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THE SEXUAL ASSAULT CRISIS IN THE UNITED STATES AIR FORCE ACADEMY

COLLEEN DALTON*

"[T]here is no 'military exception' to the Constitution."

– D.C. Circuit Chief Judge Mikval

INTRODUCTION

In the spring of 2003, the administration of the United States Air Force Academy publicly acknowledged the existence of a longstanding crisis involving the sexual assault of their female cadets.² This admission was prompted in part by an increasing number of young women who were sexually assaulted at the Academy and then came forward to tell their stories. Until recently, these women were frightened into not reporting sexual assaults due to fear of retaliation or expulsion from the prestigious Academy.³ Independent investigations revealed shocking stories and statistics about the prevalence of sexual assault on the campus. This note provides an examination of the culture that has permitted such widespread sexual assault to occur; it also considers preventative reforms as well as legal modernizations, which attempt to deal justly with sexual assault cases. Part I examines the pervasiveness and severity of the Air Force Academy's sexual assault problem through victim testimonials and Department of Defense statistics. Part II breaks down the historical efforts made by the Academy's administration since the admission of women in 1976, which ultimately failed to remedy the sexual

* J.D. Candidate, Benjamin N. Cardozo School of Law, Managing Editor, *Cardozo Women's Law Journal*. I would like to thank my family and Chris for their support and encouragement throughout my law school career.

¹ Saum v. Widnall, 912 F. Supp. 1384, 1392 (D. Colo. 1996).

² See REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 2 (2003), available at <http://www.usafa.af.mil/>. In March 2003, the Air Force Secretary and Air Force Chief of Staff published a new policy at the Academy known as the *Agenda for Change*, a series of regulations and policy improvements intended to combat incidents of sexual assault and the administration's tolerance of such incidents at the Academy.

³ See Deborah L. Rhode, *Change the Culture*, NAT'L L.J., Apr. 21, 2003, at A13. Many female cadets suffered punishment upon reporting sexual violence because the details of the incident implicated their involvement in some illegal activity, such as drinking alcohol, fraternization with upperclassmen, or otherwise violating Academy rules. *Id.* In one case, after reporting a rape, a female cadet was punished with demerits for her part in fraternizing with the upperclassman who allegedly raped her. *Id.* When the male cadet claimed it was consensual, the administration informed the female cadet it was the Academy's policy to punish them both since they couldn't be sure who was telling the truth. *Id.* The female cadet later discovered that her reported rapist was never disciplined for the incident. *Id.* See *The Oprah Winfrey Show: Air Force Academy Rape Scandal* (ABC television broadcast, Dec. 8, 2003).

misconduct problem. Part III takes a broader look at military culture. It also examines how women have not been permitted to be fully integrated into the military's structure as a result of their systematic relegation to subordinate positions. Part IV analyzes military law and establishes a platform for legal reform. It provides a particular focus on the following areas: (a) the concentration of authority in Air Force Commanders, (b) outdated military statutes and ambiguous case law in the field of sex crimes against female soldiers, (c) the Academy's Honor Code, and (d) the Academy administration's frequently changing policies governing victim confidentiality.

I. THE PROBLEM

Sharon Fullilove was the first cadet to go public with her story of rape and the apathetic Air Force Academy culture that failed to protect her.⁴ Fullilove claimed that she was raped in 1999 by an upperclassman with whom she was acquainted, and who offered to drive her to her dormitory after a school-sponsored movie night.⁵ Like many other sexual assault victims at the Academy, Fullilove did not report the rape to school officials because she feared that her military career would be over. "During sexual assault awareness week, people told us that if you make it through all four years without being sexually assaulted, you're lucky... They also say if you want to have an Air Force career you should not report it."⁶ These warnings, which came from upper-class students as well as Academy administrators, were taken seriously by entering female cadets, since admission to the Air Force Academy is exceedingly competitive, and all students want to maintain their place in the Academy to increase their chances of success in a military career. However, Fullilove, unlike other female cadets, did not put her military career before her personal safety.⁷ Two days after the rape, the upperclassman who had raped Fullilove walked into her dorm room unannounced and said he was "sorry if he had done anything inappropriate."⁸ Fullilove left the Academy shortly thereafter.⁹ She felt threatened and powerless to do anything about what had happened under the circumstances.¹⁰ "People have to understand, this is nothing like a normal college... Upperclassmen are your superiors. You have to listen to them and obey their rules. You can't tell them to get out. I didn't feel

⁴ Rhode, *supra* note 3.

⁵ Cathy Booth Thomas, *The Air Force Academy's Rape Scandal*, TIME, Mar. 10, 2003, available at <http://www.time.com/time/archive/>. Fullilove accepted the ride with three of her girlfriends, but she was the last to be dropped off. *Id.* She claims she was not concerned about being alone with the upperclassman; rather, she trusted him since he had actually shielded her from school disciplinary action on two prior occasions. *Id.* Those two incidents were later proven to be unfounded. *Id.*

⁶ *Air Force Investigates Handling of Sex Assault Cases*, NEWSDAY, Mar. 8, 2003, at A19, available at 2003 WL 15419473.

⁷ Thomas, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

safe.”¹¹ It was only after she had left the Academy that Fullilove found the courage to report the rape and share her story.¹² Academy investigators doubted the veracity of Fullilove’s claims and closed the case with no arrests or punishment.¹³ The administration offered Fullilove no explanation for this pointed inaction, nor did it proffer any justification for suspecting Fullilove’s credibility.¹⁴ Because military records are sealed on matters such as this, it is entirely unclear exactly how much good-faith investigation the Academy conducted in this case. Public records do reveal that the cadet accused of raping Fullilove graduated and is currently in the Air Force.¹⁵

Considering the Academy’s track record for dealing with sexual assaults, Fullilove’s concerns about reporting the incident were justified. In 1994, five years earlier, in an incident that became notorious throughout the school as indicative of the consequences of reporting an assault, another female cadet, identified in one media source only as “Aya,” reported a sexual assault to school authorities while enrolled at the Academy and suffered repeated physical abuse at the hands of a group of male upperclassmen in retaliation.¹⁶ On multiple occasions the upperclassmen dragged Aya out of her dormitory room, shoved and hit her, and forced her to do push-ups and pull-ups.¹⁷ “Their big beef with me was that I wasn’t loyal. They said I was a snitch and couldn’t keep my mouth shut. There’s so much power with peers.”¹⁸ Aya recalled, “[one cadet] told me he would kill me and they would never find my body up in the Rocky Mountains. I was terrified.”¹⁹ She eventually left the Academy because of psychological problems stemming from the sexual assault.²⁰ Although Aya knew she was placing herself at risk by reporting the incident, she placed her trust in the integrity of the system and reported it anyway. With behavior that ultimately appears to have become official protocol, the Academy apparently never investigated Aya’s case, and the alleged assailant left the Academy under honorable conditions.²¹

¹¹ *Air Force Investigates Handling of Sex Assault Cases*, *supra* note 6.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ Dick Foster, *AFA Tolerated Horrific Case*, ROCKY MOUNTAIN NEWS, Sept. 25, 2003, available at 2003 WL 6376261.

¹⁷ *Id.*

¹⁸ *Id.* “[Aya] had also answered her commanding officer affirmatively when asked whether another female cadet was having sex and drinking in the dormitory although she was underage.” *Id.*

¹⁹ *Id.*

²⁰ *See id.* After being on medical leave with various sleeping disorders for a year and a half, Aya returned to the Academy, but inexplicably she was placed in the same squadron that her alleged assailant had been in. *Id.* Although he had graduated, she was constantly harassed by his friends. *Id.* Aya transferred to a different squadron but continued to suffer from what the Academy branded a “personality disorder,” and she was eventually disenrolled. *Id.*

²¹ *See* Foster, *supra* note 16. In an interview, the alleged assailant admitted he was never questioned by the Academy about the incident, and nothing related to the incident was ever reported in his military record: “It was never addressed, and I just found that odd, extremely odd.” *Id.*

Incidents of sexual assault such as these have garnered much media attention at a time when over 200,000 women are on active duty in the United States Military.²²

Rape is widespread in the armed forces... Sketchy military record-keeping makes it impossible to quantify. The Pentagon puts the percentage of women raped in single digits, yet two Department of Veterans Affairs surveys in the past decade found 21 percent and 30 percent of women reported a rape or attempted rape. The comparable civilian figure is nearly 18 percent, according to a federal survey in 2000. In 1991, witnesses told Congress that between 60,000 and 200,000 female veterans had been sexually assaulted over time by servicemen.²³

The Air Force, of all the Services, is regarded as the most accommodating to women, with 99.7% of the positions open to them.²⁴ In fact, 17.8% of Air Force officers and 19.8% of new Air Force recruits are women, a higher percentage than in any other branch of the Armed Services.²⁵ The student body of the Air Force Academy reflects this, with women representing 18% of the school's approximately 4,000 cadets.²⁶ Considering the fact that the Academy has such a progressive student body composition with respect to female enrollment, it is ironic that these problems have persevered over the years; the administration does not protect or value the integrity of the young women it has permitted to attend.

