

## “HAZING” AND THE MILITARY: A HISTORICAL REVIEW OF MILITARY TRAINING TRADITIONS

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*The military historically has struggled with defining “hazing” and providing comprehensible guidance to service members on permissible and impermissible conduct. Further, some military institutions, in the past, embraced conduct associated with new entrant training that currently is disfavored, despite objections from numerous graduates of the prior programs, who found merit with the now disfavored training techniques. This Article examines the military’s historic attempts to define “hazing,” discusses how the Department of Defense Service Academies and Marine Corps Recruit Training have grappled with the issue, and reviews how “hazing” is treated under military law.*

### I. INTRODUCTION

The military has long embraced various forms of traditions, initiations, and rites of passage as a means of instilling *esprit de corps* and loyalty into its service members.<sup>1</sup> Many of these traditions continue in modern times.<sup>2</sup> Further, the military’s entry-level training programs have historically been stressful and physically demanding, and have deliberately included conduct easily characterized as harassing or demeaning.<sup>3</sup> Some training programs, such as

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<sup>1</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-226, DOD AND COAST GUARD: ACTIONS NEEDED TO INCREASE OVERSIGHT AND MANAGEMENT INFORMATION ON HAZING INCIDENTS INVOLVING SERVICEMEMBERS 1 (2016) [hereinafter GAO-16-226] (“Initiations and rites of passage can be effective tools to instill esprit de corps and loyalty among servicemembers and are included in many traditions throughout the Department of Defense (DOD) and in the Coast Guard.”); *see also* DEP’T OF THE NAVY, SEC’Y OF THE NAVY INSTRUCTION 1610.2A, DEPARTMENT OF THE NAVY (DON) POLICY ON HAZING ¶ 5(b) (2005) [hereinafter SECNAVINST 1610.2A] (“Military customs and traditions have long been an integral part of the Navy and Marine Corps.”); KRISTY N. KAMARCK, CONGRESSIONAL RESEARCH SERVICE, HAZING IN THE ARMED FORCES 1 (2019) (“Initiation customs have long been part of the culture in the United States Armed Forces as a method to welcome new members and mark rites of passage.”).

<sup>2</sup> GAO-16-226, *supra* note 1, at 15 (“[T]he Army, the Navy, and the Marine Corps . . . permit command-authorized rituals, customs, and rites of passage that are not cruel or abusive, and require commanders to ensure that these events do not include hazing”); *see also* SECNAVINST 1610.2A, *supra* note 1, ¶ 5(b) (noting that “ceremonies, initiations or rites of passage . . . if properly supervised, can be effective leadership tools”).

<sup>3</sup> *See* Captain Joseph S. Groah, Treatment of Fourth Class Midshipmen: Hazing And Its Impact On Academic and Military Performance; and Psychological and Physical Health 19 (June 2005) (unpublished M.S. thesis, Naval Postgraduate School), <https://bit.ly/38Moxle> (noting that “in Marine Corps recruit training hazing is an instrumental and planned portion of initial training”). *See generally* THOMAS E. RICKS, MAKING THE CORPS (1997) (describing the training of a platoon of Marine Corps recruits).

Marine Corps Recruit Training and Navy SEAL training, pride themselves on their physical and mental rigor.<sup>4</sup>

Attendant to these long-standing practices,<sup>5</sup> various forms of conduct developed that were generically referred to as “hazing.” Some hazing-related conduct was perfectly legitimate, albeit harsh and stressful, whereas other conduct was viewed as impermissibly abusive. The line between permissible conduct—associated with the military’s traditions, training, and discipline—and impermissible conduct has been ill-defined and not easily ascertained.<sup>6</sup> Part of the problem has been the lack of a clear, uniformly-accepted, and well-understood definition of hazing. The term refers to both a specific criminal offense and is slang for a broad spectrum of conduct, some of which may be perfectly legal.<sup>7</sup> In the criminal context, the failure to adequately define hazing as an offense may give rise to “void for vagueness” challenges.<sup>8</sup> Further, although “hazing” has been illegal as far back as 1870, historically, both hazing-related conduct viewed as permissible and conduct viewed as lying outside the scope of sanctioned activities has been tolerated—even embraced—by various parts of the military.<sup>9</sup> Indeed, many of those subjected to harsh forms of treatment that would be viewed as impermissible today found merit in the earlier practices.<sup>10</sup>

