STIGMATIZING NARRATIVES IN MILITARY SEXUAL TRAUMA CASES

Renée Burbank[*]

INTRODUCTION

Imagine someone in the military. Who is that person? You might reasonably assume they are trained in combat, physically fit, disciplined, and taught to follow orders. Likely young.[1] Likely male.[2] Likely white.[3]

Now picture a service member who was sexually harassed or raped by a fellow service member. Who do you picture? Maybe you think of someone like Kori Cioca, a petite blond Coast Guard veteran featured in the Academy Award-nominated documentary about military sexual assault, *The Invisible War*, who suffers both post-traumatic stress disorder ("PTSD") and permanent physical injuries from being beaten and raped by her supervising officer.[4] Or maybe you think of someone like Vanessa Guillén, an athletic, pretty Latina from Houston who, according to her family, was persistently sexually harassed by a fellow soldier before she went missing from Fort Hood in April 2020, and whose dismembered and burned body was discovered months later.[5] Her story

---

∗ Renee Burbank is the Director of Litigation at the National Veterans Legal Services Program, and formerly a Robert M. Cover Clinical Teaching Fellow at Yale Law School, teaching in the school's Veterans Legal Services Clinic. This Article has benefited from thoughtful comments and conversations with Rachel Camp, Tianna Gibbs, Tamara Kuennen, Naomi Mann, Dana Montalto, and Michael Wishnie. Thanks to the Clinical Law Review's writing workshop and Yale Law School's clinical fellows writing group for their assistance with earlier drafts of this article. Thanks also to Mollie Berkowitz for her invaluable research assistance and to the editors of *Kansas Journal of Law & Public Policy* for their dedicated editorial assistance.

[1] There are almost two million active duty and reserve members in the military, with slightly fewer reserve members than active duty military members. OFF. OF THE DEPUTY ASST. SEC'Y OF DEF. FOR MIL. CMTY. & FAM. POL'Y., U.S. DEP'T OF DEF., 2018 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 8 (2018), https://download.militaryonesource.mil/12038/MOS/Reports/2018-demographics-report.pdf [https://perma.cc/6K36-3QE4]. Two thirds of active duty service members are aged thirty years or younger. Almost half are under twenty-six. *Id.* at 37. Reservists are a little older, but they have gotten younger in recent years. More than half are thirty or younger. *Id.* at 95.

[2] More than eighty percent of service members (including both active duty and reserve members) are male. *Id.* at 6.

[3] Over seventy percent of the military is white. *Id.* at 7.

[4] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[5] Johnny Diaz, Maria Cramer & Christina Morales, *What We Know About the Death of Vanessa Guillen*, N.Y. TIMES (Aug. 14, 2020), https://www.nytimes.com/article/vanessa-guillen-fort-

quickly became a flashpoint in the media and a rallying cry for advocates and legislators seeking to change military procedures in charging and prosecuting sex-related offenses.[6]

Whoever you pictured, they likely fit into the dominant stock narrative of a military sexual violence[7] survivor[8]: a young, feminine woman overpowered by a higher-ranked man during a violent encounter and rendered helpless in the moment. Afterwards, if she survives at all, she is permanently wounded by the trauma of her experience.

These dominant narratives or stereotypes about who serves and who suffers in the military are, of course, incomplete. They are often in conflict. But those stereotypes nonetheless hold power and can perpetuate harm and stigma, particularly when they are applied and reinforced by governmental actors and legal systems.

This Article focuses on just one such legal system: the Department of Veterans Affairs' ("VA") disability compensation system. That system provides cash assistance to veterans who are disabled because of an injury or illness that occurred during the veteran's active service.[9] That includes new or worsened physical disabilities or mental health conditions as the result of what the VA calls "military sexual trauma" ("MST")—sexual assault, sexual battery, or "serious or pervasive" sexual harassment that a veteran experienced during service.[10]

Critically examining how the VA handles MST claims is necessary for several reasons. First, sexual assault and harassment are pervasive in the military.[11] Tens of thousands of service members are sexually assaulted each year, and more than three quarters of women[12] veterans report that they were

---

hood.html [https://perma.cc/ZRC4-265K].

[6] *Id.*; *see also, e.g.*, I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. (Sept. 16, 2020).

[7] In this article, I use the term "military sexual violence" or "sexual violence in the military" to refer to sexual assault, sexual battery, or sexual harassment that a service member experiences during service, regardless of the perpetrator's identity. I use that term, rather than the VA's term of "military sexual trauma" (MST), because MST implies that only experiences that cause trauma responses are included, and because it centers the survivor's reaction (trauma) rather than the offender's actions (violence). Therefore, I will use the term military sexual trauma or MST only to refer to the VA's specific regulatory scheme and claims adjudicated in that system.

[8] The words most often used to describe people who experience sexual violence— "victim" and "survivor" —are imperfect in different ways. I have not developed a better alternative, however, so I use both "survivor" and "victim" interchangeably.

[9] 38 U.S.C.A. §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).

[10] 38 U.S.C.A. § 1720D (Westlaw through Pub. L. No. 117-102); *See, e.g.*, U.S. DEP'T OF VETERAN AFFS., MILITARY SEXUAL TRAUMA FACT SHEET (May 2021), https://www.mentalhealth.va.gov/doc\s/mst_general_factsheet.pdf [https://perma.cc/6SJE-VZGB].

[11] *See* U.S. DEP'T OF VETERAN AFFS., *supra* note 10.

[12] The Department of Defense reports these data broken down by "men" and "women"; the Department of Veterans Affairs reports data sometimes referring to men and women, and sometimes disaggregated by "male" and "female" sexes. Neither agency separately collects data on sexual assault rates for nonbinary, gender-nonconforming, or other gender identities. Nor do they compare rates of assault for transgender men and women with those of cisgender men and women. To report the data in this Article, I (perhaps wrongly) assume that "males" identify as men and that "females" identify as women in the agencies' data. In doing so, I recognize that I am

sexually harassed during service. And yet, for most service members, there are very few options to remediate the harm of military sexual violence, especially if they do not report the perpetrator immediately.[13] The VA disability system is one of the few ways veterans can try to obtain some measure of justice and care.[14]

That leads to the second reason to analyze the VA's treatment of MST cases. Because the VA's system is one of the very few ways people who experience military sexual violence can seek redress of the harms they have experienced, the VA's approach to MST claims dominates the legal and cultural landscape for how to provide redress to service members who experience sexual violence.

Third, the VA disability system's treatment of MST survivors also provides a particularly instructive example of the harms created from overreliance on stock narratives. The VA disability system is far from the only legal or administrative proceeding that over-relies on unfair and often untrue stereotypes and that seeks to classify claimants according to those stereotypes. The uses and misuses of narrative extend to almost every area of our legal system.[15] Scholars have long described the troublesome dynamic of stock

---

erasing the trans experience. Suffice it to say, I expect that the rates of assault, bias, stigma and other harms reported in this Article are likely similar or worse for transgender, queer, and other gender identities than for cisgender men and women. *See, e.g.*, Jan A. Lindsay, Colt Keo-Meier, Sonora Hudson, Annette Walder, Lindsey A. Martin & Michael R. Kauth, *Mental Health of Transgender Veterans of the Iraq and Afghanistan Conflicts Who Experienced Military Sexual Trauma*, 29 J. TRAUMATIC STRESS 563-67 (2016); *cf.* ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT xii figure E-3 (Jan. 17, 2020) (showing similar rates of nonconsensual sexual contact in undergraduate women and undergraduate transgender, nonbinary, and genderqueer students), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/CampusSafety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/6NQ4-YFFD].

[13] Civilian courts are largely inaccessible for tort actions because of what is known as the *Feres* doctrine. And criminal prosecutions in the military justice system, like the civilian system, occur in only a tiny fraction of actual cases. In fiscal year 2019, out of 5,699 reports of sexual assault that could result in prosecution in the military justice system, just "363 (6.4%) were tried by court martial, and 138 (2.4%) offenders were convicted of a nonconsensual sex offense." PROTECT OUR DEFENDERS, FACTS ON UNITED STATES MILITARY SEXUAL VIOLENCE (Aug. 2020), https://www.protectourdefenders.com/wp-content/uploads/2018/06/1.-MSA-Fact-Sheet-180628.pdf [https://perma.cc/NK5P-F3AD].

[14] A caveat, of course. No after-the-fact legal redress or benefits system can fully remediate the harm of sexual assault and harassment or completely vindicate the victims' rights. The VA disability benefit system is no different. Because the VA disability system is remedial rather than preventative, it also cannot directly prevent future assault and harassment. Nor does it hold perpetrators or the Department of Defense (DoD) accountable. The VA disability compensation system cannot even provide relief for survivors who are violated but not disabled by that violation.

[15] Indeed, a whole wing of legal reasoning scholarship is devoted to narrative and "Applied Legal Storytelling," which explores both the power and flaws of the narratives embedded in legal rules. *E.g.*, Linda H. Edward, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 L. STUD. F. 7 (1996); Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 L. COMMC'N & RHETORIC 51 (2014).

narratives in areas of practice as wide-ranging as domestic violence,[16] affirmative action,[17] and religious liberty litigation.[18]

Evaluating the VA's approach to MST-based disability claims provides a striking addition to this body of scholarship because the VA disability system not only reflects harmful stereotypes through its decisionmakers' cultural biases, but it actually encodes some of those stereotypes into law. As this Article describes below, the VA system prioritizes certain types of victims with certain kinds of experiences: it prioritizes women; it prioritizes those who develop diagnosable PTSD as a result of their experience; and it prioritizes victims whose identities and experiences match the cultural norms and biases of VA decisionmakers. The VA's hierarchy of acceptable narratives pushes applicants to inhabit a certain persona of sexual victim as well as to perform their disability in a way that can be at odds with their experiences. The VA disability system thus de-legitimizes those who do not fit into those favored categories and imposes both implicit and explicit barriers for sexual assault and harassment victims.

Last, the VA's process also serves as a salient example of the intersectional harms that exist in legal systems' use of stock narratives, because the very structure of the VA's process for MST-related claims does not simply add together its expectations across multiple axes of identity—it explicitly compounds them. By overlaying both sexual victimhood and disability into a requirement that veterans establish the nexus between their MST experience and their current disability, the VA exposes veterans to re-traumatization, stigma, and bias across multiple axes of identity.

This Article proceeds in five parts. Part I of this Article provides some background on sexual violence in the military, its prevalence, and how the Department of Defense ("DoD") and VA's approaches to dealing with military sexual violence developed largely in response to scandals that sufficiently penetrated popular consciousness to instigate congressional inquiries. In Part II, this Article explains the basics of the VA disability compensation system and how it handles MST-related claims. Part III highlights how the system works in practice using two fictional case studies derived from the stories of clients I have worked with at the Veterans Legal Services Clinic where I

---

[16] Leigh Goodmark, *Clinical Cognitive Dissonance: The Values and Goals of Domestic Violence Clinics, the Legal System, and the Students Caught in the Middle*, 20 J.L. & POL'Y 301, 316 (2012) ("Rather than attempting to elicit the details of each woman's individual story of abuse, the legal system looks for a stock narrative, and in the absence of that stock narrative, withholds its benefits.").

[17] Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 960 (1996) ("This discussion lays the foundation for the subsequent demonstration that these underlying premises about selection are both unfair, in that they arbitrarily exclude some people and advantage others, and invalid, in that they fail to define either the goals or attributes of successful performance or to predict in most cases the individuals who can meet them.").

[18] James A. Sonne, *Religious Liberty, Clinical Education, and the Art of Building Bridges*, 22 CLINICAL L. REV. 251, 285–87 (2015) (describing the power and limitation of narratives, particularly for religion claims that may not resonate with certain judges and juries).

worked from 2018 to 2021. Part IV expands on these vignettes, tying clients' experiences to feminist and disability rights theory to demonstrate how the VA requires claimants perform both sexual victimhood and disability in a way that creates multiple, compounded harms. Part V concludes by offering ideas about next steps for advocates, the VA, and other stakeholders to reduce the power that these stigmatizing narratives possess.