In March 2003, the Department of Defense Inspector General conducted a survey among currently enrolled female cadets to ascertain the extent of the sexual assault problem at the Academy.²⁷ Out of 579 survey participants, 43 claimed they were victims of rape or attempted rape, 109 asserted that they were sexual assaulted at least once, and 397 of the women said they had experienced some form of sexual harassment while at the Academy.²⁸ Of the 177 total incidents of sexual assault

²² Amy Herdy & Miles Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short: Reforms Lag Despite Numerous Scandals, Recommended Solutions*, DENVER POST, Nov. 18, 2003, at A.01, available at 2003 WL 5525784.

²³ Miles Moffeit & Amy Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, DENVER POST, Nov. 16, 2003, at B.01, available at 2003 WL 5525666.

²⁴ REPORT, *supra* note 2, at 56 (citing MARGARET C. HARRELL ET AL., THE STATUS OF GENDER INTEGRATION IN THE MILITARY: ANALYSIS OF SELECTED OCCUPANTS 5 (2002)). The Navy currently allows women to serve in 94% of their positions, the Army 67.2% and the Marine Corps 62%. *Id.* This is significant because before these positions were open to women, feminists speculated that opening up the positions would eliminate many of the gender inequalities that exist in the military system. *Id.* Although women have recently been permitted to take prestigious fighter pilot positions in the Air Force, the number of women in such positions remains low. *Id.* This means that the system now suffers from a failure to promote women to these significant positions, resulting in a constructive bar to accession within the military. *Id.*

²⁵ REPORT, *supra* note 2, at 57. Approximately 15% of those enlisted in the Army and Navy are women, and only 6.1% of enlisted Marines are women. *Id.*

²⁶ Rhode, *supra* note 3.

²⁷ See REPORT, *supra* note 2, at 1-2, 52.

²⁸ Dick Foster, *DOD Report Confirms Rape Stats at Air Force Academy*, ROCKY MOUNTAIN NEWS, Oct. 24, 2003, at 7A, available at 2003 WL 6379029.

claimed in the survey, only 33 were reported to the Academy administration.²⁹ Many of the 80.8% of alleged victims who did not report the assaults explained that they kept silent due to embarrassment, fear of ostracism by their peers, the feeling that nothing would be done if they were to report the crime to the Academy administration, or worse, that they would be punished for infractions associated with the incident.³⁰

An investigative panel determined that at least 142 cases of sexual misconduct have been reported to the Air Force Academy's administration over the past ten years; 55% of these occurred in the Academy's dormitories.³¹ Air Force Secretary James Roche reflected, "What frightens me most is the climate that has affected so many others who have not come forward... While we have seen, whatever the number is, 25, 50, there are probably a hundred more that we do not see."³² The matter is further complicated and perhaps perpetuated by the former administration's seeming unwillingness to recognize and deal with the reports that were brought to their attention. On March 10, 2003, *Time* reported that over the past seven years the Air Force administration only formally investigated twenty reports of sexual assault; of these, eight cadets were dismissed without a court martial, and the one cadet who was court-martialed for rape was acquitted.³³ Four days later, the Air Force released its figures, claiming that since 1990 they had disciplined at least twenty male cadets for sexual misconduct, including five cadets who were court-martialed, convicted, and expelled.³⁴ Seven other cadets received reprimands for various "offenses," including one case of forcible sodomy.³⁵

Colorado Senator Wayne Allard, who has been very vocal in his disdain for the Academy's treatment of sexual assaults, doubts the reliability of Air Force proffered statistics.³⁶ The Senator's spokesman, Dick Wadhams, stated that "[w]hile there might have been some prosecutions of rape and sexual assault, we know that many, many cases were either not prosecuted to the fullest extent of the law, were ignored or the victim was punished."³⁷ Early in 2003, twenty-three women, fourteen former cadets and nine currently enrolled, demanded accountability on the part of Academy officials and accused the administration of

²⁹ *Id.*

³⁰ See REPORT, *supra* note 2, at 52.

³¹ *Id.* at 13.

³² *Air Force Investigates Handling of Sex Assault Cases*, *supra* note 6.

³³ Thomas, *supra* note 5. Fullilove observed, "It's the good-ole-boy society... The guy who did this to me knew nothing would happen to him." *Id.* The Air Force has acknowledged that they permitted a total of eighteen cadets accused of sex crimes between 1993 and 2002 to graduate from the Academy. *Sixteen Accused Academy Graduates on Active Duty*, THE MILWAUKEE JOURNAL SENTINEL, Oct. 5, 2003, at 11A, available at 2003 WL 58661998.

³⁴ Lee Hockstader, *20 Air Force Cadets Punished for Sex Offenses Since 1990*, THE WASHINGTON POST, Mar. 15, 2003, at A02, available at 2003 WL 15466335. One of the four court-martialed cadets was convicted of rape and received the maximum four-year sentence. *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* Wadhams stated that thirty-five women had contacted the Senator to discuss unreported sexual assaults against them while at the Academy;

failure to adequately investigate their complaints of sexual misconduct.³⁸ The women stated that cadets were actively discouraged from reporting such crimes and were retaliated against when they did.³⁹ The media spotlight on the Academy administration seems to have opened the door to increased reporting, as well as a greater responsibility on the part of the administration to fully investigate each case. Between April and August 2003, twelve more sexual assaults were reported, and ten were still being investigated as of November 2003.⁴⁰ In this way, the media has functioned as a vehicle for public awareness and scrutiny, and has empowered cadets to come forward with the knowledge that the administration will be held accountable, if not by the military, then by civilian forces.

This intense public scrutiny, though positive in some respects, has not proven to reduce the frequency of assaults at the Academy, or have any effect on the misogynistic culture which pervades the Academy. Jennifer Bier, director of a civilian rape counseling center in Colorado Springs, noted:

I think it is disheartening that in light of all of the publicity and all of the briefings and the scrutiny, that still at least 10 people that we know of have experienced some type of violation while at the school. And that is a tragedy... This goes to show that this problem is deeply embedded, and it's not going to get better overnight. It's something that they're going to have to diligently and passionately fight for a long period of time.⁴¹

In response to growing public outrage stemming from media coverage of the crisis, Congress directed Defense Secretary Donald Rumsfeld to appoint a panel of private citizens to investigate the policies and practices of the Air Force Academy which threatened the safety of female cadets.⁴² The panel's report, published on September 22, 2003, constitutes the most comprehensive consideration of the Academy administration's treatment of reported incidents of sexual assault, as well as a systematic examination of the culture that discouraged so many others from reporting.⁴³ The panel detailed various failed administrative efforts over the past ten years to accommodate female cadets in reporting sexual misconduct and to eliminate the culture that permits it to occur, concluding that, "[t]he regular turnover of Air Force and Academy leadership, together with inconsistent command supervision and a lack of meaningful and effective external oversight, undermined efforts to alter the culture of the Academy."⁴⁴ However, Air Force

³⁸ See Thomas, *supra* note 5.

³⁹ *Id.*

⁴⁰ *12 New Sex Abuse Cases at Air Force Academy*, L.A. TIMES, Oct. 25, 2003, at A17, available at 2003 WL 2443672; Erin Emery, *More AFA Assaults Reported*, DENVER POST, Oct. 24, 2003, at B.01, available at 2003 WL 5524111.

⁴¹ Emery, *supra* note 40.

⁴² See REPORT, *supra* note 2, at i. The panel was established on April 16, 2003, and was composed of seven experts in the fields of United States military academies, behavioral and psychological sciences, and sexual assault victims. The legislation creating this panel is Pub. L. No. 108-11, 117 Stat. 559 (2003), and can also be found in Appendix A of the panel's report.

⁴³ See *id.*

⁴⁴ *Id.* at 1; see also -app. H. Between 1993 and 2003, the Air Force Academy has had six different

Academy officials were aware that a sexual assault problem existed at least as early as 1993, and some took substantial action to remedy it.⁴⁵ Nevertheless, frequent changes in administration personnel prohibited any one program from having a sustained effect.⁴⁶

One female cadet managed to evade the Academy administration's apathy by successfully bringing her case to the United States District Court for the District of Colorado.⁴⁷ In *Saum v. Widnall*, 912 F. Supp. 1384 (D. Colo. 1996), Elizabeth Saum filed suit against the Air Force, as well as against certain Air Force Academy officials and cadets, for abuse and sexual harassment suffered while at the Academy. She drew particular attention to the Academy's mandatory survival training program, during which she claimed she was subjected to the most egregious treatment.⁴⁸ The Air Force promptly filed a motion to dismiss the suit for lack of subject matter jurisdiction and added that entertaining the plaintiff's claims would inevitably involve the court in issues regarding military training, an area the court has traditionally been unwilling to invade.⁴⁹ The judge denied the motion, however, ruling that the district court did have subject matter jurisdiction to hear this case pursuant to the plaintiff's amended complaint, which detailed many instances of defendants engaging in serious violations of the plaintiff's constitutional rights.⁵⁰ Still, the court was reluctant to enter into substantive decision-making with regard to military matters and held that only some of the plaintiff's claims were reviewable by civilian courts:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.⁵¹

superintendents and six different Academy commandants of cadets; the Air Force at large mirrors this turnover rate with official positions.