This Article will review the historic attempts to define “hazing” and discuss hazing-related treatment of cadets and midshipmen of the three Department of Defense (DoD) service academies,<sup>11</sup> and of recruits at Marine

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<sup>4</sup> See Dave Phillips, *20 Marines at Parris Island May Be Punished in a Hazing Incident*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2ZrSley> (reporting Marine Corps culture “prizes toughness”); Company Commanders, Recruit Training Regiment, MCRD San Diego, *An Officer’s Role in Recruit Training*, MARINE CORPS GAZETTE, Dec. 2014, at 58, 60 [hereinafter Company Commanders] (“Tough training makes tough Marines.”); RORKE DENVER, DAMN FEW: MAKING THE MODERN SEAL WARRIOR 17–18 (2013) (arguing that SEAL training is the toughest in the military and that SEALs argue with one another as to who had the most difficult training) [*Damn Few* by Rorke Denver, copyright 2013, 2014. Reprinted by permission of Hyperion, an imprint of Perseus Books, LLC, a subsidiary of Hachette Book Group, Inc.]

<sup>5</sup> One recent study grouped hazing into three basic types: conduct associated with (1) initiation rites, (2) newcomer testing, and (3) maintenance of existing power structures. KIRSTEN M. KELLER ET AL., RAND CORPORATION, HAZING IN THE U.S. ARMED FORCES: RECOMMENDATIONS FOR HAZING PREVENTION POLICY AND PRACTICE 32–33 (2015).

<sup>6</sup> GAO-16-226, *supra* note 1, at 1 (“[I]t has not always been easy for servicemembers to draw a clear distinction between legitimate traditions and patterns of misconduct.”). See also *id.* at 21 (“[W]e found that the military services may not have provided servicemembers with sufficient information to determine whether specific conduct or activities constitute hazing”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSIAD-93-36, DOD SERVICE ACADEMIES: MORE CHANGES NEEDED TO ELIMINATE HAZING 2 (1992) [hereinafter GAO/NSIAD-93-36] (“The distinction between hazing and legitimate fourth class indoctrination is somewhat unclear.”); KENDALL BANNING, WEST POINT TODAY 22 (Colonel A. C. M. Azoy ed., 5th ed. 1959) (1937) (“It is difficult . . . to draw a clear-cut line of demarcation at all times between hazing and discipline.”).

<sup>7</sup> See *infra* note 14 and accompanying text.

<sup>8</sup> “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.” *United States v. Brown*, 45 M.J. 389, 394 (C.A.A.F. 1996) (quoting *Parker v. Levy*, 417 U.S. 733, 757 (1974)); see also ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW 6 (3d ed. 1982) (explaining that “a statute which purports to provide for punishment, without making sufficiently precise just what is punishable thereunder, is held to be ‘void for vagueness’”).

<sup>9</sup> See *infra* notes 79, 88–90, 149, 154, 180–82, 295, 304, 311, and accompanying text.

<sup>10</sup> See *infra* notes 265–76, 323–24, 327 and accompanying text.

<sup>11</sup> The three service academies are the United States Military Academy (USMA), West Point, New York; the United States Naval Academy (USNA), Annapolis, Maryland; and the United States Air Force Academy (USAFA), Colorado Springs, Colorado. USMA and USAFA students are “cadets” and USNA students are “midshipmen.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-1001, MILITARY EDUCATION: STUDENT AND FACULTY PERCEPTIONS OF STUDENT LIFE AT THE MILITARY ACADEMIES 1 n.1 (2003). Fourth class cadets (freshmen) at the Military and Naval academies are referred to as “plebes.” GAO/NSIAD-93-36, *supra* note 6, at 10 n.1. At the USAFA, fourth class cadets are referred to as “doolies.” *Id.*

Corps Recruit Training. These entities were chosen for their long-standing reputation for extremely rigorous and harsh training regimes. The Article will discuss efforts taken to mitigate hazing-like conduct previously incorporated into such training, oftentimes over the objection of graduates of those earlier programs. Although both institutions have reformed their approach to entry-level training, the academies have taken the furthest strides away from an absolutist, attrition-based model. Next, the Article will discuss the purpose of, or justifications for, hazing-related conduct. Finally, the Article will discuss how “hazing,” and conduct constituting impermissible hazing-like offenses, have been treated under military law.

