

FOSTERING A SAFE WARFIGHTING ENVIRONMENT:
APPLYING TITLE IX AND STUDENT DISCIPLINE IN HIGHER
EDUCATION TO THE MILITARY'S FIGHT AGAINST SEXUAL
ASSAULT

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Abstract

Sexual assault in the military and in higher education has come under increasing scrutiny in the past few years. The military has the ability to criminally prosecute servicemembers who commit sexual assault and has therefore defined the problem of sexual assault as a criminal act that is best addressed through the military's criminal justice system. Colleges and universities cannot criminally prosecute students who commit sexual assault but Title IX, which prohibits discrimination on the basis of sex, requires schools to address sexual assault administratively. This is because, in addition to being a crime, sexual assault is also a form of sex discrimination and the criminal justice system is not designed to address the discriminatory harms caused by it. At colleges and universities, the responsibilities for addressing sexual assault are bifurcated with the police and prosecutors addressing the criminal aspects and the schools addressing the discriminatory aspects. The military, by focusing narrowly on the criminal aspects of sexual assault, is failing to adequately address the discriminatory harms caused by sexual assault that the criminal justice system is not designed to address. Therefore, the military should use Title IX and the processes by which colleges and universities address the discriminatory aspects of sexual assault as a model to restructure its response to sexual assault in order to fully address sexual assault as both a crime and an act of sex discrimination.

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I. INTRODUCTION

The problem of sexual assault² in the military has received significant attention in recent years.³ Overwhelmingly, the military's response has been to prioritize criminal prosecution as the preferred forum to address allegations that a member of the military has committed sexual assault.⁴ When there is a substantiated allegation that a servicemember committed sexual assault, that allegation usually leads to criminal charges at a court-martial.⁵

2. This paper is using the definition of sexual assault used by the Department of Defense (DoD). The term "sexual assault" includes a range of crimes, including rape, sexual assault, forcible sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the Uniform Code of Military Justice (UCMJ). See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 4 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>]. Stated differently, sexual assault is defined as anything that violates Article 120 or Article 125 of the UCMJ. See 10 U.S.C. §§ 920, 925 (2016).

3. See Michael D. Shear, *Obama Calls for 'Morale Courage' at Naval Academy Graduation*, N.Y. TIMES, (May 24, 2013), <http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html> [<https://perma.cc/9LW7-M7ZF>]; THE INVISIBLE WAR (Chain Camera Pictures 2012); Ali Rogin, *Sen. Kirsten Gillibrand Slams Obama Over Inaction on Military Sexual Assault*, ABC NEWS, (May 24, 2016), <http://abcnews.go.com/Politics/sen-kirsten-gillibrand-slams-obama-inaction-military-sexual/story?id=39342494> [<https://perma.cc/D2SH-NZY2>]; Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223 MIL. L. REV. 233, 247 n. 59 (2015) (detailing the "avalanche of legislation" directed at addressing sexual assault in the military); Tricia D'Ambrosio-Woodward, *Military Sexual Assault: A Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What it Tells Us, What it Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War"*, 29 WIS. J.L. GENDER & SOC'Y 173, 176-178 (2014) (discussing the media response to sexual assault in the military).

4. See Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 148-49 (2014); Murdough, *supra* note 3, at 272, 287 (stating that in military sexual assault cases Congress "expects nothing short of prosecution" and that criminal trials are "the military's preferred disposition for sexual assault"); see also 160 Cong. Rec. S1342 (2014) (statement of Sen. Clair McCaskill ("It is clear that right now we have more cases going to court-martial over the objections of prosecutors than over the objections of commanders . . . [t]here have been almost 100 cases over the last 2 years where prosecutors said this case is too tough and commanders have said, no, we have to get to the bottom of it.")).

5. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 19 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>] (stating that of 1,331 substantiated allegations of sexual assault, court-martial charges were preferred in 791 (59%) of them); Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 19 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>] (stating that of 1,437 substantiated allegations of sexual assault, court-martial charges were preferred in 926 (64%) of them). A substantiated report of sexual assault is an unrestricted report that has "has been investigated

The military's current focus on court-martial as the appropriate response to allegations of sexual assault is inadequate. The military is not limited to addressing sexual assault only at a criminal forum and may also address allegations of sexual assault through administrative means. However, pressure from Congress, the media, and the public for the military to treat sexual assault as a serious criminal act deserving of a commensurate serious criminal response has caused the military to shy away from addressing sexual assault administratively.⁶ This pressure is particularly acute for individual commanders, who are responsible for determining how to address an allegation of sexual assault committed by one of their subordinates, because taking administrative action in response to an allegation of sexual assault poses significantly more risk to the commander personally than initiating the criminal court-martial process.⁷ Pressure to respond to the sexual assault as a criminal act has been ineffective at reducing sexual assault in the military and has failed to address all of the harms caused by sexual assault.⁸ Criminally prosecuting more allegations of sexual assault has resulted in more acquittals for sexual assault, a lower conviction rate, and more sexual assaults not being adequately addressed by the military.⁹ Proving an allegation of sexual assault beyond a reasonable doubt is difficult and the types of sexual assault that frequently occur in the military, acquaintance sexual assaults involving alcohol, are among the most difficult types of sexual assault to prove in court.¹⁰ Although many of the allegations of sexual assault that result in an acquittal at trial could be proven at an administrative forum where the burden of proof is lower, Department of Defense (DoD) regulations prohibit taking administrative action against an enlisted servicemember for conduct that previously resulted in an acquittal at court-martial.¹¹ Because of the

and found to have sufficient evidence and provided to command for consideration of action which may include some form of punitive, corrective, or discharge against an offender. *See* 32 C.F.R. § 105.17(a). Although "sufficient evidence" is not defined, the context suggests that it is synonymous with probable cause. *See id.* at § 105.17(b)(2) (explaining that one of the categories for reporting sexual assault statistics is where there is no probable cause for a sexual assault offense but sufficient evidence for a non-sexual assault offense).

6. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1752, 127 Stat. 672 (2013) (stating "[i]t is the sense of Congress that [penetrative sexual assaults or attempted penetrative sexual assaults] should be disposed of by court-martial, rather than by non-judicial punishment or administrative action"); Murphy, *supra* note 4, at 149; Murdough, *supra* note 3, at 272 (stating that in military sexual assault cases Congress "expects nothing short of prosecution").

7. *See* Murphy, *supra* note 4, at 148-49.

8. *See* Andrew Tilghman, *Military Sexual Assault: Just 4 Percent of Complaints Result in Convictions*, MIL. TIMES, May 5, 2016, [http://www.militarytimes.com/story/veterans/2016/05/05/military-sexual-assault-complaints-result-few-convictions/83980218/\[https://perma.cc/P6VU-9U8R\]](http://www.militarytimes.com/story/veterans/2016/05/05/military-sexual-assault-complaints-result-few-convictions/83980218/[https://perma.cc/P6VU-9U8R]).

9. Murdough, *supra* note 3, at 295.

10. *See* Katharine K. Baker, *Why Rape Should Not (Always) be a Crime*, 100 MINN. L. REV. 221, 235-245 (2015).

11. U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS encl. 4, para. 1c.c. (Jan. 27, 2014) [hereinafter DoDI 1332.14]. The Coast Guard allows enlisted personnel to be administrative separated after an acquittal at court-martial the characterization of service cannot be under other than honorable conditions. *See* U.S. COAST GUARD,

inadequacies in the military's current response to sexual assault, the military should look externally and explore alternative approaches to addressing sexual assault allegations.

Like the military, colleges and universities also have a problem with sexual assault that has received significant attention in recent years.¹² However, their response to allegations of sexual assault committed by their students has been much different than the military's response.¹³ In part this is because, unlike the military, colleges and universities cannot criminally prosecute students who commit sexual assault. The decision to prosecute students for sexual assault is made by state and local prosecutors and schools cannot direct the police to investigate or prosecutors to charge a student. The types of sexual assaults committed by students against other students, like in the military, are overwhelmingly alcohol-facilitated acquaintance sexual assaults that are hard to prove in court and few are actually investigated or prosecuted.¹⁴ As a result, few sexual assaults committed by students against other students ever result in a criminal conviction.¹⁵

COMMANDANT INSTR. MANUAL 1000.4, MILITARY SEPARATIONS art. 1.B.23.a.(4) (Mar. 2015). For commissioned officers, at the DoD level, acquittal at court-martial does not bar administrative separation for the same misconduct. See U.S. DEP'T OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS encl. 3, para. 6(d) (Nov. 25, 2013). However, the Army regulation precludes administrative separation after an acquittal at court-martial and the Air Force regulation only allows administrative separation after an acquittal if there is substantive new evidence that was not available for trial. See U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para 4-4(a) (Apr. 12, 2006) (RAR Sep. 13, 2011); U.S. DEP'T OF AIR FORCE, INSTR. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS para. 3.2.2. (June 9, 2004).

12. See Tanya Somander, *President Obama Launches the "It's on Us" Campaign to End Sexual Assault on Campus*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Sept. 19, 2014), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [https://perma.cc/UEJ7-PKJ9]; KC JOHNSON & STUART TAYLOR, *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES* (2017); Eilene Zimmerman, *Campuses Struggle with Approaches for Preventing Sexual Assault*, N.Y. TIMES, June 22, 2016, https://www.nytimes.com/2016/06/23/education/campuses-struggle-with-approaches-for-preventing-sexual-assault.html?_r=0 [https://perma.cc/8QQD-VBA6]; Anemona Hartocollis, *Universities Face Pressure to Hold the Line on Title IX*, N.Y. TIMES, Feb. 18, 2017, <https://www.nytimes.com/2017/02/18/us/college-campuses-title-ix-sexual-assault.html> [https://perma.cc/3SW6-PDBW]; THE HUNTING GROUND (Chain Camera Pictures 2015).

13. See Murdough, *supra* note 3, at 236.

14. See Baker, *supra* note 10, at 235-245; Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Direction for Research and Reform*, 18 *Violence Against Women* 145, 147 (2012) (stating that in the United States between .4% and 5.4% of sexual assaults are prosecuted). Law enforcement agencies across the country have a history of failing to adequately investigate reports of sexual assault. See Myka Held, Note, *A Constitutional Remedy for Sexual Assault Survivors*, 16 *GEO. J. GENDER & L.* 445, 447-49 (2015). Sex crimes are considered the most difficult and most complex types of crimes for law enforcement to investigate. See Elizabeth M. Donegan, *Key Tactics for Sex Crimes Investigators*, Aspatore, 2015 WL 7300474 (2015).

15. See Tyler Kingkade, *Prosecutors Rarely Bring Charges in College Rape Cases*, HUFFINGTON POST (June 17, 2014, 7:31 AM, updated June 18, 2014),

Lacking the power to criminally prosecute students who commit sexual assault does not mean schools are forced to stand-by and accept sexual assault as part of collegiate life at their institutions. In fact, Title IX of the Education Amendments of 1972 has been interpreted to require just the opposite.¹⁶ Title IX prohibits sex discrimination at schools receiving federal funding and sex discrimination has been interpreted to include both sexual harassment and sexual assault.¹⁷ Title IX requires schools to address sexual assault not as a crime but as a form of discrimination and to take action to remedy the discriminatory harms caused by sexual assault.¹⁸ Student-on-student sexual assault is a form of sex discrimination because students have a right to equal access to education and sexual assault can hinder a student's ability to receive an education and the educational benefits that a school offers.¹⁹ In addition to protecting victims of sexual assault, a school's Title IX obligations extend to fostering a safe learning environment in which all students can learn.²⁰ To this end, schools have an obligation to investigate and respond to allegations of sexual assault.²¹ The response frequently includes holding disciplinary proceedings for students alleged to have committed sexual assault which can result in the school suspending or expelling an offending student.²²

The obligations that Title IX places on colleges and universities is separate and distinct from any law enforcement investigation or criminal prosecution.²³ This is in recognition of the fact that the criminal justice system has a different focus and different objectives when responding to an allegation of sexual assault

http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html [<https://perma.cc/T82A-HYSK>].

16. See Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006); Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali, U.S. DEP'T OF EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/XYN5-T29N>] [hereinafter Dear Colleague Letter].

17. See Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006); Dear Colleague Letter, *supra* note 16, at 1.

18. See Dear Colleague Letter, *supra* note 16, at 1.

19. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (stating that Title IX protects equal access to an education and educational benefits).

20. See Dear Colleague Letter, *supra* note 16, at 1, 3; Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, U.S. DEP'T OF EDUC., ii (Jan. 2001), <http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<https://perma.cc/3PMT-T6L5>] [hereinafter Revised Sexual Harassment Guidance]; see also Lavinia M. Weizel, Note, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1651-52 (2012).

21. See Dear Colleague Letter, *supra* note 16, at 10.

22. See Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 283 (2009).

23. See Dear Colleague Letter, *supra* note 16, at 10.

than a school does in addressing that same allegation.²⁴ In addition, it recognizes that the criminal justice system is ill suited to address discrimination.²⁵ This bifurcated response to sexual assault demonstrates the different harms and interests being addressed through each system: the criminal justice system addressing the criminal aspects and the school addressing the discrimination aspects of sexual assault. The different processes for addressing sexual assault, one criminal and one administrative, is appropriate because of the different interests being served and the different harms being remedied.

When compared with how Title IX requires colleges and universities to respond to sexual assault the inadequacy of the military's focus on criminal prosecution to combat sexual assault becomes apparent. Like the criminal justice system, the military justice system cannot adequately account for the interests of the victim and the discriminatory harms caused by sexual assault. The DoD and DOE are at odds with one another regarding how sexual assault should be addressed in the military versus at colleges and universities. The DOE finds the criminal justice system inadequate at addressing sexual assault as a form of discrimination and requires schools to remedy the discrimination. On the other hand, the DoD finds the military justice system a sufficient response to sexual assault in the military without a separate and independent process designed to address sexual assault as discrimination. By focusing narrowly on sexual assault as a crime and relying on criminal prosecutions to address it, the military's response to sexual assault is failing to address sexual assault as a form of sex discrimination, failing to remedy the discriminatory harms caused by sexual assault, and failing to meaningfully reduce the prevalence of sexual assault in the military.