⁴⁵ See *id.* at 1.

⁴⁶ See *id.* at 1.

⁴⁷ See *Saum*, 912 F. Supp. at 1384.

⁴⁸ See *id.* at 1386. During the training program, known as The Survival Escape Resistance and Evasion Training (SERE), Ms. Saum reported the abuses against her, but no action was taken to punish those responsible for the infractions. *Id.*

⁴⁹ See *id.* at 1387. See also *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Lindenau v. Alexander et al.*, 663 F.2d 68 (10th Cir. 1981); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

⁵⁰ *Saum*, 912 F. Supp. at 1390.

⁵¹ *Id.* at 1391 (quoting *Gilligan*, 413 U.S. at 10). This can be juxtaposed with the District of Columbia Circuit Court's opinion in *Steffan v. Aspin*, 8 F.3d 57, 62 (D.C. Cir. 1993) (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973):

When the military fails to accord individuals the equal protection of the laws, it treads upon an area of expertise that has long been conceded to the courts. In deciding such cases, therefore, courts should not stray from the boundaries of ordinary equal protection review. For example, faced with a claim that the military discriminates against African-Americans or women, the court should not fail to apply strict or intermediate scrutiny to the military's action.

The court distinguished the plaintiff's claims from more technical ones brought and rejected in prior cases by ruling that Saum's claims involved alleged wrongs to her personally (sexual harassment and gender discrimination) as opposed to matters involving technical military training, operations, or weaponry.⁵² Where substantial constitutional rights of military personnel are jeopardized, or where the military fails to abide by statutes or its own regulations, the district court held it was appropriate to intervene, contrary to its stated policy of non-interference in military matters.⁵³ Reiterating the two-part test delineated in *Mindes v. Seaman*,⁵⁴ the Colorado district court said where there has been a constitutional violation, and the plaintiff has exhausted all possible remedies within the military system, then she may bring her claim in civilian court. To ascertain justiciability, the court will "weigh the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision."⁵⁵ The burden is on the plaintiff to prove that if judicial review were declined, her potential injury would outweigh any interference with the military's essential functioning, and therefore the case should be heard in a civilian court.⁵⁶

In *Saum*, the plaintiff satisfied her burden by asserting non-frivolous constitutional claims, and by proving she had sought remedial assistance from the Secretary of the Air Force, and that any further efforts within the Academy's administration would have been futile.⁵⁷ The court recognized that Saum's constitutional rights were being grossly violated, and that no one within the military system was willing or able to curb this behavior that the Air Force Academy administration seemed to condone, so it authorized interference.⁵⁸ Quoting the District of Columbia Circuit in *Steffan v. Aspin*,⁵⁹ the court warned, "there is no 'military exception' to the Constitution."⁶⁰ In the years to come, *Saum* could serve as a beacon to the hundreds of young women claiming to be the victims of sexual

⁵² *Saum*, 912 F. Supp. at 1391.

⁵³ *See id.* The court enumerated matters which may and may not be reviewed by civilian courts with regard to alleged military wrongdoing:

[F]ederal courts may review matters of internal military affairs (1) to determine whether military officials "acted outside the scope of [their] powers" or (2) "violat[ed] their own regulations"; (3) to "question[] the constitutionality" of statutes, executive orders, or regulations relating to the military; (4) to review court-martial convictions alleged to involve errors of "constitutional proportions" as well as (5) selective service induction procedures. . . . Review is not permitted to "second guess judgments requiring military expertise," "substitute court orders for discretionary military decisions," or where review "might stultify the military in the performance of its vital mission." *Id.* (citing *Mindes*, 453 F.2d at 199-201).

⁵⁴ 453 F.2d 197 (5th Cir. 1971).

⁵⁵ *Saum*, 912 F. Supp. at 1392.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ 8 F.3d 57, 62 (D.C. Cir. 1993).

⁶⁰ *Id.*

assault at the Air Force Academy who were unable to obtain recourse within the military system. As the court recognized, the Air Force's administration has failed to accommodate the fundamental constitutional rights of their young women; thus, the matter has grown beyond the purview of the military and has been elevated to a matter of grave public concern, reviewable by the federal courts.⁶¹

II. RECENT HISTORICAL CONTEXT

Over the past ten years, the Air Force Academy administration has put into effect but failed to follow through on numerous efforts to curb the widespread sexual misconduct pervading the Academy's culture. The reasons for the lack of enforcement of policies are as yet unclear, but evidence a lack of effective oversight prompted by an administration that would rather not face and remedy the complex cultural biases against women in the military. The implementation of various programs proves that the Academy knew there was a widespread problem of assault and harassment, which makes its failure to respond even more glaring. In 1993, an incident of sexual assault near the Academy gymnasium engendered the concern of the superintendent at the time, Brigadier General Bradley C. Hosmer, who met with female cadets and discovered that there was a serious problem with sexual misconduct at the Academy.⁶² In response, General Hosmer instituted the Academy's sexual assault hotline and established an informal policy of victim confidentiality and amnesty to encourage reporting.⁶³ In 1994, the General Accounting Office reported levels of sexual harassment at each of the Service Academies that "portended a serious threat to the mission of the Academies to educate and train future military officers."⁶⁴ General Hosmer retired.⁶⁵ The following year, the General Accounting Office's follow-up report found that 78% of female cadets at the Air Force Academy who responded to their survey suffered harassment on a recurring basis.⁶⁶

In 1996, Air Force headquarters cast doubt on the confidentiality policy set forth by General Hosmer, since many assaults were apparently brought to the attention of counselors but went unreported, and many reports were allegedly delayed to the point that the procedure was said to interfere with the timely investigation and prosecution of assaults.⁶⁷ In a memorandum striking down the existing policy, the Chief of the Administrative Law Branch, General Law

⁶¹ See *Saum*, 912 F. Supp. at 1384.

⁶² See REPORT, *supra* note 2, at 14.

⁶³ See *id.* at 14, 15. Air Force Headquarters was not involved in the institution of these policies; General Hosmer did inform them of the changes and they never voiced any opposition. *Id.*

⁶⁴ *Id.* at 15.

⁶⁵ *Id.*

⁶⁶ REPORT, *supra* note 2, at 16. In response to the 1995 survey, the Academy set up several committees, including the Social Climate Process Action Team, the Sexual Assault Services Branch of the Cadet Counseling and Leadership Development Center, and the Sexual Assault Services Committee, to study sexual assault issues at the Academy. *Id.*

⁶⁷ See REPORT, *supra* note 2, at 17.

Division, Air Force Judge Advocate General's Office stated, "While the Academy's motive may be good, commanders and other responsible Air Force officials should never be permitted, expected, or encouraged to turn a blind eye to criminal activity, nor should they have to straddle a fence wondering which 'crimes' they should report and which they should keep secret."⁶⁸ Less than a year later, the Academy wrote to Air Force Headquarters requesting a waiver from the mandatory reporting requirements for Academy medical personnel, believing this would encourage the reporting of sexual assaults by respecting victim privacy.⁶⁹ The request was granted.⁷⁰ In other words, between 1993 and 1997, the four-year span of a typical cadet in the Academy, the policy of the Air Force Academy changed from no confidentiality for victims reporting sex crimes, to confidentiality under Hosmer, to no confidentiality under the Judge Advocate General, to confidentiality under the waiver.

In the years that followed, this same lack of adherence to any set policy made reform at the Academy all but impossible. Academy officials replaced one another regularly, as is customary in the military, and attempts to deal with this very complex cultural crisis by implementing changes during each short tenure of leadership repeatedly proved ineffectual.⁷¹ By the time General S. Taco Gilbert III became Commandant of Cadets in 2001, he reported that the Academy's program set up to deal with sexual assaults was "broken."⁷² Although Gilbert was aware of the problem, he failed to take appropriate steps to remedy it, and indeed failed to take any responsibility with regard to the sexual assaults, although it was specifically part of the duties of his position to do so.⁷³

⁶⁸ *Id.* at 19 (citing Memorandum from Colonel Jarrise J. Sanborn, USAF, Chief, Administrative Law Branch, to Chief of the Military Justice Division (JASM), General Law Division (AF/JA) (Apr. 22, 1996)).

⁶⁹ REPORT, *supra* note 2, at 22-23.

