitely” be serving in the military in the next few years compared to 18% of men.²⁸⁶ Notwithstanding such challenges, the military must make a more concerted effort to recruit young women.

280. OFF. UNDER SEC’Y DEF. FOR PERS. & READINESS, U.S. DEP’T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2000, at 3-7 (2002), <https://www.cna.org/pop-rep/2000/assets/pdf/chapters2000.pdf> [<https://perma.cc/WEU9-4QG3>].

281. DOUGLAS YEUNG, CHRISTINA E. STEINER, CHAITRA M. HARDISON, LAWRENCE M. HANSER & KRISTY N. KAMARCK, RAND CORP., RECRUITING POLICIES AND PRACTICES FOR WOMEN IN THE MILITARY: VIEWS FROM THE FIELD 33 (2017), https://www.rand.org/pubs/research_reports/RR1538.html [<https://perma.cc/A8AH-XV5M>].

282. *See id.* at 34–36 (reporting the finding from focus groups that nearly half of male recruiters felt uncomfortable pursuing young female recruits because of fears that their intentions would be misconstrued as sexual interest).

283. Claudia Grisales, *Lawmaker: Women Could Be the Answer to Military’s Recruiting Woes*, STARS & STRIPES (Apr. 13, 2018), <https://www.stripes.com/news/lawmaker-women-could-be-the-answer-to-military-s-recruiting-woes-1.521951> [<https://perma.cc/U22S-3PHY>] (“[O]nly 29 percent of people ages 18 to 23 are eligible to serve after adjustments are made for disqualifications based on standards for medical, physical health, weight, mental health, drug use, aptitude and other concerns.”).

284. *Id.*

285. *See* YEUNG ET AL., *supra* note 281, at xi, 26–27. For example, a young woman polled by the advertising and marketing arm of the DOD, explained “[i]t’s the stigma of the way they treat women in the Military. As a woman, I don’t know if I feel completely safe in that environment.” JOINT ADVERT. MKTG. RSCH. & STUD., U.S. DEP’T OF DEF., UPDATES ON THE FEMALE RECRUITING MARKET 7 (2018), <https://dacowits.defense.gov/Reports-Meetings/2018-Documents/Sept2018CommitteeMeeting/> (choose “DoD Recruitable Population Demographics (RFI 1)”) (consisting of a PowerPoint by the Joint Advertising Market Research Studies (JAMRS) titled “Updates on the Female Recruiting Market”) [<https://perma.cc/YAJ4-UGNF>].

286. KAMARCK, *supra* note 52, at 31–32.

Promotion and retention also play important roles in maintaining a diverse armed forces. On these fronts, the military is falling short. According to a 2020 Government Accountability Office (GAO) study mandated by Congress, in most years from 2004 to 2018, female active-duty enlisted service members were promoted at lower rates than male service members.²⁸⁷ While female commissioned officers had slightly higher promotion rates than their male counterparts in the same period,²⁸⁸ female officers generally make up a small percentage of officers in the military overall, especially at the highest ranks.²⁸⁹ For example, in 2018, at the lowest rank of commissioned officers (O-01), men made up 80% of officers, and at the highest rank (O-10), men were 94% of officers.²⁹⁰ Because serving in combat arms is important for consideration for the most senior ranks, we may never see women reach the military's top ranks given their continued lack of integration into combat roles.²⁹¹

In terms of retention, female troops are 28% more likely than males to leave the military early.²⁹² The GAO reviewed retention studies and found a variety of reasons for this, which can be divided into two categories: difficulties balancing military careers with family life and organizational climate issues. Female service members said demanding work schedules and deployments cause constant sacrifice of family time, and planning pregnancies to fit within the military's rigid career timelines is difficult.²⁹³ "Study participants also noted that they often faced sexism and the existence of an 'old boy's network,' especially in career fields dominated by males," and that there is a lack of female mentors and role models in leadership.²⁹⁴ Sexual assault, and how it was handled, was also cited as a significant factor.²⁹⁵ "For example, two females [in one study] stated that the perpetrator was not punished, and another woman cited the lack of support from other servicemembers as contributing to their decisions to separate from the military."²⁹⁶

287. GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 31.

288. *Id.* ("[F]rom fiscal years 2004 through 2018, female commissioned officer promotion rates ranged from 3.3 to 5.3 percentage points higher than male commissioned officer promotion rates.").

289. *Id.* at 32.

290. *Id.* at 54 tbl.5.

291. See KAMARCK, *supra* note 52, at 30 ("[T]oday's females eligible for G/FO rank likely entered service in 1985 before restrictions were lifted on women serving on combat aircraft (1991), surface combatants (1993), submarines (2010), and before the 'risk rule' was rescinded (1988).").

292. GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 18.

293. *Id.* at 28–29. Female service members also cited difficulties finding stable and safe dependent care for children while they are deployed. *Id.* at 29–30; see also DEP'T OF DEF., PRESERVING OUR COMPETITIVE ADVANTAGE: PERSONNEL AND READINESS STRATEGY FOR 2030, at 17 (2020) [hereinafter PRESERVING OUR COMPETITIVE ADVANTAGE], https://prhome.defense.gov/Portals/52/Documents/Strategy/PR_Strategy_FINAL_.pdf?ver=KY6Vacn3kT1Gd9fNxnR34w%3D%3D [<https://perma.cc/KN3C-MJKF>] ("The likelihood of separation for female Service members is 28 percent higher than males, and represents between 65 and 83 percent of parenthood-related discharges.").

294. GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 29.

295. *Id.*

296. *Id.*

For years, the DOD has identified the recruitment and retention of women as important to diversity. For example, in its *Diversity and Inclusion Strategic Plan 2012–2017*, the DOD stated that the military must represent the country it defends and that it benefits from diversity.²⁹⁷ Again, in 2020, in interviews with the GAO, DOD leadership reported that “there is a general goal to recruit a force that reflects the makeup of the country it represents as a method for encouraging trust in the military among the population at large.”²⁹⁸ Secretary of Defense Mark Esper issued a memorandum to all military components reiterating these sentiments in 2020.²⁹⁹

Despite the DOD’s stated aspirations over multiple administrations, it has failed to adequately plan for and track the integration of women into the armed forces. According to the GAO audit, the DOD lacks “goals, performance measures, and timeframes to guide and monitor efforts to recruit and retain female servicemembers.”³⁰⁰ As far back as 2014, DACOWITS recommended that the DOD should have targets to increase the representation of female enlisted service members and officers,³⁰¹ but the DOD did not implement this recommendation.³⁰²

297. DEP’T OF DEF., DIVERSITY AND INCLUSION STRATEGIC PLAN 2012–2017 (2012), https://diversity.defense.gov/Portals/51/Documents/DoD_Diversity_Strategic_Plan_%20final_as%20of%2019%20Apr%2012%5B1%5D.pdf [<https://perma.cc/XJF3-ZUJK>].

298. GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 36.

299. Memorandum from Mark Esper, Sec’y of Def., for Chief Mgmt. Officer of the Dep’t of Def., Sec’y of the Mil. Dep’ts et al. on Actions for Improving Diversity and Inclusion in the Department of Defense (June 19, 2020), <https://media.defense.gov/2020/Jun/22/2002319394/-1/-1/1/ACTIONS-FOR-IMPROVING-DIVERSITY-AND-INCLUSION-IN-THE-DOD.PDF> [<https://perma.cc/9QQ5-VJA3>] (“To ensure the morale, cohesion, and readiness of the military it is essential that our ranks reflect and are inclusive of the American people we have sworn to protect and defend.”).

300. GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 37.

301. *See* DEF. ADVISORY COMM. ON WOMEN IN THE SERVS., DACOWITS 2014 REPORT v, 32 (2014), https://dacowits.defense.gov/Portals/48/Documents/Reports/2014/Annual%20Report/2014%20DACOWITS%20Annual%20Report_Final.pdf [<https://perma.cc/6SAH-2SQA>] (“All Services should have targets to increase the representation of enlisted servicewomen; these targets should be benchmarked against the pool of eligible female recruits. Furthermore, these targets should not be constrained by past or current representation of women in the Armed Services, or estimates of the propensity of women to enlist.”). DACOWITS’s recommendation of targets came after a year-long study in which it received testimony and reports from all of the services and found that not all had targets for recruitment or retention of women. *See, e.g., id.* at 25 (“The Air Force does not have numerical targets or goals . . .”); *id.* at 25 (“[T]he Army has no recruiting goals for women specifically.”). When queried by DACOWITS, those who testified gave all kinds of reasons for not adopting benchmarks, including, for example, that goals do not necessarily determine whether a person joins the military (i.e., targets will not work); that commanders could translate broad goals differently (i.e., inconsistency); that goals may act as a ceiling; and that, in the military environment, “people might not understand that a goal is not an order” (i.e., goals would function as quotas). *Id.* at 26–27. The DOD General Counsel’s Office briefed DACOWITS and explained the following: “There is no legal interpretation that goals are unconstitutional, including numerical goals. As long as goals are not tied to specific actions, there is no legal conflict with having them.” *Id.* at 26.

302. *See* GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 37. Moreover, the DOD does not even track the integration, recruitment, promotion, or retention of LGBTQ+ service members. In 2016, for the first time, the DOD’s annual workplace climate survey included questions about the personal experiences of LGBT service members with sexual harassment, sexual assault, and discrimination. *See* 2016 WGRA SURVEY, *supra* note 147, at xxii. However, there is still no systematic tracking of the LGBTQ+ population in the military.

In the near future, the DOD will release an updated diversity and inclusion plan.³⁰³ This will be an opportunity to establish clear plans and metrics, which could translate the DOD's stated diversity aspirations into tangible practice. Without clearly defined goals, performance measures, and timeframes, DOD may continue to experience slow growth of its female population and leadership.³⁰⁴ This would be a missed opportunity to modernize its force to prepare for the future of high-tech warfare, an important strategic consideration.³⁰⁵

Experts predict that as the military adopts new forms of technology such as big data, artificial intelligence, robotics, and biotechnology, its personnel demands will change.³⁰⁶ Specifically, in the future, “[t]he need for personnel of high aptitude will increase as warfare becomes more intellectualized;”³⁰⁷ “[s]tandards for physical fitness may diminish in importance for certain occupations, particularly for those functions dependent on mental agility and performed remotely.”³⁰⁸ That is, recruiting and promoting more women in the military will increase operational effectiveness.

Continuing on the same path of stagnant growth in female representation in the armed forces would also fail to address the organizational and climate factors that contribute to the military's high prevalence of sexual assault and harassment.³⁰⁹ Because research strongly suggests that a gender-diverse military force can reduce sexual assault and harassment, recruiting, retaining, and promoting more women must be a DOD priority.

B. Gender-Neutral Physical Fitness Standards

All military branches have established minimum physical fitness standards for their members regardless of their occupational specialty.³¹⁰ Military departments also have additional physical screenings for entry into certain occupational fields.³¹¹ The resulting scores are a component of performance reviews,³¹² and thus an important aspect of career progression. Since 1994, Congress has required that occupational performance standards for

303. See GAO 2020 REP. ON RECRUITMENT AND RETENTION OF FEMALE ACTIVE DUTY PERSONNEL, *supra* note 245, at 36 n.57 (referencing the forthcoming updated report, not yet released as of this writing).

304. *Id.* at 39.

305. See JOHN D. WINKLER, TIMOTHY MARLER, MAREK N. POSARD, RAPHAEL S. COHEN & MEAGAN L. SMITH, RAND CORP., REFLECTIONS ON THE FUTURE OF WARFARE AND IMPLICATIONS FOR PERSONNEL POLICIES OF THE U.S. DEPARTMENT OF DEFENSE 1–2 (2019), https://www.rand.org/content/dam/rand/pubs/perspectives/PE300/PE324/RAND_PE324.pdf [<https://perma.cc/PHW7-8FVR>].

306. *Id.* at 8.

307. *Id.* at 24.

308. *Id.* at 25. The military may also need to reconsider its “up-or-out promotion system,” which rarely allows for lateral entry by civilians; it will “have to imagine different ways that people will affiliate.” *Id.* at 27, 28.

309. See *supra* notes 268–272 and accompanying text.

310. KAMARCK, *supra* note 99, at 19.

311. *Id.*

312. See *id.* (explaining that minimum physical fitness standards, which are administered upon entry and annually, encourage a minimum level of fitness).

military occupational specialties (called “MOSs”) be gender-neutral.³¹³ However, gender-differentiated physical fitness standards have historically been the norm for the military’s basic physical requirements.³¹⁴

This Part argues that sex-based basic fitness standards, while seemingly beneficial for women’s integration into the military, have more complex effects. Military surveys suggest that holding men and women to different physical fitness standards creates tensions among service members competing for the same jobs, duties, or promotions and can create the perception that a promotion is not earned.³¹⁵ Such hostilities, in turn, contribute to an overall organizational context in which female service members are not respected and valued equally. More generally, the current baseline fitness standards of the military are a remnant of an earlier era when military strength was coextensive with the physical strength and stamina of our troops.³¹⁶ Modern warfare, in contrast, depends primarily on military intelligence, mastery of technology, and recruiting and retaining “high aptitude personnel.”³¹⁷ These realities suggest that the role and weight given to military basic physical fitness tests need to be reassessed.

At the same time, it acknowledged that gender-neutral fitness standards have a potential downside in that they may favor men and restrict women service members’

313. Specifically, the National Defense Authorization Act for Fiscal Year 1994 required the Secretary of Defense to prescribe gender-neutral occupational performance standards, i.e., to ensure that qualification of members of the armed forces for military occupational career fields open to both male and female members is based on common, relevant performance standards without differential standards or evaluation on the basis of gender. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 543, 107 Stat. 1547, 1660 (1993) (amended 2013). This mandate coincided with Congress’s repeal of remaining statutory prohibitions on the Secretary of the Navy assigning female service members to duty on vessels and aircraft engaged in combat missions or expected to be assigned combat missions. *Id.* at §§ 541–542. In taking these actions, Congress was careful to caution that it did not support the full integration of women into combat positions or repealing the male-only draft. As the House Armed Services Committee explained:

[T]he committee does not intend that these affirmative legislative actions on the assignment of women to combat positions be construed as tacit committee concurrence in an expansion of the assignment of women to units or positions whose mission requires routine engagement in direct combat on the ground, or be seen as a suggestion that selective service registration or conscription include women. The committee notes with approval that the Secretary of Defense has announced that there will be no change to the policy-as it existed on January 1, 1993-that prohibits the assignment of women to units engaged in direct combat on the ground. . . . The committee plans to exercise close oversight on these or any other planned changes to the assignment policy for women, particularly if these changes could result in women serving in units whose mission requires routine engagement in direct combat on the ground.

H.R. REP. NO. 103-200, at 283 (1993).

314. *See* KAMARCK, *supra* note 99, at 19.

315. 2019 MSGR, *supra* note 163, at v.

316. *See* WHITFIELD B. EAST, U.S. ARMY COMBINED ARMS CTR., A HISTORICAL REVIEW AND ANALYSIS OF ARMY PHYSICAL READINESS TRAINING AND ASSESSMENT 2 (2013), https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/APRT_WhitfieldEast.pdf [<https://perma.cc/3UER-PDUX>] (“There was little separation in Greek civilization between the physical training required for war and sport. Strength, mobility, speed and stamina were all keys to success on the battlefield and in the stadium.”).