This article recommends that the military should look to Title IX and the processes by which colleges and universities administratively address the discriminatory aspects of sexual assault as a model for restructuring the military's response to sexual assault in order to have a more robust response that is capable of addressing sexual assault both as a crime and as a form of sex discrimination. By doing so, the military can better combat sexual assault in the military, protect victims of sexual assault, and provide a safe environment for all servicemembers.

Section II of this article explores the similarities between the military community environment and the college community environment, the similarities between the populations at the two types of institutions, and the similarities between the types of sexual assaults being committed. Section III will explain the basics of the military justice system and how the military currently responds to allegations of sexual assault committed by one servicemember against another. This section will also discuss why the military's current emphasis on court-martial for allegations of sexual assault is inadequate at effectively combating the problem of sexual assault in the military. Section

24. See Dear Colleague Letter, *supra* note 16, at 10; Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 507-08, 517 (2012); Hogan, *supra* note 22, at 278.

25. See Dear Colleague Letter, *supra* note 16, at 10-11; Triplett, *supra* note 24, at 508, 517; Hogan, *supra* note 22, at 278, 288-89.

IV will explain how colleges and universities respond to allegations of sexual assault between students. This section will explain Title IX and how it has been interpreted to address sexual assault at and what obligations it imposes upon colleges and universities. Section V will apply the framework that Title IX imposes upon schools to respond to sexual assault in the military in order to highlight the inadequacies in the military's current response to sexual assault. This section will also make recommendations regarding what the military should incorporate into their response to sexual assault after exploring the best practices utilized by higher education institutions.

II. THE SEXUAL ASSAULT EPIDEMIC AT COLLEGES, UNIVERSITIES, AND IN THE MILITARY

Although the problem of sexual assault within the military and at colleges and universities have both recently been receiving significant attention, they have usually been addressed individually and have rarely been considered together as part of a larger problem of sexual assault in society.²⁶ As a result, current responses to sexual assault at both types of institutions have developed independently and largely without reference to what the other is doing to combat sexual assault. This disconnect is surprising given the similarities between the problem of sexual assault within the military and at institutions of higher education.

A. Sexual Assault in the Military

The issue of sexual assault in the military received renewed national attention after the release of the documentary *The Invisible War* in 2012.²⁷ One of the themes in the documentary was that, rather than criminally prosecuting servicemembers who sexually assault other servicemembers, the military has instead ignored sexual assault allegations, covered them up, or given the offender only minor administrative punishment.²⁸ As a result of the increased scrutiny, Congress has passed sweeping legislation directing how the military was to respond to sexual assault.²⁹ In the five years prior to the release of *The Invisible*

26. *But see* Murdough, *supra* note 3; Graci Bozarth, Comment, *Strange Bedfellows: The Military, the University, and Sexual Assault*, 84 UMKCL. REV. 1003 (2016).

27. THE INVISIBLE WAR (Chain Camera Pictures 2012); Murdough, *supra* note 3, at 243-45.

28. *See* THE INVISIBLE WAR (Chain Camera Pictures 2012).

29. *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2013); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701-53, 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531-47, 128 Stat. 3292 (2014). National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000 (2016); *see also* Greg Rustico, Note, *Overcoming Overcorrection: Towards Holistic Military Sexual Assault Reform*, 102 VA. L. REV. 2027, 2034-45 (2016) (discussing reforms made to how the military responds to sexual assault); Murphy, *supra* note 4, at 153-64.; David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L. J. 1, 12-13 (2017).

War, the number of sexual assault reports within the military ranged between 2,846 and 3,393 per year.³⁰ After the release of *The Invisible War*, increased attention and scrutiny of sexual assault in the military, and steps taken by Congress and the military to encourage reporting, the number of reports of sexual assault increased dramatically.³¹ In fiscal year (FY) 2013, there were 5,518 reports of sexual assault, up from 3,604 the previous year.³² Since then, the number of sexual assault reports has remained at this heightened level with 6,131 in FY 2014, 6,083 in FY 2015, and 6,172 in FY 2016.³³

In 2014 the DoD commissioned the RAND Corporation to conduct a Military Workplace Study (RMWS) of active duty servicemembers in order to conduct an independent assessment of the prevalence of sexual assault in the

30. See DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 11 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/D84F-9CTP]. In Fiscal Year (FY) 2004, there were only 1,700 reports of sexual assault. *Id.* at 27. *The Invisible War* was released June 22, 2012 toward the end of FY 2012 and, during FY 2012, the number of sexual assault reports in the military increased to 3,604. *Id.* at 11. See *THE INVISIBLE WAR* (Chain Camera Pictures 2012).

31. Compare DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 58 (2013), http://sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf [https://perma.cc/C3ME-MVWR] with DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013 68 (2014), http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf [https://perma.cc/CTC3-PXSL].

32. See DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 11 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/D84F-9CTP]; DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 8 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [https://perma.cc/5U5E-YERK]. A fiscal year is from October 1 of the year prior to 30 September. So, FY 2013 was October 1, 2012 to September 03, 2013. Fiscal year 2013 was the first full fiscal year after the release of *The Invisible War*. *The Invisible War* was released June 22, 2012, near the end of FY 2012.

33. See DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 11, 27 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/D84F-9CTP]; DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 7 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [https://perma.cc/5U5E-YERK]. These statistics include non-servicemembers reporting sexual assaults as well as servicemembers reporting a sexual assault prior to military service. The number of servicemembers reporting being a victim of sexual assault in FY 2016 during military service was 4,794. See DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 9 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [https://perma.cc/5U5E-YERK].

military.³⁴ Prior DoD statistics regarding sexual assault focused on the number of reported sexual assaults and one of the purposes of the RMWS was to determine the actual number of sexual assaults occurring in the military, both reported and unreported.³⁵ The RMWS estimated that, in the previous year, approximately 20,000 active-duty servicemembers had been sexually assaulted out of a total of 1.3 million active-duty servicemembers.³⁶ A comparison of this number to the number of reports of sexual assault over the same period, results in the conclusion that approximately 77% of servicemembers who had been sexually assaulted in the previous year did not report the assault.³⁷ The RMWS found that the majority of servicemembers who responded that they had been a victim of sexual assault were male servicemembers.³⁸ However, because there are significantly more men than women in the military, the study concluded that approximately 1% of active-duty male servicemembers and 4.9% of female active-duty servicemembers stated they had been a victim of sexual assault in the previous year³⁹

34. NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 1 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [https://perma.cc/27AK-AAB4].

35. *See id.*

36. *See* NAT'L DEF. RES. INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 9 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [https://perma.cc/27AK-AAB4]. The RMWS estimated with 95% confidence that between 18,000 and 22,500 servicemembers had been victims of sexual assault in the previous year. *See id.* The survey was fielded in August and September 2014 and the questions asked about experiences in the past year, so the time period the survey covered was August or September 2013 to August or September 2014, depending on when an individual took the survey. *See* NAT'L DEF. RES. INST., 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 xvii (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z2-1/RAND_RR870z2-1.pdf [https://perma.cc/56LG-5KSQ]. This time period roughly correlates with FY 2014 which ran from October 1, 2013 to September 30, 2014.

37. *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 27 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [https://perma.cc/D84F-9CTP]. Although 23% is low, it is still much higher than in 2006 when only 7% of an estimated 34,200 victims of sexual assault in the military reported it. *See id.* at 27.

38. *See* NAT'L DEF. RES. INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: HIGHLIGHTS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 2 (2014), http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9800/RB9841/RAND_RB9841.pdf [https://perma.cc/D85U-ESRF] (estimating 10,600 male victims of sexual assault and 9,600 female victims).

39. *See* NAT'L DEF. RES. INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 10 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf

B. Sexual Assault at Colleges and Universities

Like in the military, the issue of sexual assault at colleges and universities has received significant national attention in recent years.⁴⁰ The most commonly cited statistic is that either one in four or one in five women in college will be sexually assaulted while in college.⁴¹ Using the one in four or one in five statistic, and assuming that most students are in college for four years, this would equate to between 5% and 6.25% of women in college being sexually assaulted per year. Although the statistics for the prevalence of sexual assault on college campuses have been questioned by some commentators,⁴² they are strikingly similar to the prevalence of sexual assault in the military.⁴³

C. Similarities Between the Military and Colleges and Universities

There are several similarities between the military and colleges and universities in addition to the overall prevalence of sexual assault. These similarities include: the institutional environment, the characteristics of victims, the characteristics of perpetrators, and the circumstances in which sexual assaults occur.

.pdf [https://perma.cc/27AK-AAB4] (listing that .95% of males and 4.87% of females experienced a sexual assault in the previous year).

40. See Murdough, *supra* note 3, at 236.

41. Richard Perez-Pena, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), https://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html?_r=1 [https://perma.cc/U99G-BXL9]; Morgan Baskin, *Controversial 1-in-5 Sexual Assault Validated in New National Survey*, USA TODAY (Sept. 21, 2015, 10:36 AM), <http://college.usatoday.com/2015/09/21/controversial-1-in-5-sexual-assault-statistic-validated-in-new-national-survey/> [https://perma.cc/U99G-BXL9]. Males report being victims of sexual assault at an estimated rate of 3.1% per year. See CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT, BUREAU JUST. STAT. RES. & DEV. SERIES 71 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [https://perma.cc/93YA-WX7X] (stating that out of nine schools, the rate of sexual assaults among undergraduate males during one school year ranged from 1.4% to 5.7% with an average of 3.1% and from 0.4% to 3.3% for sexual battery).

42. See, e.g., KC JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES 43-65 (Ecouter Books ed, 2017).

43. Compare NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 10 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [https://perma.cc/27AK-AAB4] (stating that 4.9% of active-duty female servicemembers are sexually assaulted per in 2014-2015), with CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT, BUREAU JUST. STAT. RES. & DEV. SERIES 69 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [https://perma.cc/64LU-LKHL] (stating that 10.3% of female college students reported being a victim of sexual assault in the 2014-2015 academic year).

1. Military and College Environment

The military community and the college community are both relatively insular communities where the majority of interactions by members of the communities occur with others inside the community rather than with individuals outside of the community.⁴⁴ A large number of students either live in dormitories located on campus or live near campus in areas where many of the other residents are also students. Similarly, most junior servicemembers, those who are in their first few years of military service, live in barracks, which are the military equivalent of dormitories, or in military housing located on or near the military installation.⁴⁵ Students living on or near campus tend to eat in student dining facilities or restaurants in the vicinity of campus, go to gyms located on or near campus, participate in extracurricular clubs and organizations on campus, as well as study and go to class on campus. Junior servicemembers living on a military installation eat at dining facilities on the military installation or restaurants on or near the installation, go to gyms on the installation, participate activities on the installation, and work on the installation. These insular characteristics of both the military community and the college community are even more pronounced if the military installation or school is in a remote area away from large population centers.⁴⁶ The environments, therefore, in which college students and junior military personnel live and in which sexual assaults are occurring are similar to one another.

2. Demographics

Colleges and universities are primarily composed of individuals in their late teens and early twenties. In the fall of 2015, 79.9% of full-time undergraduate students in the United States were between the ages of 18 and 24.⁴⁷ In the

44. See Murdough, *supra* note 3, at 235-36. In other words, college students tend to socialize with and interact with other college students and servicemembers tend to socialize with and interact with other servicemembers.

45. Unmarried junior military personnel are usually required to live on base in military barracks. See Rod Powers, *US Military Housing, Barracks, and Housing Allowance: What the Recruiter Never Told you about Military Housing*, THE BALANCE, (Sept. 8, 2016), <https://www.thebalance.com/what-the-recruiter-never-told-you-3332705> [<https://perma.cc/LL82-2XCK>].

46. At some remote installations, servicemembers are not even able to leave the installation. See, e.g., The Diego Garcia Welcome Aboard Guide (Dec. 13, 2016), https://cnic.navy.mil/content/cnic/cnic_hq/regions/cnrj/installations/nsf_diego_garcia/about/welcome_around/diego-garcia-welcome-aboard-package/_jcr_content/par1/pdfviewer/file.res/Welcome%20Aboard%20Guide%20Diego%20Garcia%202016.pdf [<https://perma.cc/M77C-QDGJ>] (Diego Garcia); Taylor Hall, *Thawing U.S. Cuba Relations have 'No Impact' on Naval Base*, MILITARY TIMES (July 24, 2015), <https://www.militarytimes.com/2015/07/24/thawing-u-s-cuba-relations-have-no-impact-on-naval-base/> [<https://perma.cc/RU3A-43R6>] (Guantanamo Bay).

47. See U.S. DEP'T OF EDUC. INST. OF EDUC., SCI., DIGEST OF EDUCATIONAL STATISTICS tbl. 303.45 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_303.45.asp [<https://perma.cc/3A9C-WSQ7>]. If part-time students and post-baccalaureate students are added, the percentage of students between 18 and 24 drops to 64.9%. See *id.*

military, 43.8% of all active duty servicemembers are 25 years old or younger and 50.3% of enlisted active duty servicemembers are 25 years old or younger.⁴⁸

a. Victim Demographics

Although servicemembers range in age from their teens to their 60s, victims of sexual assault in the military tend to be toward the younger end of that range.⁴⁹ Approximately 65% of individuals reporting being sexually assaulted to military authorities were between 16 and 24 years old and 84% were between 16 and 34.⁵⁰ Although these numbers include reports of sexual assault by civilians in addition to servicemembers, 63% of reports were from junior enlisted servicemembers who were overwhelmingly between the ages of 18 and 24.⁵¹ Although the overall rate of sexual assault in the military according to the RMWS is 1% for male servicemembers and 4.9% for female servicemembers, the rate for junior enlisted servicemembers is higher with 1.4% of males and 7.3% of females per year.⁵² These statistics lead to the conclusion that victims of sexual assault in the military

48. See DEP'T OF DEF. OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF., FOR MILITARY CMTY. & FAMILY POLICY, 2015 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 35 (2016), <http://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf> [<https://perma.cc/7UPW-34V3>]. The number of active duty servicemembers 30 years old or younger is 65.4% overall and 72% for enlisted servicemembers. See *id.*

49. Victims of sexual assault can be of any age and need not fit any profile. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 31 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>].