⁷⁰ *Id.* The request was granted for a one-year trial period, under the presumption that many victimized cadets would not use counseling services unless they were assured that their assault would not become common knowledge at the Academy. *Id.* The Academy never applied for a renewal of the waiver after the one-year deadline, but the administration continued to operate as if the waiver were in place until 2003. *Id.*

⁷¹ See *id.* at 19-30, app. J. In 1997, the Alcohol Use Process Action Team was initiated, and the Social Climate Process Action Team, initiated in 1995, ceased operations. *Id.* In 1998 and 1999, a Character Development Review Panel was commissioned, and the Academy determined that its Social Climate surveys were "statistically invalid." REPORT, *supra* note 2, at 19-30. In spite of this finding, no changes were made to the surveys and the surveys continued to be administered in the same manner in subsequent years. *Id.* In 2000, a Sexual Assault Policy Working Group was established to investigate the Academy's reporting policies. *Id.* In 2002, character development training was added to the Air Force Academy curriculum. *Id.* In 2003, another Working Group was commissioned, the Agenda for Change was released, many of the Academy's top officials were replaced. *Id.* The Working Group, led by Air Force General Counsel Mary L. Walker, submitted its own report, called *The Report of the Working Group Concerning Deterrence of and Response to Incidents of Sexual Assault at the U.S. Air Force Academy*. *Id.* The Department of Defense created its own investigatory panel in 2003, which published another report, discussed *supra* note 42. The Working Group Report differed from the later panel's report primarily in that it did not place any responsibility on Air Force Headquarters for the failures of the Academy's policies.

⁷² *Id.* at 30 (citing Interview by the Working Group with General Gilbert in Colorado Springs, CO (Mar. 21, 2003)).

⁷³ See REPORT, *supra* note 2, at 31.

In April 2003, it was Air Force Secretary Roche, rather than a school official, who finally responded to what had become a media-driven public outcry over this crisis by announcing the retirement of the superintendent of the Academy and reassignment of three other Academy officials, including Gilbert.⁷⁴ Roche also published the "Agenda for Change," a planned effort to effectuate change in the policies and culture of the Air Force Academy giving rise to sexual misconduct.⁷⁵ In a public address shortly after he was appointed, the new superintendent, Lieutenant General John Rosa, Jr., "declared war" on sexual harassment and sexual assault at the Academy.⁷⁶ Similarly, the chairman of the board of the Academy claimed the entire board was committed to engaging in a meaningful oversight of the changes implemented by this new administration to help combat the crisis.⁷⁷

In a December 2003 statement responding to increasing media-driven public outrage over the sexual assaults, Air Force Academy officials cited over 140 changes they had already begun to implement, including the institution of a new sexual assault response team, a reorganization of the manner in which cadets are assigned to dormitory rooms so that females would be grouped in clusters, increased enforcement against underage drinking, and new, restructured leadership.⁷⁸ The Basic Cadet Training system was modified from one "that was based on yelling and in-your-face intimidation to one that's equally challenging, but focuses on leadership, problem solving and education, while preserving human dignity."⁷⁹ The Academy's disciplinary policies were also undergoing a shift from the demerit system with weekend room restrictions and hours of marching, to a system in which all infractions are dealt with under the Uniform Code of Military Justice, subject to the same punishments as if the cadets were in the military at large.⁸⁰ The Academy summarized their actions and the scrutiny they faced in 2003:

We have been reviewed and investigated by no fewer than five panels and teams ranging from the Air Force and Dept. of Defense Inspectors General to Congressional committees and panels, to the General Accounting Office. We are in the process of implementing more than 140 recommended

⁷⁴ See *id.* at 34. The superintendent was Lieutenant General John R. Dallager. The others reassigned were the Vice Commandant, Colonel Robert D. Eskridge and Training Wing Commander, Colonel Laurie S. Slavec.

⁷⁵ See *id.* at 34; UNITED STATES AIR FORCE ACADEMY: AGENDA FOR CHANGE (2003).

⁷⁶ *Regaining Control at Air Force Academy*, ROCKY MOUNTAIN NEWS, Oct. 2, 2003, at 43A, available at 2003 WL 6376941.

⁷⁷ *Gilmore Promises Real Oversight of Academy*, DAILY PRESS, Oct. 13, 2003, at A8, available at 2003 WL 64584867. Although the board is conceivably a steadier force in the life of the school as they generally serve for longer terms than the Academy's administrators, one wonders how a group such as this could really provide effective oversight since the nature of the board members' positions are essentially hands-off.

⁷⁸ Statement from The Air Force Academy to *The Oprah Winfrey Show* (2003), at http://www.oprah.com/tows/pastshows/200312/tows_past_20031208_e.jhtml.

⁷⁹ *Id.*

⁸⁰ *Id.*

actions and programs that resulted from those myriad reviews.⁸¹

All of these assurances are nonetheless troubling when viewed in the context of a history rich in the sheer quantity of remedial programs implemented at the Academy, but faced time and time again with a situation which is not getting any better. Although the Agenda for Change remedies many of the inadequacies in the system the Academy had in place for dealing with sexual assaults, there is the danger that this hopeful plan will follow in the footsteps of its predecessors and fail because of ineffective enforcement, or because it fails to remedy the fundamental inadequacies in the culture.

In theory, the danger of another failure on the part of the Air Force Academy administration is mitigated by the panel's report, which can serve to educate top Department of Defense officials and the public alike about the prevalence and persistence of sexual assault in the Academy, and may have some insight as to how and why the crisis escalated to such an extent.⁸² The panel is uncompromising in its examination of the flaws in the system, implicating major Academy officials and even Air Force Headquarters in failing to address a problem they must have known about, but stifled in the interests of protecting themselves from unwanted negative attention.⁸³ The published report contains a list of twenty-one recommendations, many of which have already been adopted by the Air Force.⁸⁴ These recommendations include new management and directorial plans to provide better supervision and oversight, increased training in character development, improvements in the Academy's organizational culture, and steps to ensure a safe and effective response to the reporting of and investigation into sexual assaults, including having licensed psychologists, attorneys and medical professionals available for counseling and providing amnesty for victims.⁸⁵

III. MILITARY CULTURE AS A BREEDING GROUND FOR SEXUAL MISCONDUCT

As the investigative panel's report suggests, the complexities of the Air Force Academy's sexual assault crisis necessitate an examination into the culture that gives rise to this widespread mistreatment of women. In March 2003, Roche admitted to a Senate panel that the Academy's sexual assault problem essentially revolved around the overall climate of the Academy, which he acknowledged would take a long time to change since it would involve changing the way people at the Academy think.⁸⁶ This theory was brought to the attention of Air Force

⁸¹ *Id.*

⁸² Kelly Lunnie, *Air Force Academy Panel Pushes for Investigation of Leaders*, GOV'T EXECUTIVE MAG., Sept. 22, 2003, available at <http://www.govexec.com/news>.

⁸³ *See id.*

⁸⁴ *See* REPORT, *supra* note 2, at 101.

⁸⁵ *See id.* at 101-05.

⁸⁶ Tom Kenworthy & Patrick O'Driscoll, *Climate Has to Change, Air Force Leader Says*, USA

officials as early as 1996, when Colonel Hall asserted that “the problem of sexual assault and victimization continues at the Academy in large measure due to a cultural or institutional value system. This climate promotes silence, discourages victims from obtaining help, and increases the victim’s fear of reprisal.”⁸⁷ The administration’s failure to take effective action until late 2002, despite decades of warning signs, coupled with repeated reports of Academy administrators discouraging, intimidating, and punishing cadets who came forward with allegations of sexual abuse, indicate a refusal to address or even acknowledge a problem Academy officials must have known existed.⁸⁸

Numerous examples of misogynism demonstrate an Academy culture that has condoned and at times even perpetuated a belief in male superiority.⁸⁹ The slogan “LCWB” was proudly adorned by the Air Force Academy’s last all-male class in 1979; it is commonly understood to have meant “Last Class with Balls,” or “Last Class without Bitches.”⁹⁰ In August 2003, an Academy alumnus purchased a full-page advertisement in the Colorado Springs daily newspaper entitled “Bring Me Men”, and quoted biblical passages in an effort to prove that women should not be in the military.⁹¹ In spite of the fact that women have been permitted to attend the Academy since 1976, the “Bring Me Men” sign of years past was prominently displayed on the school grounds until March 2003.⁹² The type of leadership that allows this behavior to go on not only fails to recognize and protect the needs of its female cadets, but also fuels a military culture which denigrates women on numerous levels. Additionally, because of the military’s special status as an institution subject to its own internal judicial and regulatory oversight, Academy administrators have until recently suffered no repercussions for tolerating these inequities in the system. Further study into the Academy’s culture illuminates the inherent dangers in a social system free of traditional legal protections for minorities. The public attention to this widespread cultural bias eventually led to civilian legislators becoming involved in an effort to pressure administrators and the military at large into seriously addressing these problems and putting an end to the assaults.

The Academy’s Social Climate Surveys exemplify the Academy’s failure to respond to cultural inequities within the institution. Beginning in 1996, the Academy distributed Social Climate Surveys with questions relating to sexual assault as a means of measuring the cultural climate for women at the Academy.⁹³

TODAY, Mar. 13, 2003, at A.04, available at 2003 WL 5306843.