## II. HAZING: IN PURSUIT OF THE ELUSIVE DEFINITION

As an initial matter, any discussion of “hazing” in the military is difficult because the term is used to identify a specific criminal offense,<sup>12</sup> as slang for various forms of misconduct,<sup>13</sup> and to describe a stressful—but legal—encounter between a junior member of the armed forces (e.g., academy fourth class cadet, recruit) and a higher-ranking authoritative figure (e.g., upper-class cadet, drill sergeant), oftentimes in an initial training environment.<sup>14</sup> The term does not easily lend itself to a clear definition.<sup>15</sup>

In 1874 Congress criminalized “the offense commonly known as hazing” and mandated that the Superintendent of the United States Naval Academy (USNA) court-martial any midshipman guilty of such misconduct.<sup>16</sup> Despite having criminalized “hazing,” Congress failed to define the term.<sup>17</sup> In 1885, the U.S. Attorney General issued an opinion attempting to define the offense. First, the opinion noted that the 1874 statute focused solely on the USNA and that the offense of hazing “is unknown either to the common or statutory law of the land.”<sup>18</sup> In determining that the offense of hazing stemmed from the Superintendent’s order forbidding such conduct and in USNA regulations subjecting midshipmen to dismissal for hazing, the Attorney General opined that “to constitute the offense of *hazing* under the statute it is essential that the victim of the maltreatment should be a new cadet of the fourth class.”<sup>19</sup> The Attorney General, however, made no effort to clarify exactly what conduct constituted the

<sup>12</sup> 10 U.S.C. § 8464(a) (2018).

<sup>13</sup> See, e.g., Brock Vergakis, *Marine Convicted of Hazing, Has Rank Reduced*, MARINE CORPS TIMES (May 11, 2015), <https://bit.ly/31f611m>.

<sup>14</sup> See Captain David R. Alexander III, *Hazing: The Formative Years 2* (Dec. 1994) (unpublished research paper, Long Island University), <https://bit.ly/39OP0in> (“The term has become a part of the West Point language and in many cases is used to describe ‘impositions’ that are in no way in violation of the regulation.”); see, e.g., CAPTAIN DONNA PETERSON, *DRESS GRAY: A WOMAN AT WEST POINT 75* (1990) (referring to hazing in the context of upperclassmen who stopped plebes in the hallway and harassed them as “play[ing] games with the plebes”); cf. ED RUGGERO, *DUTY FIRST: WEST POINT AND THE MAKING OF AMERICAN LEADERS 31* (2001) (describing some forms of “hazing” as “just stupid, boys’-school and fraternity row stuff”); GAO/NSIAD-93-36, *supra* note 6, at 67 (acknowledging that some activities characterized as “hazing-type treatment” “can be viewed as relatively harmless, spirit-related pranks”).

<sup>15</sup> Groah, *supra* note 3, at 5 (“hazing does not fit easily into a single definition or ideology”).

<sup>16</sup> GAO/NSIAD-93-36, *supra* note 6, at 13 (citing Act of June 23, 1874, ch. 453, 18 Stat. 203). The act provided: “That in all cases when it shall come to the knowledge of the Superintendent of the Naval Academy at Annapolis, that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said superintendent to order a court-martial, . . . and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court be dismissed; and such finding, when approved by said superintendent, shall be final.” Act of June 23, 1874, ch. 453, 18 Stat. 203.