50. See *Id.* Data regarding the victim age at the time of the incident was unavailable for 9% of victims.

51. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 31-32 (2017).

52. See NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBER FROM THE 2014 RAND MILITARY WORKPLACE STUDY 10-11 (2014) http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [<https://perma.cc/27AK-AAB4>]. Over the course of a typical four year enlistment contract, at a rate of 7.3% per year, around 29% of female enlisted servicemembers would be a victim of sexual assault. See *generally id.* That being said, the rate of sexual assault varies dramatically between the military services with 2.9% of Air Force female servicemembers stating that they had been a victim of sexual assault in the past year and 7.9% of Marine Corps female servicemembers reporting the same. *Id.* at 10. The RMWS does not break-down the statistics based on both military service and pay grade, but it likely junior enlisted female members of the Marine Corps experience sexual assault at a rate significantly higher than the 7.3% since 7.9% of all female Marines stated that they had been a victim being a victim of sexual assault in the past year and junior enlisted female servicemembers overall report a significantly higher rate of sexual assault (7.3%) than the overall rates of sexual assault for all senior enlisted female servicemembers (3%), junior female officers (3.6%), or senior officers (1.3%). See *generally id.* at 10-11. Based on these numbers, the prevalence of sexual assault over a four year period would be nearly one in three, 31%.

tend to be junior enlisted servicemembers who are under the age of 24 and in their first few years of military service.⁵³

At colleges and universities, the majority of full-time undergraduate students are between the ages of 18 and 24.⁵⁴ Additionally, freshman and sophomore students are more likely to be sexually assaulted than juniors or seniors.⁵⁵ So, as in the military, victims of sexual assault in college tend to be under 24 and newer to the college environment.

b. Offender Demographics

Servicemembers who commit sexual assault are of a similar age to victims of sexual assault in the military with 47% between the ages of 16 and 24 and 79% between the ages of 16 and 34.⁵⁶ In the RMWS, female victims of sexual assault reported that the offender was a male in 98% of sexual assaults.⁵⁷ Where

53. Although this may be the statistical majority of sexual assault victims in the military, it is important to note that victims of sexual assault can be male or female, of any rank, and of any age. See DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 31 (2017).

54. See U.S. DEP'T OF EDUC., INST. OF EDUC. SCI., DIGEST OF EDUCATIONAL STATISTICS tbl. 303.45 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_303.45.asp [<https://perma.cc/3A9C-WSQ7>] (finding that 79.9% of full-time undergraduate students are between the ages of 18 and 24).

55. See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 6-2 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/U6GH-DUZV>] (stating that “women who are victimized during college are most likely to be victimized early on in their college tenure”). One study found that 84% of students who experienced a “sexually coercive incident” did so in their first four semesters on campus. Alan M. Gross et al., *An Examination of Sexual Violence Against College Women*, 12 VIOLENCE AGAINST WOMEN 288, 293 (2006); DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 15, 76 (Sept. 21, 2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [<https://perma.cc/YHR7-MQ4N>].

56. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 31 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>]. Because a significant number sexual assaults in the data, 18%, the age of the perpetrator is listed as age unknown or data not available, the percentages are based on only those cases in which data is available. If those sexual assaults were included, then 39% of offenders would be between 16 and 24 years old, 65% between 16 and 34 years old, 13% 35 years old or older, and 18% age unknown or data not available. These percentages are based only on cases where data is available. See *id.*

57. See NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBER FROM THE 2014 RAND MILITARY WORKPLACE STUDY 22 (2014) http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [<https://perma.cc/27AK-AAB4>]; see also DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 31 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>]. (finding that 78% of reported sexual assaults committed against males and females, were alleged to have been committed by males, 4% by females,

the offender is a servicemember, the offender is a junior enlisted servicemember in 56% of reported sexual assaults.⁵⁸ Similarly in the RMWS, victims of sexual assault reported that 9% of offenders were of a lower rank, 35% of the same rank, and 54% of a higher rank.⁵⁹

Students at colleges and universities who commit sexual assault are of a similar age as servicemembers who commit sexual assault. In one survey, 68% of college student victims of sexual assault estimated that the offender was between the ages of 18 and 29, with just 23% estimating that the offender was older than 30.⁶⁰ Between 94% and 97% of offenders against female students at colleges and universities are male.⁶¹

3. Involvement of Alcohol and Drugs

In the military and at colleges and universities a significant number sexual assaults involve alcohol or drug use by the perpetrator, the victim, or both. In the RMWS, 41% of female servicemembers who had been sexually assaulted in the previous year stated they had consumed alcohol prior to being sexually

and 18% by an unknown gender or data on gender not available and, excepting out those where gender is unknown or unavailable 95% of offenders were male).

58. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 32 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>].

59. See NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: ANNEX TO VOLUME 2. TABULAR RESULTS FROM ESTIMATES FROM THE 2014 RAND MILITARY WORKPLACE STUDY 43-44 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z3/RAND_RR870z3.pdf [<https://perma.cc/YR35-4MXU>]. Unfortunately, the survey was not designed to determine how much higher in rank the offender was. See *id.* However, the data regarding reports of sexual assault in FY 2016 suggests that junior and senior enlisted servicemembers committed the vast majority of sexual assaults. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 app. B at 32 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>]. Although 19% of the reports do not have the rank of the alleged offender available, 43% place the offender in the junior enlisted category (E1-E4), 28% in the senior enlisted category (E5-E9) and 6% committed by officers of any rank. See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 32 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>].

60. See U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 8 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/E5FQ-HASW>]. The age of the offender was unknown in 7% of instances and there was a mixed group of ages in 2% of instances. See *id.*

61. See *Id.* - (stating that 97% were male, 1% female, and 2% mixed group or unknown); CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT 100 (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/93YA-WX7X>] (finding that 95% of offenders for sexual battery were male and 94% of offenders for rape were male).

assaulted and 50% stated that the offender had been drinking alcohol.⁶² The DoD Sexual Assault Prevention and Response program considers alcohol consumption a risk factor for sexual assault in the military.⁶³

In colleges and universities, the rate of alcohol and drug use prior to sexual assault was higher with 63% of rape victims and 49% of sexual battery victims reporting consuming alcohol or using drugs prior to the sexual assault.⁶⁴ Victims also reported that the offender had consumed alcohol or used drugs in 58% of sexual batteries and 59% of rapes, although alcohol or drug use was unknown in 14% and 21% of incidents, respectively.⁶⁵ Alcohol consumption by college students is considered a major risk factor for sexual assault and students who frequently drink enough to get drunk are at a greater risk for sexual victimization than those who do not.⁶⁶

62. See NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: ANNEX TO VOLUME 2. TABULAR RESULTS FROM ESTIMATES FROM THE 2014 RAND MILITARY WORKPLACE STUDY 74 (2014) http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870/RAND_RR870.pdf [<https://perma.cc/27AK-AAB4>].

63. See U.S. DEP'T OF DEF., 2014-2016 SEXUAL ASSAULT PREVENTION STRATEGY 5, 19 (Apr. 20 2014), http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf [<https://perma.cc/S6WQ-RNCG>]; DoD SAFE HELPLINE, RISK REDUCTION AND PREVENTION, <https://www.safehelpline.org/ways-to-reduce-your-risk-of-rape-in-the-military> [<https://perma.cc/R2WB-LNU9>] (last visited Aug. 15, 2017); See also COREEN FARRIS & KIMBERLY HEPNER, TARGETING ALCOHOL MISUSE: A PROMISING STRATEGY FOR REDUCING MILITARY SEXUAL ASSAULTS? 2 (2014), <http://www.dtic.mil/docs/citations/ADA611616> [<https://perma.cc/Y582-C4AQ>]; See also Jeffrey R. Liebenguth, Reducing Alcohol-Related Sexual Assault in the Marine Corps 8 (Apr. 10, 2013) (unpublished Master's thesis, Marine Corps Command and Staff College), <http://www.dtic.mil/docs/citations/ADA603707> [<https://perma.cc/QGS8-F4FP>].

64. See CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT, app. E at E-40, E-44 (2016) https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf [<https://perma.cc/VP4K-99AL>]. The study defined sexual battery as "any unwanted and nonconsensual sexual contact that involved forced touching of a sexual nature, not involving penetration" and rape as "any unwanted and nonconsensual sexual contact that involved a penetrative act." See CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT, BUREAU JUST. STAT. RES. & DEV. 69 (Jan. 2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/93YA-WX7X>].

65. See CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT app. E at E-40, E-44 (2016) https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf [<https://perma.cc/VP4K-99AL>]; see also U.S. DEP'T OF JUST., SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 8 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/E5FQ-HASW>] (finding that 47% of female students victims stated the offender had used alcohol or drugs prior to the sexual assault, 25% said the offender had not, and 28% did not know or the information was unknown).

66. See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-6 (2007) (summarizing research regarding alcohol and sexual assault victimization).

4. Relationship Between Victim and Offender

The perpetrators of sexual assaults in the military and at colleges and universities overwhelmingly tend to be acquaintances of the victim. In the military, 67% of female victims of sexual assault stated that the offender was a friend or acquaintance and 89% stated that they knew or had previously met the offender.⁶⁷ At colleges and universities, between 66% and 90% of student victims of sexual assault knew the offender.⁶⁸ In college, the majority of students who are victims of sexual assault are sexually assaulted by fellow students.⁶⁹ Similarly, in the military, the vast majority servicemember victims of sexual assault are sexually assaulted by fellow servicemembers.⁷⁰

These similarities between the military and colleges and universities strongly suggests that they are dealing with substantially the same problem of sexual assault. It would reasonably follow that, if the problems are the same, a

67. See NAT'L DEF. RESEARCH INST., 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 22 (2016), https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z2-1/RAND_RR870z2-1.pdf.

68. See U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, 7 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/E5FQ-HASW>] (stating that 78% of offenders were nonstrangers to the victim); U.S. DEP'T OF JUSTICE, *The Sexual Victimization of College Women* 17 (2000) (stating that nine in ten offenders knew the victim); CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT, BUREAU JUST. STAT. RES. & DEV. SERIES app. E Data Tables for Sexual Assault, Rape, and Sexual Battery E-39, E-43 (Jan. 2016) https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf [<https://perma.cc/VP4K-99AL>] (finding that 9% of rapes and 34% of sexual batteries were committed by strangers and the rest were committed by someone the victim knew).

69. See Heather M. Karjane et al. Campus Sexual Assault: How America's Institutions of Higher Education Respond 4 (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf> [<https://perma.cc/CJ2N-DPZ2>] (stating that in most cases a student is sexually assaulted by a fellow student); CHRISTOPHER KREBS ET AL., CAMPUS CLIMATE SURVEY VALIDATION STUDY: FINAL TECHNICAL REPORT, BUREAU JUST. STAT. RES. & DEV. SERIES app. E Data Tables for Sexual Assault, Rape, and Sexual Battery E-39, E-43 (Jan. 2016) https://www.bjs.gov/content/pub/pdf/App_E_Sex-Assault-Rape-Battery.pdf [<https://perma.cc/VP4K-99AL>] (finding that in 55% of rapes and 56% of sexual batteries the victims reported the offender was affiliated with the school with 4% and 13%, respectively, being unsure if the offender was affiliated with the school).

70. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 32 (2017) (stating that over 72% of reports of sexual assault were alleged to have been committed by a servicemember, 4% by non-servicemembers, and 24% unknown or no data available) <http://www.sapr.mil/index.php/reports/sapro-reports/fy16-annual-report> [<https://perma.cc/J6JN-NAQU>]; NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: ANNEX TO VOLUME 2. TABULAR RESULTS FROM ESTIMATES FROM THE 2014 RAND MILITARY WORKPLACE STUDY 34 (2014) (finding that 89% of female servicemembers stated that the sexual assault was committed by a fellow servicemember) [HTTPS://WWW.RAND.ORG/CONTENT/DAM/RAND/PUBS/RESEARCH_REPORTS/RR800/RR870z3/RAND_RR870z3.PDF](https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z3/RAND_RR870z3.pdf) [<https://perma.cc/7SWW-ELLD>].

response to sexual assault that is effective at preventing and punishing sexual assault one should also be effective at the other and an ineffective response at one would also likely be ineffective at the other. Faced with the same problem, however, the military and colleges and universities have taken very different approaches to responding to sexual assault.

III. THE MILITARY'S RESPONSE TO SEXUAL ASSAULT

In the military, all decisions regarding how to address and punish allegations of misconduct are made by the commander of the servicemember who is alleged to have committed the misconduct.⁷¹ A commander has broad discretion in deciding how to respond to an allegation of misconduct.⁷² When faced with an allegation of sexual assault, a commander has discretion to: (1) take no action, (2) take some form of administrative action against the accused servicemember, or (3) initiate a criminal prosecution at a court-martial.⁷³ Unlike in the civilian criminal justice system, the decision whether to prosecute a servicemember based on an allegation of sexual assault is a decision made by a non-lawyer commander rather than by a career prosecutor.⁷⁴ After the *Invisible War* and the resulting scrutiny on how the military responds to allegations of sexual assault, court-martial has become the preferred forum for addressing sexual assault allegations.⁷⁵ Due to Congressional preference, commanders usually choose to court-martial a servicemember alleged to have committed sexual assault.⁷⁶ This, however, has resulted in a large number acquittals for

71. See WALTER B. HUFFMAN & RICHARD D. ROSEN, *MILITARY LAW: CRIMINAL JUSTICE AND ADMINISTRATIVE PROCESS* § 1:2 (2016). Military justice is a command-focused system in which the commander is the central figure who is responsible for the effectiveness of the unit, which includes maintaining good order and discipline. See *id.* The commander has sole authority regarding how to respond to misconduct by servicemembers within the unit.

72. See *id.* The commander has sole authority regarding how to respond to misconduct by servicemembers within the unit.

73. See U.S. DEP'T OF DEF, *MANUAL FOR COURTS-MARTIAL*, II-25—27(2016), <http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957> [<https://perma.cc/S6BH-3DQ9>] (2016) [hereinafter MCM].