317. *See* WINKLER ET AL., *supra* note 305, at 24. In fact, it is arguable that intelligence has been the most important qualification for military service even as far back as the Vietnam War.

access to the armed forces and to certain elite military occupations.³¹⁸ Therefore, it is vitally important that gender-neutral standards are validated to ensure that they measure the essential tasks necessary for entry to the military and for specific military occupations—that is, that the military’s physical standards accurately predict job performance.

Research suggests that organizational approaches that degender the workplace can go a long way toward reducing sexual misconduct. Toward that end, this Part examines the organization-wide impacts of the military’s physical fitness tests and policies. It first provides a brief history of the military’s physical fitness tests and policies, including the historical relationship between military physical performance standards and anxieties about women’s integration into combat roles. It then discusses the Army’s recent failed attempt to implement a new gender-neutral basic fitness test. Finally, this Part discusses the cultural harms perpetuated by the military’s use of sex-based physical fitness tests and explores their constitutionality. As argued, below, discarding sex-based physical fitness tests and replacing them with validated, gender-neutral physical tests that accurately predict performance in specific military occupations is an important component of the larger project of reforming the military’s culture so that all service members are equally valued and free from sex-, sexuality-, and gender-based discriminatory harm.

1. A Brief History of Military Physical Fitness Testing

a. Basic Fitness Tests

Physical fitness evaluations for individual service members date to the mid-nineteenth century.³¹⁹ The first systemic military physical training program was implemented in 1906.³²⁰ Physical fitness is, of course, critical to military operations,³²¹ but it can also be traced to the early twentieth-century “cult of strenuousness” in America, in which “[t]he male body, and particularly physical strength, became the prime indicator

318. See, e.g., NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV., INSPIRED TO SERVE: THE FINAL REPORT OF THE NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE 121 (2020) [hereinafter NAT’L COMM’N ON THE DRAFT].

319. The first physical fitness standards for United States Military Academy (USMA) cadets in 1858 “involved climbing a 15-foot wall, vaulting a horse 15 hands high (5 feet), leaping a 10-foot ditch, running a mile in 8 minutes or 2 miles in 18 minutes, walking 4.5 miles in one hour, and walking 3 miles in one hour with a 20-pound knapsack, arms, and equipment.” Joseph J. Knapik & Whitfield B. East, *History of United States Army Physical Fitness and Physical Readiness Testing*, U.S. ARMY MED. DEP’T J., Apr. 2014, at 5–6. Also recommended was the ability “to swim a mile, dive and remain 45 seconds swimming underwater, dive head first from a height of 8 feet, and leap into the water from a height of 20 feet.” *Id.* at 6.

320. *Id.* Exercises included weekly marches of twelve miles for the infantry and eighteen-mile horse-mounted marches for artillery and cavalry units. *Id.* The president at the time, Theodore Roosevelt, who was “obsessed with physical fitness” due to his experiences as a sickly child, was a proponent of a strenuous physical regimen for the military. EAST, *supra* note 316, at 43; see also Monys Hagen, *Sport, Domestic Strength, and National Security*, in WORK, RECREATION, AND CULTURE: ESSAYS IN AMERICAN LABOR HISTORY 73 (Martin H. Blatt & Martha K. Norkunas eds., 1996).

321. See Joseph J. Knapik, William Rieger, Frank Palkosa, Steven Van Camp & Salima Darakjy, *United States Army Physical Readiness Training: Rationale and Evaluation of the Physical Training Doctrine*, 23 J. STRENGTH & CONDITIONING RSCH. 1353, 1353 (2009).

of male character.”³²² Beginning in 1965, semi-annual fitness assessments were mandated.³²³

The history of physical fitness and readiness testing in the Army is illustrative of the military’s gender-based approach to basic fitness evaluations. With the establishment of the Women’s Auxiliary Corps (WAC) in 1943,³²⁴ the DOD adopted a separate basic physical fitness assessment for women. The assessment was not required, but daily “self-test” exercises were prescribed including push-ups with knees on the ground, bent-knee sit-ups, “wing lifts,” squats, running at a “dog trot” pace, and the “stork stand.”³²⁵ The Army basic physical fitness assessment went through a series of revisions after World War II, but the test items remained substantially different and less rigorous for women.³²⁶ It was only after Congress disestablished the WAC in 1978 that a single, gender-integrated basic physical fitness test was adopted with three core items (push-ups, sit-ups, and a two-mile run) for men and women.³²⁷ It was at this time that the Army began gender norming the cutoff scores such that passing scores were different (and lower) for women to account for physiological differences.³²⁸ Consistent with the Army’s experience, all branches of the military historically subjected men and women to different minimum basic physical fitness standards, whether by requiring distinct test events for men and women or by gender-norming passing scores.³²⁹

b. Occupation-Specific Fitness Tests

In contrast with basic fitness tests, occupation-specific physical fitness tests, i.e., those established to measure the ability of an individual to perform the physical tasks of specific military occupations, must be gender-neutral.³³⁰ While this requirement is seemingly intended to end stereotypical assumptions about women’s and men’s abilities, its history suggests more complicated underpinnings.

In 1993, Congress instituted gender-neutral occupational performance standards for the military, including gender-neutral physical requirements,³³¹ as part of legislation

322. MARTIN SUMMERS, *MANLINESS AND ITS DISCONTENTS* 71 (2004). “Furthermore, the discipline and aggressiveness associated with the military and, indeed, war itself, signified middle-class manliness.” *Id.* at 72.

323. Knapik & East, *supra* note 319, at 5.

324. See *supra* note 87 and accompanying text.

325. See EAST, *supra* note 316, at 96; Knapik & East, *supra* note 319, at 8.

326. See Knapik & East, *supra* note 319, at 9–13 (discussing the revisions to the Army’s physical fitness test from the post–World War II years through the 1970s). For example, the test events required of men by the 1963 Army Minimum Physical Fitness Test included “[b]end and reach” reps, squats, rower reps, sit-ups, trunk and body “twister[s],” push-ups, a half-mile run, stationary running, and walking. The test events required of women, in contrast, were jumping jacks, “[b]ouncing” reps, arm circles, twister and “[c]ross and fly” reps, sit-ups, “[c]ircle-o” reps, “[b]ent-over airplane” reps, and the “[t]runk-twist [and] arm fling.”

327. *Id.* at 12–13, 17 tbl.15.

328. *Id.* at 17 tbl.15. Beginning in 1998, the cutoff score (expected reps) for one test event, sit-ups, was finally equalized for both men and women. *Id.*

329. See KAMARCK, *supra* note 99, at 19. Base physical fitness standards are also “age-norm[ed].” *Id.* The military’s occupation-specific fitness tests, in contrast, are not gender-normed. They are “based on the capabilities needed to complete tasks associated with that occupation . . . and are outcome-based.” *Id.*

330. See *id.*

331. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 543, 107 Stat. 1547, 1660 (1993) (amended 2013). The requirement states in relevant part:

repealing the remaining statutory prohibitions on women serving on combat vessels and aircraft.³³² The 1991 Gulf War had blurred the distinction between combat and noncombat duty³³³ as military needs necessitated assigning women to locations or missions exposing them to combat.³³⁴ In many instances, the most qualified for these assignments were women.³³⁵ Female service members' strong performance in combat assignments exposed the irrationality of the combat exclusion rule.³³⁶ Additionally, some women who served were injured or captured,³³⁷ highlighting the injustice of asking women to risk their lives for their country without the benefit of combat training or eligibility for the promotion, benefits, and pay that male service members who served in combat missions regularly received.³³⁸

(a) GENDER NEUTRALITY REQUIREMENT.—In the case of any military occupational career field that is open to both male and female members of the armed forces, the Secretary of Defense—

(1) shall ensure that qualification of members of the Armed forces, and continuance of members of the Armed Force, is based on common, that occupational career field is evaluated on the basis of common, relevant performance standards, without different standards or evaluation on the basis of gender. . . .

(b) REQUIREMENTS RELATING TO USE OF SPECIFIC PHYSICAL REQUIREMENTS.—(1) For any military occupational specialty for which the Secretary of Defense determines that specific physical requirements for muscular strength and endurance and cardiovascular capacity are essential to the performance of duties, the Secretary shall prescribe specific physical requirements for members in that specialty and shall ensure (in the case of an occupational specialty that is open to both male and female members of the Armed Forces) that those requirements are applied on a gender-neutral basis.

332. *Id.* at §§ 541–42.

333. See John Lancaster, *Aspin To Open Combat Roles to Women*, WASH. POST (Apr. 28, 1993), <https://www.washingtonpost.com/archive/politics/1993/04/28/aspin-to-open-combat-roles-to-women/78a7f11a-6d29-4539-bc10-ac908cff8498/> [<https://perma.cc/3GTP-BQES>]. As one military expert has explained, “[u]nlike the combat of the last century, the modern battle is asymmetric and noncontiguous: there are no front and rear areas. Thus, female soldiers are being exposed to combat, and in some cases direct combat, on a routine basis.” Michele M. Putko, *The Combat Exclusion Policy in the Modern Security Environment*, in STRATEGIC STUDIES INSTITUTE, U.S. ARMY WAR COLLEGE, WOMEN IN COMBAT COMPENDIUM (Michele M. Putko & Douglas V. Johnson II eds., 2008).

334. Operation Desert Storm was the largest one-time military deployment since World War II; more than 40,000 women were deployed to the Gulf. See *Implementation of the Repeal of the Combat Exclusion on Female Aviators: Hearing Before the Military Personnel and Compensation Subcomm. of the H. Comm. on Armed Service*, 102d Cong. 5 (1992) [hereinafter *Implementation Hearing*] (prepared statement of Hon. Christopher Jehn, Asst. Sec’y of Def. for Mgmt. and Pers.).

335. *See id.*

336. *Id.* at 15 (prepared statement of Vice Adm. Ronald J. Zlatoper) (“Women aviators have flown every type aircraft in the Navy inventory. They are now flying jets, props, and helicopters in a variety of force support and training squadrons and their performance has been equal to that of their male counterparts.”).

337. See 138 CONG. REC. E2,383 (daily ed. Aug. 5, 1992) (statement of Rep. Schroeder) (“Mr. Speaker, I want to share with our colleagues a story about Army Major Rhonda Cornum, who was sexually assaulted as a prisoner of war during Operation Desert Storm. Despite this assault, she still believes that women should be fully integrated into the military and that the combat exclusion for women should be repealed.”).

338. See Barbara Kantrowitz, Eleanor Clift & John Barry, *The Right To Fight*, NEWSWEEK, Aug. 5, 1991 (“Many military women complain that combat is the missing step on their career ladders.”). For a thorough but succinct discussion of female service members participation in the Gulf War, see ENCYCLOPEDIA OF WOMEN AND AMERICAN POLITICS 311–12 (Lynn E. Ford ed., 2008).

In the Gulf War's aftermath, Congress turned its attention to repealing the existing combat exclusion laws.³³⁹ This began when Representative Patricia Schroeder (D-CO) offered an amendment to repeal the restrictions on women flying combat aircraft. Schroeder's amendment was adopted by the House Armed Services Committee with little fanfare and was quickly confirmed by a vote on the Senate floor.³⁴⁰ However, in the Senate debate on its version of the bill, some members expressed concern that the decision was too rushed;³⁴¹ they offered a competing proposal to create a presidential commission to study the legal, military, and societal implications of repealing the exclusionary rule.³⁴² Their amendment passed,³⁴³ but their strategy failed; a majority of Senators voted for the repeal as well.³⁴⁴ The repeal became law in December 1991,³⁴⁵ opening the way for women to fly combat missions and serve on Navy and Air Force combat ships. However, Secretary of Defense Richard Cheney immediately announced that he would wait "at least a year" until the commission completed its investigation before making any changes in assignment policies.³⁴⁶

Congress's charge to the Presidential Commission on the Assignment of Women in the armed forces was extremely broad and went well beyond the narrow question of whether women should be permitted to fly combat aircraft. The Commission was to consider the implications for combat readiness of lifting the combat exclusion, including the implications for the "physical readiness" of the armed forces and physical fitness standards; the effects of women's integration on unit cohesion; public attitudes about

339. The exclusion was formalized by the DOD in 1988 via a department-wide policy called the "risk rule," which excluded women from noncombat units or missions "if the risks of exposure to direct combat, hostile fire, or capture were equal to or greater than the risk in the combat units they support[ed]." KAMARCK, *supra* note 52, at 30 n.151 (discussing the risk rule); *see also* LAURA L. MILLER, JENNIFER KAVANAGH, MARIA C. LYTELL & KEITH JENNINGS, RAND CORP., THE EXTENT OF RESTRICTIONS ON THE SERVICE OF ACTIVE-COMPONENT MILITARY WOMEN xi (2012), <https://www.rand.org/pubs/monographs/MG1175.html> [<https://perma.cc/YN3J-67AT>] (discussing the risk rule and its undoing).

340. *Implementation Hearing*, *supra* note 334, at 1 (statement of Rep. Byron) ("The repeal of the exclusionary rule on women from combat aircraft was adopted by the House Armed Services Committee with little fanfare, and it was quickly confirmed by a vote on the Senate floor."); *see also* DARLENE M. ISKRA, WOMEN IN THE UNITED STATES ARMED FORCES 27 (2010).

341. 137 CONG. REC. S11,412 (daily ed. July 31, 1991) (statement of Sen. McCain) ("Mr. President, with the best of intentions, the amendment of Senator Kennedy and Senator Roth would rush ahead without proper study and a national consensus.").

342. *Id.* (reporting the debates in which Senators Sam Nun (D-GA), John Warner (R-VA), John McCain (R-AZ), and John Glenn (D-OH) offered an amendment to create a Presidential Commission that would evaluate the performance of women in combat roles and study the effect of repealing combat exclusion laws on the male-only draft and the national psyche).

343. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 541, 105 Stat. 1290, 1365 (1991) (establishing the Commission on the Assignment of Women in the Armed Forces).

344. *See* Eric Schmitt, *Senate Votes To Remove Ban on Women as Combat Pilots*, N.Y. TIMES (Aug. 1, 1991), <https://www.nytimes.com/1991/08/01/us/senate-votes-to-remove-ban-on-women-as-combat-pilots.html> [<https://perma.cc/GFA8-ABXV>].

345. National Defense Authorization Act for Fiscal Years 1992 and 1993, § 531, 105 Stat. at 1365 (repealing statutory limitations on assignment of women in the armed forces to combat aircraft).

