

**A BETTER UNDERSTANDING OF BULLYING AND HAZING IN  
THE MILITARY**

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*The fellows have talked terribly to me ever since the fight, for they say that I dropped out because I did not want to fight, and not because I was knocked out. I think they just wanted to kill me, if possible or come as near it as possible. There is no use of talking. The fellows here are brutes, and they have evil in their minds – Oscar L. Booz, 7 August 1898.<sup>1</sup>*

*I get treated like shit . . . the NCOs make fun of me all day. . . they fuck me over all day . . .<sup>2</sup> but I get the shit smoked out of me cuz of stupid shit they do . . . or make me do, anyways being Chen and Chinese in this platoon is a no go . . . – Danny Chen, 27 September 2011<sup>3</sup>*

**I. Introduction**

Private (PV2) Danny Chen ran to his guard tower in Afghanistan on the morning of October 3, 2011, only to hear his name yelled by his squad leader from 100 yards away. He reported, as ordered, and was berated for not wearing his Advanced Combat Helmet (ACH) into the guard tower by not only his squad leader but also by two Specialists who had been giving him a hard time for quite some time. This might be an acceptable form of correction if not for the fact that there were many other young Soldiers who did the same thing PV2 Chen was accused of doing; they would carry their ACH in their hands and put it on after getting in the tower to avoid getting tangled in the netting that hung low

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<sup>1</sup> PHILIP W. LEON, BULLIES AND COWARDS, THE WEST POINT HAZING SCANDAL, 1898–1901, at 1 (2000).

<sup>2</sup> Danny Chen, *Comment to Shaun Raphael Lim on Facebook* (Sept. 27, 2011, 8:24 and 8:33), <http://www.facebook.com>.

<sup>3</sup> Danny Chen, *Comment to Alex Torres on Facebook* (Sept. 27, 2011, 8:34), <http://www.facebook.com>.

over the tower entrance. As a result, PV2 Chen was “smoked”<sup>4</sup> by his squad leader, a Staff Sergeant, and the two Specialists, who made him do pushups and flutter kicks for several minutes after which he was ordered by these same three individuals to low crawl over coarse gravel and in full gear to the guard tower nearly 100 yards away. As he low crawled, the two Specialists threw rocks at him and yelled many of the same names they had called PV2 Chen before: “chink, egg roll,” and “fortune cookie.”<sup>5</sup> One of the Specialists dragged him by the carrying handle of his body armor. Finally, he was dragged up the stairs by the Specialists and left to perform tower watch.<sup>6</sup>

In the forty-three days he had been with his unit, PV2 Chen had been the subject of a litany of other incidents and many smoke sessions, including when a Specialist struck him in the thighs as he was made to stand against a wall, knees bent. He had also been dragged on his back, wearing nothing but a t-shirt, for forty yards by his roommate, who was a Sergeant team leader. For some, it was no surprise that a few hours after being dragged up the tower on October 3, 2011, PV2 Chen was dead from a self-inflicted gunshot wound to the head.<sup>7</sup>

The media coverage that ensued described PV2 Chen’s ordeal as: “hazing” and “mistreatment.”<sup>8</sup> Other sources called it: “bullying,” “inappropriate conduct,”<sup>9</sup> “maltreatment,” “assault.”<sup>10</sup> At trial,<sup>11</sup> the

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<sup>4</sup> Will J., *Definition of Smoke*, ONLINE SLANG DICTIONARY (May 18, 2011), <http://www.onlineslangdictionary.com/meaning-definition-of/smoke> (“to administer disciplinary punishment through physical exercise. Military slang.”).

<sup>5</sup> These set of facts are based on the author’s recent professional experience as Trial Counsel for a series of courts-martial arising out of the death of Private (E-2) Danny Chen that took place from 16 April 2012 through 31 December 2012. All of the opinions expressed by the author related to these cases are only those of the author and not of anyone else [hereinafter Professional Experience Chen Trial Counsel].

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

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

<sup>8</sup> Bill Murphy Jr., *8 Troops Charged in Death of Fellow GI*, 9 STARS & STRIPES 1, 1–2 (2011).

<sup>9</sup> *Pentagon Officials Underscores Zero Tolerance Policy for Bullying*, U.S. DEP’T OF DEF. (Dec. 21, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=66573>.

<sup>10</sup> Doug Chin, *Stop Racial Hazing in the Mil. Save Lives. Rest in Peace Danny Chen and Harry Lew*, INT’L EXAMINER (Oct. 17, 2012), <http://proxy.its.virginia.edu/login?url=http://search.proquest.com/docview/1115475342?accountid=14678>.

<sup>11</sup> Professional Experience Chen Trial Counsel, *supra* note 5.

Government argued that PV2 Chen was “subjected to mistreatment”<sup>12</sup> and died because he was “hazed, humiliated and hounded.”<sup>13</sup>

Was PV2 Chen hazed or was he bullied? Does it matter? Is there a meaningful distinction? What were the panel members thinking at the time of trial? Perhaps one was thinking, “Well, I was hazed and I did not die.” Or was another thinking, “I was hazed and it made me better”?

At the time of the trials against eight of his platoon mates, the Army had no bullying policy, but as a result of the new focus caused by such incidents, the Army has just recently developed a revised hazing policy and for the first time ever instituted a bullying policy.<sup>14</sup> All military leaders and counsel need to understand what bullying and hazing conduct really is; otherwise, many will continue to confuse hazing with bullying, or with a host of other names. While the intent of the actions against PV2 Chen can be debated, and the outcome of trial may not have been different, the lesson is clear: if a clear definition of bullying and hazing had been in the Army’s vernacular at the time, it would have been a clearer argument for the Government to make at trial, and perhaps the misconceptions held by leaders at all levels might have been made clearer.

Furthermore, clear objective standards of what hazing and bullying are would prevent military leaders from subjectively constructing what hazing and bullying mean. It is the author’s opinion that a misunderstanding and misapplication of hazing and bullying is a result of too many untrained leaders being left in a position in which they must define words like: “cruel, abusive, oppressive,” and “demeaning.” If the requirement is to stop something, it in turn requires a clear definition of what it is that must stop. For instance, imagine the effectiveness of a military justice system that simply had vague or no definitions for sexual offenses. The goal must be an objective standard that establishes a clear rule and that any conduct that controverts this rule would also be a clear violation.

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<sup>12</sup> Drew Brooks, *Jurors Return Mixed Verdicts in Staff Sgt. Andrew J. Van Bockel Hazing Case*, FAYETTEVILLE OBSERVER, Nov. 21, 2012, <http://www.fayobserver.com/articles/2012/11/20/1219030?sac=fo.military.html>.

<sup>13</sup> David Zucchini, *Danny Chen Suicide: Sergeant Guilty of Assault but Not Homicide*, L.A. TIMES, July 30, 2012, <http://www.articles.latimes.com/2012/jul/30/nation/la-na-ndanny-chen-suicide-case-verdict-20120730.html>.

<sup>14</sup> U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-19 (6 Nov. 2014) [hereinafter AR 600-20 para. 4-19].

Evidence-based studies<sup>15</sup> and state policies distinguish bullying and hazing conduct, and they should serve as a model for the military. The lack of clearly developed hazing and bullying definitions leads to disparate military policies, vagueness, misapplication, and a failure to put anyone on notice of what is considered good or bad behavior. It is time to develop an evidence-based objective definition of hazing and bullying so that the difference between the two is clear, just as nearly all of the fifty states have done.<sup>16</sup>

This article examines the differences between bullying and hazing and argues for better definitions. Section II begins with a close examination of the scholarly definitions of, and distinctions between, hazing and bullying and the studies on both that have been conducted by academic researchers, followed in Section III by a historical overview of hazing and bullying in the military. Section IV argues for three necessary changes to improve the military's current bullying and hazing policies, as well as highlighting two state laws that, according to researchers, represent our nation's best hazing and bullying laws. Section V concludes by proposing a bullying and hazing policy that is clear and that is based on more proven strategies, laws, and policies.