74. See MCM, *supra* note 73; see also Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assault in the Military*, 29 WIS. J.L. GENDER & SOC'Y 341, 371-75 (2014) (calling for the removal of prosecutorial discretion from commanders in favor of giving it to military police and JAG officers). However, the commander makes the decision in consultation with his or her Staff Judge Advocate (SJA) who is a senior military attorney. See MCM, *supra* note 73, R.C.M. 406 (requiring that a commander receive advice from the SJA before referring criminal charges to a general court-martial).

75. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1752, 127 Stat. 984 (2013) (stating the preference of Congress that penetrative sexual assaults be disposed of at court-martial rather than administratively); Murphy, *supra* note 4, at 149 (discussing the pressure on commanders to send all allegations of sexual assault to court-martial).

76. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1752, 127 Stat. 672 (2013) (stating the preference of Congress that penetrative sexual assaults be disposed of at court-martial rather than administratively); at 49 (2016) (stating that

sexual assault and has left many victims without justice and without sufficient protection.⁷⁷

A. *Military Discipline System*

The military justice system is a system designed to achieve justice and discipline.⁷⁸ It is a tool for military commanders to maintain good order and discipline within their unit as well as to punish crime.⁷⁹ A military commander has two broad categories of responses available to address any allegation of misconduct, including sexual assault: criminal and administrative.⁸⁰ Criminal responses to misconduct are called courts-martial and the amount of punishment varies based upon the crime committed and the forum, but can include confinement and a dishonorable discharge from the military.⁸¹ There are numerous types of administrative measures a commander can take in response to misconduct of a subordinate, including: informal and formal counseling, annotations in a personnel file, taking pay, reducing a servicemember's rank, restriction, and discharging a servicemember from the military.⁸² These two types of responses available to a commander to address misconduct will be discussed separately.

of 1,437 substantiated sexual assault charges, 926 resulted in court-martial charges); Murphy, *supra* note 4, at 149 .

77. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015 app. B at 8 (2016) (stating that of the 543 servicemembers who proceeded to trial with at least one sexual assault offense charged, 24% were acquitted and 76% were convicted on at least one charge at trial) See *Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015*, DEP'T OF DEF., at 49 (2016) (However, the majority of the 76% who convicted on a charge, 62%, were not convicted of a crime requiring sex offender registration suggesting that they were acquitted of sexual assault, so a total of 71% of servicemembers who went to court-martial for sexual assault were acquitted of sexual assault).

78. See MCM, *supra* note 73, Part I Preamble, I-1 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."); see also DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1 (Matthew Bender & Co., 9th ed. 2015).

79. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1 (Matthew Bender & Co. 2016).

80. See MCM, *supra* note 73, R.C.M. 306, 401.

81. See 10 U.S.C. §§ 818-820 (2016).

82. See UCMJ, art. 15, 10 U.S.C. § 815 (2016) ; MCM, *supra* note 73, R.C.M. 306(2), (3) (stating that administrative actions can include "counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above"); See DoDI 1332.14, *supra* note 11, 26-27; see also DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-8 (Matthew Bender & Co. 2016).

1. Courts-Martial

There are three types of courts-martial: summary, special, and general.⁸³ These three types of courts-martial differ with respect to the seriousness of misconduct they are designed to address and the severity of the punishment they can adjudge. Summary courts-martial are designed to “promptly adjudicate minor offenses under a simple procedure” and is the least formal of the three types of courts-martial.⁸⁴ The punishment at a summary court-martial varies based on the servicemembers pay grade and can include reduction of a servicemember’s rank, forfeitures of pay, and confinement for one month or less.⁸⁵ A summary court-martial cannot adjudge a discharge from the military.⁸⁶ There is no judge or jury at a summary court-martial,⁸⁷ instead, the court is composed solely of one commissioned officer who is usually not a lawyer.⁸⁸ The servicemember must consent to be tried by summary court-martial and, if the servicemember does not consent, the commander can instead transfer the case to a special or general court-martial or take administrative action against the servicemember.⁸⁹ Summary courts-martial are prohibited from exercising jurisdiction over penetrative sex offenses.⁹⁰ There is no right to counsel before a summary court-martial and a conviction at summary court-martial is not normally considered a criminal conviction.⁹¹ Therefore, although it is called a court-martial, a summary court-martial is effectively an administrative rather than criminal response to an allegation of misconduct.

Special courts-martial are often compared to misdemeanor courts⁹² and can be used to try any offense in the Uniform Code of Military Justice (UCMJ) except penetrative sex offenses and capital offenses, which must be brought at a general court-martial.⁹³ A special court-martial is composed of a military judge

83. See 10 U.S.C. §§ 818-820 (2016).

84. MCM, *supra* note 73, II-190.

85. See MCM, *supra* note 73, R.C.M. 1301(d). Punishments that cannot be adjudged at summary court-martial are: forfeiture of greater than two-thirds of one month’s pay, hard labor without confinement for forty-five days, and restriction to limits for two months. *Id.*

86. See UCMJ art. 20, 10 U.S.C. § 820 (2016); MCM, *supra* note 73, R.C.M. 1301(d).

87. See MCM, *supra* note 73, R.C.M. 1301(a).

88. See MCM, *supra* note 73, R.C.M. 1301(a); *see also see also* DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 15-25 (Matthew Bender & Co. 2016).

89. See UCMJ art. 20, 10 U.S.C. § 820 (2016).

90. See MCM, *supra* note 73, R.C.M. 1301(c)(2).

91. See MCM, *supra* note 73, R.C.M. 1301(e); *see also* *Middendorf v. Henry*, 425 U.S. 25, 38 (1976); *cf.* *Argersigner v. Hamlin*, 407 U.S. 25 (1972); *See generally* *Weiss v. United States*, 510 U.S. 163 (1994); *United States v. Booker*, 5 M.J. 238(C.A.A.F. 1977). However, the presence of counsel is not prohibited. See MCM, *supra* note 73, R.C.M. 1301(e).

92. See Marcus N. Fulton, *Never Have So Many Been Punished So Much By So Few: Examining the Constitutionality of the New Special Court-Martial*, *ARMY LAW.*, June 2003, at 1, 1.

93. See UCMJ art. 18-19, 10 U.S.C. §§ 818(c), 819 (2016); *see also* DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 4-3 (Matthew Bender & Co., 9th ed. 2015).

and, if the accused servicemember requests members, equivalent of a jury, there must be at least three members.⁹⁴ A special court-martial can adjudge a bad conduct discharge from the military and confinement for up to one year.⁹⁵

General courts-martial are often compared to felony courts⁹⁶ and, depending on the crimes charged, can adjudge a dishonorable discharge or dismissal from the military,⁹⁷ confinement for life without eligibility for parole, and death.⁹⁸ The court is composed of a military judge and, if the accused servicemember requests trial by members, there must be at least five members.⁹⁹ All penetrative sex offenses must be tried at a general court-martial¹⁰⁰ and, if convicted of a penetrative sex offense, a dishonorable discharge or dismissal is a mandatory part of the sentence.¹⁰¹

At all three types of courts-martial, there are no sentencing guidelines and, except for offenses with a mandatory minimum sentence, the sentence can range from no punishment up to either the maximum punishment available at the forum or the maximum punishment available for the crimes of which the servicemember is convicted.¹⁰² A dishonorable discharge or dismissal from the military is required for a servicemember found guilty of a penetrative sexual

94. See MCM, *supra* note 73, R.C.M. 501(a)(2).

95. See UCMJ art. 19, 10 U.S.C. § 819 (2016). A special court-martial may also adjudge hard labor without confinement for up to three months, forfeiture of pay up to two-thirds per month, a fine, reduction in rank, restriction to specified limits for up to two months, and a reprimand. See *id.*; MCM, *supra* note 73, R.C.M. 1003(b).

96. See Rustico, *supra* note 29, at 2038. Note, *Overcoming Overcorrection: Towards Holistic Military Sexual Assault Reform*, 102 VA. L. REV. 2027, 2038 (2016); David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 201 (2015).

97. A dishonorable discharge or dismissal is a mandatory punishment for convictions of penetrative sex offenses, rape and sexual assault, and attempted penetrative sexual assaults. See UCMJ art. 18, 56, 10 U.S.C. §§ 818(c), 856(b)(1) (2016).

98. See UCMJ art. 18, 10 U.S.C. § 818 (2016).

99. See MCM, *supra* note 73, R.C.M. 501(a)(1).

100. See UCMJ art. 18, 10 U.S.C. § 818 (2016); MCM, *supra* note 73, R.C.M. 201(f)(1)(D).

101. See UCMJ art. 56, 10 U.S.C. § 856 (2016).

102. See UCMJ art. 56, 10 U.S.C. § 856 (2016); MCM, *supra* note 73, R.C.M. 1002(a) (stating that “the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment”). There have been a number of commentators arguing in favor of sentencing reform in the military and the creation of sentencing guidelines. See Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000); Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solution*, 67 A.F. L. REV. 245 (2011); but see RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 52-53 (2014), http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Final_2014_0627.pdf [https://perma.cc/56LR-ZKW4] (recommending against the adoption of sentencing guidelines).

assault.¹⁰³ A servicemember convicted of an offense with a mandatory dishonorable discharge, such as rape, could still sentence the servicemember to no other punishment besides the discharge.¹⁰⁴ So, if a servicemember is convicted of rape, the servicemember must receive a dishonorable discharge or dismissal but there is no minimum amount of confinement required and the servicemember could be sentenced to: (1) no confinement, (2) confinement for life without the possibility of parole, or (3) any amount of confinement in between. If a servicemember elects to trial by a panel of members, the equivalent of a jury, the members also sentence the servicemember if found guilty.¹⁰⁵ Additionally, there are no sentencing guidelines to help the members determine how much confinement is appropriate besides the minimum and maximum possible sentence.¹⁰⁶

Courts-martial are similar to civilian criminal trials in many respects. They are conducted in accordance with the Rules for Court-Martial, which are analogous to the Federal Rules of Criminal Procedure.¹⁰⁷ The Military Rules of Evidence are substantially similar to the Federal Rules of Evidence.¹⁰⁸ The burden of proof is beyond a reasonable doubt at all three types of courts-martial and an accused servicemember has substantially the same protections as any other criminal defendant.¹⁰⁹

2. Administrative Actions

a. Non-Judicial Punishment

Non-judicial punishment is a type of punishment authorized by Article 15 of the UCMJ.¹¹⁰ Non-judicial punishment is a way for commanders to efficiently dispose of minor disciplinary issues in a summary fashion.¹¹¹ A servicemember

103. See UCMJ art. 56, 10 U.S.C. § 856 (2016).. A mandatory dishonorable discharge or dismissal is also required for rape of a child, sexual assault of a child, forcible sodomy, and attempts thereof. See *id.*

104. However, since there are no sentencing guidelines, the sentence could also be confinement for life without the possibility of parole. See MCM, *supra* note 73, pt. IV, ¶ 45(e)(1).

105. See Immel, *supra* note 102, at 161-71.

106. This framework has received criticism for sentences that have been imposed for sexual assault. See, e.g., *Air Force Officer's Sexual Assault Sentence Called Lenient*, ASSOCIATED PRESS, Feb. 26, 2017, <https://www.airforcetimes.com/articles/air-force-sergeant-convicted-of-misconduct-with-8-women> [<http://perma.cc/GBK3-8JU5>].

107. See GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 5-6 (2012).

108. See *id.*

109. MCM, *supra* note 73, R.C.M. 918(c).

110. See DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 3-1 (Matthew Bender & Co. 9th ed. 2015).

111. See *id.*

must ordinarily consent to non-judicial punishment¹¹² and, if the servicemember does not consent, may instead refuse it and demand trial by court-martial.¹¹³ Non-judicial punishment serves as a middle-ground punishment between lesser administrative actions and court-martial.¹¹⁴ Non-judicial punishment does not constitute a criminal conviction.¹¹⁵ The maximum punishment at non-judicial punishment is usually: 60 days restriction to specified limits, reduction in rank, extra duties, and forfeiture of one-half of one month's pay for two months.¹¹⁶

b. Other Punishment Options

There are a number of other administrative measures that a commander can use to punish misconduct and instill good order and discipline, including: transfer in assignment, administrative reduction in rank, extra training, written or oral reprimand, and withdraw of privileges or passes.¹¹⁷ These administrative measures can be utilized individually or in conjunction with one another.¹¹⁸

c. Administrative Separation

An administrative separation is an administrative measure used to separate or discharge a servicemember from the military.¹¹⁹ Administrative separations are not punitive or criminal in nature¹²⁰ and are the military's equivalent of firing

112. See UCMJ art. 15, 10 U.S.C. § 815(a) (2016) (stating that a servicemember may refuse non-judicial punishment and demand court-martial unless "attached to or embarked in a vessel").

113. UCMJ art. 15, 10 U.S.C. § 815 (2016). However, when a servicemember is attached to or embarked in a vessel, non-judicial punishment can be imposed without consent of the servicemember. See *id.*

114. Non-judicial punishment has been analogized to the commander and the servicemember submitting to a form of alternative dispute resolution where the accused agrees to submit to punishment by the commander and the commander agrees to limit the amount of punishment. See Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. Rev. 115, 118 (2007).

115. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 3-8(B) (Matthew Bender & Co., 9th 2015).

116. See UCMJ art. 15, 10 U.S.C. § 815(b) (2016); MCM, *supra* note 73, pt. V, ¶ 5(b). The maximum punishments are lower for commissioned and warrant officers and the military services can also further restrict the permissible punishments. See MCM, *supra* note 73, pt. V, ¶ 5(b).

117. See MCM, *supra* note 73, R.C.M. 306(2) ("Administrative action include corrective action such as "counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above."); DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-8 (B) (Matthew Bender & Co., 9th ed. 2015).