<sup>17</sup> Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 293 (1885).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 297 (emphasis in original); see also GAO/NSIAD-93-36, *supra* note 6, at 13 (“The U.S. Attorney General, in an 1885 opinion, determined that to constitute the offense of hazing, the victim must be a member of the fourth class.”).

offense of hazing and then left untouched the extremely broad USNA regulation definition: “The practice of molesting, annoying, ridiculing, maltreating, or assuming unauthorized authority over the new cadets of the fourth class . . . .”<sup>20</sup>

The following year, the Secretary of the Navy requested a legal opinion as to the sufficiency of certain court-martial charges against a midshipman for the offense of hazing.<sup>21</sup> Reviewing the Academy regulations defining the offense, the Attorney General determined that the court-martial specifications alleging that the accused midshipman (1) pulled the nose and otherwise maltreated and (2) struck at and otherwise annoyed a fourth classman “plainly exhibit a case of *maltreatment*, which, in conjunction with the other circumstances mentioned, contains all that is essential to constitute the offense of ‘hazing’ in the sense of the statute.”<sup>22</sup>

Decades later, in 1956, Congress enacted three separate anti-hazing statutes for the USNA (10 U.S.C. § 6964), the United States Military Academy (USMA) (10 U.S.C. § 4352) and the United States Air Force Academy (USAFA) (10 U.S.C. § 9352), respectively.<sup>23</sup> With regard to the USNA, 10 U.S.C. § 6964(a) defined “hazing” as “any unauthorized assumption of authority by a midshipman whereby another midshipman suffers or is exposed to any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgement of any right.”<sup>24</sup> Rather than adopt a uniform definition of hazing for all three academies, Congress authorized the Superintendents of the Military and Air Force academies to define “hazing” by regulation, subject to the approval of the relevant Service Secretary.<sup>25</sup>

In the mid-1970s, the Comptroller General examined “hazing” at the three Department of Defense service academies.<sup>26</sup> A subsequent report addressed hazing-like conduct in three categories: (1) hazing (undefined), which was prohibited by law; (2) harassment, which was prohibited by academy policy; and (3) certain activities permitted under the fourth class system, which could be perceived as harassment but were, as Academy officials explained, “training programs designed to develop character and self-discipline in the fourth classmen through activities which place them under stress.”<sup>27</sup> This third permissible

<sup>20</sup> Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 297 (1885).

<sup>21</sup> Hazing at the Naval Academy, 18 Op. Atty. Gen. 376 (1886).

<sup>22</sup> *Id.* at 377 (emphasis in original). In 1905 the Attorney General opined that the Superintendent could not summarily dismiss a midshipman for the offense of hazing pursuant to the 1874 Act, but instead required that the midshipman be subject to trial by court-martial. Hazing-Summary Dismissal of Cadet-Secretary of the Navy, 25 Op. Atty. Gen. 543, 546 (1905).

<sup>23</sup> See also GAO/NSIAD-93-36, *supra* note 6, at 13; DEP’T OF DEFENSE INSTRUCTION NO. 1322.22, SERVICE ACADEMIES 12 (2015) [hereinafter DoDI 1322.22] (“The practice of hazing is prohibited by law.”) (citing 10 U.S.C. §§ 4352, 6964, 9352). Effective February 1, 2019, 10 U.S.C. § 9352 was renumbered 10 U.S.C. § 9452; 10 U.S.C. § 6964 was renumbered 10 U.S.C. § 8464; and 10 U.S.C. § 4352 was renumbered 10 U.S.C. § 7452. Pub. L. No. 115-232, div. A, Title VIII, 132 Stat. 1832, 1836, 1839 (Aug. 13, 2018).

<sup>24</sup> See also GAO/NSIAD-93-36, *supra* note 6, at 13.

<sup>25</sup> 10 U.S.C. § 4352(a)(1) (Military Academy); 10 U.S.C. § 9352(a)(1) (Air Force Academy); see also GAO/NSIAD-93-36, *supra* note 6, at 13. As of 1992, the Air Force Academy followed the definition of hazing in 10 U.S.C. § 6964(a) with only slight modifications. GAO/NSIAD-93-36 *supra* note 6, at 31. The Military Academy defined hazing “as the wrongful striking, laying open hand upon, treating with violence or offering to do bodily harm by one cadet in a senior-subordinate relationship to another cadet with intent to punish or injure the subordinate cadet, or other unauthorized treatment by such cadet of another cadet of tyrannical, abusive, shameful, insulting, or humiliating nature. Hazing can also be defined to include verbal abuse.” GAO/NSIAD-93-36, *supra* note 6, at 43.