I. SEXUAL VIOLENCE IN THE MILITARY

Sexual violence, including both harassment and assault, pervades the military. Sexual harassment, particularly of women, is downright commonplace, with as many as eighty percent of women veterans reporting that they were sexually harassed during service.[19] Sexual assault is also troublingly prevalent. One in sixteen women service members report experiencing sexual assault within the previous twelve months,[20] meaning that in fiscal year 2018 alone, over 13,000 servicewomen were victimized.[21] If you expand the inquiry to how many women veterans report *ever* experiencing sexual assault while serving in the military, the rates rise to about one in four.[22] Although the rates for men are much lower—DoD estimates that approximately 0.7% of men are sexually assaulted each year[23]—the larger number of male active duty service members means that an approximately equal number of men are victims of sexual assault as women.[24]

No one knows whether these disturbing rates have changed much over the decades. Although the United States government has known that some service members experience sexual assault and harassment—largely at the hand of

---

[19] Maureen Murdoch, Arlene Bradley, Susan H. Mather, Robert E. Klein, Carole L. Turner & Elizabeth M. Yano, *Women and War: What Physicians Should Know*, 21 J. GEN. INTERNAL MED. S5, S7 (2006).

[20] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018, at 3 (2019). One in sixteen women is 6.2 percent.

[21] DEF. MANPOWER DATA CTR., TABLE OF ACTIVE DUTY FEMALES BY RANK/GRADE AND SERVICE (Dec. 2018), https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports [https://perma.cc/WA84-XY82] (citing to 2018 data) (multiplying 6.2% and 218,864 total active duty women).

[22] U.S. DEP'T OF VETERAN AFFS., *supra* note 10; U.S. DEP'T OF VETERAN AFFS., POPULATION TABLES FY 2018 BY AGE/GENDER, https://www.va.gov/vetdata/veteran_population.asp [https://perma.cc/9AUH-JYNA]. The number may be even higher if veterans who do not access the VA system have experienced sexual assault at higher rates than those who do.

[23] U.S. DEP'T OF DEF., *supra* note 20, at 3.

[24] E. Ellen Morris, Julia C. Smith, Sharjeel Yonus Farooqui & Alina M. Surís, *Unseen Battles: The Recognition, Assessment, and Treatment Issues of Men With Military Sexual Trauma (MST)*, 15 TRAUMA VIOLENCE & ABUSE 94, 97 (2014). Male survivors of military sexual violence are not well studied; even the prevalence rate of men with military sexual trauma varies widely in the literature, with "yearly incidence of male MST varying from .02% to 6% and estimates of lifetime incidence of male MST varying from .03% to 12.4%." Carol O'Brien, Jessica Keith & Lisa Shoemaker, *Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVS. 357, 357 (2015). A rough calculation based on the DoD's own estimate of 0.7% suggests that at least 7,000 to 8,000 servicemen are assaulted each year. DEF. MANPOWER DATA CENTER, ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (July 2018) (multiplying 0.7% with (1,311,761-217,393)).

other service members[25]—for at least as long as women have been permitted to serve,[26] neither the DoD nor the VA systematically collected any data on it until about two decades ago.[27] Thus, the DoD and the VA's understanding of military sexual violence is a relatively new phenomenon.

The modern cultural narratives of military sexual violence, which influence the VA's policies, have also developed relatively recently. Many modern accounts of the military's problem with sexual assault start with what is known as the Tailhook scandal.[28] In September 1991, the Tailhook Association—a voluntary association filled with active and retired Navy pilots, other military personnel, and some civilian contractors—held its thirty-fifth annual convention in Las Vegas, Nevada.[29] The next month, newspapers began reporting that dozens of women, both civilians and service members, had been harassed and molested.[30]

The DoD began investigating, but many junior officers refused to cooperate.[31] In June 1992, a female Navy lieutenant frustrated with the lack of progress or change went public with her personal story of being sexually assaulted by "the gauntlet," a "Tailhook tradition" in which men stood in a

---

[25] This violence has a long history, with both DoD officers and VA employees long participating in it. *See* Murdoch et al., *supra* note 19, at S7 (describing slander campaigns against servicewomen in World War II by general officers and enlisted men); *Sexual Harassment: VA Needs to Better Protect Employees Before the Subcomm. on Oversight & Investigations & the Women Veterans Task Force, H.R. Comm. on Veterans' Affs.*, 116th Cong. 1 (2020) (statement of Cindy Brown Barnes, Director, Education, Workforce, and Income Security, U.S. Gov't Accountability Off.) (1/4 of women veterans harassed; highest level of sexual harassment of any agency).

[26] Murdoch et al., *supra* note 19, at S7.

[27] VA began universal screening for military sexual trauma in 1999. *See* Rachel Kimerling, Kristian Gima, Mark W. Smith, Amy Street & Susan Frayne, *The Veterans Health Administration and Military Sexual Trauma*, 97 AM. J. PUB. HEALTH 2160 (2007). The office that collects such data for the DoD was not created until 2005. U.S. Department of Defense Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program (DD 2005); *see also* U.S. DEP'T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 17 (Apr. 2004), https://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf [https://perma.cc/8MMN-MNAQ] (noting that, although DoD had a general database for collecting statistical data on serious crimes in the military, "[c]urrent reporting in all five functional areas is variable across the services. None of the services are transmitting to DIBRS across all five functional areas."). That database also included only crimes, which often would not include sexual harassment.

[28] For example, many media accounts about the history of the military's problem with sexual assault starts with Tailhook. *See, e.g.*, *The Daily: A #MeToo Moment in the Military*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/podcasts/the-daily/vanessa-guillen-military-metoo.html [https://perma.cc/YHF5-VLGB] (describing the Vanessa Guillén case, the culture of sexual harassment in the military, and explaining the Tailhook scandal); Renée Goldsmith Kasinsky, *Tailhook and the Construction of Sexual Harassment in the Media: "Rowdy Navy Boys" and Women Who Made a Difference*, 4 VIOLENCE AGAINST WOMEN 81, 95 (1998) ("The Tailhook controversy may have been a watershed event.").

[29] INSPECTOR GEN., REPORT OF INVESTIGATION: TAILHOOK 91—PART 2, EVENTS OF THE 35TH ANNUAL TAILHOOK SYMPOSIUM i (1993).

[30] *See* Kasinsky, *supra* note 28, at 87–88 (collecting media reports).

[31] INSPECTOR GEN., *supra* note 29, at IV-1–IV-2.

very crowded hallway and "fondled, grabbed, groped, pinched, or otherwise . . . touched" women entering the third floor of the hotel where the convention was held.[32] In response, Congress pressed for a more serious investigation, and the DoD's Office of the Inspector General ("OIG") spent months interviewing thousands of military and civilian witnesses to determine the extent of the assault and harassment that year.[33]

The final OIG report described in great detail the escalating harassment at the Tailhook convention over the years, and how the gauntlet appeared to be a nightly, coordinated, and systematic sexual assault of women who found themselves on the third floor of the hotel.[34] The report, however, provided no guidance on how to prevent similar incidents in the future, or how best to advocate and care for the military women who had been harassed and assaulted. The report simply concluded, "We have every expectation that the Navy will address the causes and conduct that combined to produce the disgrace of Tailhook 91, and therefore, we offer no recommendations."[35]

The sole prosecution of military personnel in connection with the Tailhook 91 events ended in no convictions.[36] There was no systemic change in policies and no military-wide response.

In the ensuing decades, more scandals and more pressure from advocates and Congress eventually prodded the DoD and the VA to start making department-wide efforts to assess and address military sexual violence. In January 2004, in the early days of Operation Iraqi Freedom/Operation Enduring Freedom, the Denver Post reported that dozens of women claimed that they had been assaulted or raped while deployed, and that they had sought but were denied counseling when they returned to the United States.[37] Other newspapers soon took up reporting. In one particularly shocking example, a twenty-three-year-old sergeant alleged that she was "knocked unconscious, bound and gagged, and then raped" at a base in Kuwait.[38] She said that she was re-traumatized and treated poorly by Army officials afterwards, and later attempted suicide.[39]

In response, the DoD commissioned a task force to report on the military's care for victims of sexual assault.[40] As a result of the task force, the

---

[32] *Id.* at VI-1.
[33] *Id.* at II-4.
[34] *Id.* at VI-1 to VI-2.
[35] *Id.* at XI-1.
[36] Art Pine, *Military Justice Is Under Fire : System is Attacked After No Convictions are Secured in Tailhook Case, Downing of U.S. Copters Over Iraq. Defenders Say Public Doesn't Understand That Even a Wrist Slap Can Break a Career in the Service*, L.A. TIMES (July 6, 1995), https://www.latimes.com/archives/la-xpm-1995-07-06-mn-20678-story.html [https://perma.cc/WG2R-QKTM].
[37] Vernon Loeb, *Inquiry Ordered Into Attacks on Female GIs*, WASH. POST (Feb. 7, 2004), https://www.washingtonpost.com/archive/politics/2004/02/07/inquiry-ordered-into-attacks-on-female-gis/4387c821-449e-45d4-9d98-60fef2c9d053/ [https://perma.cc/9Z9N-CSEY].
[38] *Id.*
[39] *Id.*
[40] *Id.*; *see also* Memorandum from Donald Rumsfeld, Sec'y of Def., to the Under Sec'y of Def. (Feb. 5, 2004).

DoD created the Sexual Assault Prevention and Response Office ("SAPRO"), and in 2005, the agency created its first department-wide sexual assault policies.[41] SAPRO reports data on sexual assault cases every year, conducts a survey every other year, and has implemented a variety of policies to try to reduce sexual violence incidence, increase reporting, and care for both military and civilian victims.[42]

The DoD's policies have achieved some success in increasing reporting over the last fifteen years, though most sexual assault is still not reported to authorities. In 2006, SAPRO estimated that only seven percent of members who experienced unwanted sexual contact in the previous year had reported it; in the most recent survey, the rate was up to thirty percent.[43] That means, however, that over two-thirds of service members who reported to SAPRO that they experienced sexual assault did not report that assault to a DoD authority.[44]

Other than increased reporting, however, the last decade has found a kind of equilibrium. Politicians, the military, and the VA all decry military sexual violence.[45] But the level of military sexual violence, though somewhat lower than in 2006, has remained steady for approximately the last decade.[46]

II. THE EXISTING REGIME FOR MST-BASED DISABILITY COMPENSATION

The most significant harms created by military sexual violence and the culture that prevents survivors from reporting are the direct harms to past, current, and future victims. Perpetrators can continue assaulting and harassing victims, and when survivors do not feel free to report or that they will not be sufficiently supported, some of them will experience distress more acutely and for longer than if they were able to ask for help and receive proper care immediately.[47] Sexual violence can be traumatizing in any context, but is particularly harmful when the perpetrator is someone the victim trusted or depended on[48]—a dynamic the military purposefully fosters among service

---

[41] U.S. Dep't of Def. Dir. 6495.01, *supra* note 27; *see also* U.S. DEP'T OF DEF., *supra* note 27, at 9. ("Currently, DoD has no policy requiring a standard approach in preventing sexual assault.").
[42] *E.g.*, U.S. Dep't of Def. Dir. 6495.01, *supra* note 27.
[43] U.S. DEP'T OF DEF., *supra* note 20, at 5.
[44] *Id.*
[45] *See, e.g.*, *Statement of President Joe Biden on the Results of the Independent Review Commission on Military Sexual Assault*, WHITE HOUSE (July 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/02/statement-of-president-joe-biden-on-the-results-of-the-independent-review-commission-on-military-sexual-assault/ [https://perma.cc/Z2E2-PSSB] (discussing that both the administration and members of Congress are committed to ending military sexual assault).
[46] U.S. DEP'T OF DEF., *supra* note 20, at 5 (showing past year prevalence of sexual assault vacillating between 4.3% and 6.2% for women, and between 0.6% and 1.2% for men between 2010 and 2018).
[47] *Cf.* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 76, 80 (2014) (effective interventions for acute stress reactions reduces possibility of PTSD), https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf [https://perma.cc/XN4K-3P9W].
[48] Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 119 (2013).

members.[49] Even more so, when assault occurs in the context of an institutional setting, like the military, the victim can experience "institutional betrayal" that can be "especially damaging."[50] Approximately half of survivors of military sexual assault, for example, develop PTSD.[51]

But official silence at the time of an incident also has a secondary effect: there is nothing in their service records that documents the assault or harassment. That causes problems if and when the VA disability benefits system gets involved.

To understand how the VA disability compensation system handles MST-related claims, it is important to understand some basics about the VA and its disability system. This Part briefly explains the VA disability system and how it adjudicates MST-related claims specifically.