118. See MCM, *supra* note 73, R.C.M. 306(2).

119. See DoDI 1332.14, *supra* note 11, at 2-3; HUFFMAN & ROSEN, *supra* note 71, at § 5:37. (2016).

120. See ESTELA I. VELEZ POLLACK, *CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATIVE SEPARATIONS FOR MISCONDUCT: AN ALTERNATIVE OR COMPANION TO MILITARY COURTS-MARTIAL* 1 (May 26, 2004),

an employee.¹²¹ An administrative separation cannot be adjudged at a court-martial.¹²² The purpose of an administrative separation is to separate servicemembers from the military who do not demonstrate “commitment or potential for further service”¹²³ in the military and to determine how that servicemember’s past service should be characterized.¹²⁴ One reason that administrative separations exist is to provide an orderly means to “[m]aintain standards of performance, conduct, and discipline”¹²⁵

There are two basic parts of an administrative separation for misconduct. The first is determining whether the servicemember should be discharged from the military.¹²⁶ The second is, if it is determined that the servicemember should be discharged from the military, what kind of discharge is appropriate.¹²⁷ There are three characterizations of service that can be given to a servicemember who is being separated through the administrative separation process for misconduct.¹²⁸ From most to least favorable, they are: honorable, general (under honorable conditions), and other than honorable.¹²⁹ The benefits an individual is entitled to after military service is dependent upon the characterization of service received.¹³⁰

One basis for which a servicemember may be involuntarily separated from the military is misconduct. The misconduct can be based upon a series of minor disciplinary infractions, a civilian conviction, or the commission of a serious offense.¹³¹ A serious offense is an offense where a punitive discharge would be authorized for the same or closely related offense under the UCMJ, which is the

https://digital.library.unt.edu/ark:/67531/metacrs9293/m1/1/high_res_d/RS21849_2004May26.pdf [<https://perma.cc/X6JB-EREW>]; Rachel E. VanLandingham, *Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weaknesses in a Special Society*, 50 NEW ENG. L. REV. 21, 24 n. 8 (2015).

121. See GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 126 (Thomas Reuters 2012).

122. See MCM, *supra* note 73, R.C.M. 1003(b)(8).

123. See DoDI 1332.14, *supra* note 11, at 2.

124. See ESTELA I. VELEZ POLLACK, CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATIVE SEPARATIONS FOR MISCONDUCT: AN ALTERNATIVE OR COMPANION TO MILITARY COURTS-MARTIAL 3-4 (May 26, 2004), https://digital.library.unt.edu/ark:/67531/metacrs9293/m1/1/high_res_d/RS21849_2004May26.pdf [<https://perma.cc/X6JB-EREW>].

125. See DoDI 1332.14, *supra* note 11, at 1-2.

126. See DoDI 1332.14, *supra* note 11, at 26-28.

127. See DoDI 1332.14, *supra* note 11, at 26, 29-33.

128. See DoDI 1332.14, *supra* note 11, at 29-30.

129. See DoDI 1332.14, *supra* note 11, at 30-31.

130. See John W. Booker et al., *Beyond “T.B.D.”: Understanding the VA’s Evaluation of Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 11 (2012); ESTELA I. VELEZ POLLACK, CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATIVE SEPARATIONS FOR MISCONDUCT: AN ALTERNATIVE OR COMPANION TO MILITARY COURTS-MARTIAL 2 (May 26, 2004) [<https://perma.cc/X6JB-EREW>].

131. See DoDI 1332.14, *supra* note 11, at 20.

vast majority of crimes under the UCMJ, including sexual assault.¹³² The characterization of service appropriate for misconduct is normally under other than honorable conditions.¹³³

All servicemembers being separated from the military are entitled to due process.¹³⁴ The amount of procedure due depends upon the reason for separation and the type of discharge being sought. A servicemember being separated for misconduct is usually entitled to a hearing called an administrative separation board.¹³⁵ The board is usually composed of three unbiased commissioned, warrant, or staff non-commissioned officers.¹³⁶ There is a recorder assigned to the board whose role is similar to that of a prosecutor.¹³⁷ This person is usually a lawyer.¹³⁸ The servicemember facing potential administrative separation from the military is called the respondent and is provided representation at the separation board by a military attorney at no cost.¹³⁹ The servicemember may also be represented by a civilian attorney at the servicemember's own expense.¹⁴⁰ The board receives evidence, hears arguments, determines if the servicemember should be discharged and, if so, what type of discharge is appropriate.¹⁴¹

Administrative separation provides an expeditious way for a commander to separate an individual from the military following an allegation of misconduct. The consequences of administrative separation are less serious than the consequences of a court-martial, thus justifying a lower burden of proof, fewer procedural protections, and a less formal process.

132. See DoDI 1332.14, *supra* note 11, at 20.

133. See DoDI 1332.14, *supra* note 11, at 21. Characterization under general (under honorable conditions) is warranted for misconduct where the "positive aspects of the Service member's conduct or performance of duty outweigh negative aspects of the Service members conduct or performance of duty as documented in their service record." See DoDI 1332.14, *supra* note 11, at 30.

134. See John T. Soron, *The Right to See: A Due Process Analysis of Access to Information in Army Adverse Administrative Proceedings*, ARMY L., 2016 Issue 5 35, 35 (2016).

135. See DoDI 1332.14, *supra* note 11, at 21, 36, 38 (stating that if a servicemember is notified that they may receive an other than honorable characterization of service, they can demand an administrative board and if a servicemember has six or more years of total military service, that servicemember has the right to request an administrative separation board regardless of the characterization notified of).

136. See DoDI 1332.14, *supra* note 11, at 40 (requiring at least three individuals on the board).

137. See DoDI 1332.14, *supra* note 11, at 40; See also Faculty of The Judge Advocate General's School of the U.S. Army, *The Art of Trial Advocacy: To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards*, ARMY L., 1999 35, 35 (1999).

138. See Faculty of The Judge Advocate General's School of the U.S. Army, *The Art of Trial Advocacy: To Advocate and Educate: The Twin Peaks of Litigating Administrative Separation Boards*, ARMY L., 1999 35, 35 (1999).

139. See DoDI 1332.14, *supra* note 11, at 36, 39.

140. See DoDI 1332.14, *supra* note 11, at 36, 38-39.

141. See DoDI 1332.14, *supra* note 11, at 42-43. The board's determination is not final and may be modified in some circumstances by the separation authority, who is usually a commanding officer of the individual being separated. See *id.* at 43-45.

B. Current Military Response to Sexual Assault

The military has taken significant steps in the past few years to change the institutional response to sexual assault.¹⁴² This section will discuss how the military typically responds to an allegation of sexual assault.

Once an unrestricted report of sexual assault is made by a servicemember, the applicable military law enforcement agency is required to investigate.¹⁴³ The law enforcement agency does not have discretion regarding whether to investigate an allegation of sexual assault and if a sexual assault allegation is made, it must be investigated.¹⁴⁴ The investigations are typical criminal investigations primarily comprised of collecting evidence and interviewing witnesses. After reporting a sexual assault, a servicemember victim of sexual assault has the option to be assisted through the process by a victim advocate and may also receive legal representation from a military attorney assigned to represent victims of sexual assault and other crimes.¹⁴⁵ To protect the victim, if the alleged offender is a servicemember, the alleged offender's commanding officer may issue a military protective order to the offender ordering the offender stay away from, and not communicate with, the victim.¹⁴⁶ The commander also has broad authority to make arrangements so that the victim and offender are kept apart, such as moving one of them to another barracks to live in, transferring one of them to another job, or moving the location where one of them works. If necessary, the commander also has the authority to place the offending servicemember into pretrial confinement.¹⁴⁷ There is also a process through which a victim of sexual assault can request an expedited transfer to another military installation, which could be in another state or another country.¹⁴⁸ These

142. See Rustico, *supra* note 24, at 2040-46 (discussing changes to how the military addresses sexual assault).

143. See U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE 3 (Mar. 22, 2017) (requiring all military criminal investigative organizations to "initiate a criminal investigation in response to all allegations of adult sexual assault . . . of which they become aware that occur within their jurisdiction"). A restricted report of sexual assault is where a victim can report a sexual assault to confidentially in order to receive medical care and counseling without triggering an official investigation whereas an unrestricted report triggers an investigation. See U.S. DEP'T OF DEF., DIR 6495.01, SEXUAL RESPONSE PREVENTION AND RESPONSE (SAPR) PROGRAM 19-20 (Jan. 23, 2012), <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/649501p.pdf> [<https://perma.cc/26TF-KYK4>].

144. See U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE 3 (Mar. 22, 2017).

145. See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-66, § 533, 128 Stat. 3366-67 (2014).

146. See U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 40-41 (Mar. 28, 2013), <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> [<https://perma.cc/GN7T-YPXK>].

147. See MCM, *supra* note 73, R.C.M. 305.

148. See U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 5, 37-38 (Mar. 28, 2013), <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf> [<https://perma.cc/GN7T-YPXK>].

options are available at the discretion of a commander and provide a commander with numerous ways to ensure that a victim of sexual assault is protected after an allegation is made.

Once the law enforcement investigation is complete, or in some cases before it is complete, the investigation is reviewed by trial counsel, who are military attorneys and are the equivalent of civilian prosecutors.¹⁴⁹ In addition to reviewing the investigation, the trial counsel will usually also interview the alleged victim and other key witnesses to determine what disposition they think is appropriate.¹⁵⁰ Based on the seriousness of the allegation and the evidence available, the trial counsel then provide a disposition recommendation to the commanding officer of the accused servicemember who then decides what action to take.¹⁵¹ If the commander decides to court-martial the accused servicemember, the trial counsel will prefer criminal charges and the court-martial process begins.¹⁵² Once criminal charges are preferred, the process is similar to the civilian criminal justice system. If the commander does not think that court-martial is appropriate, the commander can pursue administrative measures instead, or can also elect to take no action.¹⁵³

The criminal and administrative responses to misconduct available to a commander are connected to one another.¹⁵⁴ A commander usually chooses to pursue one and the outcome of one can also impact the commander's ability to use the other.¹⁵⁵ For example, if an allegation of sexual assault goes to court-martial and the accused servicemember is acquitted, DoD regulations bar the commander from administratively separating an enlisted servicemember from the military for the same offense that previously resulted in an acquittal at court-martial.¹⁵⁶ This means that if a substantiated allegation of sexual assault is not proven beyond a reasonable doubt at court-martial, the servicemember will be

There is no similar process for an accused servicemember to request a transfer or for a victim to request that the accused servicemember be transferred to another military installation.

149. See Nadia Klarr, Comment, *Zero Tolerance or Zero Accountability? An Examination of Command Discretion and the Need for an Independent Prosecutorial Authority in Military Sexual Assault Cases*, 41 U. DAYTON L. REV. 89, 106 (2016).

150. See Lieutenant W.G. Perdue, *Weighing the Scales of Discipline a Perspective on the Naval Commanding Officer's Prosecutorial Discretion*, 46 NAVAL L. REV. 69, 105 (1999).

151. See *id.* at 87-88, 91-97.

152. DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 6-1 (Matthew Bender & Co., 9th ed. 2015).

153. See MCM, *supra* note 73, R.C.M. 306, 401.

154. Compare DoDI 1332.14, *supra* note 11, at 26-28, with JUDGE ADVOC. GEN. LEGAL CTR. AND SCH., *COMMANDER'S LEGAL HANDBOOK*, 1-4, 2-1, 2-2, 5-2, (JUNE, 2012), http://kansastag.gov/AdvHTML_Upload/files/Commanders%20Handbook%20-%20Final%20as%20of%2020120614%5B1%5D.pdf [<https://perma.cc/ADE4-FPTM>].

155. Compare DoDI 1332.14, *supra* note 11, at 26-28, with JUDGE ADVOC. GEN. LEGAL CTR. AND SCH., *COMMANDER'S LEGAL HANDBOOK*, 1-4, 2-1, 2-2, 5-2, (JUNE, 2012), http://kansastag.gov/AdvHTML_Upload/files/Commanders%20Handbook%20-%20Final%20as%20of%2020120614%5B1%5D.pdf [<https://perma.cc/ADE4-FPTM>].

156. See DoDI 1332.14, *supra* note 11, at 27 (A prior finding that the alleged misconduct was unsubstantiated at an administrative board does not bar subsequent court-martial).

acquitted at the court-martial and that acquittal will bar the commander from taking administrative action to separate the servicemember from the military where the burden is a preponderance of the evidence.¹⁵⁷ In such a case, the acquitted servicemember is able to remain in the military without negative consequences even if the sexual assault could have been proven by the lower standard of proof applicable at an administrative separation board. In a sense, commanders are going all-in when they send a sexual assault allegation to court-martial because, if there is not a conviction, no action can be taken against the offending servicemember after the acquittal. Although the standard for pursuing charges at a court-martial is probable cause, it is likely that in many cases commanders believe that the alleged sexual assault more likely than not occurred when the commander decides to send the allegation to court-martial.¹⁵⁸ If the allegation of sexual assault more likely occurred than did not occur, then the servicemember would be separated from the military at an administrative separation board. However, since many cases provable by a preponderance are not provable beyond a reasonable doubt, and since DoD regulations bar administrative separation after an acquittal, it stands to reason that the overreliance on court-martial as a response to sexual assault actually results in servicemembers who have committed sexual assault remaining in the military and escaping punishment.¹⁵⁹

If a servicemember is convicted of sexual assault at court-martial, a discharge from the military is only required as part of the sentence if the sexual assault is a penetrative sexual assault.¹⁶⁰ If the sentence at court-martial does not include a punitive discharge, the servicemember is required to be separated from the military administratively.¹⁶¹

157. See DoDI 1332.14, *supra* note 11, at 27, 37.

158. Non-lawyer commanders are unlikely to know the difference between probable cause and the preponderance of the evidence. When deciding whether to pursue a court-martial commanders likely believe that it is more likely that the sexual assault occurred than that it did not occur. Thus, the commander believes by a preponderance of the evidence that the sexual assault occurred when the commander decides to send the allegation to court-martial. Further, if an allegation of sexual assault cannot be proven by a preponderance it similarly cannot be proven beyond a reasonable doubt either.