## II. Distinguishing Bullying from Hazing

### A. What Is Hazing?

Despite no federally accepted definition of hazing, the state of Florida's anti-hazing statute has been touted by researchers as one of the nation's best.<sup>17</sup> In conformity with the generally agreed upon research definition, Florida defines hazing as "any action or situation that recklessly or intentionally endangers the mental or physical health or

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<sup>15</sup> Katharine B. Silbaugh, *Bullying Prevention and Boyhood*, 93 B.U. L. REV. 1029, 1033 (2013) (defining evidence-based programs and research). "Often laws also require schools to adopt bullying prevention curricula, and in some cases require that those curricula be evidence based." *Id.* at 1037; *see also id.* at 1044 (defining evidence-based research as those "driven to embrace efforts whose efficacy is based in research" and stating that "[r]eforms that work, according to research, are efforts to create a healthy whole school climate of belonging and inclusiveness").

<sup>16</sup> Compare U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 17, 2013), <http://www.stopbullying.gov> [hereinafter stopbullying.gov], with *Hazing*, STOPHAZING (Dec. 17, 2013), <http://www.stophazing.org/laws.html>.

<sup>17</sup> Telephone Interview with Dr. Mary Madden, Ph.D., Assoc. Professor and Co-Director of Nat. Collaborative for Hazing and Prevention Research, Univ. of Me. (Nov. 14, 2013).

safety of a person for purposes including, but not limited to, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution.”<sup>18</sup> It is not a defense to hazing that the victim’s consent “had been obtained, the conduct or activity that resulted in the death or injury was not . . . sanctioned . . . by the organization, or that the conduct or activity that resulted in death or injury of the person was not done as a condition of membership to an organization.”<sup>19</sup>

Common hazing practices include the following acts: beating, paddling, whipping and striking, blood pinning, branding, tattooing, burning, excessive calisthenics, confinement to restricted areas, consumption of non-food substances, and immersion in noxious substances.<sup>20</sup> In group settings, such as fraternities and other student groups, hazing practices include alcohol consumption, humiliation, isolation, sleep-deprivation, and sexual acts.<sup>21</sup>

## B. What Is Bullying?

There is no federal definition of bullying.<sup>22</sup> Additionally, “there is no uniformly used definition across states, though many states have adopted, through a variety of methods, definitions that resemble the one commonly used in the academic literature.”<sup>23</sup> Bullying is commonly defined as “the repeated and intentional exposure of an individual or group to physical and/or emotional aggression including teasing, name calling, mockery, threats of violence, harassment, taunting, social exclusion and spreading rumors in which there is a power differential between the aggressor (one or more) and the victim (one or more).”<sup>24</sup> The underlying themes in all bullying definitions currently accepted by academic researchers, including Dr. Dan Olweus (“one of the foremost researchers in bullying research”<sup>25</sup>), is that bullying is aggressive

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<sup>18</sup> FLA. STAT. ANN. § 1006.63 (West 2011).

<sup>19</sup> *Id.*

<sup>20</sup> Elizabeth J. Allan & Mary Madden, *The Nature and Extent of College Student Hazing*,

24 INT’L J. ADOLESCENT MED. HEALTH 1, 1 (2012).

<sup>21</sup> *Id.* at 1.

<sup>22</sup> Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 609 (2012).

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

<sup>24</sup> *Id.* at 607–08.

<sup>25</sup> Samuel S. Underwood, *Teacher Empathy and Its Impact on Bullying in Schools* (2010) (published Ph.D. dissertation, Tenn. State Univ.) (on file with Univ. of Va. L. Sch. Library).

behavior that is (a) intended to cause distress or harm, (b) created by an imbalance of power, and (c) repeated over time.<sup>26</sup>

Bullying is frequently “indirect, or subtle in nature” but some direct forms of bullying include: “hitting, spitting, shoving, name calling, demanding money, stabbing, choking, or burning.”<sup>27</sup> Indirect ways may include “isolating, excluding, humiliating, manipulating, blackmailing or writing hurtful or wrongful postings.”<sup>28</sup>

### C. What Is the Difference?

While there is not one official definition of either hazing or bullying among the research community, there are common characteristics that are generally agreed upon by various scholars and found in the vast amount of academic and scientific literature dealing with these topics. Researchers generally distinguish hazing from bullying in the following ways: (1) hazing is harassment by a group of senior ranking members against a group of newcomers,<sup>29</sup> while bullying is harassment by a few individuals against isolated individuals; (2) hazing takes place publicly, while bullying occurs privately; (3) new arrivals and subordinates can never haze superior ranking members, but they can bully them; (4) the hazing behavior occurs in the same manner with little change year after year, whereas bullying is not limited and can be original in its methods; (5) hazing terminates at the end of the initiation, whereas bullying continues indefinitely; (6) hazing eventually seeks to include the victim in group solidarity, whereas bullying excludes the victim from group

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<sup>26</sup> Susan P. Limber & Mark A. Small, *State Laws and Policies to Address Bullying in Schools*, 32 SCH. PSYCHOL. REV. 445, 447 (2003).

<sup>27</sup> Jana L. Pershing, *Men and Women’s Experiences with Hazing in a Male-Dominated Elite Military Institution*, 8 MEN & MASCULINITIES 470, 478 (2006).

<sup>28</sup> Neiman et al., *supra* note 22, at 608-09.

<sup>29</sup> See Kristina Ostvik & Floyd Rudmin, *Bullying and Hazing Among Norwegian Army Soldiers: Two Studies of Prevalence, Context, and Cognition*, MIL. PSYCHOL., 2001, at 18-19 (Nor.); see also Allan & Madden, *supra* note 20, at 1 (“Hazing could be generally defined as any activity expected of someone joining or participating in a group (such as a student club or team) that humiliates, degrades, abuses, or endangers regardless of a person’s willingness to participate.”); see also Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1184 (2008) (“Hazing is any activity that a high status member orders other members to engage in or suggests that they engage in that in some way humbles a newcomer who lacks the power to resist because he or she wants to gain admission into a group.”).

solidarity; (7) hazing may be used to socialize new members and increase morale, whereas bullying decreases morale.<sup>30</sup>

#### D. The Consequences of Bullying and Hazing

In addition to the physical effects of hazing and bullying, research shows that both are also linked to “psychological distress, low self esteem”<sup>31</sup> and “increased illness . . . like depression and anxiety.”<sup>32</sup> The victimization can lead to internal and external isolation,<sup>33</sup> including social isolation, which a growing body of research shows “is a severe form of stress for humans to endure.”<sup>34</sup> Throughout the United States, hazing-related deaths on college campuses are at an all time high,<sup>35</sup> and hazing and bullying that result in death or suicide have been reported in armies across the world.<sup>36</sup> Other serious effects include post traumatic stress disorder, physical injury, or death. Unfortunately, it is “often incidents like these that wake up communities and schools to implement more effective approaches to control these situations.”<sup>37</sup> Indeed the Army’s most recent change in policy followed a series of high profile hazing cases.<sup>38</sup>

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<sup>30</sup> Ostvik & Rudmin, *supra* note 29, at 18-19.

<sup>31</sup> Jennifer Holmgren et. al, Decreasing Bullying Behaviors Through Discussing Young-Adult Literature, Role-Playing Activities, and Establishing a School-Wide Definition of Bullying in Accordance with a Common Set of Rules in Language Arts and Math (2011) (published project, Saint Xavier Univ.) (on file with Univ. of Va. L. Sch. Library).