A. VA Disability Benefits

The VA's services are broken into three component administrations: the Veterans Health Administration ("VHA"), the Veterans Benefits Administration ("VBA"), and the National Cemetery Administration.[52] The VHA provides health care services to veterans through VA hospitals, outpatient sites, and Vet Centers.[53] The VBA, by contrast, is the administration that provides monetary compensation for veterans through various programs, such as disability compensation, pension, GI Bill education benefits, home loans, and life insurance.[54] Disability compensation is by far the largest of these programs.[55]

To receive VA disability compensation, a former service member must establish that they are eligible for benefits based on the amount of time they

---

[49] As the Substance Abuse and Mental Health Services Administration advises healthcare workers working with military and veteran populations, "Service members' first introduction to military service during initial training is also where they learn that there is no greater bond than the one they share with the people 'to their left and their right.' For many, this bond of brotherhood/ sisterhood lasts throughout their military career and beyond." SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., UNDERSTANDING THE MILITARY: THE INSTITUTION, THE CULTURE, AND THE PEOPLE 11 (2010), https://www.samhsa.gov/sites/default/files/military_white_paper_final.pdf [https://perma.cc/KA9R-TBUT].

[50] Smith & Freyd, *supra* note 48, at 120.

[51] Carol O'Brien, Jessica Keith & Lisa Shoemaker, *Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVS. 357, 358 (2015).

[52] 38 U.S.C.A. §§ 305, 306, 307, 2400 (Westlaw through Pub. L. No. 117-102). The Office of the Secretary also houses a variety of offices and programs that do not fit into any of those administrations, such as the office that helps implement laws that give preferences in federal procurement to veteran-owned businesses. *See* 15 U.S.C.A. § 657b (Westlaw through Pub. L. No. 117-102) (establishing the Office of Veterans Business Development).

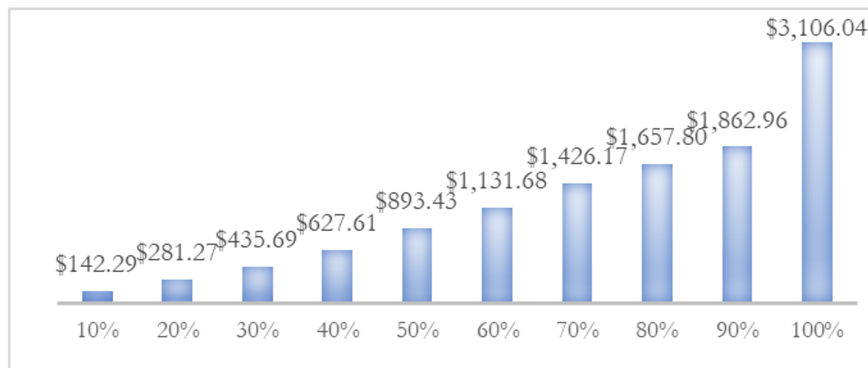
[53] NAT'L VETS. L. SERVS. PROG., VETERANS BENEFITS MANUAL § 10.1.1 (2021 ed.).

[54] *See generally Veterans Benefits Administration*, DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/benefits/ [https://perma.cc/X9A4-Y22W].

[55] In Fiscal Year 2020, VA estimated its disability compensation payments at $107 billion, far greater than any other claims, and more than the entire VA health care system's budget, at $92 billion. DEP'T OF VETERANS AFFS., FY 2021 BUDGET SUBMISSION: BUDGET IN BRIEF 9, 24 (Feb. 2020).

served and based on the character of that service.[56] Then, they must establish that it is at least as likely as not that they have a service-connected disability, which requires (1) a present disability, and (2) an in-service injury or disease that (3) was caused or aggravated by that service.[57] If the VA concludes the veteran has a service-connected disability, then the VA must determine a disability rating for the disability, ranging from zero percent to 100%, in ten percent increments.[58] By statute, the rating is supposed to reflect "reductions in earning capacity,"[59] but often the ratings are measured through general impairment and disability for all sorts of tasks. The disability rating is based solely on the VA's assessments of the veteran's symptoms and disability.[60] For basic disability compensation described here, there is no requirement to prove an actual reduction in earning capacity, nor does the VA impose asset caps to receive disability benefits.[61]

If a veteran has multiple service-connected disabilities, the VA combines their various ratings using a formula that ensures the total is never more than 100%.[62] The total percent rating from all service-connected disabilities entitles the veteran to a monthly payment. In 2020, the payment for each rating was as follows:[63]



As the graph shows, the scale is roughly exponential rather than linear, and the largest difference in pay is between ninety and 100%.

The VA publishes an extensive schedule of ratings for all types of disability, from tinnitus to joint problems to heart conditions to mental health conditions.[64] Each type of disability has its own table specifying how severe

---

[56] 38 U.S.C.A. §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).
[57] §§ 1110, 1131.
[58] § 1155 (Westlaw through Pub. L. No. 117-102).
[59] *Id.*
[60] *See* 38 C.F.R. Ch. 1, Pt. 4 (2022), WL 38 CFR Ch.1, Pt. 4 (VA ratings schedule).
[61] *See id.*
[62] § 4.25 (2018), WL 38 CFR § 4.25.
[63] *See* U.S. DEP'T OF VETERAN AFFS., PAST RATES: 2020 VETERANS DISABILITY COMPENSATION RATES (2019), https://www.va.gov/disability/compensation-rates/veteran-rates/past-rates-2020/ [https://perma.cc/NBC9-JCQX].
[64] § 4.87 (2003), WL 38 CFR § 4.87; § 4.71a (2021), WL 38 CFR § 4.71a; § 4.104 (2021), WL 38

the condition must be for a specific rating, based on how much the disability affects the veteran's life and livelihood.[65] Once a veteran receives a rating for a service-connected condition, the VA may periodically reassess the rating and can adjust the rating up or down if the veteran's condition has worsened or improved.[66]

As is most relevant for most veterans with MST-related claims, the ratings formula is the same for all mental health conditions, except eating disorders.[67] The VA schedule specifies that only zero, ten, thirty, fifty, seventy, and 100 percent ratings are available for these conditions.[68] A 100% rating means "total occupational and social impairment" and the rating schedule lists illustrative symptoms such as "gross impairment in thought processes or communication; persistent delusions or hallucinations; . . . [and] persistent danger of hurting self or others[.]"[69] A fifty percent rating, as another example, reflects symptoms such as flattened affect, frequent panic attacks, impaired judgment and abstract thinking; and "difficulty in establishing and maintaining effective work and social relationships."[70]

B. VA's approach to MST-related disability claims

In 1992, in parallel with its hearings on the Tailhook scandal, Congress decided that the VA should provide services to veterans who experienced military sexual violence.[71] It established a pilot program for the VA healthcare system to provide mental health counselling for women—but only women—veterans with "psychological trauma" caused by "a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty."[72] Over the years, the VA healthcare system has sought to lower barriers to care and counseling based on experiences of MST.[73] The VA's policies now state that all veterans who access VA services should be screened for MST, and the VA is supposed to offer MST-related mental health care to any veteran who seeks it, even if they would not qualify for other VA health care because of their discharge status or because they cannot substantiate that the MST occurred.[74] The VA's record on actually providing these services is spotty at best,[75] but the policies exist.

CFR § 4.104; § 4.130 (2014), WL 38 CFR § 4.130.

[65] §§ 4.87, 4.71a, 4.104, 4.130.

[66] § 3.327 (1995), WL 38 CFR § 3.327.

[67] § 4.130.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Kimerling et al., *supra* note 27, at 2160.

[72] Women Veterans Health Programs Act of 1992, Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4945 (codified as amended at 38 U.S.C. § 1720D).

[73] *See, e.g.*, Honor Our Commitment Act of 2020, H.R. 8268, 116th Cong. (Sept. 16, 2020).

[74] *See id.*

[75] *See, e.g.*, OUTVETS, TURNED AWAY: HOW VA UNLAWFULLY DENIES HEALTH CARE TO VETERANS WITH BAD PAPER DISCHARGES 10 (2020), https://legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf [https://perma.cc/GDC5-DKWL].

In the context of adjudicating disability benefits, though, the VA's barriers to access are much higher. This is largely because of the agency's requirement that veterans establish a service-connected disability. Although the benefits system is supposed to be pro-veteran, the veteran still bears the burden of proof,[76] which can be particularly difficult for veterans who, as part of that process, must prove they were assaulted or harassed. A tension, therefore, exists between the VA's efforts to provide affirming care and redress for veterans who experienced military sexual violence and a system in which the veteran must demonstrate that they were, in fact, assaulted or harassed *and* that they have a lasting disability from that experience.

Although the VA recognizes that MST of any kind can result in a variety of mental health conditions, including depression, anxiety, suicidality, and eating disorders, the MST regulations relaxing evidentiary standards apply only to claims of PTSD.[77] However, as described below, the VA's benefits system strongly prefers a specific, paradigmatic narrative: a service member is assaulted at a single, specific moment in time, and that single assault causes PTSD.

To be clear, even in paradigmatic MST-related claims—those with a clear claim of PTSD related to sexual assault—the VA's procedures can cause harm or fail to work as intended. In 2018, the VA OIG determined that of 2,700 cases the VA denied in a six-month period in 2017 that claimed MST-related PTSD, the VA had mishandled almost half—forty-nine percent—of them.[78] A follow-up report in 2021 found that VA mishandled fifty-seven percent of claims, which the OIG noted "was not an improvement from the 49 percent rate."[79]

And even when the VA processes MST claims correctly, the procedures themselves are potentially re-traumatizing. For example, to assist in developing PTSD claims based on MST, the VA has implemented a variety of procedures to develop the evidence of the markers of MST. This includes having MST coordinators who, until August 2020, would call claimants to ask them if they reported the assault to anyone in service to determine if the VA can find evidence of it and to tell them they can submit additional evidence.[80] The VA stopped this practice, but one might wonder how it ever created a process that involved having a stranger calling a veteran with no warning to ask them intimate questions about their actions after being sexually assaulted or harassed, possibly while they are in public spaces or at inconvenient times.

The VA's policies, however, are particularly harmful for veterans who do *not* fit the paradigmatic case. In 2002, recognizing that evidence of sexual violence is often not reflected in official records, the VA began to relax

---

[76] 38 U.S.C.A. § 5107 (Westlaw through Pub. L. No. 117-102).
[77] 38 C.F.R. § 3.304(f)(5) (2010), WL 38 CFR § 3.304(f)(5).
[78] OFF. OF INSPECTOR GEN., VETERANS BENEFITS ADMINISTRATION: DENIED POST-TRAUMATIC STRESS DISORDER CLAIMS RELATED TO MILITARY SEXUAL TRAUMA REPORT 5 (Aug. 2018).
[79] OFF. OF INSPECTOR GEN., IMPROVEMENTS STILL NEEDED IN PROCESSING MILITARY SEXUAL TRAUMA CLAIMS ii (Aug. 2021).
[80] *Id.* at 8 n.26.

standards for evidence to establish when assault or pervasive harassment occurred.[81] However, the VA still denied the vast majority of claims based on MST.[82] In 2011, in response to advocates' work demonstrating that the VA was not actually adjudicating MST-related claims properly, the VA began to train adjudicators on MST-related claims specifically.[83] At the time, the VA approved just thirty-six percent of MST-related claims of PTSD.[84] By 2017, after the VA made additional changes to its regulations and procedures, that percentage climbed to just over one half, approximately equal to that of non-MST-related PTSD claims.[85]

But those improvements are only reflected in cases where the veteran asserts that they have PTSD related to a sexual assault that can be identified with specificity.[86] That is because the VA created special rules for PTSD claims based on allegations of sexual assault, but not for any other claims related to MST.[87] The VA does not even track the rates for claims of other injuries or mental health conditions stemming from sexual violence. Someone with a less-straightforward case—for example, someone with an anxiety disorder rather than PTSD, or someone who experienced harassment from peers or intimate partner violence over the course of a long period of time—is simply not within the range of MST victims VBA contemplates.