346. *Female U.S. Combat Pilots? Not Yet!*, NINETY-NINE NEWS, July 1992, at 14, <https://www.ninety-nines.org/pdf/newsmagazine/199207.pdf> [<https://perma.cc/9MN2-LM5V>]; *see also Implementation Hearing*, *supra* note 334, at 40 (statement of Rep. Ravenel) ("I believe that this Commission proposition has been thrown in there to slow it down. I don't expect anything really positive for women to come out of it.").

women in combat; and legal and policy implications, including the implications of ending the combat exclusion for the male-only draft registration.³⁴⁷

Ultimately, the fifteen-member Commission, which was “stacked with conservative leaning members,”³⁴⁸ many of whom were “openly against the repeal of combat exclusion laws,”³⁴⁹ recommended that the combat exclusion for pilots be reinstated,³⁵⁰ that women should be excluded from all ground combat positions, and that Congress should codify the land combat exclusion.³⁵¹ Curiously, the Commission also recommended that women should be *permitted* to serve on Navy combat ships,³⁵² which Congress had declined to do. The Commission justified its recommendations on the basis of familiar arguments about unit cohesion,³⁵³ women’s unique physiology,³⁵⁴ personal privacy concerns,³⁵⁵ women’s alleged lack of interest in combat assignments,³⁵⁶ and the disruptions and distractions of pregnancy, childbirth, and motherhood.³⁵⁷ The legal implications of lifting the combat exclusion on the constitutionality of the male-only draft also loomed large in the Commission’s reasoning.³⁵⁸

It is within this context that the Commission’s recommendations on physical fitness standards must be understood. Alongside its recommendations against women serving in most combat positions, the Commission recommended the adoption of gender-neutral occupational performance standards out of concern that “women continue to enter physically demanding non-traditional occupations.”³⁵⁹ That is, the Commission’s recommendation of gender-neutral performance standards was rooted in concerns about keeping women out of combat rather than furthering gender equality in the military.

Despite the Commission’s recommendations, in 1993, with the changeover to a Democratic presidential administration, Congress repealed the 1948 law that prohibited

347. See National Defense Authorization Act for Fiscal Years 1992 and 1993, § 542, 105 Stat. at 1366–67.

348. Eileen Russell, A Study of the Military Exclusion Policy for Women, Its Ethical Dimensions and Practical Impact 47 (Jan. 2020) (M.A. thesis, Rutgers University) (on file with author).

349. ISKRA, *supra* note 340, at 29. The professional biographies and political leanings of the Commissioners are summarized in BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER 217–18 (1997).

350. See PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT 28 (1992).

351. *Id.* at 24.

352. *Id.* at 31. The Commission reasoned that the risk of capture was too high for combat pilots, *id.* at 28, but that combat ship positions except for submarines (because of privacy issues) were suitable for women. *Id.* at 31.

353. *Id.* at 25, 27–29, 34.

354. *Id.* at 9, 13, 24–27, 29, 34.

355. *Id.* at 25, 32.

356. *Id.* at 27.

357. *Id.* at 16–17, 19–20, 25, 27.

358. *Id.* at 40 (“The Commission found that excluding women from ground combat positions by statute or policy may be consistent with the Court’s ruling in *Rostker*. Women’s eligibility for combatant vessel assignments, therefore, would not appear to affect their utility in a draft situation as long as they remain excluded from ground combat positions and, therefore, would not affect the constitutionality of the all-male draft.”).

359. *Id.*

women from being assigned to combat aircraft and ships.³⁶⁰ Secretary of Defense Les Aspin directed the DOD to assign women to “all positions for which they are qualified,” except ground combat positions.³⁶¹ Yet many members of Congress remained concerned about integrating women into combat positions, and so alongside its step toward integration, it adopted the Commission’s recommendations regarding gender-neutral fitness standards,³⁶² explaining:

Regarding occupational performance standards and Service plans to expand the role of women in combat positions on Navy ships, as well as in Army, Navy, Marine and Air Force combat aircraft, Service witnesses testifying before the committee repeatedly stressed that men and women would be held to one performance standard and that standards would not be altered, or lowered, to accommodate women. The committee strongly concurs with this position.³⁶³

The Armed Services Committee made no bones about their position that this was only to be an incremental step toward integration, and that Congress had no intention of opening ground combat assignments to women anytime soon.³⁶⁴ To ensure this limitation, Congress added to the statute a requirement that the DOD must notify Congress before any policy changes in assigning women to ground combat roles or opening any combat units to women not previously open to them.³⁶⁵

As this history demonstrates, the requirement of gender-neutral physical performance standards for specific military occupations is inextricably tied with intense

360. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993). The Commission’s recommendations were largely ignored, because President Bush was defeated in the 1992 by Bill Clinton. See ISKRA, *supra* note 340, at 29.

361. See Aspin Jan. 1994 Memorandum, *supra* note 121; see also Aspin Apr. 1993 Memorandum, *supra* note 119 (repealing the rule prohibiting women from being assigned to combat aircraft); *Women in Combat*, CSPAN (Apr. 28, 1993), <https://www.c-span.org/video/?40217-1/women-combat> [<https://perma.cc/XF26-XPU4>] (CSPAN television broadcast of Secretary of Defense Les Aspin’s announcement that women will be allowed on combat aircraft).

362. See National Defense Authorization Act for Fiscal Year 1994, § 543, 107 Stat. at 1660.

363. H.R. REP. NO. 103-200, at 282 (1993). The Committee further explained that the new provisions specifically prohibited lowering standards or establishing quotas to increase or decrease the number of women in an occupational field. *Id.*

364. See *id.* at 283. The report states:

[T]he committee does not intend that these affirmative legislative actions on the assignment of women to combat positions be construed as tacit committee concurrence in an expansion of the assignment of women to units or positions whose mission requires routine engagement in direct combat on the ground, or be seen as a suggestion that selective service registration or conscription include women. The committee notes with approval that the Secretary of Defense has announced that there will be no change to the policy—as it existed on January 1, 1993—that prohibits the assignment of women to units engaged in direct combat on the ground. . . . The committee plans to exercise close oversight on these or any other planned changes to the assignment policy for women, particularly if these changes could result in women serving in units whose mission requires routine engagement in direct combat on the ground.

Id.

365. See H.R. REP. NO. 103-357, at 677 (1993) (summarizing the compromise reached between the House and Senate Armed Services Committees that would require the DOD to notify Congress ninety and thirty days, respectively, before any policy changes on the assignment of women to ground combat roles or opening any combatant unit not previously open to women).

political opposition to women serving in combat roles and anxieties about the implications of such a development for the constitutionality of the male-only draft.³⁶⁶ However, perhaps it should not be surprising that, on the eve of opening up additional career ladders for female service members by rescinding the combat exclusion rule for combat ships and aircraft, Congress invited the military to establish gender-neutral occupational strength and other performance requirements that could potentially screen out women from combat assignments. Congress and the DOD have a well-established record of “giving with one hand and taking with the other,” so to speak, when it comes to women’s integration—that is, of introducing new requirements that continue the military’s discriminatory designs alongside efforts that would otherwise seem intended to further women’s integration.³⁶⁷ Policy-based multiplicity regrading women’s integration—that is, the constant process of “degendering and regendering” the military³⁶⁸—has been the norm since women first were admitted to the armed forces in the United States. This history should, at the least, cast doubt on the conclusion that the military’s gender-neutral occupation-specific physical fitness tests are entirely benign. While, as argued below, gender-neutral fitness tests are still the best assurance for supporting a culture where men and women are equally valued in the military, they must be examined with great care and perhaps a healthy dose of skepticism. Gender-neutral physical fitness tests must not differentially screen out a higher proportion of members of one gender who are, in fact, able to perform the job.

366. For a discussion of the constitutionality of male-only draft registration, see *infra* Part III.C.

367. For example, when Congress ended women’s exclusion from formal military service in 1948, it imposed quotas severely limiting the proportion of women in the Armed Forces. *See supra* notes 88–92 and accompanying text. In 2013, in the leadup to opening all remaining assignments to women with no exceptions (including ground combat), the DOD directed all the services to review and validate their occupation-specific performance standards, *see* Panetta Jan. 2013 Memorandum, *supra* note 122, and Congress followed by codifying the validation requirement, *see* Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 524(a), 128 Stat. 3292, 3361 (2014). This wholesale review and validation exercise was ordered even though the military’s occupational performance requirements had already been validated, suggesting a primary motivation was the concern that opening combat jobs to women would hurt military effectiveness. In 2015, after the Secretary of Defense directed all services to open all military specialties to women, the Army adopted its “Leaders First” policy, which ensured that gender integration would be substantially slowed, or even halted, due to the dearth of female Army officers. *See* discussion *supra* note 205. Most recently, the Marines announced an initiative to modernize its training facilities, potentially necessitating closure of its existing training depots (including Parris Island, its hallowed all-male training depot in South Carolina), just when Congress ordered it to integrate women into its basic training. *See supra* notes 225–230 and accompanying text.

368. For this insight, I thank sociologists Orna Sasson-Levi and Sarit Amram-Katz, as they explain:

Degendering . . . attacks the structure and process of gender by recognizing . . . gender similarities in behavior, thinking, and emotions. . . . In contrast, regendering [is] a more subtle and discursive process. . . . Regendering occur[s] mostly through the ways in which cultural codes, stereotypical schemas, and hegemonic gender beliefs [are] enacted and performed in daily interactions. It [is] thus a more sophisticated and hidden process, harder to expose and change.

Gender Integration in Israeli Officer Training: Degendering and Regendering the Military, 33 SIGNS 105, 107 (2007). For a review of feminist literature on the resilience of gender norms that make challenging the military so difficult, see Claire Duncanson & Rachel Woodard, *Regendering the Military*, 47 DIALOGUE 3, 5 (2016).

c. The Recent Army Experiment

The most recent chapter in the history of the military's physical fitness tests involves a major effort by the Army to adopt a gender-neutral fitness tests for all purposes, that is, for both minimum fitness and occupational qualification.

For nearly forty years, the Army employed the Army Physical Fitness Test (APFT).³⁶⁹ The APFT was a basic fitness evaluation that all Army soldiers were required to undergo, regardless of their occupation.³⁷⁰ The APFT was normalized between men and women to account for their physiological differences.³⁷¹ For example, to receive a maximum score of 300 points, a 22- to 26-year-old male would have to complete 75 push-ups, 80 sit-ups, and a 13:00 minute two-mile run.³⁷² For a 22- to 26-year-old female to receive the same maximum score of 300 points, she would have to complete 46 push-ups, 80 sit-ups, and a 15:36 minute two-mile run.³⁷³ Gender-normed tests such as the APFT use different cutoff scores for males and females such that men and women are expected to pass at similar rates.

Around 2013, in the process of validating its occupation-specific fitness tests (which Congress had directed all services to undertake in preparation of rescinding the ground combat exclusion rule),³⁷⁴ the Army decided to overhaul its approach. Whereas the APFT was intended to be a health-based assessment focused on general fitness and body composition,³⁷⁵ the Army's new approach would focus on combat readiness as the primary purpose of Army fitness testing.³⁷⁶

369. See Knapik & East, *supra* note 319, at 14; Kelly Buckner, *What the Critics Miss: The Army Combat Fitness Test Is Going To Make Us a More Combat-Ready Force*, MOD. WAR INST. (Oct. 9, 2019), <https://mwi.usma.edu/critics-miss-army-combat-fitness-test-going-make-us-combat-ready-force/> [<https://perma.cc/96LE-BV5N>].

370. See U.S. DEP'T OF THE ARMY, ARMY REGULATION 350-1: ARMY TRAINING AND LEADER DEVELOPMENT 55 (2017), https://usacac.army.mil/sites/default/files/documents/cace/LREC/AR350-1_Web_FINAL.PDF [<https://perma.cc/59W6-JXLD>].

371. See *APFT Standards*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/apft-standards> [<https://perma.cc/MV6T-WZUG>] (last visited Feb. 1, 2022).

372. See *Male Pushup Standards Scoresheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/male-pushup-standards> [<https://perma.cc/CP8V-SPM9>] (last visited Feb. 1, 2022); *Male Situp Standards Score Sheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/male-situp-standards> [<https://perma.cc/3MJG-4JM8>] (last visited Feb. 1, 2022); *Male 2 Mile Run Standards Scoresheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/male-2-mile-run-standards> [<https://perma.cc/CAL5-NC9J>] (last visited Feb. 1, 2022).

373. See *Female Pushup Standards Scoresheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/female-pushup-standards> [<https://perma.cc/EGN3-A9GT>] (last visited Feb. 1, 2022); *Female Situp Standards Scoresheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/female-situp-standards> [<https://perma.cc/ZAZ9-PC24>] (last visited Feb. 1, 2022); *Female 2 Mile Run Standards Scoresheet*, US ARMY BASIC, <https://usarmybasic.com/army-physical-fitness/female-2-mile-run-standards> [<https://perma.cc/7CQ9-JQ5E>] (last visited Feb. 1, 2022).

374. See Panetta Jan. 2013 Memorandum, *supra* note 122. For a study commissioned by the DOD to guide the validation process, see CHAITRA M. HARDISON, SUSAN D. HOSEK & CHLOE E. BIRD, RAND CORP., *1 ESTABLISHING GENDER-NEUTRAL PHYSICAL STANDARDS FOR GROUND COMBAT OCCUPATIONS* iii (2018), https://www.rand.org/pubs/research_reports/RR1340z1.html [<https://perma.cc/A96D-KG4Q>].

375. See Buckner, *supra* note 369.

376. *Id.*

The “Army Combat Fitness Test” or “ACFT,” as it was christened, is designed as a single-standard test to be used for both minimum fitness evaluations and occupation-specific performance evaluation.³⁷⁷ It places a greater emphasis than the APFT on explosive power and speed, as well as dynamic balance, flexibility, and agility.³⁷⁸ The ACFT consists of six events and requires equipment the previous physical fitness test did not.³⁷⁹ The ACFT also requires fewer (but higher intensity) repetitions than the APFT, with the goal of reducing overuse injuries.³⁸⁰ The ACFT officially replaced the forty-year-old APFT in October 2020.³⁸¹

Rather than being gender- or age-normed, the ACFT as originally implemented (“ACFT 1.0”) used the same physical components and cutoffs for all test takers.³⁸² Across-the-board minimum score requirements were to be determined by the physical demands of specific military occupations.³⁸³ ACFT 1.0 minimum scores fell into one of three “physical demand” categories—Gold, Grey, or Black.³⁸⁴ Gold was for occupations with “moderate” physical demands and was the standard to be used for entry schools such as Basic Combat Training and the Basic Officer Leadership Course.³⁸⁵ The Grey and Black categories were for occupations with “significant” and “heavy” physical demands, respectively.³⁸⁶ So, for example, service members in technical occupations like medicine or cyberwarfare would have to meet the Gold standard, while those in the infantry or special

377. *See id.*

378. *See* Thomas Brading, *New Changes to ACFT Being Rolled Out To Impact All Soldiers*, U.S. ARMY (Sept. 27, 2019), https://www.army.mil/article/227494/new_changes_to_acft_being_rolled_out_to_impact_all_soldiers [<https://perma.cc/7VRY-ECXT>].