159. See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 24 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>] (stating that 24% of servicemembers that proceeded to trial at court-martial with sexual assault charges were acquitted, and 38% were convicted of crimes other than the sexual assault charges, meaning that 52% of servicemembers who proceeded to trial for sexual assault were acquitted of sexual assault).

160. Compare USMJ art. 18, 10 U.S.C § 856 (2016)(Sentence for crimes under 10 U.S.C. § 920(A) or (B) must include dismissal) with 10 U.S.C. §920 (2016) (Subsections (A) and (B) are penetrative assaults).

161. See, e.g., U.S. MARINE CORPS, ORDER 1900.16, SEPARATION AND RETIREMENT MANUAL para 6210 (Mar. 15, 2015). However, the failure of the court-martial to adjudge a punitive discharge prohibits the servicemember from being separated with an other than honorable characterization of service unless the service secretary approves the other than honorable discharge so a significant number result in a more favorable characterization of service. See DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY

C. *The Military's Current Response is Inadequate*

The military's current response to sexual assault by focusing on criminally prosecuting allegations of sexual assault is inadequate because it results in a large number of acquittals and, as a result, fails to remove servicemembers from the military who more likely than not committed sexual assault. The current response is the result of congressional pressure, the perceptions of the public and media regarding sexual assault in the military, and the military's institutional bias.

In reviewing the military's response to sexual assault, Congress has expressed their belief that, if there is probable cause that a sexual assault occurred, it should result in a court-martial rather than non-judicial punishment or administrative separation.¹⁶² Congress uses court-martial outcomes as the metric for measuring how well the military is doing at combating sexual assault. By doing so, Congress has framed the issue of sexual assault in the military narrowly as a criminal problem and has demanded a criminal response by the military in combatting sexual assault.¹⁶³ This framing by Congress has pressured the military to view sexual assault narrowly as a criminal act as well.¹⁶⁴

The media's coverage of sexual assault in the military and public sentiment have also taken this view that sexual assault within the military is a criminal

FISCAL YEAR 2015 APP. D, DEP'T OF DEF., at 8 (2016), http://sapr.mil/public/docs/reports/FY15_Annual/Appendix_D_FY15_Aggregate_Data_Matrices.pdf [<https://perma.cc/9NNN-D4NE>] (stating that of 48 servicemembers who were administratively separated after being convicted at court-martial and not being sentenced to a punitive discharge, 26 received an other than honorable characterization, 20 received a general under honorable conditions characterization, one received an honorable characterization, and one received an uncharacterized characterization); DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2016 APP. D, DEP'T OF DEF., at 8 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_D_Data_Matrices.pdf [<https://perma.cc/9CDL-P3Z2>] (stating that 32 servicemembers received an other than honorable characterization and 13 received a general discharge).

162. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1752, 127 Stat. 672 (2013) (stating “[i]t is the sense of Congress that [penetrative sexual assaults or attempted penetrative sexual assaults] should be disposed of by court-martial, rather than by non-judicial punishment or administrative action”).

163. See Murphy, *supra* note 4 at 148.; Sen. Claire McCaskill, Sexual Assaults in the Military – The Policy Matters, Huffington Post (Nov. 18, 2013, 2:05 PM), updated Jan. 23, 2014), http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-the-mi_b_4297449.html [<https://perma.cc/7U3T-X7AD>] (stating that her metric for military justice reform legislation is “will it better protect victims, and lead to more prosecutions?”).

164. This pressure is a lose-lose situation for the military because the military can either take fewer allegations of sexual assault to trial in order to increase the conviction rate or take more cases to trial and increase the acquittal rate. Either way, the military can be faulted for either not treating sexual assault seriously enough or for being incompetent at prosecuting sexual assault. See Murdough, *supra* note 3, at 288. (“When ‘doing justice for victims’ means that anything short of prosecution is unacceptable, the inference is that every allegation is always capable of evidentiary proof and only indifference or malfeasance on the part of those administering the justice system can account for the disparity in numbers.”). Although the military has an incentive to resist the paradigm framing sexual assault narrowly as a criminal problem, the military has not done so.

problem which the military should respond to as such. The media have covered sexual assault in the military as a problem of the military being too soft on sexual assault and too incompetent to effectively deal with it. The military is portrayed as a boy's club, sweeping sexual assault allegations under the rug and punishing victims who report sexual assault rather than punish offenders.¹⁶⁵ Public perception of the military's response has tracked the media's portrayal of it.

These combined pressures on the military have caused the military as an institution to also view sexual assault through a criminal law lens and to favor court-martial as the appropriate forum for addressing it. Because of this, most allegations of sexual assault that are supported by probable cause go to court-martial.¹⁶⁶ Given this low threshold for sending an allegation of sexual assault to court-martial, a large number of cases result in acquittal for sexual assault.¹⁶⁷ Since acquittal prevents subsequent administrative separation, by focusing narrowly on criminal prosecution, many servicemembers who commit sexual assault go unpunished and remain in the military and free to offend again. Ironically, this outcome is exactly what the federal government seeks to avoid in mandating how colleges and universities must respond to sexual assault within their respective communities.

IV. COLLEGE AND UNIVERSITY RESPONSES TO SEXUAL ASSAULT

A. Title IX

Title IX was enacted as part of the Education Amendments of 1972 and was intended to protect students from discrimination based upon sex.¹⁶⁸ The statute provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal

165. See THE INVISIBLE WAR (Chain Camera Pictures 2012).

166. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016 app. B at 19 (2017), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [<https://perma.cc/5U5E-YERK>]. (stating that of 1,331 substantiated allegations of sexual assault, court-martial charges were preferred in 791 (59%) of them); Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 19 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>] (stating that of 1,437 substantiated allegations of sexual assault, court-martial charges were preferred in 926 (64%) of them).

167. See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 24 (2016), http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf [<https://perma.cc/JX2C-6PZY>] (stating that 52% of servicemembers who proceeded to trial for sexual assault were acquitted of sexual assault and that 34% of cases in which sexual assault charges were preferred were dropped or resolved outside of the court-martial forum).

168. See Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006).

financial assistance.”¹⁶⁹ The scope of the statute has been expanded so that the entire educational institution must comply with Title IX whenever any program or school within the institution receives any federal funding.¹⁷⁰ Since some part of virtually every college or university receives federal funds, the law effectively applies to all colleges and universities.¹⁷¹

The mandate of Title IX is to prevent discrimination on the basis of sex.¹⁷² Title IX seeks to prevent discrimination by preventing the use of federal resources to support discriminatory practices and by providing individuals with protection against discriminatory practices.¹⁷³ Title IX has been interpreted to include not only discrimination against students by school employees, but also student-on-student discrimination.¹⁷⁴ Sexual harassment is considered a form of sex discrimination within the meaning of Title IX.¹⁷⁵ Sexual harassment has, in turn, also been interpreted broadly to include sexual assault and sexual violence.¹⁷⁶ Sexual harassment, especially sexual assault, can create a hostile learning environment and thereby limit a student’s ability to receive an education and have access to the full benefits of a school’s program.¹⁷⁷ Sexual assault is a form of sex discrimination because victims may experience physical injuries, emotional distress, and mental distress all of which can interfere with that student’s ability to receive an education or participate in activities that the school offers.¹⁷⁸ These issues may be compounded if the student victim is forced to live in the same dormitory, eat in the same dining facilities, attend the same classes, or participate in the same organizations as the offending student.¹⁷⁹ A single instance of sexual assault can create a hostile environment and constitute sex discrimination.¹⁸⁰

169. 20 U.S.C. § 1681 (2006).

170. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 3(a), § 908, 102 Stat. 28, 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2006)).

171. See Triplett, *supra* note 24, at 494-95.

172. See 20 U.S.C. § 1681 (2006).

173. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979).

174. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650, 652 (1999) (applying Title IX to prohibit student-on-student sexual harassment if sufficiently severe and that sexual harassment can deny a victim equal access to an educational program or activity).

175. See Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998) (citations omitted).

176. See Dear Colleague Letter, *supra* note 16.; Revised Sexual Harassment Guidance *supra* note 20, at 21.

177. See Dear Colleague Letter, *supra* note 16; Revised Sexual Harassment Guidance, *supra* note 20 at 2, 3, 5, 29 n. 37 (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999)).

178. See Hogan, *supra* note 22, at 280.

179. See RANA SAMPSON, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 8 (2002), http://www.ncdsv.org/COPS_Acquaintance-Rape-of-College-Students-17_2002.pdf [<https://perma.cc/47HU-HXH4>]; Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications*, 2013 B.Y.U. EDUC. & L.J. 143, 165-67 (2013) (discussing effects of sexual assault on students’ access to education). These effects are likely even more severe at small schools in small towns or rural areas.

180. See Dear Colleague Letter, *supra* note 16 at 3 (citations omitted).

Title IX is administered by the Department of Education (DOE) Office for Civil Rights (OCR). It requires colleges and universities to have prompt and equitable procedures for responding to allegations of sex discrimination at their institution.¹⁸¹ Schools that do not abide by Title IX risk being sued civilly under a private right of action by victims of sexual assault or in an enforcement action by the OCR itself.¹⁸² Part of abiding by Title IX is that schools must take actions to prevent and respond to sexual assault and, failing to do so, they risk civil liability if the institution is deliberately indifferent to student-on-student sexual assault and risk losing federal funding.¹⁸³ The obligation on colleges and universities to respond to sexual assault includes student-on-student sexual assault and is not limited to sexual assaults that occur on school grounds, but includes sexual assaults that occur anywhere.¹⁸⁴ In order to give schools guidance regarding what Title IX requires of schools, the OCR has routinely published guidance.¹⁸⁵

1. Dear Colleague Letter

In April 2011, the OCR issued guidance in the form of a “Dear Colleague Letter” instructing colleges and universities regarding how they should address sexual harassment and sexual assault in order to comply with Title IX.¹⁸⁶ The Dear Colleague Letter has received a significant amount of attention primarily because it instructs schools that, in order to comply with Title IX, they should adopt a preponderance of the evidence standard at school disciplinary proceedings for sexual assault.¹⁸⁷

The Dear Colleague Letter is primarily focused on victims of sexual assault and ensuring that schools recognize and protect them and their rights.¹⁸⁸ As such, most of the requirements imposed on schools are focused on protecting victims of sexual assault and ensuring that schools do not adopt procedures in their disciplinary process that favor students accused of sexual assault over students

181. See 34 C.F.R. § 106.8(b) (2016) (stating schools receiving federal funding “shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints”).

182. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639-40 (1999) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979)); see also Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 375 (2016).

183. See Dear Colleague Letter, *supra* note 16; see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998); Triplett, *supra* note 24, at 495-97.

184. See Dear Colleague Letter, *supra* note 16 at 4.

185. See, e.g., Dear Colleague Letter, *supra* note 16; REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 20; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/FC5W-22FX>].

186. See Dear Colleague Letter, *supra* note 16.

187. See Dear Colleague Letter, *supra* note 16 at 11.

188. See Triplett, *supra* note 24 at 507, 509-10.; Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915, 942 (2014).

alleging being a victim of sexual assault.¹⁸⁹ For example, the Dear Colleague Letter strongly discourages allowing the alleged offending student to personally cross-examine the alleged victim because it “may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”¹⁹⁰ In addition, immediately after stating that alleged offending students must be given due process, the letter states that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”¹⁹¹ The Dear Colleague Letter also obligates schools to take proactive measures to prevent sexual assault and to investigate allegations of sexual assault independent of whether there is a criminal investigation into the allegation and regardless of the outcome of any criminal investigation if there is one.¹⁹²

2. Title IX and Criminal Justice

When a student at a college or university sexually assaults another student, the action can be conceptualized in several different ways. First, it is a criminal act where the appropriate forum is the criminal justice system.¹⁹³ Second, it is a tort, where the appropriate forum is a civil suit for money damages.¹⁹⁴ Third, it is an act of discrimination that constitutes a civil rights violation.¹⁹⁵ The DOE OCR interpretation that Title IX mandates that schools address sexual assault as discrimination through disciplinary proceedings.¹⁹⁶ There are many harms caused by sexual assault but there is no forum that can adequately address and remedy all of the harms equally. Rather, the most appropriate forum for addressing sexual assault depends on which harm one is trying to address. If one is concerned about addressing an incident of sexual assault because it is a criminal act, then the only appropriate forum for addressing it is the criminal justice system and a civil suit for money damages or a school disciplinary hearing are woefully inadequate means of addressing it. In order to address sexual assault, a school must first decide how they view sexual assault and what harm they seek to address. What Title IX does is force colleges and universities to view a sexual assault as an act of sex discrimination and a civil rights violation and to then require school to take steps to best address that harm.¹⁹⁷ Addressing sexual assault as a criminal act is left to the criminal justice system.

When sexual assault is viewed as an act of sex discrimination and a civil rights violation, the preponderance of the evidence standard and the requirement

189. Lave, *supra* note 188 at 942.

190. Dear Colleague Letter, *supra* note 16 at 12.

191. Dear Colleague Letter, *supra* note 16 at 12.

192. See Dear Colleague Letter, *supra* note 16 at 4, 14.

193. See Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 966-67 (2016); see also Chmielewski, *supra* note 179, at 150.