<sup>32</sup> James K. Wither, *Battling Bullying in the British Army 1987 - 2004*, 1 J. OF POWER INST. IN POST-SOVIET SOCIETIES 7 (2004) (U.K.).

<sup>33</sup> Colleen Creamer Fielkow, Note, *Bullies, Words, And Wounds: One State’s Approach in Controlling Aggressive Expression Between Children*, 46 DEPAUL L. REV. 1057, 1107 (1997).

<sup>34</sup> Hara Estroff Marano, *Big Bad Bully*, PSYCH. TODAY (Nov. 16, 2013), <http://www.psychologytoday.com/articles/200910/big-bad-bully>.

<sup>35</sup> Chad William Ellsworth, Definitions of Hazing: Differences Among Selected Student Organizations (2004) (published M.A. thesis, Univ. of Md.) (on file with Univ. of Va. L. Sch. Library) (“Hollman remarked that since 1990 more alcohol and hazing related deaths have occurred on campuses throughout the United States than throughout the rest of the recorded history of higher education.”).

<sup>36</sup> Ostvik & Rudmin, *supra* note 29.

<sup>37</sup> Creamer Fielkow, *supra* note 33, at 1107.

<sup>38</sup> Professional Experience Chen Trial Counsel, *supra* note 5.

### E. The Prevalence of Hazing

While the prevalence of hazing in the U.S. military is unknown, and no studies to date have been conducted amongst the military population, studies done on similar populations suggest that that prevalence could be high. In one of the most expansive research projects on hazing, academic researchers analyzed 11,482 surveys from undergraduate students enrolled in fifty-three U.S. colleges and universities.<sup>39</sup> Nine out of ten students did not consider themselves to have been hazed,<sup>40</sup> but in actuality, fifty-five percent of respondents reported that they had experienced at least one hazing behavior in relation to their involvement in a campus club, team, or student organization.<sup>41</sup> This demonstrates a lack of understanding of what hazing is amongst a similar age group as servicemembers.

Of those who labeled their experiences as hazing, ninety-five percent said they did not report the events to campus officials, and in particular, thirty-seven percent stated they failed to report the incident because they did not want to get members of their group in trouble.<sup>42</sup> The positive results of hazing were more often cited by students than the negative results, and numerous students justified hazing practices based on their perception that it promotes bonding or group unity.<sup>43</sup> This statistic gives credence to the common defense used by many servicemembers accused of hazing: we are not hazing; we are training or making this Soldier stronger.<sup>44</sup> The correlation between military and college culture is further verified by studies of U.S. Military Academy students that indicate that hazing and bullying activity is “viewed as a critical component of resocializing new initiates.”<sup>45</sup>

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<sup>39</sup> ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK, INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING 2 (2008).

<sup>40</sup> *Id.* at 33.

<sup>41</sup> *Id.* at 14 (for each affiliation with a team or organization that the students identified with, the participants were given a list of behaviors, most of which met the definition of hazing that was decided on by undergraduate student focus groups, as well as after a review of the literature related to hazing and the expertise of the Research Advisory Group).

<sup>42</sup> *Id.* at 28.

<sup>43</sup> *Id.* at 27.

<sup>44</sup> Professional Experience Chen Trial Counsel, *supra* note 5; *see also infra* notes 56-57.

<sup>45</sup> Pershing, *supra* note 27, at 473.

## F. The Prevalence of Bullying

A Norwegian Army study of 696 Norwegian soldiers ranging in age from eighteen to twenty-seven years old found that a total of twelve percent of respondents claimed that they had been the victims of academically defined bullying while in the Army, and fifty-three percent had reported that they were witnesses to bullying in the Army.<sup>46</sup> Of those, sixty-three percent of victims and sixty-two percent of witnesses reported that the bullying took place in the barracks.<sup>47</sup> Fifty-eight percent of the victims and sixty-seven percent of witnesses reported that the bullies came from the same unit as the victim, and forty-eight percent of the victims and forty-one percent of witnesses reported “that bullying was done by the victims’ own roommates.”<sup>48</sup> Similarly, a 2003 British Army survey found that forty-three percent of a sample of 2000 soldiers responded that bullying was a problem and five percent claimed to be victims of it.<sup>49</sup> This problem is likely larger in the U.S. military than these foreign samples.<sup>50</sup>

## III. Overview of Past and Current Solutions in the Military

### A. History of Policies and Attempts at Resolution

The negative effects of hazing or maltreatment<sup>51</sup> date back to the Revolutionary War and possibly longer.<sup>52</sup> A movement toward change did not occur until 1874 when Congress created the Hazing Law, which banned hazing of any kind and made it an offense triable by court-martial.<sup>53</sup> This proved insufficient, as in 1901, a congressional inquiry

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<sup>46</sup> Ostvik & Rudmin, *supra* note 29, at 21.

<sup>47</sup> *Id.* at 22.

<sup>48</sup> *Id.*

<sup>49</sup> Wither, *supra* note 32, at 2.

<sup>50</sup> Pamela Lutgen-Sandvik & Sarah J. Tracy et. al, *Burned by Bullying in the American Workplace: Prevalence, Perceptions, Degree and Impact*, 44 J. MGMT. STUDIES 837, 851 (2007). In a study comparing U.S. prevalence to Scandinavian prevalence, the “US had a significantly higher prevalence of bullying for nearly all points of comparison. For example, 46.8 per cent [sic] of the US, 15.8 per cent [sic] of the Danish, and 24.1 per cent [sic] of the Finnish reported experiencing one negative act at least weekly.” *Id.*

<sup>51</sup> *United States v. Finch*, 22 C.M.R. 698, 700-01 (N.B.R. 1956).

<sup>52</sup> Judith Ann Johnson, *Military Aristocrat or Warrior-Monk? The Religious and Ethical Formation of the American Military Officer* (2002) (published Ph.D. dissertation, Claremont Univ.) (on file with Univ. of Va. L. Sch. Library).

<sup>53</sup> *Id.*

was initiated to investigate the death of former West Point Cadet Oscar Booz and over 100 other cases of hazing; the inquiry included interviews of almost the entire West Point student body, which included senior cadet and future general, Douglas MacArthur.<sup>54</sup>

Booz entered the Academy in the fall of 1898, but four months later, he left the school in weakened health. He died in December of 1900 from tuberculosis of the larynx. His father cast the blame for his son's death on the time, as a cadet, that he was doused and drugged with Tabasco sauce and punched over the heart.<sup>55</sup> Booz claimed his son had also received two black eyes, loosened two teeth in a fight, had hot grease from a candle poured over him, was called names, was ordered to fight another cadet, and was not allowed to read his Bible.<sup>56</sup> A fellow classmate told Congress, "Oscar, instead of showing himself to be a man of spirit and courage, responded in an unmanly manner."<sup>57</sup> MacArthur told the committee that hazing makes "a man lose his rough edges, his conceit."<sup>58</sup> MacArthur refused to give the name of any culprit, but did admit that as a cadet, he had been brought to convulsions and lost consciousness as a result of hazing.<sup>59</sup>

The result was a change in the regulations,<sup>60</sup> only to be followed by two other congressional investigations in 1908 and 1910.<sup>61</sup> In 1910, West Point enacted an anti-hazing policy that required suspension for acts of hazing.<sup>62</sup> The struggle between the long-held belief that hazing

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<sup>54</sup> *Id.*

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

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

<sup>57</sup> *Id.* at 207.

<sup>58</sup> *Id.* at 209.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 211. (arguing that the change was met with resistance.) "In 1902, for example, the Corps of Cadets (through their senior leaders), told the Superintendent that they were willing to cease physical expressions of hazing for plebes; however, they would not accept restrictions against annoying, harassing, or bracing plebes." *Id.* at 210.