379. *See Army Combat Fitness Test*, U.S. ARMY, <https://www.army.mil/acft/> [<https://perma.cc/RR3F-F8KG>] (last visited Feb. 1, 2022). Specifically, “the ACFT consists of six events designed to test power, muscular endurance, muscular strength, speed, agility, cardio endurance, balance, flexibility, coordination, and reaction time.” DEF. ADVISORY COMM. ON WOMEN IN THE SERVS., DEP’T OF DEF., 2020 ANNUAL REPORT 31 (2020) [hereinafter DACOWITS 2020 ANNUAL REPORT], https://dacowits.defense.gov/Portals/48/Documents/Reports/2020/Annual%20Report/DACOWITS%202020%20Annual%20Report%20WEB.pdf?ver=SC_TG6frXqkyw5p7poVWIw%3D%3D [<https://perma.cc/5M5V-SJ6Y>]. The six components of the ACFT as originally proposed were the three-repetition maximum deadlift, standing power throw, hand-release push up, sprint drag-carry, hanging leg tuck, and two-mile run. *Id.*

380. *See* Brading, *supra* note 378.

381. *Army Combat Fitness Test*, *supra* note 379. While the ACFT 2.0 became the “test of record” for the Army on October 1, 2020, scores will not count for soldiers until March 2022, because the service had to adjust around the novel coronavirus (“COVID-19”) pandemic and put a pause on training in March of 2020. *See* Memorandum from Sec’y of U.S. Army on Army Directive 2020-06 (Army Combat Fitness Test) (June 12, 2020), https://www.army.mil/e2/downloads/rv7/acft/army_directive_2020_06_acft.pdf [<https://perma.cc/YT3Z-F9P7>].

382. *See* Brading, *supra* note 378.

383. *See* U.S. Army Training & Doctrine Command Pub. Affs., *Army Combat Fitness Test Standards*, U.S. ARMY (Sep. 27, 2019), <https://www.army.mil/standto/archive/2019/09/27/> [<https://perma.cc/P96H-B77R>].

384. *Id.*

385. *Id.*

386. *Id.*

forces would need to meet the Black standard.³⁸⁷ “Unlike its predecessor, the ACFT was designed to be both gender and age neutral.”³⁸⁸

In order to develop the ACFT, the Army conducted a study to identify which fitness events most predict performance on commonly occurring “critical warrior” tasks, including moving quickly over, under, around, and through obstacles; lifting, carrying, and dragging heavy loads (i.e., extracting and transporting a casualty); generating and applying force (i.e., hand-to-hand combat); executing submaximal work for long periods; and moving for long distances over uneven terrain under heavy loads.³⁸⁹ Notably, all of these tasks are the typical activities of ground combat soldiers. Based on these combat goals, the researchers administered twenty-three common physical test events (predictor tests) to 350 soldiers to identify (i.e., validate) the events predictive of performance on the critical warrior tasks. Ultimately, after another phase involving 152 soldiers, the Army settled on the six-event ACFT.³⁹⁰

A University of Iowa analysis of the study concluded that the ACFT “is based on a scientifically valid examination of experimental results and is predictive of combat soldier task performance in men and women.”³⁹¹ However, the peer review also highlighted flaws, including considerable variability in test participant performance;³⁹² that a particular new component—the hanging leg tuck, which replaced sit-ups in the original APFT—was not predictive of performance and was disproportionately not predictive of performance for women;³⁹³ and that females were underrepresented in the test group.³⁹⁴ The researchers warned that due to the “inherently unbalanced study design . . . determination of which tasks best predict or represent . . . performance could be influenced towards strategies used predominantly by men.”³⁹⁵ Despite these concerns, the Army continued to pour money and resources into preparing for the test instead of revisiting its validity and purpose; it moved ahead in releasing the ACFT, and even retained the leg tuck as one of the six events.

387. See *Army OPAT Standards by MOS, ACFT – NEW ARMY PT TEST*, <https://newpptestarmy.com/acft-info/acft-standards-by-mos/#Army-OPAT-Standards-by-MOS> [https://perma.cc/6CPH-5XXG] (last visited Feb. 1, 2022). The breakdown of physical demand categories (PDC) for military occupational specialties (MOS’s) appears to be contained in a 2019 update to DA PAM 611-21, but this updated document is presently only accessible from a military network (on file with author).

388. DACOWITS 2020 ANNUAL REPORT, *supra* note 379, at 31.

389. See WHITFIELD B. EAST, MAJ. DAVID DEGROOT & STEPHANIE MURACA-GRABOSKI, U.S. ARMY CTR. FOR INITIAL MIL. TRAINING, TECH. REP. NO. T19.041-13.1, *BASELINE SOLDIER PHYSICAL READINESS REQUIREMENTS STUDY 11* (2019).

390. *Id.* at 23, 32.

391. KARIM A. MALEK, KEVIN C. KREGEL, LAURA A. FREY-LAW, LONDON EVANS & RAJAN BHATT, UNIV. IOWA, *REVIEW REPORT BASELINE SOLDIER PHYSICAL READINESS REQUIREMENTS STUDY 3-4* (2020).

392. *Id.* at 9.

393. *Id.*

394. During Phase II, only 14.3% of test participants were female, and in Phase III only 10.5% of participants were female. *Id.* at 10. This was not representative of the percentage of women in the total Army force (16% at the time). *Id.* at 13. The average participant was twenty-four years old and male. See EAST ET AL., *supra* note 389, at 45 tbl.10. A mere sixteen women, all volunteers for the study with an average age of twenty-three, were used to validate the test in the final phase of the study. *Id.* at 29.

395. MALEK ET AL., *supra* note 391 at 10.

Unsurprisingly, the rollout and implementation of the new test did not go smoothly, and the Army is now in a state of limbo regarding how it will implement physical fitness standards. During the transition period to the new test, women failed the hanging leg tuck at significantly higher rates than men.³⁹⁶ Concern about the test was especially high among Army service members in medical occupations (including surgeons, nurses, dentists, optometrists, and general physicians) and other noncombat positions.³⁹⁷ Additionally, concerns were raised that the ACFT “discriminates against older or slightly broken soldiers who still have a lot to offer.”³⁹⁸ The ACFT is also expensive, both for individual service members to train for and the Army as a whole; whereas the APFT required no other equipment than a clipboard, pencil, and a stopwatch, the ACFT requires “hexagonal trap bars, pulling sleds, medicine balls, kettlebells, and . . . plates.”³⁹⁹

The ACFT went through a number of changes due to training disruptions caused by the COVID-19 pandemic and perceived unfairness, including the temporary substitution of a plank for the hanging leg tuck and lowering the minimum passing score (“ACFT 2.0”).⁴⁰⁰ Subsequently, Congress asked the Army to suspend implementation of the ACFT until an independent assessment of the test could be conducted to assess the potential impact on certain populations.⁴⁰¹ Members of Congress suggested that the test had not

396. See ARMY TRAINING AND DOCTRINE COMMAND, U.S. ARMY, INFORMATION PAPER PRESENTED TO DACOWITS ON THE ACFT (2020), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/June2020/USA%20RFIs%207-9%20ACFT.pdf?ver=2020-09-15-211533-860> [<https://perma.cc/QW36-9DQ4>] (showing that as of the third quarter of 2020, 48% of women compared with 93% of men passed the hanging leg tuck; women’s pass rates of the other ACFT elements were much more competitive, ranging from 81% to 93% compared with 95% to 100% for men); Matthew Cox, *Army Plans To Continue ACFT for Now Despite Congressional Order To Halt Testing*, MILITARY.COM (Jan. 7, 2021), <https://www.military.com/daily-news/2021/01/07/army-plans-continue-acft-now-despite-congressional-order-halt-testing.html> [<https://perma.cc/48A9-R2ZR>] (“[F]ewer than 50% of women passed the ACFT in the third quarter of 2020”); David Brown, *Army Combat Fitness Test Fiasco! Slides Reveal 84% of Women Failing ACFT*, (Oct. 5, 2019), <https://news.clearancejobs.com/2019/10/05/army-combat-fitness-test-fiasco-slides-reveal-84-of-women-failing-acft/> [<https://perma.cc/HPS2-G5UQ>].

397. See David Brown, *Army Combat Fitness Disaster: Units Refusing To Take Test, Medics Bailing*, CLEARANCEJOBS (Mar. 31, 2021), <https://news.clearancejobs.com/2021/03/31/army-combat-fitness-disaster-units-refusing-to-take-test-medics-bailing/> [<https://perma.cc/39JS-4FSZ>] (“[M]ilitary medical staff . . . are . . . eyeing ACFT standards skeptically and planning to exit the Army as soon as possible.”).

398. Maj. Lisa Beum, *The Army Never Should Have Switched to the ACFT*, MILITARY.COM (May 6, 2021), <https://www.military.com/daily-news/opinions/2021/05/06/army-never-should-have-switched-acft.html> [<https://perma.cc/TTY2-4B2Q>].

399. Brown, *supra* note 397. For the military to evaluate the physical fitness of soldiers with the ACFT requires “\$68 million of equipment and a mandatory testing ground.” *Id.*

400. See Thomas Brading, *ACFT 2.0: Changes Sparked by COVID-19*, U.S. ARMY (June 15, 2020), https://www.army.mil/article/236479/acft_20_changes_sparked_by_covid_19 [<https://perma.cc/FL5G-DF2B>] (reporting that the intent of the changes was to give troops “more time to train for and pass the six-event test”). Other changes included dropping the stationary bike event (an alternative event for the two-mile run) from 15,000 meters to 12,000 meters and requiring that all soldiers only meet the “Gold” scoring standard rather than the more grueling “Grey or Black” scoring minimums usually “reserved for harsher, more physically demanding career fields.” *Id.*

401. National Defense Authorization Act 2021, Pub. L. 116-283, § 598, 135 Stat. 3388, 3669. The suspension does not specifically mention assessing the impact on women, but this was a key point of discussion among critics.

been developed with sufficient participation of women⁴⁰² and that the test would be harder to train for and pass in austere environments, where the additional equipment required for the test might not be available.⁴⁰³ After a year-long study of the issue, DACOWITS also raised concerns about the ACFT's "potential for negative impact on servicewomen's health and their abilities to advance in their careers at rates similar to servicemen."⁴⁰⁴ The Service Women's Action Network⁴⁰⁵ was also among the chorus of critics.⁴⁰⁶ In the face of all of this criticism and the complications of training and testing during a global pandemic, the Army decided to pause administrative actions resulting from ACFT failures until March 2022.⁴⁰⁷

Based on its independent review, the Army is now provisionally implementing and collecting data on a revised ACFT ("ACFT 3.0").⁴⁰⁸ This version keeps the current six test events, although it permanently allows the plank as a substitute for the hanging leg tuck, includes five performance categories rather than three (Green, Bronze, Silver, Gold, and Platinum), and reinstates gender-normed cutoff scores within each performance tier.⁴⁰⁹ Rather than having a specific numerical score, a soldier is scored within their color-coded percentile tier, which reflects an Army-wide percentile range for their

402. See Letter from United States Senators Kirsten Gillibrand and Richard Blumenthal to the chairmen and ranking members of the House and Senate Armed Services committees (Oct. 20, 2020) [hereinafter Gillibrand and Blumenthal letter], <https://www.gillibrand.senate.gov/imo/media/doc/Sen.%20Gillibrand%20NDAA%20Conferee%20Letter%20re%20ACFT%20FINAL%2010.20.20.pdf> [<https://perma.cc/Y84H-YSKF>]; see also Missy Ryan, *Senators Urge Pentagon To Suspend Implementation of Army's New Fitness Test*, WASH. POST (Oct. 20, 2020, 11:00 PM), https://www.washingtonpost.com/national-security/army-new-fitness-test/2020/10/20/d46660bc-12da-11eb-82af-864652063d61_story.html [<https://perma.cc/XU4W-X8ML>].

403. See Gillibrand and Blumenthal letter, *supra* note 402. According to critics, "[t]he ACFT is . . . a monumental logistical task for leaders to administer. The test involves bumper plates, kettlebells, diamond bars, sleds and medicine balls, and a large amount of space." Steve Beynon, *Army May Go Back to Job-Specific Scoring After All on the New Fitness Test*, MILITARY.COM (June 15, 2021), <https://www.military.com/daily-news/2021/06/15/army-may-go-back-job-specific-scoring-after-all-acft.html> [<https://perma.cc/Z6KH-7FTH>].

404. DACOWITS 2020 ANNUAL REPORT, *supra* note 379, at 32. According to DACOWITS, the NDAA requires gender-neutral physical fitness tests only in occupational specialties that opened to women in 2016, i.e., combat positions, and the Army is misinterpreting the relevant language. *Id.*

405. The Service Women's Action Network is a membership organization advocating for the needs of service women. See *About*, SERV. WOMEN'S ACTION NETWORK, <https://www.servicewomensationnetwork.org/about> [<https://perma.cc/G4SX-GHKZ>] (last visited Feb. 1, 2022).

406. *SWAN Urges Congress To Halt Implementation of Army Combat Fitness Test (ACFT)*, SERV. WOMEN'S ACTION NETWORK (Nov. 16, 2020), <https://www.servicewomensationnetwork.org/media-room/swan-urges-congress-to-halt-implementation-of-army-combat-fitness-test-acft> [<https://perma.cc/2YMC-8MKG>] (reporting that a national nonprofit organization representing women service members and veterans issued a letter to the House and Senate Armed Services Committees urging suspension of the AFTC until further assessment on the test's impact on the career prospects for women and older soldiers).

407. See Army Rsr. Strategic Commc'ns U.S. Army Rsr. Command, *FAQs: COVID-19 Impact to the U.S. Army Reserve*, U.S. ARMY RSRV. (Dec. 22, 2020), <https://www.usar.army.mil/News/Article/2121404/faqs-covid-19-impact-to-the-us-army-reserve/> [<https://perma.cc/S6Q4-EWDV>] ("A passing score on the last APFT remains valid until 31 March 2022 for any purpose requiring a passing APFT or score.")

408. See Ctr. for Initial Mil. Training, U.S. Army Training Command, *ACFT 3.0*, U.S. ARMY (Mar. 23, 2021) <https://www.army.mil/standto/archive/2021/03/23/> [<https://perma.cc/ZZ49-X3AB>].

409. See Thomas Brading, *ACFT 3.0: Exploring a More Inclusive Scoring Assessment, Planks Stay*, U.S. ARMY (Mar. 22, 2021), <https://www.army.mil/article/244220> [<https://perma.cc/EHP5-JP3H>].

gender.⁴¹⁰ This change is contemplated to be accompanied by a change in promotion board materials, which would no longer include the gender of that particular soldier.⁴¹¹ Although the current test employs a single minimum standard for all occupations, senior Army officials who testified before Congress in the summer of 2021 reported that they are considering reinstating job-specific scoring bands.⁴¹² “There will be no final decisions on the new fitness test, including its standards, until an independent study on it is completed at the end of 2021.”⁴¹³

Beyond the ACFT, there is a mosaic of different physical fitness tests among and within the branches of the military. As required by law,⁴¹⁴ occupation-specific specialized training programs in the Army, Air Force, and Marine Corps use gender-neutral passing requirements that hold men and women to the same standard.⁴¹⁵ Yet within these same branches, baseline annual fitness tests are still differentiated by sex.⁴¹⁶ Seeking to avoid a controversy like the one surrounding the Army’s ACFT, the Air Force has announced that its updated fitness test will involve only minor tweaks, remain gender-normed, and provide several alternative options to demonstrate strength and cardiovascular fitness.⁴¹⁷

2. Gender-Normed Physical Fitness Tests Harm Both Male and Female Service Members

From an organizational perspective, the fraught history of physical fitness tests in the military demonstrates that both gender-normed and gender-neutral physical fitness

410. See U.S. ARMY, ACFT 3.0: RECOGNIZING PERFORMANCE EXCELLENCE (n.d.), https://www.army.mil/e2/downloads/rv7/acft/acft_performance_categories.pdf [<https://perma.cc/QG5V-9GJ7>]. Platinum includes those in the top 1% of their gender; Gold includes the top 10%; Silver, the top 25%; Bronze the top 50%; and Green, those who make the minimum standard. *Id.*

411. See *id.* On this basis, and because a soldier’s score is not shared with promotion boards (only the soldier’s color-coded performance), the Army is reporting that the ACFT 3.0 is gender neutral.