The main substantive difference in how the VA regulations treat sexual-assault-related PTSD claims and other MST claims is in the evidence necessary to prove the in-service injury or illness necessary to substantiate a claim.[88] For the average, non-MST-related claim, a veteran must demonstrate they experienced an illness or injury during service that caused or aggravated a disability.[89] To determine whether the illness or injury occurred, the VA relies on official service records and service medical records, although it will also consider certain private medical evidence and evidence from the veteran or their friends, family, or others.[90] For sexual-assault-related PTSD claims, the VA expands its review and will accept a wider array of evidence. Namely, the VA will accept evidence including, but not limited to, "records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted

---

[81] *See id.* at 27.
[82] U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-477, MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE, BUT VA CAN DO MORE TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS 2 (2014).
[83] *Id.* at 10.
[84] *Id.* at 14 fig.4.
[85] OFF. OF INSPECTOR GEN., *supra* note 79, at ii.
[86] The VA's focus on PTSD claims above all other MST-related claims is so strong that it does not report grant rates for MST-based claims for disabilities that are *not* PTSD, such as major depressive disorder, substance use disorders, generalized anxiety disorder, suicidality, or eating disorders. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 82.
[87] 38 C.F.R. § 3.304(f)(5) (2010), WL 38 CFR 3.304(f)(5).
[88] *Id.*
[89] 38 U.S.C.A. §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).
[90] § 3.303(a) (1961), WL 38 CFR § 3.303(a).

diseases; and statements from family members, roommates, fellow service members, or clergy."[91] The VA will also look for evidence of behavior changes that suggest the existence of a traumatic incident, such as requesting a transfer, drug use, "episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes."[92] Claimants can also use a medical opinion diagnosing PTSD to help establish that a traumatic stressor event—namely, the assault—occurred.[93]

How does this difference play out? Say a veteran is assaulted and then struggles in their job and gets punished, which gets documented in their service record. But, like most service members who are sexually assaulted, they do not receive medical attention and do not report the assault or tell others. After their time in service, they are diagnosed with PTSD. If the veteran applies for service-connected disability compensation, the VA can look both to the job struggles and the current medical diagnosis as evidence that the assault occurred. The VA's rules suggest that such a claim should be granted.

On the other hand, if the very same veteran had instead developed major depressive disorder, the VA will look to the service records alone, find nothing about an assault, and likely deny the claim for failure to establish that an in-service injury occurred. Although the VA *can* consider lay evidence in determining whether an in-service event occurred, it can only consider that evidence if it is both credible *and* the lay statement "is consistent with the places, types, and circumstances of his or her military service."[94] In practice, this often means it is up to the whim of the adjudicator who happens to be handling the case.

The "consistent with military service" standard comes from the VA's Adjudication Procedures Manual, the guidance manual that all VA adjudicators are required to use and follow.[95] The manual's explanation of the standard suggests that the military records must reflect some specific reason to believe that an injury occurred at the specific time and place identified by the veteran and gives a lot of leeway to adjudicators on what seems consistent with military service.[96] The manual explains the standard for establishing an in-service injury by providing two examples. In the first example, a veteran claims he hurt his shoulder loading cargo onto an airplane.[97] His spouse provides a statement that he complained about a shoulder injury at the time,

---

[91] § 3.304(f)(5) (2010), WL 38 CFR § 3.304(f)(5) (Direct service connection).
[92] *Id.*
[93] *Id.*
[94] U.S. DEP'T OF VETERANS AFFS., M21-1, PART IV, SUBPART I, CHAPTER 1, SECTION B – EVIDENTIARY STANDARDS FOR FINDING AN EXAMINATION OR OPINION NECESSARY, at IV.i.1.B.1.b In-Service Event, Injury, or Disease (Feb. 9, 2022), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/enUS/portal/554400000001018/content/554400000180495/M21-1,-Part-IV,-Subpart-i,-Chapter-1,-Section-B---EvidentiaryStandards-for-Finding-an-Examination-or-Opinion-Necessary [https://perma.cc/ETA2-3CFW] [hereinafter M21-1] (Adjudication Procedures Manual).
[95] *Id.*
[96] *Id.*
[97] *Id.*

and though he was not treated for a shoulder injury in service, his military records do establish that his job was loading cargo and that he was on an exercise on the date he says he got hurt.[98] This evidence is considered credible and consistent with his service, enough to support developing the record further by asking a VA doctor for a medical examination to determine if there is a nexus between the in-service event and current disability. In the second example, a veteran claims a disability based on being exposed to chemical gas, but his military records do not show him being exposed to gas or chemicals or getting medical treatment for them.[99] This claim is therefore considered "incredible and not consistent with circumstances of his service."[100] Because there is no service record that specifically corroborates the veteran's story, the VA discounts the veteran, no matter how credible they otherwise are, or if they have other lay evidence to support them.

Importantly, nothing in the manual provides any specific guidance about what to do with MST-related claims outside of the PTSD context. It does not provide examples of how to determine whether MST claims are credible, or how to determine if a sexual assault or harassment is "consistent with the circumstances of service." And in general, VA leadership is strongly opposed to the idea that a veteran's testimony, even if credible, is enough to establish that sexual violence occurred.[101]

Suffice it to say, at least some VA examiners consider claims of sexual violence to be a shocking claim that requires specific support in the record. For them, sexual violence is more like mysterious chemical gas that probably did not really exist than a run-of-the-mill injury from carrying something too heavy.

In practice, in many cases if a claimant is not claiming PTSD based on sexual assault, the VA will only accept that there was in-service MST if it is reflected somehow in the service records—that is, if the veteran reported it during service and their chain of command decided to document it somewhere.[102] Or, to put it another way, if a veteran's experience doesn't fit the narrative that an assault causes PTSD, then they do not receive the

---

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Hearing on H.R. 1092 Before the Subcomm. on Disability Assistance and Mem'l Affs., H. Comm. on Vet. Affs.*, 116th Cong. 7 (2019), https://docs.house.gov/meetings/VR/VR09/201 90620/109624/HHRG-116-VR09-Wstate-ClarkW-20190620.pdf [https://perma.cc/B8BT-YPKT] (statement of Willie C. Clark, Sr., Dep'y Under Sec'y for Field Operations Veterans Benefits Administration, Dep't of VA) [hereinafter Statement of Willie C. Clark, Sr.].

[102] For a rare example of this standard being sufficient for a veteran's claim, see Bd. Vet. App. 18135649 (Sept. 17, 2018) (MST based on pervasive sexual harassment because the service personnel records reflected an investigation as well as a letter in the service records "years before her present claim" from the veteran requesting to be placed in inactive status because of "very bad" harassment by a high ranked individual in her unit.). This is the only case at the Board of Veterans Appeals I have found where the VA granted MST-related service connection based on pervasive harassment rather than a physical assault. Decisions by the VA's regional offices that are not appealed to the Board are not publicly available, however, so there are probably other instances where the VA has granted service connection based on harassment.

advantage of VA's MST regulations. This disparity in how the VA treats different kinds of MST and different kinds of disabilities is unjust. It effectively punishes a survivor for reacting to their assault in a way that the VA does not prefer.

III. TWO CASE STUDIES

Both the VA's basic claim structure and its MST-specific regulations can cause unintended pain and harm to veterans. I have seen some of this harm in my work with veterans, particularly when I was a clinical instructor and attorney in the Veterans Legal Services Clinic at Yale Law School.[103] Among other types of advocacy, the clinic represents veterans in applications for disability benefits and, if necessary, appeals before the VA and in federal court. Some of the clinic's clients have MST-related claims for mental health conditions, and they seek disability compensation to help compensate for the way that their mental health impacts their ability to find and keep jobs—or find and keep housing or meet their other basic needs. The process of seeing VA compensation is often long and arduous, and as we work with survivors of military sexual violence, the process itself can often be punishing and exclusionary, especially for veterans whose identities or experiences do not match the VA's structural or cultural expectations for military sexual violence survivors.

To illustrate the difficulties inherent in the VA's process, consider two fictional clients, Ms. B and Mr. N. Though they are fictional accounts, their stories are based on experiences of real clients and representative of our clients who have experienced military sexual violence. To protect client confidentiality, I have combined several clients' stories, created certain hypothetical details, and anonymized identifying information.

A. Ms. B

Ms. B is a Black woman in her mid-twenties, with a round and expressive face. She keeps her hair tied back tightly into a neat, low bun (at least she does every time I see her). It's a style she started wearing while in the Navy.[104] The first time I meet her, she easily expresses all her many and sometimes overwhelming emotions to me and my clinic students. She is, to use the cliché she uses, an open book. The doctors at the VA say this is a symptom of

---

[103] *See Veterans Legal Services Clinic*, YALE L. SCH., https://law.yale.edu/clinics/vlsc [https://perma.cc/5RXN-2E9G].

[104] Although the Navy expanded its list of acceptable hairstyles for women in 2018, that was after Ms. B served. During her service, buns were one of the few hairstyles that Black women could wear. *See* UNITED STATES NAVY UNIFORM REGULATIONS, NAVPERS 15665I, ch. 2, sec. 2, art. 2201.1; Jennifer McDermott, *US Navy Now Allows Women to Wear Ponytails, Lock Hairstyles*, AP NEWS (July 11, 2018), https://apnews.com/7be954ddf0d242688ecb1df9d85fe6bb/US-Navy-now-allows-women-to-wear-ponytails,-lock-hairstyles [https://perma.cc/QD88-68AC] ("At the U.S. Naval War College in Newport," Rhode Island, on Wednesday, women said they're excited to switch from buns, which don't fit well under helmets.")

borderline personality disorder,[105] but another, private doctor, has said she has bipolar disorder and an anxiety disorder. Ms. B doesn't think she has a personality disorder, but she admits she started having "behavioral problems and bad grades" starting in middle school. Eventually, we learn that her behavior coincided with being sexually abused by her mother's boyfriend. She tells us she really does not want to have a personality disorder, which she says would mean there is something intrinsically wrong with her, something that cannot be fixed.[106]

Instead, she insists the reason she has trouble managing her emotions is because of her ex-boyfriend. They met in basic training, and then they were stationed together. She says the relationship brought out the worst in both of them. Her friends agree, saying the bad relationship was "both of their faults." One time when he slammed her against a wall, someone called the military authorities, but when they arrived, Ms. B hid the extent of the violence to protect him. In the end, her commanding officer just told her to stop interacting with him. She did not comply.

After service, Ms. B struggled to hold a job. She came to our clinic because she hopes to receive disability payments from the VA so she can stay in an apartment rather than move back in with her mother and step-father. She wants to go to college, and eventually get an office job somewhere.

Her ex is still in the military.

They still text.

* * *

In multiple ways, Ms. B's case does not fit what the VA expects for disabilities based on experiences of sexual violence. She doesn't have a diagnosis of PTSD but has received a variety of other diagnoses. She experienced intimate partner violence over a prolonged period of time, rather than a single instance of sexual assault to point to as a "stressor" or "traumatic event," in the language of PTSD diagnosis.[107] She also was assaulted before service, too, which could have precipitated her symptoms in addition to or instead of the assaults in service.

As the clinic students begin to develop a case to present to the VA for

---

[105] AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 663 (5th ed., 2013) [hereinafter DSM V].

[106] The American Psychiatric Association defines a personality disorder as, "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." *Id.* at 645. The stigma surrounding personality disorders, and borderline personality disorder in particular, is pervasive even among mental health professionals like psychotherapists, psychiatrists, and psychiatric nurses. *See* Randy A. Sansone & Lori A. Sansone, *Responses of Mental Health Clinicians to Patients with Borderline Personality Disorder*, 10 INNOVATIONS IN CLINICAL NEUROSCIENCE 39 (2013) (summarizing various studies finding that mental health clinicians have negative feelings and prejudicial attitudes towards patients with BPD, and more negative feelings than for patients with other conditions).

[107] DSM V, *supra* note 105, at 271, 279 (describing clinical requirements for PTSD diagnosis discussing differential diagnosis for PTSD related to the "stressor").

why she should receive benefits, they are confronted with an ethical dilemma common for many advocates assisting clients to receive public benefits[108]: should they encourage Ms. B to edit her story to fit it into one that the VA expects, one that will be easier for the agency to recognize as deserving of compensation? Should she try to avoid talking about the assaults in her childhood, and try to make herself seem more like she was a victim of her partner than she really feels? How should she portray the relationship itself? Can she—should she—tell the VA what she tells us: that she was not a helpless victim and that she partly blames herself for what she simply calls a "bad relationship"? Should she explain why she is still in contact with her ex-boyfriend, even though the relationship caused her so many problems? And even if it is advisable, is any of this editing even possible in the context of a case in which the VA will order its own medical evaluation from a VA doctor, where she will have to answer questions about her experiences to receive a diagnosis?