⁸⁷ REPORT, *supra* note 2, at 20.

⁸⁸ See Herdy & Moffeit, *Military’s Response to Rapes, Domestic Abuse Falls Short*, *supra* note 17; see also Foster, *supra* note 22.

⁸⁹ See Dick Foster, *AFA Women Still Dodge Flak; Resentment toward Female Cadets Viewed as Ingrained in Culture*, ROCKY MOUNTAIN NEWS, Jan. 14, 2004, at 12A, available at 2004 WL 58485111.

⁹⁰ See *id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See REPORT, *supra* note 2, at 57.

These surveys were determined to be deficient based on poor construction and administration soon after they were constructed, but the Academy continued to administer them without making any changes in subsequent years.⁹⁴ In a 2002 survey, 26.9% of male cadets indicated that they did not believe women belonged at the Air Force Academy.⁹⁵ Other sources report that this number is much higher, and that most male cadets answered the survey according to what they believed their superior officers wanted to see. The actual percentage of opposition may be closer to between 60 and 80%.⁹⁶

This pervasive animosity becomes especially threatening when one considers that the student body is organized into a cadet authority structure known as the "Fourth Class System," in which each new cadet class is placed under the supervisory control and power of the older classes.⁹⁷ Although the General Accounting Office recommended that the Department of Defense change the power structure among cadets because of its conduciveness to abuse of authority, the Fourth Class System at the Air Force Academy was upheld, in spite of the fact changes to the hierarchical cadet systems at both West Point and the Naval Academy resulted in corresponding drops in incidents of hazing.⁹⁸ In 2003, Roche targeted this system as contributing to the sexual assault problem because cadets were placing loyalty to their squadron or class above the Academy's Honor Code.⁹⁹ Secretary Roche indicated that efforts were being made to encourage cadets to conceive of the Air Force as a whole, which would theoretically promote values such as integrity and a standard of excellence rather than personal loyalties.¹⁰⁰

⁹⁴ *Id.* at 57.

⁹⁵ *Id.* at 59. Comments accompanying the 2002 survey included, "[E]ven with women in the Armed Forces, they should not be at the military academies," and "[W]omen are worthless and should be taken away from USAFA." *Id.*

⁹⁶ See Mike Rosen, *Clip Wings of AFA Coeds*, ROCKY MOUNTAIN NEWS, Oct. 17, 2003, at 51A, available at 2003 WL 6378368. Because of the danger cadets feel in reporting the truth in these surveys, all of the statistics the surveys create are called into question. This must be addressed in order to obtain an accurate understanding of the pervasiveness of this cultural gender war.

⁹⁷ See REPORT, *supra* note 2, at 68-70. This system has also been criticized for promoting loyalty to peers above adherence to the Academy's Honor Code.

⁹⁸ *Id.* at 69. Informally, freshmen cadets at the Academy are referred to as "doolies," which is the Greek word for "slave." *Id.* They are literally at the mercy of the other three classes of cadets under this system, forced to obey other students at the risk of being punished. *Id.* Freshmen at the Academy are forbidden from using telephones, which strikes an ironic chord considering the Academy's recent institution of a sexual assault crisis hotline. *Id.* Furthermore, freshmen cadets are limited to seven responses when speaking to upperclassmen. See *The Oprah Winfrey Show: Air Force Academy Rape Scandal*, *supra* note 3.

⁹⁹ See Kenworthy & O'Driscoll, *supra* note 86; see also REPORT, *supra* note 2, at 62-65. The Honor Code and the Air Force's "Core Values" represent the character guiding policies of the Academy. REPORT, *supra* note 2, at 62. The Honor Code simply states that no cadet "will lie, steal, or cheat, nor tolerate among [them] anyone who does." *Id.* The Core Values require "Integrity First, Service Before Self, and Excellence in All We Do." *Id.* This concept of "Service Before Self" resonates with many sexual assault victims who are told, or who believe independently, that acknowledging their victimization would be an impediment to the Air Force's effectiveness. See *The Oprah Winfrey Show: Air Force Academy Rape Scandal*, *supra* note 3.

¹⁰⁰ See Kenworthy & O'Driscoll, *supra* note 86.

However, accounts of heinous sexual assaults involving young female soldiers are by no means limited to the academies. Sexual misconduct pervades all branches of the Armed Services where military power structures inevitably create an oppressed class subject to the authority of another.¹⁰¹ *U.S. v. Simpson*¹⁰² involved two defendants who were charged with rape and many other crimes that took place during an Army training program.¹⁰³ The court recognized that the military's unique command structure makes trainees particularly vulnerable to such crimes, and permitted a broader definition of "force" to be used in the jury instructions instead of the definition provided in the military's model rules.¹⁰⁴ Specifically, the court required a showing of force for the crime of rape, but explained that this may be satisfied by proof of constructive force.¹⁰⁵ Constructive force can take the form of the use or abuse of military authority which creates a reasonable belief that resistance would be futile or that the victim would suffer physical injury if she refused.¹⁰⁶ This broader definition could conceivably accommodate many of the young cadets in the Academy's Fourth Class System who suffered sexual assault at the hands of upperclassmen.

An important factor to solving the problem of the mistreatment of women at the Air Force Academy and in the military is to allow them the same opportunities as male soldiers to advance beyond the oppressed class, and to not automatically relegate them to lesser positions on account of an unspoken policy of gender subjugation.¹⁰⁷ This is a huge hurdle for a military culture which has traditionally been completely infused with masculine ideals and female stereotypes.¹⁰⁸ The difficulty in successfully integrating women into the military is intensified when many men in the system fundamentally believe that women should not be there.¹⁰⁹ Opponents of women in the military assert that sexual misconduct is unavoidable regardless of changing policies because the nature of the military as an institution

¹⁰¹ See Herdy & Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short*, *supra* note 22.

¹⁰² 58 M.J. 368 (U.S. Armed Forces 2003).

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 379.

¹⁰⁵ *See id.* at 377.

¹⁰⁶ *Id.*

¹⁰⁷ See REPORT, *supra* note 2, at 19. Women face a serious obstacle immediately upon entering the military in that they are literally stripped of their traditional gender role, suddenly becoming "female soldiers" rather than "women". *Id.* Men, on the other hand, often find the opportunity to affirm their sense of masculine identity when they enter the military. *Id.* This identification process sets female cadets at a disadvantage from the moment they enter the Academy and is reinforced in other ways throughout their terms in the military. *Id.*

¹⁰⁸ It is difficult to escape the pervasiveness of the gender schism in the military as it is so deeply engrained in the terminology and ideology of the Armed Services. One cadet relates: "When we go on runs, we would say jodies, which are marching chants to keep you in step. And they're very degrading to females, they're very disgusting and grotesque and should never be said. Things like that sort of ingrain in your brain that women are disposable." See *The Oprah Winfrey Show: Air Force Academy Rape Scandal*, *supra* note 3. For an in-depth socio-scientific examination of gender identity in the military, see generally Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFF. L. REV. 51 (2001).

¹⁰⁹ See Rosen, *supra* note 86.

necessarily values aggression and masculinity in situations where young men are under tremendous stress and confined in close quarters with women.¹¹⁰ They believe the best and most obvious solution to the sexual assault problem is to exclude women from the Academy and from the military:

Women who want to serve our country in that capacity are to be commended for their patriotism. But this isn't about them and it isn't about equal employment opportunities; it's about war, national defense and the common good. The military is different from civilian society, as it must be. It's not a democracy, you can't quit when you want, say what you want or do what you want. Conventional anti-discrimination laws in areas like age, physical ability and gender don't apply.¹¹¹

Feminists have been split over the broad and complex issue of women in combat, but proponents insist it is a fundamental right of all United States citizens to fight in defense of their liberties.¹¹² Still, if women are denied equal opportunities and protection within the military system and are actively suppressed from positions of leadership, these liberties grow increasingly transparent. This is the plight of many female cadets who are sexually abused in the Air Force Academy, who enter with idealism and high hopes, but are stifled through a system that is unable or unwilling to accommodate them. This subordination often persists into their time of active service, if not through sexual misconduct, then through various other methods of discriminatory treatment. In spite of this, it is clear that women soldiers have already become a significant factor of the Armed Services, and their participation has boosted the force of the military in this country. In conjunction with this, the Academy reported the highest number of female applicants ever for its class of 2008; nearly 3,000 young women are seeking admission, a 40% increase over past years in a year with the worst scandal in the Academy's history.¹¹³ Academy officials said in an official statement:

We attribute this [increase in female applicants] to several possibilities, including a sense of trust and confidence that the new leadership team is on the right path toward resolving our problems—to assurances that the Academy is a safe place to live and learn—to renewed patriotism and a desire to serve the nation brought on by the war in Iraq—to the fact that the U.S. Air Force and the Air Force Academy offer leadership, educational and character-building opportunities to women and men that are not found in many other organizations.¹¹⁴

¹¹⁰ See *id.* "Ironically, but not surprisingly, the same young men who might be opposed to the presence of women at the Academy as a matter of military principle are unable to resist their charms as a matter of libido."