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

<sup>62</sup> *Id.* at 211. ("Any cadet who should invite, order, or compel a candidate, new cadet or fourth class man to engage in any form of physical exercise (except at authorized drill), eat or drink any-thing . . . or shall strike, treat with violence, or offer bodily harm to a candidate, new cadet, or fourth class man or shall invite, order, compel or permit a candidate, new cadet, or fourth class man to sweep his (the senior cadet's) room or tent, make his bed, clean his arms, equipment or accouterments, bring water, or perform for him any other menial service, or to do for him anything incompatible with the position of a cadet and gentleman shall (even without intent to humiliate a candidate, new cadet, or fourth class man), be summarily suspended and turned back to join the next class.").

was good versus the constant oversight of Congress lingered for years, and was not hidden in even the more senior circles. For example, Superintendent Samuel Tillman, in his 1918 annual report, “cited a definite advantage to be gained from hazing, specifically: the quicker attainment by a new man of the mental and physical bearing of a West Point cadet.”<sup>63</sup> Historians believe that through the years, officials at the Academy “played less of a neutral role than a silently supportive one, because they actually believed in the value of hazing to build character.”<sup>64</sup>

Despite attempts by leaders at different levels,<sup>65</sup> abusive antics continued at the service academies, setting a negative standard for the military, in particular officer leadership.<sup>66</sup> At the service academies, the recitation and memorization of useless information was considered permissible and commonplace because, as the Staff Judge Advocate opined in 1946, the “hazing or harassing of 4th classmen” that was prohibited “included some form of physical, exercise or exertion, or tasks of servitude,” thus since these useless recitation requirements did not cross that “physical” line, they were permissible.<sup>67</sup> Soldiers, cadets, leaders and their support staff continued to find ways around labeling it hazing despite the complaints of cadets about the rigors of activities such as useless memorization.

In the military, prior to the 1950 enactment of the Uniform Code of Military Justice (UCMJ), the practice was to treat abuse and current day maltreatment “as a violation of Article 96 (the General Article)” with no specific definition of the maltreatment type-offense.<sup>68</sup> Case law and legislative history prior to and after the 1950 enactment of Article 93, maltreatment, UCMJ, is “sparse.”<sup>69</sup> The general public heard little about military hazing until the late 1950s and 1960s when military training

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

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

<sup>65</sup> Captain Christopher H. Engen, Accepted Form of Hazing or Leader Development Tool? The History and Evolution of Fourth Class Knowledge 6-7 (unpublished project, U.S. Military Acad.), available at <http://digital-library.usma.edu/cdm/ref/collection/p16919coll1/id/28>.

<sup>66</sup> *United States v. Sojfer*, 44 M.J. 603, 608 (N-M. Ct. Crim. App.1996) (“The pre-UCMJ cases generally dealt with situations where officers maltreated enlisted personnel.”).

<sup>67</sup> Engen, *supra* note 65, at 11.

<sup>68</sup> *United States v. Finch*, 22 C.M.R. 698, 701 (N.B.R. 1956).

<sup>69</sup> *United States v. Carson*, 55 M.J. 656, 658 (Army Ct. Crim. App. 2001). *Cf. Sojfer*, 44 M.J. at 608 (asserting that maltreatment cases were not very developed in the case law and that a majority of cases dealt with commander maltreatment of subordinates).

practices were spotlighted following the drowning deaths of six Marine recruits at Parris Island and the unusually rigorous artillery training at Officer Candidate School conducted by Vietnam War returnees.<sup>70</sup>

Hazing, in all its forms, was banned at the Academy in 1978 following the recommendations of a committee that was created by the Army Chief of Staff to look into the Academy's procedures<sup>71</sup> and a Government Accounting Office (GAO) Report.<sup>72</sup> Following the committee's recommendation, useless-fact memorization was eliminated, a hazing tradition that had lasted for over a century. The committee also commented that the Academy lacked "long range planning" and was "not institutionally sensitive to the need for change."<sup>73</sup> The Academy's attempt towards change, particularly the abolishment of hazing, was highlighted by the admission of its first female cadet in the fall of 1976.<sup>74</sup>

Despite years of incidents and efforts made to curb the tide, the problem of abusive tactics still remained in the military, as seen through some highly publicized events like the 1989 incident involving Gwen Dreyer (a female midshipman who was tied to a urinal)<sup>75</sup> and the 1991 Tailhook scandal.<sup>76</sup> Scandals involving gender and sexual issues, such as Tailhook<sup>77</sup> and the Dreyer incident, brought the pandemic of abusive

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<sup>70</sup> Hank Nuwer, *Hazing: Separating Rites from Wrongs*, AM. LEGION MAG., July 2001, at 2.

<sup>71</sup> Engen, *supra* note 65, at 14.

<sup>72</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-148057, DoD SERVICE ACADEMIES MORE CHANGES NEEDED TO ELIMINATE HAZING (1992) ("[I]n a 1975 GAO report . . . we noted that it was difficult to differentiate hazing from activities permitted under the various fourth class systems.") [hereinafter GAO-148057].

<sup>73</sup> Johnson, *supra* note 52, at 233.

<sup>74</sup> *Id.*

<sup>75</sup> In 1989, Gwen Dreyer, a female student at the Naval Academy was chained to a urinal, as well as mocked and harassed by a group of male students, for throwing a snowball at a male student during a snowball fight. She then had photos taken of her by male superiors as she was chained. She resigned from the Academy and her story gained wide circulation. *Id.* at 228.

<sup>76</sup> Johnson, *supra* note 52.

<sup>77</sup> In 1991 the Tailhook Association convention in Las Vegas, Nevada, brought the depraved nature of hazing incidents to light for all Americans and led to "something different happening." See Norman Kempster, *What Really Happened at Tailhook Convention Scandal: The Pentagon Report Graphically Describes How Fraternity-Style Hi-jinks Turned into Hall of Horrors*, L.A. TIMES, Apr. 24, 1993, at 1 ("Approximately 200 Navy and Marine aviators waited in a third-floor corridor for a woman to approach and would then grab, pinch, and grope the breasts, buttocks and legs of the stunned woman."); see also Johnson, *supra* note 52. These raucous acts led to "at least 83 women" being assaulted, and revelations that these fraternity style antics "were far from

behavior to the forefront of American public life and was cited as a culprit for a “breakdown in discipline.”<sup>78</sup> A 1992 GAO Report involving hazing at the military academies concluded that there was a need to sharpen and focus the definition of hazing<sup>79</sup> because of the difficulty in distinguishing hazing from permissible conduct.<sup>80</sup> The Department of Defense (DoD) responded by saying “that they were working to ensure the distinctions were understood.”<sup>81</sup>

In 1997, the DoD issued an anti-hazing policy. It was brought on by yet another high profile incident, the 1993 Marine Corps “blood pinning” video that circulated nationwide in 1997, which showed numerous Marine Corps parachutists having their wings pinned to their chest with such force that it sent them writhing in pain.<sup>82</sup> Then-Secretary of Defense William Cohen issued a policy memorandum<sup>83</sup> prohibiting hazing, which is now encapsulated in Army Regulation (AR) 600-20’s paragraph 4-19<sup>84</sup> and in similar sister-service regulations.<sup>85</sup> Before the issuance of this anti-hazing policy, all similar misconduct was dealt with under Article 93, maltreatment,<sup>86</sup> as well as other punitive articles, like Article 128, assault or battery.<sup>87</sup> This remains the case today, with the only change being that practitioners can now charge hazing and bullying offenses under Article 92, failure to obey a lawful general regulation.<sup>88</sup> Until November 2014, there had never been an anti-bullying policy in

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unprecedented.” Kempster, *supra* note 77, at 1. This was the first time in military history that hazing was cited as sexual harassment, as well as the culprit for a “breakdown in discipline.” Johnson, *supra* note 52, at 230. The aspects of good-natured fun was finally viewed as an offense “against common human decency” and served as the impetus needed to bring hazing activities in the military to the forefront of the conversation. *Id.*

<sup>78</sup> Johnson, *supra* note 52, at 230.