These questions vex my students, as they realize that what will make the case easier from the VA's perspective will make it harder for Ms. B to engage with the process at all. As Professor Leigh Goodmark has explained in the context of domestic violence cases:

> This question of editing or not editing and its effect on winning or losing a case sets up a Catch-22 for victims, however. She may choose to tell the [full, nuanced] story . . . and risk judicial skepticism and disbelief; alternatively, she may edit her story and deny herself the opportunity to give voice to her experience, thereby branding her actions as deviant. Editing victims' stories reinforces the stereotype of the paradigmatic victim, making it more difficult for women to tell stories that fail to conform. Victims of violence should not have to choose between telling their chosen stories and receiving protection.[109]

Ms. B must decide how much of herself to show the VA, risking rejection if she shares too much but reinforcing her stigma if she hides the nuances of her experiences or offering the VA a version of her history or her diagnosis that she does not truly accept.

B. Mr. N.

Mr. N is about a decade older than Ms. B, and quieter. He is white and

---

[108] *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); *see also* Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993); JoNel Newman, *Identity and Narrative: Turning Oppression Into Client Empowerment in Social Security Disability Cases*, 79 ALB. L. REV. 373, 374–76 (2015).

[109] Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 123 (2008).

wiry, with short cropped blond hair that makes him look younger than he is. He joined the Army as soon as he finished high school, eager to follow in the footsteps of his father, uncle, grandfather, and brother. As a kid, he liked tinkering with radios and televisions, and he hoped to be radio systems operator or a satellite communications officer. However, during his entrance processing, he discovered he was colorblind and therefore was disqualified from those jobs. Instead, he ended up as a cook, which he did not like very much. He did not fit in with his unit and had few friends. He developed depression and started receiving medication for it.

Eventually, Mr. N deployed overseas. One night, a fellow enlisted soldier assaulted Mr. N and forcibly penetrated him with a bottle. Mr. N immediately reported it, and an investigation ensued. The fellow soldier was court martialed and discharged.

Mr. N, though, did not get relief. Although investigations are supposed to be confidential, fellow soldiers began teasing him about the assault and mocking him for having reported it. Mr. N asked to be transferred to a new unit, but his request was denied. The Army instead began processing him for potentially being medically discharged because of his depression. In the meantime, Mr. N started being unable to sleep, experiencing intrusive thoughts, and more severe and pervasive suicidal ideation. He began self-medicating with alcohol and drugs. For that, the military stopped the medical discharge process and instead discharged him with an Other-Than-Honorable ("OTH") characterization.[110]

For several years after his discharge, Mr. N was struggling with addiction, joblessness, and homelessness. The VA would not offer him assistance, and when he applied to the VA for medical care, he was denied. When the law changed such that the VA was supposed to offer him mental health care for anything related to his sexual assault,[111] he did not hear about it. Eventually, he sought pro bono legal assistance from a local organization, who helped him apply for VA disability benefits and got him access to VA health care. However, the VA generally does not provide disability benefits to former service members with OTH discharges.[112] In fact, the VA does not even call them veterans unless they decide that the service was honorable for VA purposes, notwithstanding the military's OTH characterization.[113] While Mr. N waited for the VA to determine whether it would even hear his claim for PTSD

---

[110] Since the 1940s, service members have received one of five "characterizations" of their service upon discharge: Honorable, General (Under Honorable Conditions), Undesirable (changed later to "Other-Than-Honorable"), Bad Conduct, or Dishonorable. *See* Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical & Legal Basis for Excluding Veterans from "Veteran" Services*, 122 PENN ST. L. REV. 69, 95–96 (2017).

[111] In theory, even veterans with OTH discharges can seek mental health services at the VA, and in particular are supposed to be able to seek MST-related health care. In practice, however, many VA locations fail to make these distinctions when someone walks in, and instead are told that if they have an OTH they cannot access health care. *See generally* OUTVETS, *supra* note 75, at 1.

[112] *See* Maj. Jeremy R. Bedford, *Other Than Honorable Discharges: Unfair and Unjust Life Sentences of Decreased Earning Capacity*, 6 U. PA. J. L. & PUB. AFFS. 687, 693–94 (2021).

[113] OUTVETS, *supra* note 75, at 3.

related to his sexual assault, he continued to struggle with addiction and cycled in and out of homelessness, living at halfway houses, on friends' couches, and in his car.

* * *

Even though Mr. N immediately reported his rape, Mr. N was effectively punished for complying with the process the DoD spends so much effort to promote and encourage people to use. He trusted the DoD authorities to provide justice and care, but although the military prosecuted his rapist, it did not protect Mr. N. Instead, it left him to face harassment and retaliation, and gave him an OTH discharge for conduct that stemmed from his trauma and its aftermath. Then, compounding his trauma, the VA repeatedly refused to serve him and kept him out of both the VA healthcare system and the disability compensation system for years because the VA determined his OTH characterization meant he was not considered a "veteran." This is because the VA makes veterans like Mr. N first convince the agency that an OTH was not due to "willful and persistent misconduct"[114] before the VA will even consider their MST claim. That means the VA evaluates the quality and reasons for a veteran's misconduct outside of the framework that is supposed to help MST survivors receive disability benefits. By initially barring him from healthcare and benefits because of the DoD's decision to impose an OTH discharge, the VA erected an immense and unnecessary barrier and exacerbated Mr. N's distress for years.

Because there was such clear documentation of Mr. N's assault, the VA would almost certainly recognize that an assault occurred, if it ever agrees to review the merits of his case. He would have to demonstrate he does have PTSD, but his case largely fits within the MST paradigm the VA is prepared to adjudicate.

Mr. N, however, has a complicating factor that Ms. B does not: he is male and therefore his story does not fit the expected narrative. He is therefore less likely to be believed than a woman with the same experience.[115]

IV. HOW THE VA DISABILITY SYSTEM HARMS MST CLAIMANTS

Ms. B and Mr. N's stories illustrate flaws in the VA system, and how they harm MST claimants. Much of that harm derives from the very foundation of the VA system as it currently exists.

Providing VA compensation to veterans who experienced sexual violence during service lies at an uncomfortable intersection between the VA's attempts to improve its responses to military sexual violence and the agency's statutory obligation to pay only veterans who can establish that they have a disability that is service-connected, that is, caused or exacerbated by an injury or illness

---

[114] 38 C.F.R. § 3.12(d)(4) (1997), WL 38 CFR § 3.12(d)(4).

[115] People are less likely to believe male survivors when they report rape compared to female survivors. Susanne Schwarz, Matthew A. Baum & Dara Kay Cohen, *(Sex) Crime and Punishment in the #MeToo Era: How the Public Views Rape*, 44 POL. BEHAVIOR 75, 99 (2020).

that occurred during active duty.[116] The VA disability system is structurally and fundamentally imbued with a mistrust of applicants, which creates barriers for all claimants, not just those with MST-related claims. Although VA's mission is to care for veterans, suspicions about people swindling the disability compensation system permeate the entire regulatory scheme and are nearly as old as the system itself.[117] Put simply, the VA disability system, by design, seeks to help only worthy veterans and tries to weed out those who are undeserving or not as disabled as they claim. For military sexual violence survivors, that means that obtaining benefits to which they are entitled can be a fraught experience as they try to prove to the VA both that they were assaulted or harassed and that they are, in fact, disabled because of it.

A. *The VA's Mistrust of Claimants*

The VA disability benefits system is very generous, particularly compared to most public benefits in the United States. A veteran with a 100% rating receives over $37,000 per year, tax-free, without any caps on other income or assets.[118] But with that generosity comes skepticism, and some of the system's gatekeepers become suspicious of those who seek to obtain these benefits.[119]

This skepticism that can pervade certain VA decisionmakers' opinions are neither unique to the VA, nor a modern problem. Whenever a government system provides benefits to certain people but not others, part of that system's mission becomes keeping out people who do not qualify for benefits. The VA disability compensation system is no exception.

Since at least the nineteenth century, suspecting disabled people of deception has been an integral part of the rise of governmental regulatory schemes seeking to regulate and provide benefits to disabled people and particularly poor disabled people.[120] After the Civil War, Congress expanded its disability pension system for veterans to include diseases arising after service but because of injuries and incidents in service. In response, newspapers began reporting stories of "bogus" applicants and "pension frauds," [121] highlighting a fear that some people would receive benefits who did not deserve them. That distrust was not limited to breathless accounts in the popular press—military and political leaders also expressed their skepticism. As General Matthew Mark Trumbull put it, "'Veteran diseases' are

---

[116] 38 U.S.C.A §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).

[117] For an excellent history of the Civil War-era disability pension system and the contemporaneous public suspicion and mistrust that it created, see Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO STATE L.J. 109 (2001).

[118] U.S. DEP'T OF VETERAN AFFS., *supra* note 63.

[119] For example, in my own practice, I have seen VA medical examiners' files that note when a veteran admits that they hope to receive VA benefits during an examination meant to determine whether they have a present disability. The implication that the veteran may be exaggerating their symptoms can be almost impossible to overcome, as the VA can use the notation to undermine any future symptoms reported or factual claims made by the veterans.

[120] ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 23 (2014) (citing Deborah Stone, THE DISABLED STATE 26 (1984)).

[121] *See* Blanck, *supra* note 117, at 120.

those miraculous ailments which rage unsuspected in the bodies of old soldiers until seductive pension laws bring them to the notice of the sufferers."[122] Or, in the words of President Cleveland as he vetoed an expansion to the veteran pension system in 1887, which was quickly enacted in 1890 after he was voted out of office: "[T]here can be no doubt that the race after the pensions offered by this bill, would not only stimulate weakness and pretended incapacity for labor, but put a further premium on dishonesty and mendacity."[123]

Those attitudes have continued to the present day, and they are held not just by members of the public but by VA officials as well. In 2019, for example, VA officials testified to the House Subcommittee on Disability Assistance and Memorial Affairs that the agency "strongly oppose[d]" lowering the burden of proof required for MST claims to accept lay evidence of trauma as sufficient to establish that event occurred.[124] According to the officials, "VA is concerned that the bill's language would functionally require VA to accept all allegations of an MST stressor and potentially award service connection based on a single lay statement from the Veteran. . . ."[125] The VA argued that its requirement that there be additional supporting evidence is "needed to maintain the integrity of the claims process."[126]

Even people who can prove they are not faking their condition can face perceptions that they should not receive benefits to which they are entitled because their claim is less deserving or legitimate. This problem is not specific to VA; the employees of a variety of social welfare programs perceive recipients of those programs as more or less deserving.[127] Also, in general, veterans themselves consider some disabilities more legitimate and deserving of VA disability compensation than others, prioritizing physical injuries from combat like loss of limbs or deafness, and believing combat-related mental health conditions related to combat injuries to be more severe than mental health conditions for other reasons.[128] This perception can easily carry over to VA adjudications, in part because VA adjudicators are often veterans themselves.[129]

---

[122] *Id.* at 129 n.82 (quoting M.M. Trumbull, *Pensions for All*, 39 POPULAR SCI. MONTHLY 721, 723 (1889)).
[123] *Id.* at 124.
[124] Statement of Willie C. Clark, Sr., *supra* note 101, at 7.
[125] *Id.* at 8. The bill died in committee. *See* H.R. 1092, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1092/committees [https://perma.cc/69WA-5T24].
[126] Statement of Willie C. Clark, Sr., *supra* note 101, at 8–9.
[127] Casey MacGregor & MarySue V. Heilemann, *Deserving Veterans' Disability Compensation: Qualitative Study of Veterans' Perceptions*, 42 HEALTH & SOC. WORK 86, 87 (2017) (citing KATZ, M. B., THE UNDESERVING POOR (NEW YORK: PANTHEON 1989)).
[128] *Id.* at 89–90 (describing interviews and concluding that, "[i]f the cause of the condition was not connected to military participation, [*i.e.*, combat or a military operation,] it was not deemed by participants as worthy of [VA disability compensation].").
[129] Almost one third of VA's entire workforce are veterans, more than any other federal agency. *VA Celebrates Workforce, Union, and Veterans*, DEP'T OF VETERANS AFFS. (Sept. 3, 2010), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=1950 [https://perma.cc/G57B-Y9UP].