¹¹¹ *Id.* But see Brief of Amici Curiae, *U.S. v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941) (where numerous pseudo-scientific theories regarding physical and intellectual differences between men and women are dispelled).

¹¹² See Blythe Leszky, *Feminism on the Front Lines*, 14 HASTINGS WOMEN'S L.J. 133, 136 (2003).

¹¹³ See Statement from The Air Force Academy to *The Oprah Winfrey Show*, *supra* note 78.

¹¹⁴ *Id.*

Based on the current activity of the U.S. military in Iraq and elsewhere, eliminating women from the military entirely is not a viable option; therefore, the culture must change to provide for their protection.¹¹⁵

In spite of its historical reluctance to address the problem, some experts have posited that the Academy is a unique forum that may be able to effectuate a cultural transformation unlike many other institutions: "The Air Force Academy is a hierarchical, tightly disciplined institution that could dictate and enforce such changes."¹¹⁶ In order to do this, those enacting reforms must understand exactly which inequities in the military Academy's laws and policies are contributing to this problem, and how the rules should change to best protect female cadets while still maintaining the integrity and fundamental purpose of the military system as a whole.

IV. LEGAL, ANALYSIS, POLICY ISSUES, AND PROPOSED REFORMS

Although it is clear that the Air Force Academy administration has failed to adequately address the needs of victims of sexual assault, it still remains to be answered whether this injustice is attributable to the administration's failure to enforce the military laws in place, whether it is due to the inadequacies of the laws themselves, or a combination of both. One proposed reform that would theoretically remedy either deficiency is the judicial curtailment of the powers of military commanders.¹¹⁷

A. Concentration of Power in Air Force Commanders

In the face of widespread criticism, the Armed Forces and Congress still permit commanders very broad discretion in handling disciplinary matters.¹¹⁸ In contrast to the civilian system where prosecutors make decisions about whether to try accused criminals, under the Uniform Code of Military Justice, commanders have complete discretion to choose which soldiers will be subject to criminal punishment *as well as* which people will sit on the panel to judge those same soldiers.¹¹⁹ "It's called command discretion, and it's a total conflict of interest....

¹¹⁵ See Rhode, *supra* note 3.

¹¹⁶ Kenworthy & O'Driscoll, *supra* note 86.

¹¹⁷ See Herdy & Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short*, *supra* note 22. In 2001, an independent review board called the Cox Commission examined the Code of Military Justice and found that commanders were granted too much discretion. *Id.* Pentagon officials failed to implement any changes in response. *Id.* Canadian and Great Britain's courts have both taken steps to limit the discretion of commanders in matters of military justice, but American courts have been very resistant to implement such changes, even though such power clearly evidences potential conflicts of interest. *Id.*

¹¹⁸ See *id.*; U.S. v. Kelly, 40 M.J. 558, 570 (Navy-Marine Corps Court of Mil. Rev. 1994).

¹¹⁹ See Herdy & Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short*, *supra* note 22. Furthermore, if the accused is convicted, this jury, unlike in the civilian system, decides what punishment is appropriate under the circumstances. See also Gail Diane Cox, *A "Good Soldier" Stands Accused of Assault: A Night of Drinking Leads to Charges of Sexual Assault, But Was the Act*

The commander can choose zero punishment all the way to court-martial, and he can ask himself, 'Is this a good soldier?' And he can ask, 'What is our financial investment in this soldier?'"¹²⁰ It appears to have become common practice for favored male soldiers to receive disciplinary hearings as opposed to trials.¹²¹ This concentration of power differentiates the United States military academies from civilian systems of justice and should be reconsidered, since it may be at least partly responsible for the failures of the administration to handle sexual assault claims effectively.¹²² One response to this flaw is the formation of an Academy Response Team ("ART") to assist and empower cadets in the initiation of their sexual assault case.¹²³

B. Outdated Statutes, Ambiguous Case Law

Congress has not fully assessed the military justice system since the 1970s, when women were first introduced into the military academies. The Uniform Code of Military Justice has often been criticized as antiquated and conservative. For instance, military officials continue to prosecute for adultery in court-martials long after most civilian courts ceased such prosecutions.¹²⁴ The absence of modern statutory authority has led to a justice system heavily reliant on case law, which has proven inadequate because of the failure of the military courts to adopt generally applicable uniform standards. When an independent panel reviewed the military laws in 2001, they called for reforms to the rape statute through a broader definition of coercion to accommodate civilian notions of the force requirement of rape; i.e. an upperclassman using his authority to pressure a new cadet into sex would

Consensual?, 17 NAT'L L.J. 43, June 26, 1995, at A12, col. 1.

¹²⁰ Herdy & Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short*, *supra* note 22. Juries are also under the commander's control in this system, and they face the threat of losing their careers if they vote counter to the commander's wishes. *Id.*

¹²¹ See Moffeit & Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, *supra* note 23 (detailing several cases of rape in military academies where the accused went untried or received only minimal punishment, while the alleged victims were pushed away, punished, and told they were crazy). Although the Air Force has only produced limited data regarding their treatment of sexual assault cases, the Army published information to the effect that nearly 5,000 cases involving male soldiers accused of sexual misconduct, including rape, were handled administratively. *Id.* Less than half this number was actually sent to court-martial. *Id.* Significantly, there are many gaps in these statistics, with thousands of cases unaccounted for in military records. *Id.*

¹²² See *id.* Air Force officials have strongly denied this: "We have found the [Uniform Code of Military Justice] is perfectly capable of dealing with any kind of rape allegation... I am completely confident that my military law lets me get at any conduct that's going to arise." *Id.*

¹²³ See REPORT, *supra* note 2, at 92. This proposal was part of the Agenda for Change, a new set of policies aimed at curbing the sexual assault crisis in the Air Force Academy, which was published in March 2003.

¹²⁴ Moffeit & Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, *supra* note 23 at 4. See Quince Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternalization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177 (1999).

constitute coercion under the broader definition.¹²⁵ The Air Force Military Justice Division denied the need for revisions to the rape statute, claiming military case law has already provided for a broad interpretation of coercion.¹²⁶ Indeed, the United States Court of Appeals for the Armed Forces held in *U.S. v. Cauley* that the totality of the circumstances of any given case must be considered in determining whether force or lack of consent occurred in an alleged rape.¹²⁷ Still, when changes occur in the law due to judicial interpretations that make the original statutory language incomplete or vague, codifying those changes can function to eliminate misinterpretations of the law by future parties as well as by military officials who may not keep abreast of the latest case law.¹²⁸ The military's rape shield law, set out in Military Rule of Evidence 412, has also been judicially interpreted to the point that its parameters can only be understood by looking at the rules set out by the many cases decided since its codification in 1978.¹²⁹ As it stands now, the rape shield law is a tangled web of judicially imposed balancing tests and standards.¹³⁰ Because the law fails to exist in a unified form with a clear purpose, it could become merely a set of flimsy procedural obstacles to the admission of evidence in court-martial proceedings.¹³¹ Here too, a Congressional update to the codified laws could serve to unify the legal reasoning into an identifiable standard equally applicable to all future cases.¹³²

Since judicially-created law is at the forefront of the modernization of the military legal system, an examination of current case rulings is necessary to fully understand the present state of controlling law and how it differs from civilian law. One such difference is illuminated in *Feres v. U.S.*, where the Supreme Court held that the Federal Tort Claims Act does not extend to create liabilities for injuries

¹²⁵ See Moffeit & Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, *supra* note 23 at 4..

¹²⁶ See *id.* at 4. Colonel Craig Smith, Chief of the Air Force Military Justice Division, stated: "Force, under our military law, does not have to be just physical force... Force can also mean intimidation or threats... where a victim's resistance would be futile." *Id.* at 4. For an examination of the judicial interpretations of rape in the military system, see generally Major Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F.L. REV. 19 (1996).

¹²⁷ *U.S. v. Cauley*, 58 M.J. 353, 356 (C.A.A.F. 1996) (citing *U.S. v. Webster*, 40 M.J. 384, 386 (C.M.A. 1994); *U.S. v. Palmer*, 33 M.J. 7, 10-11 (C.M.A. 1991); *U.S. v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987); *U.S. v. Bonano-Torres*, 31 M.J. 175, 178-179 (C.M.A. 1990)). For a more recent interpretation, see *U.S. v. Simpson*, 58 M.J. 368, 379 (C.A.A.F. 2003).

¹²⁸ See Moffeit & Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, *supra* note 23.