194. See Swan, *supra* note 193, at 970; Chmielewski, *supra* note 179, at 150.

195. See Swan, *supra* note 193, at 964; Chmielewski, *supra* note 179, at 150.

196. See Dear Colleague Letter, *supra* note 16, at 1,8.

197. See Chmielewski, *supra* note 179, at 153.

for independence from the criminal justice system makes sense. When there is an act of discrimination there are two parties with competing interests. Equally important and competing rights must be balanced, unlike as in a criminal trial, which is focused on safeguarding the rights of the accused.¹⁹⁸ The offending student and the victim both have the right to receive an education and a system that is designed to more strongly protect the rights of one necessarily negatively impacts the rights of the other. The victim has the right to attend the college or university free from being sexually assaulted and the offender has a liberty and property interest in receiving an education.¹⁹⁹ Any burden of proof higher than preponderance of the evidence favors the rights of an alleged offender to over the rights of an alleged victim. Additionally, civil rights causes of action are adjudicated using the preponderance of the evidence standard rather than a higher standard.²⁰⁰ Similarly, Title IX enforcement actions use the preponderance of the evidence standard.²⁰¹ Therefore, the preponderance of evidence standard, rather than clear and convincing or beyond a reasonable doubt standards, establishes parity and allocates risk of error between the interests of the victim and offender without favoring either party.²⁰² Any standard of proof higher than preponderance would be an insurmountable obstacle for some victims with meritorious claims and would favor the alleged offender's word over the victim's.²⁰³ Additionally, although there is stigma from being held responsible for sexual assault at a school disciplinary hearing, that stigma is much more analogous to the stigma from being held responsible for sexual assault as a tort in a civil court or for discrimination under Title VII than the stigma from a criminal conviction for sexual assault. Finally, as discussed in Section IV.C, below, the purposes of addressing sex discrimination are different from the purposes of criminal law and the criminal justice system is ill equipped to address those purposes. Therefore, in addressing sexual assault as a form of sex discrimination a procedure separate and independent of the criminal justice system with a burden of proof that balances the interests of both parties is most appropriate.

B. Purpose of Title IX

Title IX requires schools to emphasize the rights of victims of sexual assault to have access to education and to be able to receive an education in a safe

198. See Triplett, *supra* note 24, at 507, 517; Hogan, *supra* note 22, at 278; Weizel, *supra* note 20, at 1632, 1650-51.

199. See *Goss v. Lopez*, 419 U.S. 565, 575 (1975); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1380, 1382 (W.D. Mich. 1983); see also Weizel, *supra* note 20, at 1619-30 (discussing due process in school disciplinary proceedings).

200. See, e.g., *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (stating that the standard for discrimination claims under Title VII is preponderance of the evidence) (citation omitted).

201. See *Dear Colleague Letter*, *supra* note 16, at 11.

202. See Triplett, *supra* note 24, at 507, 517; Weizel, *supra* note 20, at 1631-33, 1650-5.

203. See Triplett, *supra* note 24, at 507; Chmielewski, *supra* note 179, at 162.

environment. This is because sexual assault of students “interferes with students’ right to receive an education free from discrimination”²⁰⁴ and it can create a hostile environment which can “interfere[] with or limit a student’s ability to participate in or benefit from the school’s program.”²⁰⁵ Simply stated, a victim of sexual assault usually does not want to encounter the offending student everywhere he or she goes, which is likely to be the case at many colleges and universities. Fear of seeing the assailant on campus causes many victims to drop out of school²⁰⁶ and can also cause students to otherwise withdraw from participating in the campus community.²⁰⁷ Colleges and universities have an obligation to protect student victims of sexual assault to provide with a safe place to live and learn.²⁰⁸

In addition to protecting the rights and safety of individual victims, colleges and universities also have obligations toward the campus community as a whole.²⁰⁹ In order to be effective as an institution at educating students, colleges and universities must provide a safe learning environment for all students.²¹⁰ The OCR issued guidance in 2001 emphasizing that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”²¹¹ An intimidating, hostile, or unsafe environment is not conducive to learning.²¹² The institution has obligations to “foster a culture of

204. Dear Colleague Letter, *supra* note 16, at 1.

205. Dear Colleague Letter, *supra* note 16, at 3.

206. See Evelin Mac Clay, Comment, *Colleges and Universities: A Place to Get Away with Rape*, 28 ST. THOMAS L. REV. 256, 270 (2016); Sarah Edwards, *The Case in Favor of OCR’s Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL’Y 121, 136-37 (2015).

207. See Aya Gruber, A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform, 15 J. GENDER RACE & JUST. 583, 606 (2012) (stating that fear of sexual assault impacts many aspects of women’s lives including decisions regarding travel, dress, communication, dating and residence).

208. See Revised Sexual Harassment Guidance, *supra* note 20, at ii (stating that schools have an obligation to take “prompt and effective action calculated to end the harassment, prevent its recurrence, and as appropriate, remedy its effects”); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing For Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 405-06 (2005); Edward N. Stoner II, Reed Smith Shaw & McClay, Reviewing your Student Discipline Policy: A Project Worth the Investment, 9 (2000), <http://files.eric.ed.gov/fulltext/ED444074.pdf> [<https://perma.cc/5LXJ-WXPZ>]; Dear Colleague Letter, *supra* note 16, at 15 (stating that a school’s primary concern with disciplinary proceedings is student safety).

209. See Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F 103, 116 (2015).

210. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1996-97 (2016).

211. Revised Sexual Harassment Guidance, *supra* note 20, at ii.

212. See Baker, *supra* note 10, at 875-76 (by ignoring sexual assault on campus, it is likely that the atmosphere created will detract from many women’s educational performance and discourage them from participating in activities and being able to advance themselves).

respect, inclusion, and civility”²¹³ on campus as well as foster a “culture of trust and safety.”²¹⁴

So, Title IX imposes obligations on colleges and universities to address allegations of sexual assault in order to address discrimination, protect victims so that they can receive an education, and foster a safe learning environment for all students. The enforcement of Title IX by the OCR ensures that schools have a system for addressing sexual assault that is designed to address the discriminatory harms caused by sexual assault because other methods of addressing sexual assault, are inadequate at addressing the discriminatory harms of sexual assault. Applying this framework to the military’s response to sexual assault demonstrates how it is inadequate at addressing the discriminatory harms of sexual assault.

V. TITLE IX APPLIED TO THE MILITARY

There is no constitutional or statutory right to serve in the military and there is no statutory equivalent to Title IX for the military.²¹⁵ There is a DoD policy prohibiting sex discrimination, but it does not contain a mechanism to ensure compliance, like withholding federal funds, nor does it provide a private cause of action for individuals being discriminated against on the basis of sex.²¹⁶ Despite these differences, both Title IX and the military’s equal opportunity policy both have the same goals of preventing discrimination on the basis of sex and fostering an environment free of discrimination.

The obligations that Title IX imposes upon colleges and universities should be instructive to the military in structuring an effective response to allegations of sexual assault for several reasons. First, the military should recognize that there are many harms that it has an obligation to address in responding the sexual assault.²¹⁷ Second, there is no “one size fits all” response to sexual assault that adequately addresses all of the harms caused by sexual assault. The military justice system alone is inadequate at fully addressing sexual assault just as administrative measures alone are inadequate.²¹⁸ Third, an administrative response to sexual assault is more appropriate than a criminal response at addressing the discriminatory effects of sexual assault, ensuring the victim’s safety, and fostering a safe environment for all servicemembers and the military

213. Janet Napolitano, “Only Yes Means Yes”: An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL’Y REV. 387, 389 (2015).

214. *Id.* at 390. See also Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2016).

215. See Elizabeth L. Hillman, Heller, *Citizenship, and the Right to Serve in the Military*, 60 HASTINGS L.J. 1269, 1278 (2009).

216. See U.S. DEP’T OF DEF., DIR. 1350.02, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (AUG. 18, 1995), <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/135002p.pdf> [<https://perma.cc/D2GQ-F7N6>].

217. See Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 19-22 (2015).

218. *Id.* at 20-21.

community.²¹⁹ Fourth, by potentially foreclosing an administrative separation based on an allegation of sexual assault depending upon the outcome of a criminal trial, the military's response to sexual assault is inconsistent with the requirement that the DOE imposes on colleges and universities to not link their response to sexual assault to outcomes in the criminal justice system.²²⁰ Fifth, only sexual assault allegations that go to court-martial should be those with a reasonable likelihood of a conviction because, if a conviction is not reasonably likely, it is not worth the delay that the court-martial process requires to address the discriminatory aspect of sexual assault and protecting the safety of the victim and other servicemembers.²²¹ By taking these steps, the military can better respond to allegations of sexual assault by holding servicemembers accountable criminally where warranted and separately remedying the discriminatory effects of sexual assault to protect servicemembers and foster a safe environment.

A. *Sexual assault in the military causes multiple harms which should all be addressed.*

Title IX and the OCR's interpretation of Title IX makes clear that sexual assault between students at colleges and universities is a form of sexual harassment and can constitute sex discrimination.²²² Because the problem of sexual assault is virtually identical at both types of institutions,²²³ the military should adopt OCR's position in the Dear Colleague Letter that sexual assault can constitute sex discrimination and issue guidance to that effect. By not explicitly recognizing and addressing sexual assault in the military as a form of sex discrimination, the two federal agencies, DoD and DOE, risk taking inconsistent positions regarding sexual assault.

Further, the discriminatory effects of sexual assault in the military are similar to, and potentially even worse than, at colleges and universities. A student victim of sexual assault may withdraw from the campus community, change residences, or even drop out of school altogether as a result of being sexually assaulted and the offender still being on campus.²²⁴ The compulsory

219. See Dear Colleague Letter, *supra* note 16, at 9-10.

220. See Dear Colleague Letter, *supra* note 16, at 9-10.

221. The United States Attorney Manual states that federal prosecution should not be commenced unless "admissible evidence will probably be sufficient to obtain and sustain a conviction." See U.S. DEP'T OF JUST., U.S. ATT'YS' MANUAL 9-27.220 (2017), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200> [<https://perma.cc/W8NW-4KM9>]. The comments section of the manual further elaborates that a prosecutor should not recommend a charge that the prosecutor "cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient and admissible evidence at trial." See *id.* at 9.27-300(B).

222. See Dear Colleague Letter, *supra* note 16, at 1.

223. See Section II(C), above.

224. See Evelin Mac Clay, Comment, *Colleges and Universities: A Place to Get Away with Rape*, 28 ST. THOMAS L. REV. 256, 270 (2016); Sarah Edwards, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL'Y 121, 136-37 (2015); Aya Gruber, A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform, 15 J. GENDER RACE & JUST. 583, 606 (2012) (stating that fear

nature of military service limits a servicemember's ability to do the same and the victim servicemember's attempts to avoid the offender could even result in criminal charges against the victim.²²⁵

Unlike students, servicemembers also have limited ability to seek redress for sex discrimination. Although the military has policies regarding equal opportunity and sexual harassment; servicemembers are precluded from suing the government for violations of these policies or under Title VII which prohibits employer discrimination on the basis of sex.²²⁶ The limitations on servicemembers to individually address sex discrimination within the military means that the burden of addressing sexual assault as a form of sex discrimination falls squarely on the military and, if their response is inadequate, they do not of the same external checks to ensure their response is sufficient.²²⁷

Therefore, the military should adopt the DOE's position and recognize that sexual assault can be a form of sex discrimination in addition to being a criminal act. Once explicitly recognized, the military will then be better able to address the discriminatory effects of sexual assault.

B. Criminal prosecutions alone are inadequate at fully addressing the harms caused by sexual assault.

The application of Title IX to colleges and universities demonstrates that, because a court-martial is a criminal forum, it is ill-suited to address the sex discrimination aspect of sexual assault between servicemembers. The Dear Colleague Letter requires schools to independently investigate and address allegations of student-on-student sexual assault independent of any law enforcement investigation or criminal prosecution because of the different focus, procedural protections, and standards for a criminal investigation and prosecution than for a Title IX discrimination investigation.²²⁸ A school that tied its Title IX response to whether there is a criminal conviction would be found in violation of its Title IX obligations to address sexual assault as a form of sex discrimination. Reliance on the criminal justice process to remedy sex discrimination is especially inappropriate given that the types of sexual assaults that occur most frequently at colleges and universities tend to be the most difficult types of sexual assaults to prove beyond a reasonable doubt.²²⁹

of sexual assault impacts many aspects of women's lives including decisions regarding travel, dress, communication, dating and residence).

225. See, e.g., UCMJ art. 86, 92, 10 U.S.C. §§ 886, 892 (2016)..

226. See Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 221 MIL L. REV. 211, 218-20 (2014); Aparna Krishnaswamy Patrie, Note, *No Place in the Military: The Judiciary's Failure to Compensate Victims of Military Sexual Assault and a Suggested Path Forward Using Lessons Learned from the Prison Context*, 8 J. NAT'L SECURITY L. & POL'Y 119, 122 (2015).

227. See Patrie, *supra* note 226, at 122.

228. See Dear Colleague Letter, *supra* note 16 at 1, 4, 10; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 27 (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/WD8B-R7X9>].

229. Baker, *supra* note 10, at 235-45.

Acquaintance sexual assaults and alcohol facilitated sexual assaults frequently lack sufficient evidence, memories are often distorted due to impairment by alcohol, and the high evidentiary burden requires a virtually flawless case in order to achieve a conviction.²³⁰ For good reason, beyond a reasonable doubt is a high standard to meet, and attempts by the military to work around the edges to make criminal prosecutions easier will never be sufficient to overcome the procedural safeguards of the criminal justice system and make it a proper forum to address all harms caused by sexual assault. Reliance upon the military justice system to criminally prosecute servicemembers for sexual assault will, and should, result in many servicemembers being acquitted even if they more likely than not committed the alleged sexual assault. Therefore, in the same way that a school tying its Title IX response to the outcome of the criminal justice system would violate Title IX, the military using the military justice system to address sexual assault as a form of sex discrimination is similarly a failure to appropriately address and remedy sex discrimination in the military.²³¹

C. Administrative proceedings are frequently more appropriate than criminal prosecutions.

Administrative proceedings are a more appropriate forum to address sexual assault as a form of sex discrimination than criminal proceedings. Administrative proceedings are significantly quicker than criminal proceedings.²³² From the time administrative separation proceedings are initiated until the board convenes is generally within thirty days and final action is within sixty days.²³³ From the time criminal charges are preferred for a court-martial until trial is frequently six months or more for a sexual assault case.²³⁴ The quicker process would better protect the victim and the military community

230. Baker, *supra* note 10, at 235-45.

231. If the military were subject to the same requirements imposed upon schools, the reliance on court-martial as the means of addressing allegations of sexual assault would likely violate Title IX. If a school modeled its Title IX response off of the military's response to sexual assault, it would likely violate Title IX and risk losing federal funding, an enforcement action by the DOE, and lawsuits from victims.

232. See Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485, 519 (2014).

233. *Id.* at 536.