412. See Beynon, *supra* note 403 (“If you’re a Ranger . . . or in a fitness type organization . . . I would say you want people with a certain level of fitness. If you’re doing something else, a neurosurgeon, you might be more concerned with that person operating than leading the battalion in PT.” (omissions in original)).

413. *Id.*

414. For the history of this requirement, see *supra* Part III.B.

415. Both the Army Ranger School and the Special Forces Assessment and Selection use gender-neutral standards. So do certain physical positions in the Air Force such as tactical air controllers. See Stephen Losey, *Gender-Neutral Fitness Test for All? Air Force Considering Running-Based Formula*, AIR FORCE TIMES (Mar. 19, 2019), <https://www.airforcetimes.com/news/your-air-force/2019/03/19/gender-neutral-fitness-test-for-all-air-force-considering-running-based-formula/> [<https://perma.cc/E6YC-U59D>].

416. The Air Force, Navy, and Marine Corps physical fitness tests all scale men and women differently. See Stew Smith, *Air Force BMT Physical Fitness Test*, MILITARY.COM (2021), <https://www.military.com/military-fitness/air-force-fitness-requirements/air-force-basic-military-training-fitness-test> [<https://perma.cc/42AX-LN9N>]; Stew Smith, *What You Should Know About the Navy Physical Readiness Program*, MILITARY.COM (2021), <https://www.military.com/military-fitness/navy-fitness-requirements/navy-physical-readiness-tests> [<https://perma.cc/ZA5Q-M2VX>]; Stew Smith, *USMC PFT Score Charts*, MILITARY.COM (2021), <https://www.military.com/military-fitness/marine-corps-fitness-requirements/usmc-pft-charts> [<https://perma.cc/DR3Q-2ULW>].

417. See Amanda Huffman, *Air Force PT Test Adjusts, Aiming To Avoid Army Combat Fitness Test Struggles*, CLEARANCEJOBS: NEWS & CAREER ADVICE (June 1, 2021), <https://news.clearancejobs.com/2021/06/01/air-force-pt-test-adjusts-aiming-to-avoid-army-combat-fitness-test-struggles/> [<https://perma.cc/89BF-JB39>].

tests have, variously and at different times, been developed and deployed by the military in ways that contribute to the devaluation of women's service. In order to shift the culture of the military to one where men and women are equally valued and have the same opportunities for training and career progression, the military must utilize gender-neutral physical fitness tests. However, such tests must be keyed to the physical readiness required for performance of actual, regular, and recurring duties of specific military occupations, most of which, as discussed below, do not involve combat, much less ground combat.

Let us start with gender-normed basic fitness tests, of the variety that the Army used for forty years until its recent effort to implement a gender-neutral basic fitness test, and which the Army seems to be resurrecting with the ACFT 3.0. Seen from one perspective, having different physical standards for men and women allows more women to qualify for military service and successfully compete in the promotions process.⁴¹⁸ This approach is not without precedent. For example, to avoid incurring disparate impact liability under Title VII,⁴¹⁹ some civilian law enforcement agencies employ gender-normed physical ability tests.⁴²⁰

418. See Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567, 594–95 (2018).

419. Title VII of the Civil Rights Act of 1964 is the federal law that prohibits employment discrimination based on sex and sexual orientation. See Title VII of the Civil Rights Act of 1964, § 717(a), 42 U.S.C. § 2000e–16(a). Section 2000e–16(a) of Title VII prohibits sex discrimination by federal employers, such as the FBI and other federal law enforcement agencies. See *id.*

420. See Levin, *supra* note 418, at 595. Courts have upheld such tests under Title VII where no significantly greater burden of compliance is imposed on either sex. See *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016) (“[A]n employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each.”); *Hale v. Holder*, EEOC Dec. No. 570–2007–00423X, slip op. at 4–5 (Sept. 20, 2010) (recognizing that “distinctions based on the obvious physical differences between men and women” do not per se contravene Title VII); *Powell v. Reno*, No. 962743, 1997 U.S. Dist. LEXIS 24169, at *9–10 (D.D.C. July 24, 1999) (“Title VII allows employers to make distinctions based on undeniable physical differences between men and women . . . where no significantly greater burden of compliance [is] imposed on either sex.”); *cf. Jaspersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc) (upholding sex-based grooming standards on the basis of the “equal burdens of compliance” doctrine); *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1074 (1983) (upholding an airline’s sex-based weight requirement which set a higher maximum weight for men than for women of the same height on the basis of the “equal burdens of compliance” doctrine).

These cases suggest that some differential treatment of men and women based upon inherent physiological differences is not only lawful but potentially required under Title VII. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 151 (2d Cir. 2018) (Lynch, J., dissenting) (holding that employer may violate Title VII when it fails “to impose distinct fitness requirements for men and women . . . if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity”); *Lanning v. Se. Pa. Transp. Auth. (SEPTA)*, 181 F.3d 478, 490 (3d Cir. 1999) (holding that a discriminatory gender-neutral cutoff score (a twelve-minute, 1.5-mile run) for transit officer positions must “be shown to measure the minimum qualifications necessary for the successful performance of the job in question in order to survive a disparate impact challenge” under Title VII); *cf. Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (explaining that under Title VII, an employer may engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, if the employer has a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action). However, and importantly for this analysis, Title VII does not apply to uniformed service members. See *supra* notes 49–51 and accompanying text.

On the other hand, the military's use of gender-normed physical fitness standards runs the risk of contributing to women's subordination by perpetuating the view that women are weaker than men because they are allowed to do less while achieving the same scores. In a male-dominated workplace, such a viewpoint perpetuates the subordination of women.⁴²¹ Social science research bears out this phenomenon. Specifically, studies have found that "task cohesion" developed through shared experiences within a group is a predictor of group performance.⁴²² Moreover, studies conducted across several of the services—including the Marine Corps, Army, and Special Operations—have found that positive unit cohesion was more likely when and if physical standards and professional standards of conduct were applied equally to men and women.⁴²³ In contrast, differential treatment of women reinforced negative perceptions about women.⁴²⁴ Studies of women's integration in foreign militaries also find that gender-neutral standards reduce barriers to women's integration "because they help establish an equal foundation among all new recruits and help to dispel the notion that women in combat arms are physically unprepared and incapable of completing their jobs effectively."⁴²⁵ Finally, research on integration also demonstrates that women can

421. See Levin, *supra* note 418, at 595. For example, the following statement from a Marine Corps sergeant interviewed in the Marine Corps's study on organizational culture illustrates how frustration with unequal standards leads to the devaluation and discrimination of women:

We're not equal with females. I do seven pull-ups, I get like 40 points. A female does seven pull-ups, they get 100 points. Until they're actually equal, they're not going to be socially accepted, and I'm going to treat them like a sandwich maker, and I'm going to turn a blind eye to pictures of them on the Internet because they're not equal. That's me. I'm not going to put the pictures up, but I will turn a blind eye to it because they're not equal. And if a female gets pregnant and they take 15 months off of being a Marine because they're on limited duty, how am I going to treat you equal if I get ten days of freaking PTAD [family leave] once my wife pops out a kid? I can't spend that time. Nothing equal about it. So to socially accept females, you can't have them just meet the minimum standard of five pull-ups to join the infantry. They got to be actually equal just like everything else.

LANE ET AL., *supra* note 238, at 42–43.

422. See KAMARCK, *supra* note 99, at 29.

423. See JESSICA GLICKEN TURNLEY, DONA J. STEWART, RICH RUBRIGHT & JASON QUIRIN, JOINT SPECIAL OPERATIONS UNIV., SPECIAL OPERATIONS FORCES MIXED-GENDER ELITE TEAMS (SOFMET): EXAMINING SOCIO-CULTURAL DYNAMICS OF SOFMET 91–93 (2014), <https://dod.defense.gov/Portals/1/Documents/wisr-studies/SOCOM%20-%20JSOU%20Study%20on%20Special%20Operations%20Forces%20Mixed-Gender%20Elite%20Team3.pdf> [<https://perma.cc/LL39-8FPG>].

424. See *id.* at 91–92.

425. AGNES GEREKEN SCHAEFER, JENNIE W. WENGER, JENNIFER KAVANAUGH, JONATHAN P. WONG, GILLIAN S. OAK, THOMAS E. TRAIL & TODD NICHOLS, RAND CORP., IMPLICATIONS OF INTEGRATING WOMEN INTO THE MARINE CORPS INFANTRY 142 (2015) (presenting the findings of an in-depth analysis of twenty-one countries' integrations experiences).

perform most tasks that men are able to perform given appropriate training,⁴²⁶ and other studies find large returns for all service members to training and experience.⁴²⁷

These studies support adherence to gender-neutral physical fitness standards. Despite its bumpy rollout, the Army's original vision of a gender-neutral ACFT has the potential to be a positive example for other branches of the military. Placing men and women on equal footing in terms of physical expectations may stop the self-fulfilling prophecy of holding women to lower standards and thus expecting less from (and for) them.⁴²⁸ To be sure, physical fitness standards are important for many reasons and need to be developed scientifically and rigorously. Moreover, ACFT clearly needs adjustment to reflect more realistic (and less demanding) minimum physical demands for entry training and most military occupations. But it was misguided for the Army to abandon gender-neutral fitness standards so quickly. The Army should stay the course, because doing so could ultimately foster a culture that places equal value on men and women by holding them to equal standards.

At the same time, there must be a relationship between gender-neutral physical performance standards and the requirements of the job—whether a physical test is used to evaluate qualifications for minimum entrance and retention or the demands of specific military occupational specialties. And on this front, the ACFT is a blunderbuss of a test wide of its targets, both as a minimum basic fitness test and a performance standard for combat positions. While there is no doubt that some minimum level of fitness is required to ensure a prepared military and to motivate physical training, the ACFT is unrelated to the performance tasks of the vast majority of service members' jobs. Eighty-four percent of active-duty personnel work in noncombat occupations.⁴²⁹ As one critic observes, "while it would be nice if cooks, helicopter mechanics, paralegals, and linguists could, at a moment's notice, graduate Ranger school . . . retention with a basic level of physical fitness is more important."⁴³⁰ The main effect of the ACFT, it seems, will be to discourage qualified men and women from military service and drain the military of talent by spurring the exit of skilled service members who are not in combat occupations.

426. See Sasson-Levi & Sarit Amram-Katz, *supra* note 368, at 116 (in a study of subjects in two Israeli Defense Forces training courses, finding that "[o]n the whole . . . the qualitative data from the two courses indicate that the functioning of men and women was relatively similar and, more important, that differences within each gender group were greater than differences between gender. Differences in age, prior military experience, and education seemed to be more indicative than gender of one's chances of graduating with high grades."). More broadly, sociological research on the workplace suggests that gendered patterns relating to employee performance and promotion are significantly a function of endogenous organizational factors and workplace policies. See Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. L. REV. 1041, 1088–96 (2017).

427. See STANLEY A. HOROWITZ, CULLEN A. ROBERTS & JULIE A. PECHACEK, INST. DEF. ANALYSES, UNDERSTANDING AND MANAGING MILITARY PERSONNEL QUALITY 1–2 (2019).

428. See *e.g.*, Germano, *supra* note 65 (describing how lower expectations for female Marines in basic training contributes to lower performance, thus feeding into further justification for lower expectations and devaluation).

429. See *Military Careers*, U.S. BUREAU OF LAB. STAT.: OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/military/military-careers.htm> [<https://perma.cc/PA7J-UJ59>] (last modified Sept. 8, 2021) (calculated from Tables 1 and 2).

430. Brown, *supra* note 397.

Moreover, multiple DOD assessments of military “readiness” conclude that physical strength is not what the military needs to retain its competitive edge under current and evolving global conditions.⁴³¹ Technical advances have fundamentally changed the face of modern warfare; very few specialties, even combat specialties, require uncommon strength.⁴³² What the modern military requires, according to its own personnel and readiness experts, are people with data-centric skills, those who can work with cutting-edge technology, and individuals who can capably exercise responsibility and make decisions in complex situations⁴³³—that is, individuals with strong leadership and mental capabilities. In sum, the ACFT is both futile and perverse insofar as it is used as a basic fitness test for qualification and retention in the military.

Secondly, even as a test for evaluating service members’ qualifications for combat, the data did not support the conclusion that the test ACFT was sound. The test was developed on a small, unrepresentative sample, and a required component of the test did not predict performance in combat tasks.⁴³⁴ The high failure rates of women should also have given researchers who validated ACFT pause when female soldiers have performed at least as well as male soldiers in the battlefield over the course of more than twenty years and in three major wars in the Persian Gulf, Afghanistan, and Iraq.⁴³⁵

A gender-neutral approach to physical assessment in which physical fitness tests are tied to the requirements of specific military occupations has the potential to dismantle discriminatory structures by sending the message that men and women are equally legitimate and capable service members. Hence, gender-neutral physical fitness testing holds the promise of shifting the culture that devalues women’s service. Although only one piece of the puzzle, this positive change in climate should help to reduce sexual harassment and other gender-based harms. As discussed next, validated, gender-neutral physical fitness standards may also be required by the Constitution.

3. Gender-Normed Physical Fitness Tests May Be Unconstitutional⁴³⁶

It is not settled law, by any means, whether the military’s use of gender-normed physical fitness tests are constitutional. In *United States v. Virginia*,⁴³⁷ a case striking down single-sex education at the Virginia Military Institute (VMI),⁴³⁸ Justice Ruth Bader

431. See, e.g., PRESERVING OUR COMPETITIVE ADVANTAGE, *supra* note 293, at 6 (“The Department’s workforce requirements . . . requir[e] the ability to recruit and retain quality candidates for the Information Age with technical skills and digital literacy.”); *id.* at 10 (“As the challenges we are facing toward 2030 require nimble, connected, and more technologically proficient military forces, the 21st Century Service member must have the cognitive capacity to conceive, design, and implement approaches to integrate our capabilities across all warfighting domains in a complex global strategic environment.”).

432. See Russell, *supra* note 348, at 51 (reviewing studies) (“All branches of the military seem to reflect the sentiment that technical training trumps physical strength.”).

433. See PRESERVING OUR COMPETITIVE ADVANTAGE, *supra* note 293, at 9.

434. See *supra* notes 391–395 and accompanying text.

435. See *supra* notes 331–338 and accompanying text for a discussion of female soldiers’ performance in combat in the Gulf War. See also Putko, *supra* note 333, at 29 (discussing female soldiers’ performance in combat in Afghanistan and Iraq).