¹²⁹ See Kevin Smith, *Navigating the Rape Shield Maze An Advocate's Guide to MRE 412*, ARMY LAW. 1, 2 (Oct./Nov. 2002). See also *U.S. v. Stirewalt*, 53 M.J. 582 (C.G. Ct. Crim. App. 2000); *U.S. v. Coates*, 2003 WL 21058262 (N-M. Ct. Crim App. 2003). But see *U.S. v. Banker*, 57 M.J. 699 (A.F. Ct. Crim. App. 2002); *U.S. v. Buenaventura*, 45 M.J. 72 (C.A.A.F. 1996); *U.S. v. Valentin-Nieves*, 57 M.J. 691 (N-M. Ct. Crim. App. 2002).

¹³⁰ See Smith, *supra* note 129, at 2.

¹³¹ See *id.*

¹³² Although adherence to a single rape shield statute does not guarantee more equitable treatment of parties by military tribunals, it would provide a single standard that could stand in the way of judicial evasion of the "Rape Shield Maze". See *id.*

arising out of, or incident to, military service.¹³³ This decision has prevented military rape victims from pursuing tort claims against the government, and its continued existence as precedent is indicative of a system of law that categorizes sexual assaults with all of the other injuries that can befall servicemen and women as part of their military duties.¹³⁴ Moreover, in *Smith v. U.S.*, the Seventh Circuit affirmed the dismissal of a claim for damages ensuing from rape, claiming that they were bound by the *Feres* doctrine.¹³⁵ The court took care to emphasize the importance of addressing sexual assault, particularly in the military, but asserted that they were unable to do so in the context of this case:

When the organizations involved are the Armed Forces of the United States, the victim, in addition to the suffering experienced by all such victims, is deprived of the very special satisfaction that military service to the Country should bring. Tolerance of such behavior also results in a warping of military discipline, a lack of military readiness, and a weakening of national security. Democratic support for military institutions is eroded when citizens do not believe that their children, and those of their neighbors, will be treated with dignity and respect during their period of service.

We hold only that Congress has made it clear that an FTCA [Federal Tort Claims Act] action, in which the service member seeks damages from the United States and necessarily calls into question the management decisions of those who exercise military leadership, is not the appropriate avenue for a wronged service member seeking redress for such a grave wrong.¹³⁶

Another case of interest in studying the military's legal system and its repercussions for victims of sexual assault is *U.S. v. Leak*,¹³⁷ which serves as a contemporary interpretation of the gradations of sexual misconduct under military law. In *Leak*, the alleged victim, known in the record as SPC M, was repeatedly involved in sexual activity with a Small Group Leader while participating in a thirty-day Primary Leadership Development Course in Germany.¹³⁸ SPC M claimed each of the encounters was non-consensual, and that she feared she would be expelled from the program if she did not acquiesce to the wishes of the accused.¹³⁹ The court in *U.S. v. Bradley*, held that "the military relationship... create[d] a unique situation of dominance and control where explicit threats and display of force by the military superior [are] not necessary" for a conviction of

¹³³ 340 U.S. 135 (1950). The Federal Tort Claims Act can be found at 28 U.S.C. § 2671, et seq.

¹³⁴ See Patricia Manson, "Hands Tied," *Court Rejects Army Sexual Assault Suit*, 145 CHI. DAILY L. BULL. 218, Nov. 8, 1999.

¹³⁵ See *Smith v. U.S.*, 196 F.3d 774 (7th Cir. 1999).

¹³⁶ *Id.* at 778. The court implies that Congress could change the law to provide for such claims, but thus far has not. *Id.* The court further states, "It is not our role, at least in the context of an FTCA suit, to pass judgment on the adequacy of that congressional response." *Id.*

¹³⁷ 58 M.J. 869 (A.Ct. Crim. App. 2003).

¹³⁸ See *id.*

¹³⁹ *Id.* at note 11.

rape.¹⁴⁰ This ruling was only one of the factors weighed in the court's consideration of the charges in *Leak*.¹⁴¹ Ultimately, the court decided that the evidence was insufficient to sustain a rape conviction where SPC M was never threatened with bodily injury or harm to her career, and where her comments to the accused during the encounter were construed as un-intimidated.¹⁴² The court ruled this way even though SPC M said "no" several times before intercourse, the accused used force to restrain her by the wrists while trying to remove her clothes, and the two physically "wrestled" until SPC M eventually gave in.¹⁴³ These actions, the court determined, amounted to indecent assault, defined as the "offensive touching of another, however slight."¹⁴⁴ The judge may have been swayed by a procedural presumption under military laws of rape and indecent assault, which state that in a rape case, where the victim does not manifest lack of consent, the court may draw an inference that the victim consented.¹⁴⁵ In contrast, when considering an indecent assault charge, the court may not infer the victim's consent under these circumstances.¹⁴⁶

In interpreting the statutes relevant to *Leak*, the Army Court of Criminal Appeals reveals a military law that is relatively sparse and outdated in its statutes, and more progressive but rather inconsistent in its body of case law.¹⁴⁷ Because the differentiation between the requirements of each charge is primarily defined in case law and not by unequivocal statutory authority, each charge in the case turns on a judicially created and applied balancing test through which the court is empowered to reason its way to the desired outcome. Now that the Air Force Academy's scandal is under governmental (and public) scrutiny, the time is ripe to initiate changes in the statutes to institute a body of military law that accommodates and protects its servicewomen with evenhanded application, and dignity is accorded to victims.

Even with such statutory reform, one cannot escape the notion that the most effective way of handling the Air Force Academy's sexual assault crisis is to prevent the widespread occurrences altogether through legal reforms that can function to change the Academy's culture. The proposed National Defense Authorization Act for Fiscal Year 2004 is such an effort.¹⁴⁸ If passed, the

¹⁴⁰ U.S. v. Bradley, 28 M.J. 197, 200 (C.M.A. 1989).

¹⁴¹ *Leak*, 58 M.J. at 875. Here, the accused was in a position of power, but he was not a part of the alleged victim's platoon. *Id.* All of the incidents occurred while the two were on breaks from classes. *Id.* at 871.

¹⁴² *Id.* at 876. Before the act of sexual intercourse, the accused reached into his desk drawer and retrieved a condom from a box. *Id.* At that time SPC M accused him of "setting her up" and "bringing other females up there". *Id.* The court found these comments to be evidence of SPC M's lack of fear. *Id.* at 872.

¹⁴³ *Id.* at 872. The court considered significant the fact that SPC M resisted at first, but then ceased resisting and became acquiescent. *Id.*

¹⁴⁴ *Id.* at 877 (citing U.S. v. Watson, 31 M.J. 49, 53 (C.M.A. 1990)).

¹⁴⁵ *Leak*, 58 M.J. at note 13 (citing *Watson*, 31 M.J. at 52-53).

¹⁴⁶ *Id.*

¹⁴⁷ See generally *id.*

¹⁴⁸ See REPORT, *supra* note 2, at 50.

legislation would require an annual report detailing sexual assault statistics, a review of the Academy's policies implemented to remedy the sexual assault crisis, and results of the cadet survey.¹⁴⁹ The report would be distributed to the Department of Defense, the Air Force Academy's Board of Visitors, and the Committees on Armed Services as a means of securing external oversight of the Academy administration's response to the problem of sexual assault.¹⁵⁰ The passing of this legislation would do much to increase the accountability of all levels of leadership involved with the Academy, which is central to ensuring fundamental change.¹⁵¹ Holding Air Force Headquarters accountable for the failures of the Academy is significant considering that the Rumsfeld-appointed, independent, investigative panel reported that the highest levels of Air Force leadership must have known about the sexual assault problem at the Academy but failed to act and suffered no consequences as a result.¹⁵² Although reports and surveys have historically been ineffective in engendering change in the Academy, the hope is that the statutorily imposed involvement of the military at large will force the administration into an honest assumption of responsibility for the current state of social discord within the Academy, which will then lead to deliberate efforts to combat the highly publicized problem.¹⁵³

C. *The Honor Code*

In order for the Academy administration to be able to address the sexual assault problem, it must implement policies that encourage the reporting of such incidents. As Colorado Senator Wayne Allard, a noted advocate for victim rights, stated: "I will measure whether we are successful or not by whether we can get victims at the academy comfortable enough to report a rape... If a victim is processed and treated fairly and the perpetrator is not let off, then it will change the culture."¹⁵⁴ One bar to reporting may be the Academy's Honor Code, a policy which on its face would seem unequivocally positive to have in place at the Academy.¹⁵⁵ In actuality, however, a commitment on the part of the Academy administration to punish cadets who fail to tell the whole truth is dangerous when cadets face being ostracized and abused by their peers, or worse, by older cadets who can exercise their authority over singled-out whistleblowers.¹⁵⁶ Academy officials should reconsider the presumptive sanction of disenrollment for honor code violations, if only because cadets may not report violations out of fear that

¹⁴⁹ *Id.* at 51.

¹⁵⁰ *Id.* The potential danger here is that Academy officials would have an incentive to quash the reporting of sexual assault to produce more favorable statistics in these reports.

¹⁵¹ *See id.*

¹⁵² *See id.* at 5.

¹⁵³ *See* REPORT, *supra* note 2, at 51.