<sup>79</sup> GAO-148057, *supra* note 72.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 105.

<sup>82</sup> Tucker Carlson, *Emasculating the Marines: The Hysteria Over Hazing*, WKLY. STANDARD, Feb. 17, 1997, at 27.

<sup>83</sup> *Id.*

<sup>84</sup> AR 600-20 para. 4-19, *supra* note 14.

<sup>85</sup> U.S. DEP’T. OF AIR FORCE, POL’Y., HAZING (30 Oct. 1997); U.S. COAST GUARD, COMMANDANT INSTR. M1600.2, DISCIPLINE AND CONDUCT para. 2C (Sept. 2011); U.S. MARINE CORPS, ORDER 1700.28B, HAZING (20 May 2013); U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 1610.2A, DEPARTMENT OF THE NAVY POLICY ON HAZING (15 Jul. 2005).

<sup>86</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 17 (2012).

<sup>87</sup> *Id.* ¶ 54.

<sup>88</sup> *Id.* ¶ 16.

any of the services, and as of the date of this article, the Army appears to be the only branch of service to have published one.<sup>89</sup>

## B. Current Policies Aimed at Resolution

Since no comparison can be made of the service's anti-bullying policy (the Army is the only one with such a policy), the author conducted a review and comparison of the different services' hazing policies (see the appendix). Comparing the common themes and words in those regulations, as well as the Army's current bullying policy, reveals vague adjectival requirements, over breadth, exceptions to the rule, intent requirements, dissimilar policies, and includes other words that do not meet the academically accepted definition of hazing. While the Army makes a better attempt with its revised hazing and new bullying policy,<sup>90</sup> it also fails to clearly define hazing and bullying as agreed by the academic researchers and experts. A close look at the comments of senior leaders relating to bullying and hazing incidents lends credence to the argument that confusion remains and that there is a growing need for clarity.<sup>91</sup>

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<sup>89</sup> During the course of this article, the author made numerous attempts to find a history of bullying within the military and has found nothing to show that any U.S. military anti-bullying policy has ever existed within military literature. In November 2014, the Army issued Army Regulation 600-20, which appears to be the first and, currently, only anti-bullying policy in the military.

<sup>90</sup> It is the author's opinion, based on the research that the author conducted, that while the Army follows the following academically accepted aspects of hazing and bullying, it does not go far enough: 1) hazing need not be committed in the physical presence of the victim; it may be accomplished through written or phone messages, text messages, email, social media, or any other virtual or electronic medium. 2) Without outside intervention, hazing conduct typically stops at an identified end-point, while 3) bullying will typically continue without any identifiable end-point. 4) Hazing is directed at new members of an organization or individuals who have recently achieved a career milestone. Cf. AR 600-20 para. 4-19, *supra* note 14.

<sup>91</sup> See Karen Parrish, *Panetta 'Will Not Tolerate' Bullying, Hazing*, AM. FORCES PRESS SERV. (Dec. 27, 2011), <http://www.defense.gov/News/NewsArticle.aspx?ID=66609>. The title of the article suggests that leaders recognize that there is a difference between bullying and hazing and that both have negative effects, yet there was no anti-bullying policy in place at the time. In this same article, Secretary of Defense Panetta said, "I will not tolerate any instance where one service member inflicts any form of physical or psychological abuse that degrades, insults, dehumanizes or injures another service member." *Id.* The Secretary uses specific, not vague, adjectival phrases, such as degrades, but fails to categorize such acts as either bullying or hazing, labeling it simply inappropriate behavior. *Id.* Later in this same article, the Chairman of the Joint Chiefs of Staff, Army General Martin E. Dempsey, "spoke out strongly against hazing and bullying

An examination of Army Regulation (AR) 600-20 shows that the Equal Opportunity (EO) policy,<sup>92</sup> the hazing policy, and the nascent bullying policy are very similar.<sup>93</sup> Still, there is a lack of clear definitions because terms found in chapter 6 of AR 600-20, such as “offensive behavior,” are not defined. Similarly, in paragraph 4-19 of AR 600-20 terms such as “suffer, cruel, oppressive, humiliating, or demeaning” are not defined. Furthermore, there is a lack of guidance as to the objective or subjective nature of either the EO or hazing policy in

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after the charges were announced,” which shows that the Chairman himself, or his spokesperson, knows that there is a difference between bullying and hazing, but again, no anti-bullying policy was in existence. *Id. Cf.* Letter from General Raymond T. Odierno et al, to Members of the U.S. Army, Hazing (Jan. 13, 2012) (no mention of bullying is made in this letter).

<sup>92</sup> Compare U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chapter 6 (6 Nov. 2014) [hereinafter AR 600-20 ch. 6] (“The EO Program formulates . . . a comprehensive effort to maximize human potential and to ensure fair treatment . . . and to . . . sustain effective units by eliminating discriminatory behaviors or practices that undermine teamwork, mutual respect, loyalty, and shared sacrifice . . . . The U.S. Army . . . will provide an environment free of unlawful discrimination and offensive behavior.”), and *id.* (defining discrimination as “any action that unlawfully or unjustly results in unequal treatment of persons or groups based on race, color, gender, national origin, or religion” and defining disparaging terms, equal opportunity, gender discrimination, prejudice, etc), with AR 600-20 para. 4-19, *supra* note 14 (“everyone is expected to do what is right by treating others as they should be treated with dignity and respect.” Hazing is defined as “any conduct . . . [that] causes another service member . . . to suffer or be exposed to an activity that is cruel, abusive, humiliating, oppressive, demeaning or harmful. . . .”), and *id.* (defining bullying is defined as “any conduct . . . [that] causes another service member . . . to suffer or be exposed to an activity that is cruel, abusive, humiliating, oppressive, demeaning, or harmful behavior, which results in diminishing the other Servicemember’s dignity, position, or status.”).

<sup>93</sup> AR 600-20 chapter 6 requires “fair treatment” and prohibits “disparaging terms.” AR 600-20 ch. 6, *supra* note 92. The prohibition against hazing proscribes humiliating and harmful acts but so does bullying. AR 600-20 para. 4-19, *supra*, note 14. Bullying similarly results in the diminishing of the person’s dignity, position, or status, but hazing and violating the equal opportunity policy can do this as well. Army Regulation 600-20, paragraph 4-19, defines hazing as “any conduct whereby one service member . . . regardless of Service or rank, unnecessarily causes another service member to suffer or be exposed to an activity that is cruel, abusive, oppressive, or harmful.” Bullying has a very similar definition with the only distinction being that bullying “results in the diminishing of the Servicemember’s dignity, position or status.” But it can clearly be argued that hazing does the same thing. Army Regulation 600-20, paragraph 6-1(a), further holds the purpose of the EO program is to “create and sustain effective units by eliminating discriminatory behaviors or practices that undermine teamwork, mutual respect, loyalty and shared sacrifice of the men and women of America’s Army.” These are small samples of the elements that both commanders and trial counsel must define on a daily basis in determining the difference among EO, hazing, and, in the Army’s case, bullying.

the AR, which is an element of the UCMJ offense of maltreatment.<sup>94</sup> The danger of allowing the incorporation of the military's EO policy with the bullying and hazing policies is that, as some academic institutions have found when they sought to combine harassment policies with bullying, the results can lead to "confusion and incorrect assumptions about the nature of bullying"<sup>95</sup> or hazing.