<sup>26</sup> COMPTROLLER GEN. OF THE U.S., B-159219, RESPONSE TO THE HONORABLE SAMUEL S. STRATTON, HOUSE OF REPRESENTATIVES, ON HAZING AT THE SERVICE ACADEMIES (Mar. 21, 1975), <https://bit.ly/3k4aJrC> [hereinafter COMPTROLLER GEN. OF THE U.S.]. The Comptroller General also reviewed the amount of combat training at the three academies. *Id.*

<sup>27</sup> *Id.* at 1.

category of activities included prohibiting fourth classmen from visiting certain locations, requiring that they square corners, prohibiting them from speaking at meals or in the hallways unless otherwise authorized, requiring that they memorize and recite certain knowledge, and requiring that fourth classmen, while in the dining hall, “sit at attention; i.e., erect, hands in the lap heads up, eyes straight ahead, and using the bottom but not the back of the chair.”<sup>28</sup> Certain “harassment-type” activities that had changed during this period included shouting at fourth classmen, which was now prohibited,<sup>29</sup> and limiting the required recitation of knowledge during meals “to insure [sic] that each fourth classman eats a full meal.”<sup>30</sup>

Significantly, the Comptroller General opined that “the concepts of hazing and harassment at the academies cannot be specifically defined nor adequately explained in terms of certain activities.”<sup>31</sup> Characterizing harassment as an “art form,” the report noted that the undesirability of the activities were not to be gauged by the underlying acts alone, but rather by how they were carried out and by the contribution they made to the fourth classmen, their supervisors, and the academies.<sup>32</sup>

In 1992, the Government Accountability Office (GAO) examined the treatment of fourth classmen and issued an extensive report discussing hazing at the three DoD service academies. Ironically, the GAO never defined the term “hazing” before discussing it.<sup>33</sup> Instead, the GAO noted that traditional practices involving the treatment of fourth class cadets and midshipmen that exceeded those sanctioned by the academies “*can* be considered hazing.”<sup>34</sup> For purpose of its analysis, the GAO instead used “the term ‘hazing-type treatment’ . . . to reflect the fact that the distinction between appropriate and inappropriate behavior often lies in the degree of the treatment and the manner in which it is conducted.”<sup>35</sup> The GAO acknowledged that some of the practices they viewed as “hazing-type activities” were “permitted, within limits, by the rules of the fourth class indoctrination system.”<sup>36</sup> Further, recognizing that the college-aged cadets and midshipmen were “prone to engage in many of the pranks and hijinx [sic] that are practiced by their civilian counterparts,” the GAO conceded that some of the activities that they characterized as “hazing-like activities” could “be viewed as relatively harmless, spirit-related pranks.”<sup>37</sup> With regard to the general attitude toward the fourth class system, the GAO found that “[t]he belief that a rigorous

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<sup>28</sup> *Id.* The Air Force Academy specifically excluded the following activities from a characterization of harassment: “shining shoes, drill, making beds, parades, required class attendance, taps, haircuts, [and] prohibition on car ownership . . .” *Id.* at 3.

<sup>29</sup> *Id.* at 2 (“Corrections are to be made quietly but firmly.”). *Id.* At least through the 1990s this rule appears to have been frequently violated. See RUGGERO, *supra* note 14, at 30 (describing how plebes were screamed at by upper class cadets).

<sup>30</sup> COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 2. At least through the 1990s, this mealtime restriction appears to have been largely ignored. See PETERSON, *supra* note 14, at 86 (“A favorite trick of the upper-class cadets is to prevent plebes from eating by keeping them constantly busy with table duties.”).

<sup>31</sup> COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 3.

<sup>32</sup> *Id.* at 3. For example, requiring a fourth classman to shine his shoes, by itself, does not constitute harassment, but the activity could ripen into harassment if the upperclassman were to require the plebe to report to his room every 10 minutes with shined shoes and then soiled the shoes. *Id.*

<sup>33</sup> GAO did reference the definition contained in 10 U.S.C. § 6964, but this definition did not serve as the basis of its further analysis. GAO/NSIAD-93-36 *supra* note 6, at 13.