¹⁵⁴ Kenworthy & O'Driscoll, *supra* note 86.

¹⁵⁵ For an overview of the Academy's Honor Code, see *supra* note 99.

¹⁵⁶ *See* REPORT, *supra* note 2, at 63.

they themselves or their peers will be disenrolled as a result.¹⁵⁷ The Academy could encourage reporting incidents of sexual assault and address sexual assault violations more directly by instituting a policy of amnesty for all victims who report such crimes.¹⁵⁸ Although the Academy has had in place a policy which provides that cadets who report sexual assault are “generally not [to] be disciplined,” its effectiveness is questionable at best, considering that most cadets are unaware of its existence, and many cadets have been punished for illegal activity that surfaced when they reported assaults against them.¹⁵⁹

D. Victim Confidentiality

Another highly-contested policy encouraging the reporting of sexual assaults is victim confidentiality, which in its ideal form would accord victims privacy and safety and encourage eventual reporting should the cadet choose not to report at that time.¹⁶⁰ The investigative panel noted that this policy has been targeted as a shortcoming of the Academy’s current procedures and has ended up functioning as a scapegoat through much of the Academy’s history with regard to incidents of sexual misconduct:

On the issues of victim confidentiality and sexual assault reporting, the pendulum’s swing has reacted to extremes under the spotlight of high-profile events, going from a position of total confidentiality and victim control over incident reporting to the new Academy policy which eliminates confidentiality and mandates reporting. Neither extreme is satisfactory. The continuing challenge is to reach an appropriate balancing point, while remaining consistent with the policies, practices and procedures of the Air Force at large.¹⁶¹

Proponents of the current confidentiality system insist it is the best solution, since it involves the mandatory reporting of any assault to the Academy Response Team, a group of trained professionals who will maintain the confidentiality of the victim.¹⁶² The response team will then report the incident so that evidence can be gathered and appropriate action can be taken against the perpetrator in a timely manner.¹⁶³ This policy, like many at the Academy, makes logical sense in the abstract, but its practical success seems entirely dependent upon responsible

¹⁵⁷ See *id.* “Almost 70% of cadets would tolerate or possibly tolerate honor violations ‘depending on the severity of the violation’ and 78% would continue to tolerate violations as long as the presumptive sanction of disenrollment is in place.” *Id.* at note 189 (citing the *Carns Report* (Aug. 2001)). The Honor Code’s presumptive sanction also fails to consider gradations of violations, and many cadets reported feeling that it was too strict for minor offenses. *Id.*

¹⁵⁸ See REPORT, *supra* note 2, at 88.

¹⁵⁹ See *id.* (citing USAFA Cadet Wing Instruction 51-201 ¶ 2.8.3).

¹⁶⁰ REPORT, *supra* note 2, at 75.

¹⁶¹ *Id.* at 76. The panel recommends involving psychotherapists and utilizing the psychotherapist-patient privilege, which would mandate confidential counseling except under very limited circumstances. *Id.*

¹⁶² See *Regaining Control*, *supra* note 76.

¹⁶³ See *id.*

enforcement by Air Force officials. Only when female cadets can trust in the integrity of the Academy's administration as part of a military institution that is fighting to serve their best interests will they come forward with reports of sexual assault.¹⁶⁴ The Air Force can take significant steps toward securing this type of administration by providing for longer terms of service for all major Academy officials, which would enable them to follow through with their proposed reforms and effectuate meaningful, lasting changes for the future.¹⁶⁵

CONCLUSION

The foregoing demonstrates that the sexual assault problem is exceedingly complex, implicating all levels of the Air Force and an Academy culture that has systematically repressed numerous incidents of sexual misconduct against its female cadets. The undertaking to remedy this crisis must be monumental to have any effect on an institution with very deeply embedded values and traditions. The public outrage over this scandal may bring to light some of the inequities in military law and policy, including the Air Force's failure to promote women to more prestigious upper-level positions, and may even effectuate change through a sort of media-driven political process.¹⁶⁶ There are no clearly delineated solutions to this type of discrimination and many debates circulate over the proper policies to meet the needs of the military as well as the needs of its women.

The appointment of an independent panel of private citizens for the purposes of investigating the scandal has contributed much in the way of knowledge regarding the Academy's culture and the policies already in place, both officially and unofficially. That is, the panel's report investigated both the black-letter policy, represented in military law and school regulations, as well as the actual practices of Academy officials. In this way, the panel separated the list of promises from the administration and the actual, demonstrated efficacy of these programs in action. As history has proven, it is all too easy for Academy officials to create rules and programs on the books; it is another thing entirely to actually begin to effectuate change in the culture through well-enforced, well-crafted policies over a period of time. An example of this proposition can be found in the administration, or lack thereof, of the Air Force Academy's Social Climate Surveys, which theoretically could serve as an invaluable tool in ascertaining the realities of the experience of female cadets. Instead, these surveys were virtually ignored by Academy officials, despite the fact that their results, though concededly flawed, evidenced a culture that is not only resistant but positively hostile toward women in the military. These surveys are only one instance of the Academy setting into action plans which are facially remedial and theoretically geared toward curbing

¹⁶⁴ See REPORT, *supra* note 2, at 63.

¹⁶⁵ See Amy Herdy & Miles Moffeit, *Military's Response to Rapes, Domestic Abuse Falls Short: Reforms Lag Despite Numerous Scandals, Recommended Solutions*, *supra* note 22.

¹⁶⁶ See *id.*

the sexual assault problem, but which practically, are of no assistance to victimized young women.

Those who seek to address the sexual assault crisis through the reform of military law and policy must be mindful of this danger of lack of enforcement by the Air Force Academy administration. However, this should not discourage people from fighting to change antiquated practices through legal reform. Points of contention include the concentration of power of Academy commanders, the Academy's perpetually changing policy regarding confidentiality when reporting a sexual assault, the presumptive disenrollment policy for violations of the Honor Code, the involvement of administrative leadership including the Board of Directors in overseeing proposed changes to the system, and the adequacy of the current rape and rape shield laws generally in the military, as codified and as expounded upon in case law. The Academy's history has shown that any policies put into place must be adequately supervised by officials who will be held accountable for their actions if the policies are to have any chance of success.¹⁶⁷ A review of the case law governing sexual assault reveals that Congress is overdue to reassess the Uniform Code of Military Justice, so that the Academy and other institutions can operate under a clear and uniform system of law, unfettered by conflicting judicial opinions. In doing so, Congress should equate these reforms with the Civil Rights laws in that the laws need to function to fundamentally change a culture; here, it is a culture that has denigrated women for decades.

Some optimists see the inclusion of women in the military as an opportunity to combine compassion with the aggressiveness of war, which has been an important factor in the ongoing conflict in Iraq and the rebuilding of its civilization. If women are to contribute to the military in any meaningful way, they must be afforded the same respect as men, and the military academies are a good place to begin to effectuate this type of change. The increased attention that this crisis garnered has also been directed at the military generally, where studies have shown the plight of women is no better. Many female soldiers in active combat have suffered from sexual assaults and have been unable to find recourse overseas where resources for victims of such incidents are negligible if in existence at all. In theory, today's cadets will be tomorrow's officers, and through them the Academy can serve as a vehicle for reform of the Air Force at large:

The military has done better in some respects at dealing with racial and ethnic discrimination... than many other segments of American society, some say. "They could become a model in this area, too, in changing attitudes toward sexual violence," says Emilie Buchwald, editor of the book, *Transforming a Rape Culture*.¹⁶⁸

¹⁶⁷ See REPORT, *supra* note 2, at 36.

¹⁶⁸ Kenworthy & O'Driscoll, *supra* note 86.

With new leaders only recently instated, many of the proposed changes are just now being put into effect, and their efficacy is yet to be seen.¹⁶⁹ The public and institutional pressure on Academy officials is mounting though, and this bodes well for the feminist cause. The administration knows that female cadets who are victims of sexual misconduct now have somewhere to turn where their voices will be heard loud and clear – the American media. It is significant that these policy changes are clearly motivated at least in part by the outpouring of media attention the Air Force Academy's sexual assault scandal has received. A Pentagon statement, issued in November of 2003, suggested the power of the media as a catalyst for the changes taking place at the Academy: "Obviously, the incidents at the Air Force Academy put the issues of sexual harassment and sexual assault in newspapers; so we try to remain attentive to the current policies and the needs for improvement."¹⁷⁰ This may mean that the American public also plays a key role in ensuring the success of the proposed reforms, for the difficulties one faces in setting out to change a discriminatory culture can only be overcome if those who suffer oppression are supported by a massive and unified call for change.

¹⁶⁹ See REPORT, *supra* note 2, at app. A.

¹⁷⁰ Moffeit and Herdy, *For Crime Victims, Punishment: Women Who Were Raped While Serving in the Military Say They Were Isolated and Blamed for the Attacks, While the System They Turned to for Help has Treated The Men Who Assaulted Them Far More Humanely*, *supra* note 23.