All branches of service should avoid the tendency of mixing terms found in hazing, equal opportunity, and bullying into one policy that creates "overly broad and arbitrary policies."<sup>96</sup> To avoid such problems, researchers in the academic setting have called for policies to contain "a precise definition . . . that is consistent with the definition commonly used by researchers."<sup>97</sup> Clearer definitions would give leaders the right tools and would help avoid potential legal challenges of these policies for issues of vagueness and over breadth.<sup>98</sup>

On October 2, 2012, a group of legislative officials sent letters to the DoD General Counsel asking for support to include a hazing statute in the UCMJ in response to recent hazing incidents, such as in the case of PV2 Chen.<sup>99</sup> The National Defense Authorization Act (NDAA) of 2013 also contained language that required an evaluation of the definition of hazing contained in the August 28, 1997 Secretary of Defense Policy Memorandum.<sup>100</sup> While recent military efforts, such as the Army's publication of a new regulation, is a good step forward, the DoD must realize that to sustain an effective policy, clearer academically accepted definitions are needed.

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<sup>94</sup> Cf. MCM, *supra* note 85, ¶ 17 (noting that maltreatment requires that "cruelty oppression, or maltreatment . . . be measured by an objective standard").

<sup>95</sup> Limber & Small, *supra* note 26, at 447-48.

<sup>96</sup> Nan Stein, *A Rising Pandemic of Sexual Violence In Elementary And Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. POL'Y 33, 46 (2005).

<sup>97</sup> Limber & Small, *supra* note 26, at 453.

<sup>98</sup> *United States v. Sweney*, 48 C.M.R. 476 (A.C.M.R. 1974) (The appellant argued that what was prohibited by the regulation is unascertainable because of its vague terms and that the regulation included innocent conduct within its prohibitions, thus making the policy void because it was overbroad).

<sup>99</sup> Press Release, Representative Judy Chu, Congressmembers Urge Department of Defense to Support Making Hazing a Crime (Oct. 2, 2012), *available at* <https://chu.house.gov/press-release/congressmembers-urge-department-defense-support-making-hazing-crime>.

<sup>100</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 534, 126 Stat. 1632, 1727 (2013).

#### IV. Recommended Changes

##### A. The New Jersey Anti-Bullying Law<sup>101</sup>

In December of 2011, the Department of Education (DoE) released the results of a two-year study that was conducted jointly by the DoE and the Department of Health and Human Services' first "Federal Partners in Bullying Prevention Summit."<sup>102</sup> The study examined the viability of state anti-bullying laws and policies, as well as the effects of states' laws that incorporated the DoE's recommended policies.<sup>103</sup> Led by experts, the DoE identified sixteen key components and school district policy subcomponents within existing state laws that according to experts, created stronger laws.<sup>104</sup> The sixteen key components were: (1) purpose, (2) scope, (3) prohibited behavior, (4) enumerated groups, (5) district policy, (6) district policy review, (7) definitions, (8) reporting procedures, (9) investigations, (10) written records, (11) sanctions, (12) mental-health referrals, (13) communications, (14) training and prevention, (15) transparency and monitoring, and (16) legal remedies.<sup>105</sup> The study concluded that Maryland and New Jersey were the "only states with legislative language encompassing all of the key components."<sup>106</sup> Additionally, the researchers identified the states with the most expansive of the sixteen components, and again, New Jersey ranked at the top.<sup>107</sup> While much work is left to be done and while not all sixteen components may apply to the military, the DoD can learn lessons from the state of New Jersey and should adopt a policy that either is similar to or adds to the closest of all seemingly federally approved state laws.

##### B. The Florida Anti-Hazing Law<sup>108</sup>

Currently, forty-four of the fifty states have anti-hazing laws.<sup>109</sup> Using Secretary Duncan's analysis above, states' laws can be a useful

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<sup>101</sup> 2010 N.J. Sess. Law Serv. ch. 122 (West).

<sup>102</sup> U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES ix (2011).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at xiii.

<sup>105</sup> *Id.* at xii.

<sup>106</sup> *Id.* at xiii.

<sup>107</sup> *Id.* at 44; *see also* *New Jersey Law*, BULLY POLICE USA, [http://www.bullypolice.org/nj\\_law.html](http://www.bullypolice.org/nj_law.html) (last visited Feb. 28, 2014) (grading New Jersey's anti-bullying law as the highest possible grade of an A++).

<sup>108</sup> FLA. STAT. ANN. § 1006.63 (West).

tool in helping to draft an evidence-based military anti-hazing policy. The state of Florida's anti-hazing law has been in place since 2005<sup>110</sup> and is seen as one of the "most advanced hazing laws" because it addresses hazing at both public and private universities, and it contains a written hazing definition with an enumeration of appropriate punishments.<sup>111</sup>

With alarming statistics like nine out of ten college-aged students who do not consider themselves victims of hazing despite experiencing classic hazing behaviors,<sup>112</sup> the military must create an anti-hazing policy that mirrors a proven law, like that of Florida. Dr. Mary Madden, a leading researcher in the area of hazing, recommends the state of Florida's anti-hazing law.<sup>113</sup> She describes the benefits of this law, as: (1) identification that the injurious behavior can be not only physical but mental, (2) clearly stated policies that are implemented with consistency (i.e., two schools implement the same punishment for similar hazing activity), and (3) publication of consequences and punishments so that others can see that there are consequences and that similar future misconduct can be discouraged.<sup>114</sup>

Both the hazing and bullying laws described above lay out an objective standard that DoD can learn and improve upon. The military would benefit from more precise definitions like those used by the states of Florida and New Jersey. Further, the military can use the recommendation of researchers who have frequently suggested that a "precise definition of terms, especially hazing . . . and bullying" is necessary.<sup>115</sup> Giving commanders and leaders a more objective scientific

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<sup>109</sup> Isabel Mascarenas, *Florida's Anti-hazing Law Among Toughest Nationwide*, 10 NEWS (May 3, 2012, at 7:06 p.m.), <http://www.wtsp.com/news/article/253824/8/Floridas-anti-hazing-law-among-toughest-nationwide>.

<sup>110</sup> Elia Powers, *Testing an Anti-Hazing Law*, INSIDE HIGHER ED. (Jan. 31, 2007), <http://www.insidehighered.com/news/2007/01/31/hazing.html> (stating "Florida passed one of the country's toughest anti-hazing laws...").

<sup>111</sup> Hailey Beitman, *Next Wave Anti-hazing Laws*, Apr. 6, 2012, <http://news.jrn.msu.edu/bullying/2012/04/06/united-states-hazing-laws/>.

<sup>112</sup> Allan & Madden, *supra* note 20, at 6.

<sup>113</sup> Interview with Dr. Mary Madden, Ph.D., *supra* note 17.

<sup>114</sup> *Id.*

<sup>115</sup> Nelda Cambron-McCabe & Ellen V. Bueschel, *Where does Tradition End and Hazing Begin? Implications for School District Policy*, 196 EDUC. L. REP. 19, 26 (2005); *see also* Holmgren, *supra* note 31, at 34 ("The solutions that research does support include compelling a common definition, using literature and role-playing and peer mediation"); *see also* Ellsworth, *supra* note 35, at 31 ("It is also reported that it was the responsibility of the leadership at the academies to effectively define hazing activities, because the distinction between hazing activities and legitimate fourth class

definition will provide them with the clarity that they need to enforce and identify hazing and bullying behavior, and avoid any wiggle room.