B. Performing Sexual Victimhood

Against this backdrop of mistrust, the VA disability benefits system pushes veterans like Ms. B and Mr. N to conform and perform socially acceptable victim roles, or risk not receiving benefits at all. As explained above, to receive disability compensation from the VA for claims related to MST, the veteran must convince the VA that they experienced sexual assault or pervasive sexual harassment in the military.[130] If they did not officially report the assault or harassment at the time, that often means pointing to secondary evidence about how they reacted to the sexual violence. But not everyone reacts to sexual violence the same way. The VA regulation provides a long list of markers it looks for as evidence of MST. By setting forth a specific list, though, the regulation prioritizes and provides an advantage to a certain type of victim: one who immediately confides in family and friends at the time, who can no longer do their job, or who has unexplained but documented mental health symptoms.[131] Basically, the VA is more likely to give relief to someone who has a single traumatizing experience, who has trusted friends to confide to, and who cannot quickly function.

The harm of requiring sexual assault victims to behave in certain ways is not a new concept. In the 1990s, for example, feminist legal scholars widely condemned the problematic concept of "battered woman syndrome," a theory first developed by Lenore Walker in 1979,[132] which for a time saw some modest popularity in certain criminal proceedings. Battered woman syndrome, as it was used in legal proceedings, sought to explain and justify a woman—always a woman—killing a violent partner by describing her acts as the desperate reaction of a victim so traumatized that she was unable to leave or act rationally.[133] Proponents of using battered woman syndrome as a legal defense strategy sought to use expert testimony to explain the syndrome as a subset of PTSD that explained violent behavior as temporary insanity, diminished capacity, or otherwise justifying a homicide that juries or other decisionmakers might find irrational.[134] Feminist legal scholars explained, however, that this concept was "inaccurate, reductionist, and potentially demeaning."[135] More broadly, as Professor Leigh Goodmark has explained, the cultural narrative of a paradigmatic or normal victim of sexual violence expects victims to be passive, middle-class, straight, white, cis-gendered

---

[130] *See* discussion *infra* Section II.B.
[131] 38 C.F.R. § 3.304(f)(5) (2010), WL 38 CFR § 3.304(f)(5).
[132] LENORE E. WALKER, THE BATTERED WOMAN (1979).
[133] Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 974–75 (1995) (describing how the syndrome was used in courts).
[134] *Id.* (describing how the syndrome was used in courts).
[135] *Id.* at 975; *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 153 (2004) (The "battered woman syndrome" and the related concept of "learned helplessness" fails to grasp the ways in which women who are assaulted are often not at all incapacitated but are active in struggling against the violence.").

women.[136] The use of the syndrome as a gendered, stereotyped trope has long since fallen out of favor, even as cultural narratives of what it means to be a paradigmatic or "good" victim persists.

In the VA disability system, these cultural norms are exacerbated and complicated by the military culture that pervades military sexual violence. Even more than in civilian contexts, victims of military sexual violence often do not fit the cultural narrative of who victims should be or how they should react. For example, military members are trained in combat, and trained not to be passive. They are unlikely to be weak and helpless victims who could not have fought back physically. But they are also trained *not* to fight back against or challenge their superiors.[137] Service members are quickly inculcated into a culture of protecting the cohesion of one's unit by not making complaints. This means that—regardless of their actions—survivors who wanted to be, or still identify as, good service members may have difficulty reconciling their actions with the military's cultural expectations of its members generally and of sexual violence survivors specifically. A survivor might think, "A good soldier would have fought back," but also, "A good soldier would not complain." Or, in the words of Ryan Leigh Dostie, a writer and veteran:

> Rape victims must yell, cry, fight—says the Army that has trained us for years to be silent, to be strong, to be obedient. It's as if there is a list somewhere about how we, the raped, are supposed to act, how to play our parts for those who will judge us. We're failing a set of standards that we have no idea even exist.[138]

Ms. Dostie reported her rape while deployed in Baghdad, but Army investigators did not believe her or other rape victims she knew because they did not act "enough 'like a rape victim.'"[139] Although Ms. Dostie wrote to shine a light on the Army's failures, the same conflicting expectations about how veterans would have behaved in the face of sexual violence exist at the VA, where many of the employees also served in the military in the same totalizing culture.

In addition, military sexual violence survivors are not necessarily middle-class straight, white, cis-gendered women with pristine mental health backgrounds that make VA decisionmakers trust them as reliable narrators of their experiences. One of the strongest predictors of experiencing sexual assault as an adult is a history of childhood assault and trauma,[140] meaning

[136] Goodmark, *supra* note 109, at 77.
[137] For example, a servicemember can be subject to a court martial for disrespecting a superior commissioned officer or failing to follow orders. 10 U.S.C.A. §§ 889, 890 (Westlaw through Pub. L. No. 117-102).
[138] Ryan Leigh Dostie, Opinion, *She Didn't Act Like a Rape Victim*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/opinion/armed-forces-rape.html [https://perma.cc/4MKV-NXXD].
[139] *Id.*
[140] Katie A. Ports, Derek C. Ford & Melissa T. Merrick, *Adverse Childhood Experiences and*

that, like Ms. B, many service members' military sexual assault or harassment may not be their first encounter with sexual violence. Previous sexual violence experiences can complicate a veteran's mental health history, as well as impact their reaction to being assaulted or harassed again. Similarly, a history of forcing gay and lesbian service members into the closet and the former ban on trans people from serving[141] mean that LGBTQI+ veterans, particularly those who served during periods of official discrimination, may have particularly complex stories about how and why they responded—or did not respond—to sexual violence during service. During the enforcement of Don't Ask Don't Tell, for example, service members understood that if they reported a same-sex rape, they risked their own discharge, regardless of their sexual orientation.[142]

The VA—both in its benefits system and its health care—also contributes to a culture that can create additional stigma and impossible standards for the up to half of military sexual violence survivors who are men. Although the VA recognizes that male veterans experience sexual violence in similar numbers—though at lower rates—as women, the VA has historically approached MST as primarily a problem for women veterans.[143] This message still pervades veteran communities, even though the VA now explicitly includes men it its MST outreach and health care.[144] Nevertheless, even now, the men who experience MST are often left out of VA's own medical research,[145] as well as the cultural narrative. Male veterans who have experienced sexual violence struggle with how to fit their experiences into cultural military narratives that reinforce rape myths like "Real men don't get raped," and "Male rape is not serious."[146] In part because of how male survivors are not included in the cultural narrative of sexual violence, and in part because of the hyper-masculinity encouraged by the military, it takes years, sometimes decades, for men who experience long-lasting psychological effects from military sexual violence to seek and obtain treatment.[147]

Sexual Victimization in Adulthood, 51 CHILD ABUSE & NEGLECT 313 (2016).

[141] *See* Memorandum of August 25, 2017, 82 Fed. Reg. 41319 (Aug. 30, 2017) (reinstating pre-2016 policy permitting discharge of openly transgender individuals); Memorandum for the President from James N. Mattis, U.S. Sec'y of Def., to President Trump (Feb. 22, 2018). These policies ended with an executive order from President Biden in January 2021. Exec. Order No. 14004, 86 Fed. Reg. 7471 (Jan. 25, 2021).

[142] Nathaniel Penn, *Son, Men Don't Get Raped*, GQ (Sept. 2, 2014), https://www.gq.com/story/male-rape-in-the-military [https://perma.cc/62EA-EAJ6].

[143] As a simple example of this stereotype, one can simply look to the fact that, by statute, the VA's initial provision of MST health care was for women only. *See supra* n.72 and accompanying text.

[144] *See, e.g.*, Men You Are Not Alone in Overcoming Military Sexual Trauma (Infographic), U.S. DEP'T OF VETERAN AFFS. (May 2021), https://www.mentalhealth.va.gov/docs/mst/Men_MST_infographic_508_english.pdf [https://perma.cc/32WM-JHSW].

[145] Carol O'Brien, Jessica Keith & Lisa Shoemaker, *Don't Tell: Military Culture and Male Rape*, 12 PSYCH. SERVS. 357, 357 (2015) (describing the scant research on MST's effects on male veterans).

[146] *Id.* at 360.

[147] *Id.* ("At Bay Pines' C. W. Bill Young VA Medical Center in Florida, the country's first residential facility for men suffering from MST, the average patient is over 50 years old at

In sum, the VA disability system can harm veterans with MST-related claims by demanding that they fit the cultural expectations of a sexual assault victim. For some veterans, they can be coerced into reducing their story to fit into expectations, like Ms. B being forced to decide whether to try to point to her rape as the cause of her mental health conditions even though her understanding through counseling and treatment is more complicated. For other veterans whose identities mean they cannot fit into dominant narratives, like male veterans, they risk not being believed at all. Veterans who are brave enough to tell their stories, either during their time in the military or afterwards, risk more than just not being believed. Mr. N, for example, reported his rape immediately, but experienced retaliation and bullying in response, followed by years of homelessness, illegal drug use, and poverty because, with the OTH discharge from the military, the VA would not hear his case at all before it adjudicated the seriousness of the reasons for his discharge.

And what if a veteran cannot fit their story of sexual violence into a VA-approved definition of military sexual trauma? To paraphrase the words of Professor Goodmark, "If there is no [MST], she is not a victim, regardless of how debilitating her experience has been, how complete her isolation, or how horrific the emotional abuse she has suffered."[148] For example, the VA does not explicitly consider intimate partner violence to be a category of MST. For veterans like Ms. B, then, whose history with sexual violence does not match the stranger rape or assault from a superior narratives of sexual violence in the military that the VA and our culture are used to, they risk the VA not considering their benefits claim to be an MST-related claim at all.

Last, even for the veterans who can convince the VA that they have credibly asserted that they experienced MST, that simply means in most cases that the VA will refer the veteran for a medical examination. At this medical examination, the veteran will have to recount their sexual trauma to a medical provider—not any current treating provider the veteran may have and trust, but one specifically tasked with providing what is called a "compensation and pension exam"[149] for the purposes of determining eligibility for benefits. In the medical examination, the veteran must explain not only their trauma, but how they are currently affected, so that the examiner can determine if there is a nexus between a current disability and the underlying MST experience.

C. Performing Disability

Just as having to perform victimhood to establish that sexual violence occurred can re-traumatize and stigmatize veterans, proving disability is also a potentially demeaning and stigmatizing process. Benefit systems that require

---

admission.")

[148] Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 30 (2004).

[149] *See VA Claim Exam (C&P exam)*, DEP'T OF VETERANS AFFS., https://www.va.gov/disabili ty/va-claim-exam/ [https://perma.cc/TDL9-U58D] ("After you file your disability benefits claim, we may ask you to have a claim exam (also known as a compensation and pension, or C&P, exam).")

establishing a medical disability incentivizes claimants to highlight incompetence and victimization. As Professor JoNel Newman has explained in the context of Social Security disability cases, a well-meaning advocate may find that their "efforts to develop client narrative in the light most favorable to them, legally, often has the adverse effect of disempowering or re-victimizing our clients."[150] The disability benefits system makes an unusual demand of disabled people, who may spend energy minimizing and masking their disabilities to avoid discrimination in social, employment, and other contexts. The VA disability system, like other administrative schemes that provide certain benefits but only to people who qualify as disabled in a particular way, demands that applicants do the exact opposite: they must highlight their impairments to be recognized as entitled to the benefit.