436. I am especially indebted to Cate Vaden, 2021 S.J. Quinney College of Law graduate and law clerk to the Honorable Chief Justice Matthew B. Durrant, for her assistance in preparing this Part.

437. 518 U.S. 515 (1996).

438. *United States v. Virginia*, 518 U.S. at 519.

Ginsberg noted in dicta that physical differences may constitutionally justify sex-based rules.⁴³⁹ Moreover, sex-based physical fitness tests appear to be legal and perhaps even required under Title VII,⁴⁴⁰ an area of law that, while not applying directly to the armed forces,⁴⁴¹ has historically influenced the Court's interpretation of the Constitution.⁴⁴² However, the question must at least be raised as to whether the military's use of gender-normed physical tests may violate the Fifth Amendment because they subject individuals to different physical standards solely on the basis of sex. The constitutionality of gender-normed physical tests likely hinges on whether they are viewed as perpetuating an overly broad generalization about women or, alternatively, as accurately accounting for physiological differences between men and women. The government may also be able to defend gender-normed tests if it can demonstrate they were formulated to remedy past discrimination against women.

"The Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating on the basis of sex absent an 'exceedingly persuasive justification.'"⁴⁴³ The Supreme Court has stated that sex-based classifications are unconstitutional unless the government demonstrates "an exceedingly persuasive justification"⁴⁴⁴ or that any sex-based classification is "substantially related" to the achievement of "important governmental objectives."⁴⁴⁵ Most recently, in *Sessions v. Morales-Santana*,⁴⁴⁶ the Court clarified that "the classification must substantially serve an important governmental interest *today*, for 'in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'"⁴⁴⁷ The Court has also repeatedly held that sex-based discrimination is unconstitutional when it

439. *See id.* at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.").

440. *See supra* note 420 and accompanying text.

441. *See supra* notes 49–51 and accompanying text for an analysis of federal court decisions holding that Title VII does not cover uniformed military personnel. *See also* Kessler & Gearhart, *supra* note 42, at 420 (discussing federal court decisions holding that Title VII does not cover uniformed military personnel).

442. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 22, 108 (2014) (examining the "unprecedented bond between struggles for racial justice and sex equality" created by Title VII and civil rights advocates' "hope that courts would extend" antidiscrimination doctrines developed under Title VII "to constitutional cases of all kinds").

443. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815, 1815 (2021) (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017)). The Supreme Court applies the same equal protection analysis, whether considering claims against the federal government under the Fifth Amendment or claims against state actors under the Fourteenth Amendment. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

444. *See, e.g.,* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

445. *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

446. 137 S. Ct. 1678 (2017).

447. *Sessions*, 137 S. Ct. at 1690 (alterations and omission in original) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015)).

“serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”⁴⁴⁸

The military’s gender-normed physical tests treat otherwise equally situated men and women differently solely due to their sex.⁴⁴⁹ In order for this sex-based discrimination to be constitutional, the government must demonstrate that gender-normed physical tests are substantially related to the achievement of an important governmental interest. No court has yet considered an equal protection challenge to gender-normed physical requirements for employment under the United States Constitution. The Michigan Court of Appeals came close, in *Alsbaugh v. Commission on Law Enforcement Standards*,⁴⁵⁰ when the court considered an equal protection challenge by two male applicants to the police academy under the Michigan Constitution.⁴⁵¹ Although the *Alsbaugh* court analyzed an equal protection claim under the Michigan Constitution, the test applied by the court was essentially identical to the intermediate scrutiny standard applied by the United States Supreme Court.⁴⁵²

In *Alsbaugh*, two male applicants to the police academy sued after they failed the police academy’s entrance test with scores that would have been passing for female applicants.⁴⁵³ The court started its analysis by distinguishing two types of physical exams—(1) tests that “delineate the specific minimum fitness standards required” for a job and (2) “test[s] designed to assess general physical fitness”—finding that the police academy’s test fell into the second category.⁴⁵⁴ The court’s analysis suggested that gender-normed fitness tests were more likely to relate to an important governmental interest when they were used to assess fitness generally.⁴⁵⁵ The court viewed favorably that the police academy’s use of gender-normed employment tests was intended to be an inclusive rather than exclusive measure.⁴⁵⁶ The court held that the gender-normed test was constitutional because “gender-norming the performance standards to account for the immutable physiological differences in strength and aerobic capacity between males and females” was substantially related to the important governmental interest of “avoid[ing] the potential for a disproportionate impact that a single standard would necessarily have on the female candidates.”⁴⁵⁷

The DOD may similarly argue that the military’s use of gender-normed physical tests accounts for physiological differences between the sexes in order to allow equally

448. *E.g.*, *J.E.B.*, 511 U.S. at 130–31.

449. See *supra* Part III.B.1 for a discussion of the history of gender-normed physical standards in the military.

450. 634 N.W.2d 161 (Mich. Ct. App. 2001).

451. *Alsbaugh*, 634 N.W.2d at 164.

452. See *id.* at 166 (“Classifications based on gender are reviewed under the ‘intermediate’ or ‘heightened-scrutiny’ test and will pass constitutional muster only if the classification is ‘substantially related to an important governmental objective.’” (quoting *Crego v. Coleman*, 615 N.W.2d 218, 224 (Mich. 2000))).

453. *Id.* at 164.

454. *Id.* at 167.

455. See *id.* at 169.

456. *Id.* at 167–68.

457. *Id.* at 169.

fit women to serve and be eligible for service, retention, and promotions.⁴⁵⁸ The government could also frame an important governmental interest in terms of affirmative action, arguing that gender-normed physical standards are substantially related to increasing opportunities for women to remedy past discrimination by the military.

The persuasiveness of an important governmental interest in recognizing physiological differences between the sexes may depend on whether the Supreme Court views this goal as perpetuating an overly broad generalization about women's capabilities or a necessary reflection of biological differences between the sexes. The Court has repeatedly struck down laws based on sex stereotypes and recently commented that "[e]ven if stereotypes frozen into legislation have 'statistical support,' our decisions reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn."⁴⁵⁹ But the "Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."⁴⁶⁰ For example, in *Michael M. v. Superior Court of Sonoma County*,⁴⁶¹ the Supreme Court held that a law criminalizing statutory rape only when an individual had sex with a female under the age of eighteen was constitutional because it reflected the biological fact that in 1981 girls could become pregnant and boys could not.⁴⁶²

Supporters of gender-normed physical tests have highlighted Justice Ginsburg's footnote from *United States v. Virginia* stating that physical training at the Virginia Military Institute may have to be adjusted for women,⁴⁶³ but the majority of the opinion demonstrates why gender-normed physical tests may be unconstitutional. The Court rejected Virginia's arguments that women would struggle with the rigor of VMI's academic regime, noting "[i]n contrast to the generalizations about women on which Virginia rests" that

VMI's implementing methodology is not inherently unsuitable to women; some women . . . do well under [the] adversative model; some women, at least, would want to attend [VMI] if they had the opportunity; some women are capable of all of the individual activities required of VMI cadets and can meet the physical standards [VMI] now impose[s] on men.⁴⁶⁴

United States v. Virginia demonstrates that a tendency or generalization does not make a rule. While many women may not be able to achieve the same scores as men on a gender-neutral physical fitness test, some women may be able to and want that

458. The FBI succeeded with an almost identical argument in its defense of gender-normed physical standards under Title VII. See *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) ("[P]hysical fitness standards suitable for men may not always be suitable for women, and accommodations addressing physiological differences between the sexes are not necessarily unlawful.").

459. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 n.13 (2017).

460. *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981).

461. 450 U.S. 464 (1981).

462. *Michael M.*, 450 U.S. at 467–68.

463. See *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.").

464. *Id.* at 550 (omission in original) (alterations in original) (citations omitted) (internal quotation marks omitted).

opportunity. Holding women to lower physical standards also perpetuates the generalization that women are weaker or less physically capable than men.

An alternative argument the government may rely on is that the use of gender-normed physical tests gives women opportunities to serve and be promoted as a remedy for past discrimination. In *Califano v. Webster*,⁴⁶⁵ the Court held that “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.”⁴⁶⁶ In order to rely on this interest, the government must show that its purpose in using a sex-based classification is to remedy past discrimination.⁴⁶⁷ The Court has rejected arguments that statutes were designed to remedy past discrimination against women when they were actually based on stereotypes or generalizations about women.⁴⁶⁸ Following *Califano*, the Court has issued several opinions outlining the application of strict scrutiny to affirmative action programs based on race but has not addressed affirmative action based on gender, so there are questions about what standard may be applied in the future.⁴⁶⁹ The DOD could certainly demonstrate past discrimination against women in the military, but it may be more difficult to demonstrate that remedying that discrimination was the reason for the enactment of gender-normed physical standards. A review of the implementation of gender-based physical testing in the military may reveal whether remedying past discrimination was an actual reason for their adoption. There could also be debate about the extent to which gender-normed physical standards are substantially related to remedying past discrimination. As the Army’s latest chapter with the gender-neutral format of the ACTF suggests,⁴⁷⁰ the Army seems to have given little consideration of whether any of its fitness tests will help more women qualify for military service and promotion.

More generally, the history of military physical performance standards demonstrates that the military’s physical fitness tests have been adapted repeatedly to achieve various purposes unrelated to physiological differences between men and women. At times, standards have been lowered to increase recruitment.⁴⁷¹ At others, baseline standards have been increased to achieve the narrow purpose of “combat

465. 430 U.S. 313 (1977).

466. *Califano*, 430 U.S. at 317.

467. *Id.*

468. *Id.*

469. See Katharine T. Bartlett, *Affirmative Action and Social Discord: Why Is Race More Controversial Than Sex?*, 52 U.C. DAVIS L. REV. 2305, 2323 (2019).

470. See *supra* Part III.B.1.c. In particular, it seems that the Army did not sufficiently evaluate the ability of female service members to successfully train for and perform the hanging leg-tuck, one of the six required components of the first version of the ACFT. See *supra* Part III.B.1.c.

471. See, e.g., HAMILTON GREGORY, *McNAMARA’S FOLLY: THE USE OF LOW-IQ TROOPS IN THE VIETNAM WAR* 52 (2017) (presenting an historical study and analysis of the Pentagon’s “Project-100,000,” which aimed to meet the manpower needs of an escalating war by extending eligibility for enlistment and the draft to previously ineligible low-IQ men); see also I.M. Greenberg, *Project 100,000: The Training of Former Rejectees*, 50 PHI DELTA KAPPAN 570, 570 (1969) (“In October, 1966, the armed forces lowered the entrance requirements for military service. We began accepting thousands of young men who were previously being rejected because they failed the standard entrance tests or the educational requirements for service. Provision was also made for accepting some men with easily correctible physical defects.”).

readiness,” even when unrelated to the tasks that most individuals in the military perform.⁴⁷² And throughout, keeping women out of combat positions and justifying the male-only draft has been a consistent preoccupation and animating concern in developing and revising fitness tests.⁴⁷³ This long history suggests that the military’s physical fitness standards are only loosely related to physiological differences between men and women or remedying past discrimination against women. Rather, the military’s physical standards have been adopted to achieve a constellation of conflicting military purposes, some of them fairly understood as related to furthering gender equality, others entirely unrelated, and still others to ensure women’s secondary status.

Of course, the constitutionality of any particular military fitness test will depend on the facts presented in any case before the Court. It is difficult to predict, *a priori*, if any particular physical fitness test would survive a constitutional challenge under the Fifth Amendment, especially given the multiplicity of physical tests used by each service. However, the analysis presented here suggests that, if such a case were to reach the Supreme Court, it would be incumbent on the justices to approach any physical fitness test that discriminates against women with great skepticism.

C. Gender-Neutral Selective Service Registration

A national conversation about whether women should be required to register with the Selective Service System is needed. Women are now allowed to serve in all combat specialties but cannot register for conscription, commonly known as “the draft.” A national debate on this subject would result in Congress changing the current male-only registration requirement to include all Americans ages eighteen to twenty-six. By doing this, Congress would signal a national cultural shift in acceptance of women in the armed forces. Such a shift would go a long way toward promoting equality for women currently serving in the military. Further, male-only registration is unconstitutional. After providing a brief history of the Selective Service System, the following discussion considers these arguments.

1. The History of the Selective Service System

The Selective Service System⁴⁷⁴ is the federal agency charged with administering the Military Selective Service Act (MSSA),⁴⁷⁵ which provides the statutory authority for the federal government to maintain the Selective Service.⁴⁷⁶ One of the main functions of the Selective Service is to maintain a database of registrants in case of a draft. While

472. See Knapik & East, *supra* note 319, at 9 (noting that combat readiness was the primary focus of Army fitness testing in the 1920s, in 1946, and then again after the Korean War, but in intervening periods, other goals prevailed); see also *supra* Part III.B.1.c.

473. See *supra* Part III.B.1 for a brief history on physical fitness testing in the military.

474. See *About Selective Service*, SELECTIVE SERV. SYS., <https://www.sss.gov/about/> [<https://perma.cc/K2PW-TUDM>] (last visited Feb. 1, 2022).

475. Military Selective Service Act, 50 U.S.C. §§ 3801–20.

476. The MSSA was first enacted as the Selective Service Act of 1948. KRISTY N. KAMARCK, CONG. RSCH. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION: ISSUES FOR CONGRESS 8 (2021), <https://crsreports.congress.gov/product/pdf/R/R44452> [<https://perma.cc/6MEJ-NMEN>].

there has not been an active draft since the Vietnam War,⁴⁷⁷ the MSSA requires all male citizens (and most male noncitizen residents) between the ages of eighteen and twenty-six to register with the Selective Service.⁴⁷⁸ A very high percentage of this population is registered.⁴⁷⁹ However, some young men are not aware of their status, because automatic administrative processes register them as they turn eighteen, such as when they apply for a driver's license or federal student financial aid.⁴⁸⁰ Compulsory registration in the absence of a draft is "a low-cost insurance policy against potential threats," ensuring that names and contact information of male citizens will be available quickly in the event of an emergency.⁴⁸¹

Women have never been required or permitted to register for the draft, although Congress has contemplated the idea several times.⁴⁸² Once was in 1980, President James E. Carter Jr. reinstated the Selective Service registration requirement (which had been done away with by President Ford in 1975) in response to concerns over the Russian invasion of Afghanistan and apparent deficiencies in the military's ability to quickly respond to Cold War threats in Europe.⁴⁸³ President Carter recommended that all Americans register, including women.⁴⁸⁴ However, the Senate Armed Services Committee rejected the idea outright, stating in its report, "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys widespread support among our people."⁴⁸⁵ The Committee reasoned that the primary

477. See Donald W. Maxwell, *Young Americans and the Draft*, 20 OAH MAG. HIST. 37, 37 (2006) ("A military draft was in place in the United States from September 1940 to July 1973."); Andrew Glass, *U.S. Military Draft Ends, Jan. 27, 1973*, POLITICO (Jan. 27, 2012, 12:58 PM), <https://www.politico.com/story/2012/01/us-military-draft-ends-jan-27-1973-072085> [<https://perma.cc/R9ES-Z7WB>] (noting that the draft calls administered by the Selective Services System during the Vietnam War occurred between 1968 and 1973).