### C. The Use of Evidence-Based Research

The challenge for the military, as in other organizations,<sup>116</sup> is selecting a policy that is supported by scientifically proven results and that demonstrates positive outcomes; otherwise the military is left wasting money and time. While budding military anti-bullying or anti-hazing policies are grounded in well-intentioned motives, policy makers “should investigate whether or not the intervention is based on research, if it promotes prosocial behavior, and if there is documented outcome data.”<sup>117</sup> Many states have mandated that school boards and officials implement local, or use state-enacted, bullying or hazing policies that are developed through consultation and insight from experts in the field.<sup>118</sup> For example, the state of Massachusetts requires that the Department of Education consult with the “department of public health, the department of mental health, the attorney general . . . and experts on bullying” to “compile a list of evidence-based curricula, best practices and academic based research that shall be made available to all schools.”<sup>119</sup> In Mississippi, the state’s school districts are required to “incorporate evidence-based practices” into the school district policies.<sup>120</sup> It is

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indoctrination was unclear.”); *id.* at 39 (“In order to effectively confront hazing, a common definition and set of perceptions about hazing and unacceptable hazing activities should be established.”); Kristin E. Bieber, *Do Students Understand What Researchers Mean by Bullying?* 53 (2013) (published Ph.D. dissertation, Univ. of Neb.) (on file with Univ. of Va. L. Sch. Library) (“These discrepant definitions of bullying suggest that researchers must be very specific about what is meant by bullying when asking students to report how often they bully others or are bullied.”); Chris Lee, *Exploring Teachers’ Definitions of Bullying*, 11 *EMOTIONAL & BEHAVIORAL DIFFICULTIES* 61, 62 (2006) (U.K.) (“The need for a definition is located in distinguishing between bullying, other forms of aggression and acceptable behaviors. . . . Much of the terminology that informs definitions generate as many questions as it provides answers.”).

<sup>116</sup> Susan M. Swearer et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, *EDUC. RESEARCHER*, Jan. 2010, at 38, 43 (“One challenge however is getting educators to adopt such evidence based programs. [One researcher] found that educators preferred to adopt anti-bullying programs in their schools that their colleagues anecdotally reported were effective over programs that were scientifically shown to be effective.”).

<sup>117</sup> *Id.*

<sup>118</sup> *E.g.*, *MISS. CODE ANN.* § 37-11-54 (West 2013); *see also, e.g.*, *MASS. GEN. LAWS ANN. ch. 71*, § 370 (West 2013).

<sup>119</sup> *Id.* § j.

<sup>120</sup> *MISS. CODE ANN.* § 37-11-54 (West 2013).

uncertain as to whether DoD plans a review and assessment of the bullying and hazing policies, but if and when that occurs, DoD should consult experts and incorporate evidence-based practices to improve its current policies.

States whose definitions rely on studies and research-based models to form policy generally find greater success in applicability and understanding.<sup>121</sup> While states' adoption of laws is not the only cure for hazing or bullying behavior, Education Secretary Arne Duncan believes that "officials can use these examples as technical assistance in drafting effective anti-bullying laws, regulations, and policies."<sup>122</sup> Through the enactment of anti-bullying laws in forty-nine out of the fifty states, legislators have increasingly sought to enact laws<sup>123</sup> that have, effectively, required that they draw upon research.<sup>124</sup> Since there are no recent empirical studies involving the active duty military community,<sup>125</sup> and no scholars have spent time looking into hazing in the U.S. military setting,<sup>126</sup> it would be beneficial for the military to use state laws and policies that already build on scientifically proven results.

#### D. Dispelling Acceptability in Our Ranks

The findings of the studies discussed in this article suggest that hazing and bullying can find a level of acceptability within the ranks.<sup>127</sup> The idea that group unity and bonding gets stronger with hazing or bullying pervades the minds of our youngest military men and women, and goes back to the days when "prototypes" for the armed services "included young men seeking to become warriors."<sup>128</sup> The 1992 GAO survey showed that "15.7 percent of men and 5.4 percent of women view plebe year as a rite of passage."<sup>129</sup> This mindset has been around the service

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<sup>121</sup> See Silbaugh, *supra* note 15; see also Swearer, *supra* note 116.

<sup>122</sup> Letter from Secretary Arne Duncan, Sec'y of Educ, to Governors and Chief State School Officers (Dec. 16, 2010), available at <http://www2.ed.gov/policy/gen/guid/secletter/101215.html> [hereinafter Key Policy Letter].

<sup>123</sup> Silbaugh, *supra* note 15, at 1033; see also [stopbullying.gov](http://stopbullying.gov), *supra* note 16 (containing a list of all states that have anti-bullying policies, with the exception of Montana).

<sup>124</sup> MISS. CODE ANN. § 37-11-54 (West 2013); MASS. GEN. LAWS ANN. ch. 71, § 370 (West 2013).

<sup>125</sup> Pershing, *supra* note 27, at 473.

<sup>126</sup> Nuwer, *supra* note 70, at 6.

<sup>127</sup> Ostvik & Rudmin, *supra* note 29, at 25.

<sup>128</sup> LEON, *supra* note 1, at 166.

<sup>129</sup> Pershing, *supra* note 27, at 482; see also GAO-148057, *supra* note 72.

academies for over a century.<sup>130</sup> Yet to date, there have been no military studies that have tested and proved the hypothesis that “individuals who undergo an unpleasant experience increase their liking for the group.”<sup>131</sup>

This “severity attraction hypothesis” has been tested more recently by academic researchers whose findings support a conclusion that group attractiveness did not increase when the initiation was more severe.<sup>132</sup> A recent study examined 167 college athletes who had undergone “an effortful, painful, or humiliating experience inflicted by more senior members of a team” and evaluated whether this increased new members’ attraction to the team.<sup>133</sup> In this study, researchers found that the “more hazing activities student athletes reported seeing or doing, the less cohesive they perceived their team to be in sport-related tasks.”<sup>134</sup>

Education is key to countering the severity-attraction hypothesis.<sup>135</sup> “There needs to be clearer definitions and policies as well as education efforts to teach the population about what the consequences of bullying and hazing are” and that show that the theory of severity attraction has no proven validity.<sup>136</sup> Furthermore a key aspect of change will need to include more clearly defining acceptable forms of training versus hazing and bullying.

#### E. Increased Awareness and Understanding Among Military Leaders

“How about shaving someone’s eyebrows to celebrate service selection? While it could potentially be

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<sup>130</sup> Johnson, *supra* note 52, at 230 (noting that the Navy Inspector General concluded in 1989, after another serious hazing incident at the Naval Academy, that most viewed hazing “as a type of baptism or initiation rite” and that “[w]hile such initiation might look like a punishment, it is actually a ritual for tempering the soul of the initiate, preparing the recruit for the reward of entry into the fraternal collective”); *see also id.* at 207 (“Oscar Booz was called out to fight according to an immemorial custom in the Corps of Cadets because he refused to obey an order given him by an upperclassmen. . . . [And] instead of showing himself to be a man of spirit and courage,” Oscar Booz “responded in an unmanly way.”).

<sup>131</sup> Elliott Aronson & Judson Mills, *The Effect of Severity of Initiation on Liking*, J. ABNORMAL & SOC. PSYCHOL., 1959, at 177.

<sup>132</sup> Ellsworth, *supra* note 35.

<sup>133</sup> ALLEN & MADDEN, *supra* note 39.

<sup>134</sup> *Id.*

<sup>135</sup> Interview with Dr. Mary Madden, Ph.D., *supra* note 17.

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

demeaning and shaving is outlawed in the SECNAV instruction, it's OK that SEAL candidates have been subjected to this because it's unique to the requirements of being in the special forces community," said Rear Admiral Ted Carter, the Navy's commander of the Navy Office of Hazing Prevention. When asked by a reporter, "What about covering sailors with grease?" he said, "that depends on the type of grease," though none is defined in the instruction.<sup>137</sup>

Statements like these illustrate the confusion and consequences of poorly defined definitions and policies that plague all levels of military leadership. A study conducted in 2005 into the attitude of school teachers "found that many teachers were unaware that their students were involved in bullying" and "one of the main reasons . . . was the inability to differentiate bullying from other activities."<sup>138</sup> A leader and pioneer in bullying research,<sup>139</sup> Dr. Dan Olweus identified that one of the core elements necessary to the success of a bullying intervention program in schools is the support from school administrators and the awareness and involvement of the teachers and parents.<sup>140</sup> Similarly, military leadership's support and understanding is integral in successful bullying and hazing intervention. Studies have found that leaders "lack of consensus on bullying invites confusion and disagreement about the legal obligations schools and communities have in order to prevent bullying and support students involved in bullying."<sup>141</sup>

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<sup>137</sup> Jacqueline Klimas, *Hazing or Harmless? Navy Leaders Try to Stamp Out Hazing, But Many Sailors Question the Rules*, NAVY TIMES, July 7, 2013, at 18.