Professor Tobin Siebers described this type of disability performance as "masquerading disability"—that is, a performance of a socially stigmatized identity in socially acceptable ways to legitimize access to certain spaces.[151] Borrowing the term "masquerade" from feminist and queer theory used to describe women in male-dominated spaces who engage in a heightened performance of femininity or womanliness, Professor Siebers emphasized that in certain contexts, disabled people display and exaggerate their stigmatized identity rather than mimicking or trying to pass as someone with a dominant, desirable identity.[152] By playing into stereotypes about what a disabled person looks like or acts like, a disabled person manages the stigma of their identity.[153] Disabled people can perform their disability in a range of formal and informal circumstances as a strategy to handle others' expectations and suspicions. For example, Professor Siebers, whose right leg was affected by polio when he was two years old but did not use a wheelchair, described his own strategy of exaggerating a limp when seeking early boarding on airplanes.[154] Other disabled people use wheelchairs at airports even if they do not often need them in other contexts because "[t]he wheelchair allows [them] to claim disability" rather than overcompensate and overextend their capacity under the "'angry glances' of fellow travelers."[155]

The VA raises the stakes for a successful disability masquerade because the whole disability benefits system structurally and fundamentally both rewards and distrusts disability. Under the suspicious eye of the gatekeeper to disability-based compensation, a disabled person using stereotypes to their advantage and performing the masquerade encouraged by social attitude risks becoming seen as a malingerer or a faker seeking to perpetrate the "disability con."[156] As Professor Doron Dorfman has demonstrated, "public suspicion of

---

[150] JoNel Newman, *Identity and Narrative: Turning Oppression Into Client Empowerment in Social Security Disability Cases*, 79 ALB. L. REV. 373, 386 (2016).
[151] TOBIN SIEBERS, DISABILITY THEORY 101 (2008).
[152] *Id.*
[153] *Id.* at 101–02.
[154] *Id.* at 97; *Id.* at 107–08.
[155] *Id.*
[156] Samuels, *supra* note 120, at 28; Doron Dorfman, *Fear of the Disability Con: Perceptions of*

abuse of disability laws and rights" exists across a variety of situations in which disabled people are perceived to receive special benefits, from Social Security Disability Benefits to accommodations for learning disabilities in academic settings to disabled parking spots.[157]

For MST-related claims in particular, the VA disability compensation magnifies the problems of the disability masquerade in at least two ways: first, by legitimizing one disability—PTSD—over all others; second, by demanding a sometimes impossible accounting of causation or the amount of exacerbation caused by MST over other traumas, like childhood abuse, or other pre-existing conditions.

1. Non-PTSD claims

As explained above, PTSD is the stock narrative for MST-related claims, and the VA gives advantages to veterans who fit that narrative over those who do not. It is true that PTSD is one of the more common lasting effects of sexual violence, particularly in the military.[158] But PTSD is not the only disability that sexual violence survivors experience. People who experience MST have an "increased risk of . . . depressive disorders, eating disorders, anxiety disorders, alcohol-related disorders, dissociative disorders, bipolar disorders, and psychotic disorders."[159] They can also exhibit mental health symptoms without a specific diagnosis attached, like suicidal ideation or sexual dysfunction.[160]

As explained in the previous subsection, veterans who do not experience sexual violence in a way that clinically qualifies as PTSD are severely disadvantaged by the VA benefits system. In effect, they are punished for not experiencing MST in the way the VA expects. If a veteran experienced MST which causes mental health conditions or other disabling disruptions in their life—but does not develop PTSD specifically—they may not be able to establish for the VA's purposes that the sexual violence occurred at all because the VA will not look to the broader array of MST markers outside the military service records themselves.

That creates terrible pressure and perverse incentives for veterans who do not have a diagnosis when they meet with a medical doctor or VA medical examiner to determine if they have a service-connected disability. If the doctor's assessment reveals a patient is exaggerating or malingering, that could

Fraud and Special Rights Discourse 53 L. & SOC'Y REV. 1051 (2019). Professor Dorfman identifies Ellen Samuels as the originator of the term "disability con" to describe people feigning disability as a disguise and method for obtaining special benefits, special treatment, or dispensation from cultural norms. *Id.* at n.1.

[157] *Id.* at 1066 tbl.2 (2019).

[158] Sara Kintzle, Ashley C. Schuyler, Diana Ray-Letourneau, Sara M. Ozuna, Christopher Munch, Elizabeth Xintarianos, Anthony M. Hasson & Carl A. Castro, *Sexual Trauma in the Military: Exploring PTSD and Mental Health Care Utilization in Female Veterans*, 12 PSYCH. SERVS. 394, 395 (2015).

[159] Lisa M. Brownstone, Brook Dorsey Holliman, Holly R. Gerber & Lindsey L. Monteith, *Phenomenology of Military Sexual Trauma Among Women* Veterans, 42 PSYCH. WOMEN Q. 399, 400 (2018).

[160] *Id.*; *see also* Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 224 (1993).

end the veteran's chances for getting a crucial diagnosis; but if a patient does not report the symptoms necessary for a PTSD diagnosis in particular, they will be disadvantaged as well.

Just think back to Ms. B. When she arrived at our clinic, she already had several conflicting mental health diagnoses, which is not uncommon for clients with complex histories and symptoms. Many mental health conditions have overlapping diagnostic criteria, and the diagnosis process can take years to get right, with multiple misdiagnoses along the way. The fact that Ms. B received a personality disorder diagnosis from a single visit with an examiner is suspect because personality disorders must reflect an unchanging condition over time.[161] Her bipolar disorder diagnosis also has a high probability of being incorrect; some research suggests perhaps more than half of all patients diagnosed with bipolar disorder do not have that condition.[162] As a Black woman, Ms. B is more likely than a white or male counterpart to receive an incorrect first diagnosis, too.[163]

So, it made sense for her to go back to yet another doctor and get another opinion to see if a new evaluation would result in a PTSD diagnosis after all. That step would not be necessary if the VA system did not prize PTSD over all other mental health conditions for MST-related claims. After all, its rating system lumps all mental health conditions—other than eating disorders—together in a single rating scale, and multiple mental health conditions receive a single rating together.[164] Getting another evaluation means she must explain—again—her history of sexual violence, her violent relationship, and why she told military officials a different story about her ex-boyfriend than she tells now. And on top of it all, Ms. B has a complex relationship with the diagnosis she receives, made even more complicated by the benefits process. The possible borderline personality disorder diagnosis carries immense stigma, and Ms. B did not want that to be the right diagnosis. She also knew, after consulting with advocates and working on her VA case, that a PTSD diagnosis is the best diagnosis for her VA claim, and she worried about what it would mean if she failed to get that diagnosis. All this pressure—both based on the VA system and on her own biases and expectations about what it would mean to live with certain diagnoses—gave her even more stress and frustration about the process. We urged her to be as matter-of-fact as possible and not worry about the diagnosis she would receive because we would work to get her

---

[161] It's also worth noting that, conveniently, personality disorders are not "diseases or injuries for compensation purposes," which means they cannot serve as the basis for disability compensation. 38 C.F.R. § 4.127 (2015), WL 38 CFR § 4.127.

[162] Mark Zimmerman, Camilo J. Ruggero, Iwona Chelminski & Diane Young, *Is Bipolar Disorder Overdiagnosed?*, 69 J. CLINICAL PSYCH. 935 (2008).

[163] *See, e.g.*, Quenette L. Walton & Jennifer Shepard Payne, *Missing the Mark: Cultural Expressions of Depressive Symptoms Among African-American Women and Men*, 14 SOC. WORK IN MENTAL HEALTH 637–57 (2016). The higher rates of misdiagnosis can also mean overdiagnosis for certain conditions. *See* ELIZABETH A. KLONOFF & HOPE LANDRINE, PREVENTING MISDIAGNOSIS OF WOMEN: A GUIDE TO PHYSICAL DISORDERS THAT HAVE PSYCHIATRIC SYMPTOMS xxii (1997).

[164] § 4.130 (2015), WL 38 CFR § 4.130.

benefits no matter what. But no matter the outcome, the process itself caused harm, and all of us wished it was not necessary to make the best possible case for her benefits claim.

2. Pre-existing conditions and other trauma

Because the VA can pay compensation only for service-connected conditions, the necessity to draw causal links between mental health conditions and events in service is largely inextricable from the very nature of the benefits system. Nevertheless, that system thus rewards or punishes veterans for things they cannot control, like whether they experienced additional abuse or trauma prior to or after service. Veterans with multiple mental health conditions and multiple causes for those conditions can struggle to prove their entitlement to benefits.

Ms. B's case again illustrates the problem. Like many Veterans Legal Services Clinic clients, one reason she joined the military in the first place was to leave an abusive environment. So, even if she could receive a PTSD diagnosis, a doctor might determine that the underlying trauma that caused her PTSD was the sexual abuse she experienced as a child. The additional sexual violence she experienced as an adult may have made things worse, but unless there is medical evidence of how bad her PTSD was before experiencing sexual violence or a doctor is willing to make a medical opinion that the in-service sexual assault made her PTSD worse,[165] Ms. B cannot receive disability compensation.

Of course, this does not mean the VA never finds MST to exacerbate existing conditions. But the system is created to make it easier for the VA to identify a single traumatic experience as the cause of mental health symptoms than to accept veterans' claims who have murkier or multi-layered disabilities or histories of additional trauma.

D. The Intersectional Harm of Performing Both Disability and Victimhood

Adjudicating MST-related claims exacerbates the problem of performing disability because it intersects with the performance of being a victim of sexual violence. Because of the very definition of a service-connected disability,[166] the VA disability system demands not just a performance of victimhood and a performance of disability, but a demonstration that both these identities are interconnected. Because the VA's disability compensation system requires proving a nexus between an in-service event and a present disability, at each

[165] § 3.310(b) (2014), WL 38 CFR § 3.310(b) ("Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. However, VA will not concede that a nonservice-connected disease or injury was aggravated by a service-connected disease or injury unless the baseline level of severity of the nonservice-connected disease or injury is established by medical evidence created before the onset of aggravation or by the earliest medical evidence created at any time between the onset of aggravation and the receipt of medical evidence establishing the current level of severity of the nonservice-connected disease or injury.").

[166] 38 U.S.C.A. §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).

step of the process, a veteran must subject themselves to suspicion that one caused the other, even if someone is willing to believe both that the sexual violence occurred and that the veteran is disabled. And this additional distrust means that the pressure to perform both victimhood and disability is not merely additive, but multiplicative and intersectional.

Think back to Mr. N, for example. Performing the role of sexual victim can be particularly hard for men; so too can performing disability. Having to link the two, however, creates another, new harm. His rape carried extreme stigma, particularly as a man. But he also experienced isolation and retaliation after his rape, a betrayal that affected him acutely as well, and the failure of the military to give him appropriate medical treatment at the time likely contributed to his conditions. It certainly contributed to his difficulties after service, when for years his less than honorable discharge kept him out of VA services and from receiving compensation. The VA's system pushes him to claim the rape as *the* cause for his condition, rather than a complex relationship between the sexual assault, his fellow soldiers' bullying, and the institutional betrayal of being discharged rather than helped. Each time he took a step in the process of the VA adjudication process, he had to decide anew whether to edit the narrative of his story to talk only about his rape rather than the other times he felt betrayed. That created its own reinforcing stigma surrounding his experience, as he either denies a part of his story or submits to a role he found demeaning.

In addition, this process is not simply a one-time hearing in a courtroom-like setting, but a many-layered procedure that requires a veteran to describe and convince multiple layers of people of both their experience of sexual violence and their disability, *and* that the sexual violence caused or exacerbated the disability. They must convince: at least one medical professional, and often more if they received a diagnosis prior to or early in their claim process but then need to go to a VA medical examiner for a rating; one or more VA representatives processing their claim; and more VA doctors at a periodic review if they receive a disability rating, or a higher-level reviewer or member of the Board of Veterans Appeals if they appeal a denial.[167] This is to say nothing of having to navigate the more informal judgments of other people involved, from an advocate or veterans service representative assisting with the claim to officers at the Veterans Health Administration who manage MST-related healthcare services.[168]

Having to continually recount one's history of sexual violence as well as explaining one's mental health and the connection between the two can take a heavy toll, particularly if one or both parts of that story do not conform with the listener's expectations. In the words of one disabled person describing the

[167] § 3.326 (2019), WL 38 CFR § 3.326 (Examinations); § 3.327 (1995), WL CFR § 3.327 (Reexaminations); § 3.2601 (2019), WL CFR § 3.2601 (Higher-level review); 38 U.S.C.A. Pt. V., Ch. 71 (Westlaw through Pub. L. No. 117-102) (establishing the Board of Veterans Appeals).
[168] Courtney Valdez, Rachel Kimerling, Jenny K. Hyun, Hanna F. Mark, Meghan Saweikis & Joanne Pavao, *Veterans Health Administration Mental Health Treatment Settings of Patients who Report Military Sexual Trauma*, 12 J. TRAUMA DISSOCIATION 232 (2011).

process of proving an invisible disability in the Social Security system, "Because there is no outward evidence of my problem, I have to explain it for someone to know about it. I have had to tell hundreds, maybe thousands of people about my personal medical problem over the last 22 years. I am used to it after all this time, but it is frustrating."[169]

V. CONCLUSIONS AND NEXT STEPS

A. Mr. N

Several years after Mr. N filed his claim, the VA eventually decided his misconduct that led to his discharge was not "willful and persistent"[170] and thus deemed him a veteran for VA benefits purposes. Because his case was so well documented, there was overwhelming evidence that he had experienced a sexual assault that traumatized him. The VA eventually granted him a 100% rating for PTSD. Around the same time, Mr. N found a seasonal construction job that he liked. The income from that job, combined with the over $3,000 a month he receives from the VA has let him rent an apartment of his own. He recently got engaged to a woman he met when he moved for his job.