478. 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 . . .").

479. See DONALD BENTON, SELECTIVE SERV. SYS., ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 2 (2020), <https://www.sss.gov/> (choose "Reports and Publications" then "Annual Reports to Congress" and select "Annual Report to Congress – FY 2020") [<https://perma.cc/AD4T-D9WX>] (reporting a 92% registration rate with the Selective Service for fiscal year 2020).

480. See LAURA SEAGO, BRENNAN CTR. FOR JUST., AUTOMATIC REGISTRATION IN THE UNITED STATES: THE SELECTIVE SERVICE SYSTEM EXAMPLE 2–3 (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Automatic-Registration-in-the-US-Selective-Service-Example.pdf [<https://perma.cc/XNC3-MKJV>] (noting that 95% of the male population ages eighteen to twenty-five is registered, but 72% of registrations are initiated automatically by the Selective Service through other transactions).

481. NAT'L COMM'N ON THE DRAFT, *supra* note 318, at 94.

482. The issue of women and the draft was also a contentious point of discussion when Congress was debating the proposed Equal Rights Amendment in the 1970s. Men were actively being conscripted to fight in Vietnam at the time, and it was not at all certain how the Equal Rights Amendment would affect women and the draft. See Cary Franklin, *The ERA, the Military, and the Making of Constitutional Meaning*, 43 HARBINGER 115, 116–17 (2019) (discussing how the Equal Rights Amendment's chief supporters "defeated numerous attempts over the course of 1970 and 1971 to add provisions to the ERA exempting women from the draft").

483. NAT'L COMM'N ON THE DRAFT, *supra* note 318, at 91.

484. *Id.*

485. S. REP. NO. 96-826, at 157 (1980).

purpose of the draft was to raise combat troops, and it made no sense to include women in a draft in light of the military's ban on women serving in combat.⁴⁸⁶

Congressional debate on women and the draft emerged again in the late 2000s after women's eligibility for combat positions gained more widespread acceptance.⁴⁸⁷ Some members of Congress expressed skepticism about the utility of the Selective Service System but reasoned that if it were to remain, women should be included. For example, Representative Bradley Byrne (R-AL) stated,

If we are going to have a Selective Service system, of course, it needs to include women. Women serve in every single combat role

I believe we should take a hard look at doing away with Selective Service entirely. Of course, at the very least, we should include both men and women at the age of 18.⁴⁸⁸

However, many in Congress remained opposed. For example, Senator Ted Cruz (R-TX) said in 2016,

It is a radical change that is attempting to be foisted on the American people.

I am the father of two daughters. Women can do anything they set their mind to, and I see that each and every day. But the idea that we should forcibly conscript young girls into combat, in my mind, makes little to no sense. It is, at a minimum, a radical proposition.⁴⁸⁹

The late Senator John McCain (R-AZ) responded,

The fact is that every single military leader in this country—both men and women . . .—believes it is simply fair, since we have opened up all aspects of the military to women . . . that they would also be registering for Selective Service.

I would also point out that every single member of the [Armed Services] committee— . . . [including] all of the female members of the committee—also finds it a matter of equality.⁴⁹⁰

In sum, members of Congress have debated requiring women to register with the Selective Service several times since 1980, but conservatives have thus far been successful in blocking a gender-neutral draft.⁴⁹¹ However, extending Selective Service registration to include women has gained momentum since all combat roles in the military were opened to women in 2015, eliminating the rationale for their exclusion. In 2017 Congress mandated the formation of a commission—the National Commission on

486. *Id.* (“The policy precluding the use of women in combat is, in the committee’s view, the most important reason for not including women in a registration system.”).

487. By a vote of 84–12, the Senate passed a version of the 2017 National Defense Authorization Act that would have required registration of women. *Roll Call Vote 114th Congress - 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=2&vote=00098 [<https://perma.cc/6TKR-5HQA>] (last visited Feb. 1, 2022).

488. 114 CONG. REC. H2441 (daily ed. May 17, 2016) (statement of Rep. Bradley Byrne).

489. 114 CONG. REC. S3484 (daily ed. June 7, 2016) (statement of Sen. Ted Cruz).

490. *Id.* (statement of Sen. John McCain).

491. See Leo Shane III, *Congress Drops Plans To Make Women Register for the Draft*, MIL. TIMES (Nov. 29, 2016), <https://www.militarytimes.com/news/pentagon-congress/2016/11/29/congress-drops-plans-to-make-women-register-for-the-draft/> [<https://perma.cc/Z3KL-89CM>] (explaining how the draft registration provision narrowly passed a House Armed Services Committee vote in spring 2016 but had been stripped out of the final legislative draft by conservatives in both the House and the Senate in November 2016).

Military, National, and Public Service⁴⁹²—to study the possibility of universal registration.⁴⁹³ The Commission, which released its final report in March 2020,⁴⁹⁴ concluded following years of research and hearings that it was time to extend the registration requirement to “all Americans” between ages eighteen and twenty-six, including women.⁴⁹⁵

The Commission explained that including women would double the pool of potential conscripts in a national emergency and thus increase the number of individuals qualified to serve, thereby improving national security.⁴⁹⁶ The statistics discussed in the Commission’s report indicate that women are equally likely to qualify for service as men—indeed, slightly more women are likely to qualify for service (29.3% of women compared with 29% of men); excluding half the pool of eligible persons would be “imprudent.”⁴⁹⁷ However, the Commission’s recommendation to include women in the registration requirement was mainly based on larger considerations about women’s status in American society.

The Commission pointed out that registration for service is linked to societal conceptions of civic duty.⁴⁹⁸ Requiring women to “register, and perhaps be called up in the event of a draft, is a necessary prerequisite for their achieving equality as citizens, as it has been for other groups historically discriminated against in American history.”⁴⁹⁹ Male-only registration, the Commission continued, “sends a message to women not only that they are not vital to the defense of the country but also that they are not expected to participate in defending it.”⁵⁰⁰ Ultimately, the Commission concluded that the male-only draft is based on outdated notions about women’s roles as mothers, wives, and

492. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 551, 130 Stat. 2000, 2130 (2016) (establishing a National Commission on Military, National, and Public Service to examine “the feasibility and advisability of modifying the military selective service process,” including potentially disregarding age or sex, instead of requiring women to register).

493. See NAT’L COMM’N ON MIL., NAT’L, & PUB. SERV., INTERIM REPORT JANUARY 2019: A REPORT TO THE AMERICAN PEOPLE, THE CONGRESS, AND THE PRESIDENT 1, 5 (2019) (“Our bipartisan Commission was created amid a debate over whether the selective service registration requirement should be extended to include women.”); see also National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 555(e)(1), 130 Stat. 2000, 2136 (2016) (directing that the Commission must report their findings and “shall include in the report legislative language and recommendations for administrative action to implement the recommendations of the Commission”).

494. See generally NAT’L COMM’N ON THE DRAFT, *supra* note 318 (responding to the U.S. Government’s first ever request for “a comprehensive and holistic review of all forms of service to the Nation”).

495. *Id.* at 111. The Commission also made recommendations with respect to establishing greater opportunities for voluntary national and public (government) service. *Id.* at 129–36.

496. See *id.* at 115. Over the course of the Vietnam War, there was a gradual lowering of standards for draftees in response to needed increases in troop numbers. Individuals with lower aptitudes were more likely to die or be dishonorably discharged than their peers. The Commission stated that adding women to the Selective Service System would increase the number of highly qualified individuals able to serve in a wide variety of positions. See *id.* at 114–15.

497. *Id.* at 115.

498. *Id.* at 118.

499. *Id.*

500. *Id.*

caretakers.⁵⁰¹ The “current disparate treatment of women unacceptably excludes women from a fundamental civic obligation and reinforces gender stereotypes about the role of women.”⁵⁰² Building on the Commission’s recommendations, in March 2021, Senator Jack Reed (D-RI), the chair of the Senate Armed Services Committee, shared his “hope” that gender-neutral registration will be “incorporated into the next national defense bill.”⁵⁰³

2. Male-Only Registration Harms Both Men and Women

Given the low likelihood of the draft being reactivated, some might consider it a moot question as to whether women should be required to register for Selective Service.⁵⁰⁴ However, even without a draft, male-only registration harms both men and women. There is no difference between men and women with respect to eligibility for military service. Yet by virtue of the sex-based registration law, only men may be denied a panoply of federal and state benefits if they fail to register. Women, in contrast, suffer a different but equally unjustifiable injury. As our country attaches significant status to military service, exclusion from registration has the effect of teaching women (and society more broadly) that women are second-class citizens, not fit to serve their country should there be a national emergency. Exclusion from registration also demeans women by perpetuating stereotypes about their proper roles. Given these significant material and dignitary harms, eliminating sex-based registration is important for both men and women.

Any man who knowingly fails to register with the Selective Service may face criminal penalties of up to five years in prison and up to \$10,000 in fines.⁵⁰⁵ While the military does not currently enforce the criminal penalties for failing to register, many men still face real economic consequences for not registering. Registration with the

501. *See id.* at 120. The Commission heard from a number of voices from the religious community opposed to the registration of women, raising concerns about the ability of women to continue their roles as wives or mothers if pressed into military service. *See id.* Proponents of the status quo also cited studies indicating women suffer considerably higher rates of injury in basic training than their male counterparts, arguing that combat is an occupation better suited to the male physiology. *See id.* at 121.

502. *Id.* at 115.

503. Amy Howe, *Justices Grant State Secrets Case, Won't Tackle Male-Only Draft*, SCOTUSBLOG (June 7, 2021, 12:35 PM), <https://www.scotusblog.com/2021/06/justices-grant-state-secrets-case-wont-tackle-male-only-draft/> [<https://perma.cc/S8A3-2D57>].

504. Indeed, some would like to see the MSSA repealed. *See* H.R. 4523, 114th Cong. (2016) (seeking to repeal the Military Selective Service Act); *see also* Doug Bandow, *Draft Registration: The Politics of Institutional Immortality*, CATO INST. (Aug. 15, 1994), <https://www.cato.org/publications/policy-analysis/draft-registration-politics-institutional-immortality> [<https://perma.cc/ZNF3-KVSZ>] (“Even the Department of Defense acknowledges that registration could be dropped with no effect on military mobilization requirements.”).

505. 50 U.S.C. § 3811; *see also* OFF. OF PUB. & INTERGOVERNMENTAL AFFS., SELECTIVE SERV. SYS., ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES: FISCAL YEAR 2016, at 9 (2016), <https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-2016-Web.pdf> [<https://perma.cc/6437-QTFW>] (noting that the Military Selective Service Act requires the Selective Service System to maintain a list of individuals suspected to be in violation of the act by not registering and requires the delivery of those names to the Department of Justice on an annual basis).

Selective Service System is an eligibility condition for many state and federal benefits.⁵⁰⁶ For example, registration is a condition of receiving federal student aid⁵⁰⁷ or federal job training,⁵⁰⁸ holding employment with the federal government,⁵⁰⁹ demonstrating moral character on the United States citizenship application,⁵¹⁰ and receiving state educational assistance in many instances.⁵¹¹

Additionally, the ability to register is foreclosed after age twenty-six with few exceptions; if a man does not register before then, he may be permanently cut off from those opportunities.⁵¹² These consequences tend to fall on low-income and immigrant men, who might never have been aware of a registration requirement and are less likely than middle- and upper-income men to apply for a driver's license or federal student aid by age twenty-six.⁵¹³ It is difficult to quantify the loss of benefits that have resulted from failures to register, but to provide an example, in California alone, between the years 2012 and 2015, an estimated \$100 million in potential lifetime benefits were lost as a result of failures to register.⁵¹⁴ Both disparate treatment and impacts on the basis of sex are occurring because of the male-only registration requirement. Men and women should face the same expectations and repercussions for noncompliance.

Male-only registration also has negative consequences for women given registration's symbolic value. Congress passed the male-only registration requirement when society did not see women as valuable in a military context. Retaining male-only registration sends the message that women are less fit to serve the nation in a national

506. See *Legislation by States, Territories, and the District of Columbia*, SELECTIVE SERV. SYS.: STATE-COMMONWEALTH LEGIS., <https://www.sss.gov/register/state-commonwealth-legislation/> [<https://perma.cc/3ZRG-KUS4>] (last visited Feb. 1, 2022) (“[M]en who fail to register with Selective Service are not eligible for certain programs and benefits . . . includ[ing] student loans and grants for college, government jobs, and job training.”).

507. See 50 U.S.C. § 3811(f) (providing that any person required to register who fails to do so is ineligible for federal student aid).

508. See The Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, § 189(h), 128 Stat. 1425, 1601 (2014) (codified at 29 U.S.C. § 3249) (indicating that failure to register bars participation in (or derivation of benefits from) federally authorized and funded job training programs and related services for underemployed or unemployed individuals).

509. See 5 U.S.C. § 3328(a) (indicating that the failure to register will bar employment in an executive agency).

510. See *Chapter 7 - Attachment to the Constitution*, U.S. CITIZENSHIP & IMMIGR. SERVS.: POL'Y MANUAL, <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7> [<https://perma.cc/BG2C-QSWD>] (last updated Nov. 23, 2021) (noting that U.S. Citizenship and Immigration Services will deny naturalization applications of those who fail to register with Selective Service).

511. See, e.g., UTAH CODE ANN. § 53B-11-104 (West 2020).

512. See Gregory Korte, *For a Million U.S. Men, Failing To Register for the Draft Has Serious, Long-Term Consequences*, USA TODAY (Apr. 3, 2019, 11:07 AM), <https://www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002/> [<https://perma.cc/V7JG-XZ4Q>].

513. See Tina Griego, *America May Never Have a Draft Again. But We're Still Punishing Low-Income Men for Not Registering*, WASH. POST (Oct. 16, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/10/16/america-may-never-have-a-draft-again-but-were-still-punishing-low-income-men-for-not-registering/> [<https://perma.cc/F2JA-SQ9C>] (“[T]he price for failure to register is high and is largely born by the men who can ill afford to pay it: high school dropouts, disconnected inner city residents, ex-offenders and immigrants . . .”).

514. Assemb. B. 82, 2015–2016 Reg. Sess. (Cal. 2015).

emergency than men.⁵¹⁵ Requiring women to register with the Selective Service alongside men would make it official United States policy that women are equally fit to serve the country in times of conflict. Registration would signal that women have equal civic obligations as men and work to break down stereotypes about women in the military context.