<sup>138</sup> Underwood, *supra* note 25.

<sup>139</sup> See Abby J. S. Hallford, *An Analysis of Bullying Legislation Among the Various States* (2002) (published Ph.D. dissertation, The Univ. of Tulsa) (on file with Univ. of Va. L. Sch. Library); see also Karin E. Tusinski, *The Causes and Consequences of Bullying* (2008) (published Ph.D. dissertation, Univ. of Mo., St. Louis, Mo.) (on file with Univ. of Va. L. Sch. Library).

<sup>140</sup> Fielkow, *supra* note 33, at 1092.

<sup>141</sup> Bieber, *supra* note 116.

## V. Conclusion

### A. Coordinated Approach

The military must clarify the definitions of both bullying and hazing, as well as lead a coordinated service-wide response to the deficiencies identified by recent cases and investigations.<sup>142</sup> To be a successful program, the text of the policy is not the only critical element. As the British Army learned, “to escape the imposition of external oversight” the DoD’s policies to combat bullying and hazing must be “backed by a real commitment on the part of leaders at all levels to enforce them, as well as continued improvements that build on” the measures put in place to counter this decrepit behavior.<sup>143</sup> The process of having leaders who are committed to “developing and applying the policy is at least as important as its actual contents.”<sup>144</sup> Furthermore, all branches of service must be committed to clear policies against such behavior, and must also be proactive in gathering “data to assess the extent” of bullying and hazing, as well as training and using appropriate experts to train on how to prevent this conduct.<sup>145</sup>

### B. Difficult Changes

The military faces an “unenviable predicament.” It has to reassure parents that their sons and daughters will not be brutalized during training, while at the same time ensuring that all services “are adequately prepared for the rigors of combat.”<sup>146</sup> It is important that DoD follow the DoE’s advice<sup>147</sup> in consulting the appropriate experts and using the appropriate resources available to develop a policy that would have a

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<sup>142</sup> Wither, *supra* note 32, at 1 (“The final investigation report, released in March 2004 was damning on the failings of the preceding 15 years. Among the issues were the longstanding inadequacy of funding for welfare and supervisory resources in training and the absence of a coordinated, organization wide response to deficiencies identified by previous investigations.”).

<sup>143</sup> *Id.* at 10.

<sup>144</sup> Denise Salin, *The Prevention of Workplace Bullying as a Question of Human Resource Management: Measures Adopted and Underlying Organizational Factors*, 24 SCANDINAVIAN J. MGMT. 221, 223 (2008) (Fin.).

<sup>145</sup> Scott D. Camassar, *Cyberbullying And The Law: An Overview of Civil Remedies*, 22 ALB. L.J. SCI. & TECH. 567, 572 (2012).

<sup>146</sup> Wither, *supra* note 32, at 10.

<sup>147</sup> Key Policy Letters, *supra* note 122.

“positive ripple effect.”<sup>148</sup> In the 1992 response to the GAO investigation into hazing at the service academies, the DoD said that “it would work in conjunction with the services on continually refining the understanding of what constitutes approved behavior.”<sup>149</sup>

The Supreme Court has ruled against schools that act with “deliberate indifference in the face of actual knowledge” of a hostile environment that is “so severe, pervasive and objectively offensive, as to deprive the victim of the educational opportunities provided by the school.”<sup>150</sup> While the DoD is far from acting with “deliberate indifference,” the failure to implement policies that set clear objective standards for misconduct that has been ongoing for over 100 years can be suggestive of complicit indifference each time another incident occurs.

When Congress met in 1901 to inquire into the “hazing” actions of the West Point class, it undoubtedly sought to identify solutions to prevent this misconduct for future military leaders. The adoption, publication, and enforcement of a refined and proven anti-bullying and anti-hazing policy would deliver the right message by more clearly defining and publishing prohibited conduct, as well as outlining the clear consequences for such behavior.<sup>151</sup> Together with the recent changes DoD is seeking, the New Jersey anti-bullying and the Florida anti-hazing laws offer a clear and effective example that DoD can build and work from so that disparate, vague, and misapplied policies can be remnants of the past. Clear and proven policies can provide practitioners, leaders, victims and offenders the tools necessary to identify appropriate and inappropriate conduct, and stem the tide that has run from the days of Oscar Booz to those of Danny Chen.

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<sup>148</sup> Lee, *supra* note 115, at 69.

<sup>149</sup> GAO-148057, *supra* note 72, at 98.

<sup>150</sup> Neiman, *supra* note 22, at 622 (citing *Flaherty v. Keystone Oaks School Dist.*, 247 F. Supp.2d 693 (W.D. Pa. 2003) (noting that in *Flaherty*, the court held that “Title IX could provide a private remedy against a school for creating a hostile environment by failing to take disciplinary action against offending students,” but the plaintiff must “show that the harassment is so severe, pervasive, and objectively offensive as to deprive the victim of the educational opportunities” and that “the school acted with deliberate indifference in the face of actual knowledge of such conduct.”).

<sup>151</sup> Key Policy Letters, *supra* note 122.

### APPENDIX: ARMED SERVICES HAZING POLICY/REGULATION COMPARISON

Major Tenet of Reg/Policy	Army**	Navy	Marines*	Air Force	Coast Guard***
Introductory Comments	X	X	X	X	X
Regardless of svc/rank	X	X	X	X	
Suffer or be exposed	X	X	X	X	X
Activity = cruel, abusive, oppressive, harmful, humiliating, demeaning	X	X	X	X	X
Activity can be verbal/psychological	X	X	X	X	X
On or off duty	X				
Consent is not a defense	X	X	X	X	X***
Reprisal prohibited	X	X	X		
CMD Authorized Exception (e.g., operational activities, corrective training, counseling, athletics)	X	X	X	X	X
Duty to Rpt/ Investigate	X	X****	X*****	X	X
Punitive Policy	X	X	X		
Victim-Witness Assistance Available		X	X		
Prohibited Activities	Physically striking, to inflict pain, piercing skin, forcing to consume excessive amounts of food or drink, or encouraging other to engage in illegal, demeaning, dangerous activity; Physical presence not required, can occur through non-direct mediums	Like Army with exception of the non-direct medium clause, but adds the following: verbally berating for sole purpose of belittling or humiliating, abusive/ridiculous tricks, threaten-ing bodily violence, branding, taping, tattooing, shaving, greasing, painting, excessive physical exercise and blood wings	Same as Navy w/ exception of no mention of "blood wings"	Hitting, striking, tattooing, branding, shaving, "blood pinning," and forcing alcohol consumption	Same as Navy but adds the following: mean tricks, throwing over ship/pier, group wrestling, targeting a particular member, encouraging full disrobing, restraining other than for law enforcement purpose, touching, striking or threatening offensively
Bullying	X**				

\*= Marine policy references resources, dangers of hazing, and makes the EO branch lead agency, and sets training and reporting requirements.

\*\*= Army Regulation is the only one of the service regulations/policies that includes a bullying clause.

\*\*\*= Coast Guard policy allows a person who consents to being hazed to be held liable for consenting.

\*\*\*\*= Navy policy mentions report only and a duty to investigate is not clearly outlined.

\*\*\*\*\*= Marine policy says to report only.