B. Ms. B

Ms. B submitted to yet another psychiatric evaluation to determine if she has PTSD. The psychiatrist determined that Ms. B's childhood abuse was so pervasive that as a child Ms. B never developed a sense of safety to be displaced, as the trauma usually associated with PTSD diagnosis would do. She received a diagnosis of depression and anxiety, but not PTSD. She was disheartened by this diagnosis, even though we explained she can still file a VA claim. Ms. B decided she did not want to go through the VA disability process at all, at least for now. We manage to ensure she has access to VA mental health care, but she finds therapy difficult and frustrating, and because she does not have access to any other VA health care, it is inconvenient and uncomfortable for her as well. Most recently, she told us she has stopped going, even though in the past couple months she has called the National Veterans Suicide Prevention hotline multiple times.

C. Changing Stock Narratives at the VA

As the cases of Ms. B and Mr. N demonstrate, the outcomes for veterans who experienced military sexual violence can vary immensely depending on how doctors, advocates, and VA decisionmakers treat them, their disabilities, and their stories. The VA prizes formal diagnoses and formal investigations of sexual violence, even though it knows veterans who are entitled to benefits often lack both. Meanwhile, when a veteran's story is messy or their medical

---

[169] Dorfman, *supra* note 156, at 1079 (quoting an anonymous respondent in a qualitative survey of people with disabilities).
[170] § 3.12(d) (1997), WL 38 CFR § 3.12(d).

history is complex, veterans are locked out of the VA benefits system either formally or informally.

The VA and veterans' advocates must work to uproot the stock narratives themselves and replace them with a more expansive understanding of what MST looks like. As this Article has explained, some parts of the VA's preferred stock narrative are enshrined in law. Other parts exist simply through biased application of decisionmaker discretion. Therefore, fixing VA's problem with adjudicating military sexual trauma-related claims will require change on at least two levels. First, the VA must remove its regulatory discrimination that favors certain types of survivors and experiences over others. Second, the existing stock narrative must be replaced by new systems and cultural expectations that permit much more expansive understandings of what a disabled veteran who survived military sexual violence looks like.

1. Changing the Law

There are some readily available first steps to this process. The VA should remove the structural preferences for PTSD claims over other mental health conditions, and for claims based on a single violent assault rather than other types of sexual violence. This can be done by simply expanding the more robust evidentiary regulations in 38 C.F.R. § 3.304(f)(5) to *all* claims of disability based on assault or harassment. A veteran should not have to contort their life and health into a specific box in order to adequately establish for the VA's purposes that they experienced military sexual violence. The liberalizing approach to using indicia of sexual violence to establish an in-service injury should also be available to veterans who experienced other types of bullying, harassment, retaliation, and other types of potentially traumatizing experiences, so that veterans do not need to identify a particular sexualized encounter to establish a service-connected disability. This would permit claims from veterans who may have experienced sexualized behavior but do not identify their experiences as sexual trauma, but rather think of it as hazing or general harassment. A veteran should not have to tell their story the way VA likes to be entitled to VA compensation.

More fundamentally, veterans should not have to claim or establish PTSD to be able to link trauma to a mental health condition. Indeed, under the VA statutory system, mental health-related disability claims should not require a diagnosis at all. A medical practitioner can help identify behaviors and conditions that impair functioning, without having to go through a diagnostic process that is notoriously difficult, can cause re-traumatization by requiring veterans to repeatedly talk about their assault or harassment, is riddled with discrimination, and often takes years even outside the context of the VA's backlog of disability compensation claims.

The VA system is particularly well positioned to deal with disabilities without a specific diagnosis. Indeed, it already does so for physical disabilities. The Federal Circuit has recognized that the VA's requirement that the relevant statutes define disability to encompass pain without a specific diagnosis, which

the VA must compensate.[171] Unfortunately, the Court of Appeals for Veterans Claims subsequently determined that, by contrast, the VA's assessment of mental health conditions requires a diagnosis to obtain compensation.[172] Treating mental health conditions as different in kind from other disabilities, however, is not supported by any statutory requirement. Mental health claims should require only documentation of the impairment the veteran is experiencing, not a specific diagnosis.

Those two potential legal changes, however, only deal with one issue or problematic narrative at a time. The first would make it easier to demonstrate the sexual violence occurred; the second would make it easier to establish disability. But what about the nexus between the two, that particular part of VA disability benefits that is the crux of all cases, even outside the MST context? Intersectional disadvantages are particularly difficult to remedy by piecemeal solutions. By their very nature, the rely on the interplay between various phenomena. Here, the intersectional damage of a veteran having to perform both disability and sexual victimhood causally as well as simultaneously cannot be easily removed from the VA benefits system.

That is because of the system itself, as described above, was formed and defined by a fundamental mistrust of veterans that has been a part of the VA since the nineteenth century.[173] That mistrust means that the statutory system provides extensive opportunity for claims adjudicators to rely on their own cultural expectations when deciding both service connection and disability ratings.

Fixing these fundamental problems, then, cannot be achieved by the VA alone. Congress must change the statutes that reinforce the mistrust the VA has of disabled veterans generally and MST survivors specifically. Over the years, advocates have proposed various creative ways to provide more care and compensation to survivors of military sexual trauma. For example, one proposal specifically attempting to address the problems described in this Article is to create a compensation fund for MST survivors that is not linked to disability.[174]

This Article's proposed solution is, perhaps, even simpler. Why make MST claimants prove the traumatic event occurred or its nexus to their current condition at all? VA knows that certain types of meritorious claims are almost impossible for an individual veteran to establish and permits the claim to succeed through a series of presumptions that one or more of the three requirements for service connection are met.[175]

For example, for certain disabilities that medical research shows are associated with exposure to Agent Orange, the law incorporates an

---

[171] Saunders v. Wilkie, 886 F.3d 1356, 1368 (Fed. Cir. 2018).
[172] Martinez-Bodon v. Wilkie, 32 Vet. App. 393, 404, 404 (2020).
[173] See discussion, *supra* Section IV.A.
[174] *See* Julie Dickerson, *A Compensation System for Military Victims of Sexual Assault and Harassment*, 222 MIL. L. REV. 211 (2014).
[175] 38 U.S.C.A. §§ 1110, 1131 (Westlaw through Pub. L. No. 117-102).

understanding that, as with many toxic exposure cases, establishing individual causation is simply too tenuous, and so VA does not require it.[176] Instead, although a veteran's diabetes, for example, might have developed regardless of their military service, VA presumes that, if a veteran has diabetes and may have been exposed to Agent Orange by virtue of their service in Vietnam, the medical nexus requirement is met and provides disability benefits.[177] VA's Agent Orange presumptions rely on a basic concession that veterans who served in or near Vietnam during the Vietnam war may have been exposed to Agent Orange, and the military's records simply cannot help.

The same might be said for military sexual violence. It could happen to any service member, serving anywhere in the world, and the military and VA know that, more often than not, it will never be reported in service. Therefore, the same logic that applies to Agent Orange cases could apply to MST cases. Where medical evidence establishes that certain disorders are associated with MST, claims based on those conditions might not require individual proof. A current diagnosis paired with a credible articulation of MST—which can be established by the veteran's testimony alone—should be enough.

More fundamentally, if, as Congress, the VA, and courts routinely exhort, veterans' benefits are designed to be thanks from a grateful nation,[178] why does the cause of someone's disability matter, whether or not it is related to sexual trauma? A truly grateful nation might consider taking care of disabled veterans regardless of the cause of their disability. In fact, there are already hints of this in the existing benefits regime. For example, the disability system already makes no distinction among reasons a servicemember gets injured during the period of service—a knee disability from tripping during a basketball game with buddies off base is just as worthy of benefits as the same disability incurred during a military exercise.[179] It is not a tremendous moral leap to suggest that, if we decide we have a moral or policy obligation to provide for veterans no matter why they are disabled, we should also support them no matter when or why they are disabled.

2. Changing cultural expectations

Congress, however, is not likely to remove the in-service event and nexus requirements of VA disability claims generally, or MST claims specifically, any time soon. Veterans and advocates, then, must grapple with how to mitigate the harm inherent in having to perform sexual victimhood as linked to disability to gain access to VA's disability benefits regime. That means working to creating new systems and more inclusive cultural narratives to

---

[176] 38 C.F.R. § 3.309(e) (2017), WL 38 CFR § 3.309(e).
[177] *Id.*
[178] *See, e.g.*, Procopio v. Wilkie, 913 F.3d 1371, 1387 (Fed. Cir. 2019) ("[T]hose who served their country are entitled to special benefits from a grateful nation."); Barrett v. Principi, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.") (quotations omitted).
[179] The one exception is disabilities that are the result of willful misconduct or drug or alcohol use. 38 U.S.C.A. §§ 1110, 1131.

supplant the current stock narratives of MST claims. Changing culture is a more nebulous task, but equally important to lasting change.

The stigma of sexual violence and disability are not VA creations. They exist throughout our culture. Erasing those stigmas are monumental tasks that decades of scholars, activists, and advocates have grappled with. VA policymakers and veterans' advocates are, or should be, part of those movements, too, if for no other reason than that the VA is in many ways a downstream product of military culture and American culture as a whole.

For example, advocates representing military sexual violence survivors can work to dismantle and change the existing stock MST narratives. Many already do. I have explained how my clinic students grappled with how to help clients present their stories in ways that fit the required elements of veterans' benefits law while still honoring the complexity of their experiences. These decisions are part of all good client-centered advocacy, but it also has structural implications as advocates can help empower clients by challenging and shaping cultural assumptions and norms.[180]

But challenging and changing cultural narratives should not rest on the shoulders of individual veterans with their own benefits on the line. The VA should work to minimize the stigmatizing process of requiring veterans to perform disability on top of performing victimhood. It should also permit veterans to avoid having to tell the VA about their trauma multiple times and allow medical professionals with prior knowledge of the veteran's story to relate their story by using written forms rather than requiring in-person examinations at the VA. It should explicitly track and evaluate biases in adjudicators' decisions, and discipline those who disadvantage veterans with disfavored identities, like men, veterans with preexisting conditions, or veterans who continued to be sexually active after a purported sexual assault.[181]

The VA also must clarify in the VA adjudicator manual that an allegation of military sexual violence is, unfortunately, consistent with the conditions of service for servicemembers no matter where or who they are. Right now, the VA manual for adjudicators clarifies that no specific documentation is required for a veteran who says they injured their shoulder moving boxes.[182] If a veteran's job in the military might have required moving boxes, and they seem otherwise credible, the VA directs its adjudicators to believe the veteran. Veterans alleging military sexual violence deserve no less. Studies demonstrate few people make false allegations of sexual violence[183], but the VA states as a

---

[180] For example, Professor Newman has outlined how his clinic seeks to empower clients through narrative in Social Security disability cases.

[181] *See, e.g.*, Bd. Vet. App. No. 1320555 (June 26, 2013) (denying a veteran's claim for MST-related PTSD because the veteran's account of her assault was not credible because she had said one lasting effect of the assault was that she could not be intimate with men, but her service records showed she was treated for STDs well after the alleged assault).

[182] M21-1, *supra* note 94, at IV.i.1.B.1.b.

[183] *See* David Lisak, Lori Gardinier, Sarah C Nicksa & Ashley M Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN

matter of official policy that it believes veterans will lie to the VA about MST to get benefits. Even if some number of veterans might try to take advantage of the VA benefits system, the default should not be to assume claimants are lying. As the broader culture begins to grapple with what it would mean to judicial, educational, and employment contexts to believe women, the VA and veterans law advocates must answer the same question for veterans who experienced sexual violence: what would it mean to believe them, to honor their experiences even if they do not follow the expected story?

1318, 1329 (2010) (estimating the prevalence of false allegations of sexual assault is between two and ten percent).