More broadly, as liberal feminist theorists have argued, “[d]efense of the state” is the “ultimate test of citizenship,” and exclusion from the military has historically served as an ideological basis for a range of discriminatory harms.⁵¹⁶ From this perspective, “women’s equal participation in the military is an important manifestation of equal rights, and therefore promotes the vision of gender equality and equal citizenship for men and women.”⁵¹⁷ Whether, and to what extent, this is true has been a topic of ongoing feminist debate. Noya Rimalt, for example, argues based on the experience of gender integration in the Israeli military that “it is questionable whether the integrationist strategy will ever enable [women] to win the battle for gender equality from within.”⁵¹⁸ While this is undoubtedly true, extending the draft to women would still send a very powerful message that gender-based distinctions are not acceptable in today’s society. A nationwide shift in policy on female fitness for military service would also directly benefit those women who have already volunteered to serve in the armed forces. Finally, and more to the point, gender-neutral draft registration could facilitate the cultural shift that will be necessary to reduce gender-based violence and harassment in the military.⁵¹⁹

3. Male-Only Registration Is Unconstitutional

Beyond the policy reasons for including both women and men in the Selective Service System, the Supreme Court’s sex-equality jurisprudence has fatally undermined the legal justification for women’s exclusion from registration. *Rostker v. Goldberg*⁵²⁰ considered the constitutionality of male-only registration under the Equal Protection Clause in 1980, soon after Congress declined to allow women to register.⁵²¹ The plaintiffs were several individuals who had been draftees during Vietnam, first filing a constitutional challenge to the draft in 1971.⁵²² Ultimately, the Supreme Court held that

515. The Commission cites the 1981 statement of Eleanor Smeal, then President of the National Organization for Women, who explained that the “Government says that every man, regardless of any disability, must register, but that all women, regardless of competency, cannot . . . creat[ing] the myth that all men are more competent than all women.” NAT’L COMM’N ON THE DRAFT, *supra* note 318, at 119 (internal quotation marks omitted). Additionally, were it permitted, roughly the same percentage of men and women would qualify for induction into the military, at 29.3% for females and 29.0% for males. *Id.* at 115.

516. See CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 185–86 (1989).

517. Rimalt, *supra* note 129, at 1098 (citing Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 *WOMEN’S RTS. L. REP.* 175 (1982)).

518. *Id.* at 1099.

519. See DOD FY 2019 REPORT ON SEXUAL ASSAULT, MAIN REPORT, *supra* note 37, at 5 (“The Department focuses on military climate and culture because over a decade of research, including Departmental surveys, concludes that respectful and healthy workplace climates reduce the risk of sexual assault.”).

520. 453 U.S. 57 (1981).

521. *Rostker*, 453 U.S. at 57.

522. See *id.* at 61–62 (noting that the case stagnated in district court until the registration requirement was about to be reinstated in 1980).

requiring only men to register under the Military Selective Service Act did not violate equal protection under the Fifth Amendment.⁵²³ The majority of the Court reasoned that Congress had great discretion in matters of military affairs and that Congress had decided against requiring women to register.⁵²⁴ They also noted that Congress had found the purpose of the draft was primarily to raise combat troops.⁵²⁵ Because women were not eligible for combat roles, “[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft.”⁵²⁶ In a 6–3 decision, the Court upheld the male-only registration requirement, reasoning that “[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”⁵²⁷

But women are now allowed to serve in all combat positions, undermining the Court’s rationale for upholding women’s exclusion from registration. That is, excluding women from registration is no longer substantially related to an important governmental objective, given that women may now serve voluntarily in combat positions.⁵²⁸ The only remaining objections to the registration of women is that women are naturally suited for the domestic sphere or too physically or psychologically fragile for military service. These justifications are precisely the sort of “archaic and overbroad generalizations” about women’s capacities that will not satisfy heightened scrutiny under the Fourteenth Amendment’s Equal Protection Clause, as even the Court in *Rostker* agreed.⁵²⁹ Moreover, subsequent Supreme Court decisions since *Rostker* reaffirm that stereotypes about women do not constitute an important governmental objective.

In *United States v. Virginia*, the Supreme Court struck down the long-standing male-only admission policy of the Virginia Military Institute (VMI).⁵³⁰ Writing for a 7–1 majority of the Court, Justice Ginsburg reasoned that because VMI failed to show an “exceedingly persuasive justification” for its sex-based admissions policy, it violated the Equal Protection Clause.⁵³¹ In *Romer v. Evans*,⁵³² the Court struck down class-based legislation that excluded homosexuals from the protection of state antidiscrimination laws in Colorado, concluding that the provision was “born of animosity toward the class of persons affected.”⁵³³ In *Obergefell v. Hodges*,⁵³⁴ the Court decided that states may not exclude same-sex couples from marriage because such restrictions violate the Fourteenth

523. *See id.* at 78–79.

524. *See id.* at 63, 68–69, 74, 77 (“The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.” (citation omitted)).

525. *Id.* at 78.

526. *Id.*

527. *Id.* at 79.

528. The male-only registration requirement must be evaluated under intermediate scrutiny as a sex-based classification. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

529. *Rostker*, 453 U.S. at 508 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

530. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

531. *Id.* at 555–56.

532. 517 U.S. 620 (1996).

533. *Romer*, 517 U.S. at 634.

534. 556 U.S. 14 (2015).

Amendment's guarantee of equal dignity that all persons enjoy.⁵³⁵ Of note, the Court relied on trial court findings that excluding same-sex couples from marriage harms children, families, and LGBTQ people by imposing concrete dignitary and material harms,⁵³⁶ yet provides no benefits to heterosexual married couples or the institution of marriage.⁵³⁷ In the same way, exclusion of women from the Selective Service provides no benefit to men, women, or the military and, in fact, undermines the military's ability to recruit a competent force. It also contributes to a culture that marginalizes women who do volunteer. That is, the sex-exclusionary system harms men, women, and the military.⁵³⁸ Finally, the Court instructed in *Obergefell* that, "in interpreting the Equal Protection Clause, the Court has recognized that insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged."⁵³⁹

Based on the elimination of the dispositive facts in *Rostker*, and subsequent precedents reaffirming the Court's expansive interpretation of dignity and equality protected by the Constitution, it is time for the Court to distinguish or reverse *Rostker* and find that the sex-based classification employed by the MSSA does not satisfy intermediate scrutiny. As of 2021, one federal district court has decided precisely that, and a second opened the door to such a ruling.

In *National Coalition for Men v. Selective Service System*,⁵⁴⁰ a federal district court in Houston held that male-only draft registration violates the Equal Protection Clause of the Fifth Amendment because the military has eliminated the combat exclusion policy.⁵⁴¹ Therefore, women are "similarly situated" for the purpose of the draft.⁵⁴² The case was filed by the National Coalition For Men, a nonprofit whose goal is to "end[] harmful discrimination and stereotypes against boys, men, [and] their families."⁵⁴³ As in *Rostker*, the government asserted that its purpose in maintaining a male-only registration system was raising combat troops, but the court held that women's exclusion was not substantially related to that purpose given that women are now allowed to serve as combat troops.⁵⁴⁴ The U.S. Court of Appeals for the Fifth Circuit subsequently reversed on the basis of stare decisis, holding that *Rostker* is binding precedent until the Supreme

535. *Obergefell*, 556 U.S. at 681.

536. *Id.* at 668.

537. *Id.* at 679.

538. For a variation on this argument, see Gabrielle Fromer, Comment, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 GEO. J. GENDER & L. 173, 182–90 (2017).

539. *Obergefell*, 556 U.S. at 673.

540. 355 F. Supp. 3d 568 (S.D. Tex. 2019), *mot. for relief from judgment denied*, No. CV H-16-3362, 2019 WL 1902693 (S.D. Tex. Apr. 29, 2019), *rev'd*, 969 F.3d 546 (5th Cir. 2020) (*per curiam*), *cert. denied*, 141 S. Ct. 1815 (2021).

541. *See Nat'l Coal. for Men*, 355 F. Supp. 3d at 581–82.

542. *Id.* at 582 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981)).

543. *Philosophy*, NAT'L COAL. FOR MEN (NCFM), <https://ncfm.org/ncfm-home/philosophy/> [<https://perma.cc/2LJN-N7GQ>] (last visited Feb. 1, 2022).

544. *See Nat'l Coal. for Men*, 355 F. Supp. 3d at 582.

Court decides to reverse it⁵⁴⁵—and the Supreme Court recently declined to take up the case by denying certiorari in June 2021.⁵⁴⁶ The second case challenging the constitutionality of male-only registration, *Kyle-Label v. Selective Service System*,⁵⁴⁷ remains pending before the U.S. District Court for the District of New Jersey.⁵⁴⁸

Although the Court chose not to revisit *Rostker*, universal registration does not seem totally out of reach. The Supreme Court’s denial of certiorari in *National Coalition for Men* was accompanied by an explanatory statement authored by Justice Sotomayor and joined by Justices Breyer and Kavanaugh. In the statement, Justice Sotomayor noted that the Fifth Amendment prohibits discrimination on the basis of sex absent an “exceedingly persuasive justification.”⁵⁴⁹ She observed that the “role of women in the military has changed dramatically” since the Court’s decision in *Rostker* nearly forty years ago and that “thousands of women have served with distinction in a wide range of combat roles.”⁵⁵⁰ However, because the Senate Armed Services Committee was holding hearings on the issue, “at least for now,” Sotomayor concluded, “the Court’s longstanding deference to Congress on matters of national defense and military affairs cautions against granting review while Congress actively weighs the issue.”⁵⁵¹ Justice Sotomayor’s statement, joined by both sides of the bench, seems to suggest that the male-only registration requirement would not survive if the Court chose to take up the issue.⁵⁵²

It is not yet clear whether Congress can successfully tackle the male draft. There is still vocal resistance from expected corners on both the right⁵⁵³ and the left.⁵⁵⁴ And while

545. See *Nat’l Coal. for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549–50 (5th Cir. 2019) (per curiam) (reasoning that although the factual underpinning of the Supreme Court’s reasoning in *Rostker* has changed, the district court could not overrule Supreme Court precedent).

546. *Nat’l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815, 1815 (2021).

547. 364 F. Supp. 3d 394 (D.N.J. 2019).

548. See *Kyle-Label*, 364 F. Supp. 3d at 417–18. *Kyle-Label* involved a young woman who had repeatedly tried to register with the Selective Service System but was denied. She brought a putative class action on behalf of herself and a group of similarly situated women, alleging that the MSSA constitutes unconstitutional sex discrimination and a violation of her fundamental due process rights of equal citizenship. *Id.* at 399–400. The court denied the government’s motion to dismiss for failure to state a claim, reasoning that suits of first impression challenging a precedent are permissible and that *Rostker* did not bind the court anyway. *Id.* at 417. Framing the legal question as “whether the sex-based classification drawn by the MSSA is substantially related to achieving the purposes of the MSSA, when men and women *are* similarly situated,” the court reasoned that the claim “poses a question never addressed by the *Rostker* Court, and therefore, “*Rostker* does not ‘directly control’ this case.” *Id.* at 16. As such, the judge ruled that the lawsuit could proceed.

549. *Nat’l Coal. for Men*, 141 S. Ct. at 1815–16.

550. *Id.* at 1816.

551. *Id.*

552. See *id.*

553. See Ariel Zilber, ‘America’s Daughters Shouldn’t Be Drafted Against Their Will’: Conservatives Blast Proposal that Would Require Women To Register for the Military Draft Alongside Men, DAILY MAIL, (July 25, 2021, 9:46 AM), <https://www.dailymail.co.uk/news/article-9823365/Conservatives-blast-proposal-require-women-register-draft.html> [<https://perma.cc/H4BU-WH8F>].

554. On the left, opposition comes from antiwar groups. For example, Code Pink: Women for Peace opposes drafting women, and the draft entirely, because of its opposition to U.S. militarism. See *It’s Time To End Draft Registration Once and For ALL!*, CODE PINK, https://www.codepink.org/its_time_to_end_draft_registration_once_and_for_all [<https://perma.cc/B4EA-ZYU2>] (last visited Feb. 1, 2022).

the Senate and House Armed Services Committees initially approved versions of the 2022 National Defense Authorization Act extending the Selective Service registration requirement to women,⁵⁵⁵ the provision was stripped, yet again,⁵⁵⁶ from the final version of the Act.⁵⁵⁷ Still, there is growing bipartisan support for this change in Congress,⁵⁵⁸ as well as mounting pressure from cases working their way through the federal courts.⁵⁵⁹ It seems that the sex-based registration under the MSSA may not be long for this world. And it should not be.

Male-only Selective Service registration is no longer rational or justifiable in light of DOD policy opening all positions in the armed forces to women. Selective Service registration should include men and women. Besides being constitutionally mandated, sex-neutral registration would help shift the military's organizational climate that contributes to sexual assault and harassment. It would establish that women and men have an equal place in the armed forces and that their service is equally valuable. Although I do not favor the draft, or war, there are compelling reasons to eliminate this gender divide.

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. 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.

The military has too often reflected cultural norms insufficiently concerned with women's equality. The organization's lack of gender diversity in its membership and leadership also contributes to its poor record of sexual assault and harassment. Sexual assault and harassment hinder recruitment, undermine service members' performance, and waste considerable administrative, legal, and intellectual resources, undermining the military's overall effectiveness and mission. Ongoing tolerance of sex discrimination and

555. See JACK REED & JIM INHOFE, SENATE ARMED SERVS. COMM., FISCAL YEAR 2022 NATIONAL DEFENSE AUTHORIZATION ACT 2 (2021), <https://www.armed-services.senate.gov/imo/media/doc/FY22%20NDAA%20Executive%20Summary.pdf> [<https://perma.cc/YJ5E-H889>]; see also Press Release, U.S. Senate Comm. on Armed Servs., SASC Completes Markup of Fiscal Year 2022 National Defense Authorization Act (July 22, 2021), <https://www.armed-services.senate.gov/press-releases/-sasc-completes-markup-of-fiscal-year-2022-national-defense-authorization-act> [<https://perma.cc/8V3X-H2XC>]; Rebecca Kheel, *Up Next in the Culture Wars: Adding Women to the Draft*, HILL (Aug. 1, 2021, 6:58 PM), <https://thehill.com/policy/defense/565719-up-next-in-the-culture-wars-adding-women-to-the-draft> [<https://perma.cc/95SX-D9TC>].

556. See Shane, *supra* note 491.

557. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021); Rebecca Kheel, *Congress Drops Effort to Add Women to the Draft*, MILITARY.COM (Dec. 7, 2021).

558. See Kheel, *supra* note 557 ("In July, the Senate Armed Services Committee voted 21-5 to add women to the draft registration system, with seven Republicans among the "yes" votes. The House Armed Services Committee approved the change in September in a 35-24 vote, with four Republicans supporting it.").

559. See *supra* notes 540-548 and accompanying text.

sexual misconduct in the military also has society-wide effects, perpetuating women's inequality in America.

Addressing women's underrepresentation in the military and shifting its hypermasculine climate will enhance the power that women have within the military. This should, in turn, reduce the prevalence of sexual assault and harassment in the military. As suggested in this Article, three specific organizational interventions would achieve these ends. The Department of Defense should set specific goals, performance measures, and timeframes to increase diversity in the military; adopt gender-neutral fitness standards keyed to military occupations; and require Selective Service registration for all Americans irrespective of sex. These organizational interventions are compelling as a matter of public policy and, indeed, arguably mandated by the Constitution. True equality for women and sexual minorities in the military requires more than simply punishing misconduct. Ultimately, equality will only occur when the military addresses the organizational conditions under which sexual misconduct is mostly likely to occur.