234. *Id.* at 519. Obviously, an investigation is required before choosing which avenue to pursue, but a review of an investigation by an attorney during the investigation would be able to identify some cases in which criminal charges are not viable and speed up the investigation in order to hold an administrative separation board sooner. For example, if the sole issue is going to be whether the alleged victim consented, not whether sexual activity occurred, waiting six months for DNA results may be worth it if there is a chance the case will go to trial, but not if there is otherwise insufficient evidence to prove the case beyond a reasonable doubt because DNA evidence would impact the contested issue in the case. Thus, rather than six months for the DNA evidence, the case can instead be sent to an administrative separation board which could be finished well within six months.

by removing the offending servicemember from the community.²³⁵ Additionally, putting victims of sexual assault through a six-month long court-martial process, testifying at trial, and being subject to cross-examination is often traumatic for a victim of sexual assault. It can be justified, however, where there is a reasonable likelihood of a conviction in which case the harm to the victim by going through the criminal process may be outweighed by the importance of punishing the offender, holding the offender accountable, and protecting society.²³⁶ Where there is little or no chance of a conviction, putting a victim of sexual assault through the military justice system needlessly hurts the victim without any benefit.²³⁷ Although colleges and universities do not have the ability to choose between criminal and administrative fora for addressing sexual assault, their process demonstrates the value of addressing sexual assault allegations administratively in addition to, or in lieu of, addressing them criminally.

D. Because criminal and administrative responses to sexual assault address different harms, the outcomes should not be linked.

The Dear Colleague Letter requires schools to address allegations of sexual assault independent of whether there is a criminal investigation or prosecution or the outcome of either because the criminal justice system is ill-suited to address discrimination. The criminal justice system is designed to address different harms caused by sexual assault.²³⁸ Although the DOE OCR prohibits linking their actions pursuant to Title IX to the outcome in the criminal justice system, the DoD takes an inconsistent position and prohibits administrative action after an acquittal at court-martial.²³⁹ By doing so, the military is implicitly subordinating addressing sexual assault as sex discrimination subordinate to addressing it as a criminal act. The military is limiting its ability to address sexual assault as both a crime and as an act of discrimination. The criminal justice system is not the appropriate venue to address sex discrimination and barring administrative separation after acquittal fails to address and remedy the discriminatory effect of sexual assault upon servicemembers.²⁴⁰

If an allegation of sexual assault goes to court-martial, that should mean that there was a reasonable likelihood of the government meeting the beyond a reasonable doubt standard. If the prosecution falls short of that standard, it should not be falling far short of it. Any case that the government is taking to

235. Practically, it would also save the government money because the cost of an administrative separation is significantly cheaper than the cost of a court-martial and the military must also continue to pay the accused servicemember while pending court-martial. See Ghiotto, *supra* note 232 at 519.

236. See Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 70-72 (2015) (discussing the negative effects that the criminal justice system can have to victims).

237. See *id.*; See also Victor I. Vieth, *Adult Sexual Assault: Pre-Charging Considerations in the Difficult Case*, 32 FEB PROSECUTOR 24, 27 (1998) (Describing common issues of proof in sexual assault cases).

238. See Dear Colleague Letter, *supra* note 16, 9-10.

239. See DoDI 1332.14, *supra* note 4, at 27.

240. See DoDI 1332.14, *supra* note 4, at 27.

court-martial ought to be able to easily meet the preponderance of the evidence standard. Therefore, barring administrative separation after acquittal at court-martial has two potential effects on how the military as an institution responds to sexual assault. The first is that some of the allegations of sexual assault that the military is taking to court-martial could be proven by a preponderance standard but result in an acquittal at court-martial where the standard is beyond a reasonable doubt. If that is the case, then acquittal at court-martial is barring subsequent administrative separation of servicemembers whom the government could have proven by the preponderance of the evidence at an administrative separation board committed the alleged sexual assault. In such cases, the acquittal prevents the military from addressing the sex discrimination aspects of the sexual assault which is one of the problems that the Dear Colleague Letter sought to remedy by requiring schools to separate their Title IX response from the criminal justice system. The second potential effect is that military commanders are refraining from taking sexual assault allegations to court-martial which they believe have a reasonable likelihood of resulting in a conviction because the commanders do not want to risk being barred from administratively separating those servicemembers if there is an acquittal. Even where the evidence is strong, there is always a risk of an acquittal at a criminal trial, so a risk-adverse commander may refrain from sending an allegation of sexual assault to court-martial where a court-martial is appropriate because the commander deems that protecting the victim and the military community from the alleged offender outweighs the risk of an acquittal and not being able to administratively separate the alleged offender. All evidence points to the former, rather than the latter, currently being the case in the military.²⁴¹ Nevertheless, neither of these possibilities is desirable.

If court-martial and administrative separation are designed to address different harms caused by sexual assault, they should not be linked to one another and the outcome of a court-martial should not be determinative with regard to the administrative options available to a commander to address the problem of sexual assault as sex discrimination within his or her command. Court-martial and administrative separation are two separate processes with two separate purposes and should be treated as such. Protections should also be put in place to avoid the risk of abuse by a commander who could use administrative separation maliciously after a servicemember is acquitted at court-martial.²⁴² There must be a distinct purpose served by administrative separation that is not served by court-martial, and Title IX provides that purpose. The ability to hold administrative separation proceedings after an acquittal should be limited to those cases where the separation is remedying the sex discrimination aspects of sexual assault. Additionally, the decision should be made by a higher-level commander than who previously oversaw the court-martial as a prophylactic

241. See Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2015 app. B, DEP'T OF DEF., at 18 (2016) (stating that of the 1,437 cases in which sexual assault was substantiated, court-martial charges were preferred in 926 cases and administrative separation was pursued in 95 cases).

242. See generally Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401 (2016) (discussing unlawful command influence in the military).

against administrative separation being used maliciously. These recommendations should be made in conjunction with the recommendation in the next section to end the military's overreliance on courts-martial to address allegations of sexual assault.

E. Allegations of sexual assault should not be referred to a court-martial if a conviction is not reasonably likely because the harms outweigh the benefits.

Where there is no reasonable likelihood that an allegation of sexual assault could be proven beyond a reasonable doubt at court-martial, military commanders should not refer that allegation of sexual assault to court-martial because doing so serves no legitimate purpose. Instead, where there is a reasonable likelihood that an allegation of sexual assault could be proven by a preponderance of the evidence, but not a reasonable likelihood that the allegation could be proven beyond a reasonable doubt, the commander should focus on remedying the discriminatory harms that sexual assault can cause and initiate administrative separation procedures to address those harms.²⁴³ The harms caused by court-martial, both to the victim and the accused, as well the time and resources required, are only outweighed by benefits of a court-martial if there is a reasonable likelihood of a conviction.

Individual commanders are unable to implement this change without the military as a whole changing. Currently, a commander who decides not to refer a case to court-martial, especially if it is against the victim's preference, risks personal and professional damage; whereas a commander who sends every case to court-martial risks nothing personally or professionally.²⁴⁴ The current system requires commanders to choose between personal advancement and what is the good for the military as a whole.²⁴⁵ Although we may expect military

243. Even if an allegation which does not have a reasonable likelihood of a conviction results in a conviction, there is a greater than normal risk that such cases will be overturned by the appellate courts as opposed to allegations with a reasonable likelihood of a conviction because the military appellate courts are empowered to conduct a factual sufficiency review wherein the appellate court itself must also be convinced of the servicemember's guilt beyond a reasonable doubt. See UCMJ art. 66(c), 10 U.S.C. § 866(c) (2016); *United States v. Walters*, 5 M.J. 391, 396 (C.A.A.F. 2003) (citing *Turner v. United States*, 396 U.S. 398 (1970)).

244. See Murphy, *supra* note 4, at 149; OFFICE OF SENATOR KIRSTEN GILLIBRAND, SNAPSHOT REVIEW OF SEXUAL ASSAULT REPORT FILES AT THE FOUR LARGEST U.S. MILITARY BASES 11, 13 (2016), <https://www.gillibrand.senate.gov/imo/media/doc/May%202016%20Military%20Sexual%20Assault%20Report.pdf>

[<https://perma.cc/NC7V-PT9X>] (finding that “[d]espite widespread attention to the issue of military sexual assault and the DoD’s stated commitment to addressing the issue, several cases were found in which the military investigator found probable cause to go forward with the case, yet the commander failed to do so” and finding that discharge in lieu of court-martial was insufficient punishment) (emphasis omitted).

245. See Murphy, *supra* note 4, at 149; Craig Whitlock, *General’s Promotion Blocked over her Dismissal of Sex-Assault Verdict*, Wash. Post, May 6, 2013, <https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07->

commanders to make hard decisions,²⁴⁶ we should not expect them to make needlessly hard decisions. Therefore, changes must be made to allow commanders, in consultation with their attorneys, to determine on a case-by-case basis whether court-martial is the appropriate venue for an allegation of sexual assault. If it is not, the commander must be given discretion to make that decision and refer the action to an administrative forum.

Congress must also allow the military to change and, to do so, must stop pressuring and incentivizing the military to favor court-martial as the only appropriate response to an allegation of sexual assault. The military will not change if Congress does not allow it to change. Congress too must recognize that court-martial is frequently not the appropriate venue for alcohol-facilitated sexual assaults committed by an acquaintance of the victim because they rarely can be proven beyond a reasonable doubt. Sending allegations of sexual assault to court-martial which are not reasonably likely to result in a conviction serves no purpose besides creating the appearance that the military is taking sexual assault seriously.²⁴⁷

If Congress continues to pressure the military to take these cases to court-martial, they must expect a high rate of acquittals. No amount of training or experience for prosecutors or tinkering with the rules will change this result. Forcing court-martial where it is not appropriate does a disservice to all involved.²⁴⁸ Therefore, Congress must recognize that the rate of acquittals due to sexual assault is, in part, due to the pressure that they are putting on the military to take cases to court-martial that do not belong at that forum.²⁴⁹ Instead, Congress should stop pressuring the military to focus on court-martial as a response to sexual assault and instead allow the military to respond to allegations of sexual assault as appropriate on a case-by-case basis.

Like with Title IX, Congress should instead recognize the sexual assault committed by a servicemember against another servicemember is not just a crime

b6e0e6152528_story.html?utm_term=.99f0ff2cf343 [https://perma.cc/9JKE-YJA8]; 160 CONG. REC. S1343-44 (statement of Sen. Kelly Ayotte) (“Our proposal actually has it as part of how a commander is going to be judged, how commanders handle [sexual assault] cases . . . I want to hold commanders more accountable for not only how they handle these crimes but also for that zero tolerance policy within their unit.”); Press Release, Sen. Kirsten Gillibrand, *Senator Gillibrand Releases Latest Military Sexual Assault Snapshot Report: New Data Show Despite Recent Congressional Reforms, Dysfunction in Military Justice System Remains* (May 23, 2016), <https://www.gillibrand.senate.gov/news/press/release/2016/05/23/senator-gillibrand-releases-latest-military-sexual-assault-snapshot-report-new-data-show-despite-recent-congressional-reforms-dysfunction-in-military-justice-system-remains-1> [https://perma.cc/3DAZ-5ZQD] (stating “trials for individuals accused of sexual assault [in the military] are rare” and that “[i]nstead of pursuing justice, it appears that in many cases, commanders do the exact opposite and use their powers to dispose of these troubling cases outside of the courtroom.”).

246. See Murdough, *supra* note 3, at 301.

247. Albeit at the cost of making it appear that the military is inept at prosecuting sexual assault because of the resulting high acquittal rate.

248. See Garvin, *supra* note 236, at 70-72. (discussing the negative effects that the criminal justice system can have to victims).

249. See Schlueter, *supra* note 96, 224-25.

but also a form of sexual harassment and sex discrimination that must be also be combatted and, where the crime cannot be proven in a criminal forum, the discrimination should still be addressed in an appropriate forum for claims of discrimination to protect victims of sexual assault and protect the military community. The measure of success cannot be based solely on statistics because a holistic response to sexual assault cannot be evaluated in such a way. Only by refocusing on why Congress and the military are concerned about sexual assault within the military, can the processes for dealing with sexual assault be realigned to best combat it.

VI. CONCLUSION

The Dear Colleague Letter recognized that, to prevent sex discrimination at colleges and universities pursuant to Title IX, schools have an obligation independent of the criminal justice system to address sexual assault between students because sexual assault is a form of sex discrimination that criminal justice system is ill-equipped to address. To this end, Title IX requires colleges and universities to respond to sexual assault between students administratively because an administrative forum is better situated to address the discriminatory aspects of sexual assault. The result of this is that, at colleges and universities, the response to sexual assault is bifurcated with the criminal justice system responsible for addressing sexual assault as a crime and the schools responsible for addressing sexual assault as a form of sex discrimination.

Although the federal government through Title IX requires schools to address the sex discrimination aspects of sexual assault separate from the criminal aspects of it, the military has taken the opposite approach and has focused its response to sexual assault to treating it as a crime and criminally prosecuting allegations of sexual assault between servicemembers. By focusing narrowly on addressing the crime aspects of sexual assault, the military is failing to address the sex discrimination aspects of sexual assault and thereby inadequately protecting victims and failing to foster a safe environment for all servicemembers.

To fully respond to the problem of sexual assault in the military, the military must address all aspects of sexual assault and have processes in place designed to remedy all aspects of sexual assault. Title IX and student disciplinary procedures at colleges and universities provide a guide for how the military should restructure its response to sexual assault to adequately address the discriminatory aspects of it. The military should utilize its existing administrative processes to address sexual assault as a form of discrimination in a way that is separate and not contingent on its processes for addressing sexual assault as a crime. By doing so, the military can appropriately address sexual assault as a crime while also appropriately addressing it as a form of discrimination.

Students have a right to an education free from discrimination and servicemembers, who volunteered to serve and put their lives in danger to protect the United States, equally deserve to live and work in an environment that is free from discrimination. Like the obligations imposed by Title IX on colleges and universities, the military also has an obligation to protect servicemembers and to

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foster a safe environment free of discrimination in which they can live, work, and train to fight.