<sup>34</sup> *Id.* at 2 (emphasis added).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 67.

<sup>37</sup> *Id.* The GAO found the “misuse of formally granted authority” as the factor that distinguished permissible pranks from hazing. *Id.* at 68. “If specific individuals are singled out and subjected to significantly more such spirit-related treatment than their peers, such targeted harassment *may* be hazing.” *Id.* (emphasis added).

fourth class year is an effective method for developing military officers has been accepted largely as an article of faith.”<sup>38</sup>

In its response to the report, DoD criticized GAO for its failure to define what constituted “hazing-type treatment.”<sup>39</sup> DoD noted, “The term can and does mean different things to different people. Theoretically, any aggressive training regime could be construed as ‘hazing-type treatment’ while not actually being hazing, which is more clearly defined.”<sup>40</sup>

The GAO investigation revealed that during the 1989 to 1990 time frame, the USNA operated under a fourth class indoctrination instruction that had modified 10 U.S.C. § 6964’s statutory definition of hazing to prohibit “undue” humiliation.<sup>41</sup> Providing little additional guidance, the USNA instruction noted that “[t]raining should be rigorous, both physically and mentally, however, there is a clear boundary between military discipline and harassment.”<sup>42</sup>

Reviewing the USNA’s instruction as part of a comprehensive review of the fourth class system at the three academies, the GAO observed that “the instruction . . . did little to specify where that boundary was” and “contained few details on what constituted improper indoctrination or hazing.”<sup>43</sup> Even the bright-line examples of prohibited conduct were limited, leaving much to be desired in terms of clarifying the gray area between a large body of permissible and impermissible conduct: “(1) imposing unit runs for punishment, (2) requiring more than 10 push-ups at a time or more than 80 in 1 day, (3) imposing ‘physical punishment’ during Extra Military Instruction periods, and (4) requiring a midshipman to consume any portion of his meal in an unusual or degrading manner, or against his will.”<sup>44</sup> Unsurprisingly, investigators determined that midshipmen had difficulty determining what conduct constituted hazing.<sup>45</sup>

In July 1990, the USNA made an unsuccessful attempt to clarify the meaning of various terms contained in 10 U.S.C. § 6964. The essence of the term “cruelty” was limited to intentional conduct: “[T]he intent to hurt another—to inflict pain—whether physically, psychologically or otherwise.”<sup>46</sup> Not defining “indignity,” the USNA took an almost aspirational approach, merely noting that every midshipman was “entitled to be treated in all circumstances as a human being who has significant value” and their dignity was “not to be degraded.”<sup>47</sup> Acknowledging that the term “humiliation” did not extend to the feelings generated by failure generally, the USNA stated that the term did “extend to acts intended to fundamentally debase a midshipman in the opinion of self or others.”<sup>48</sup> When determining whether conduct fell within “hardship or oppression,” one had to take into account the plebe’s “total load,” and conduct did not constitute hazing so long as it fell within “the published plebe indoctrination system . . . .” However, the conduct *may* constitute hazing if it fell outside that structure,

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 89.

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

<sup>41</sup> *Id.* at 16, 88.

<sup>42</sup> *Id.* at 16.

<sup>43</sup> *Id.* at 16.

<sup>44</sup> *Id.* at 16–17.

<sup>45</sup> *Id.* at 17; *see also id.* at 25 (“In the fall of 1990, what constituted hazing was still unclear to a sizeable number of midshipmen.”).

<sup>46</sup> *Id.* at 19.

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

<sup>48</sup> *Id.* at 20. A subjective standard, presumably conduct did not arise to the level of humiliation if neither the plebe nor onlookers viewed the conduct as humiliating; that is, intended to fundamentally debase the plebe. Conduct that actually humiliated a plebe, but was viewed as not intending to do so, would not satisfy this definition.

“especially if it has *serious* negative consequences in the academic or other realms.”<sup>49</sup> The prohibition against the “deprivation or abridgment of any right” was triggered by limiting rights of other midshipmen beyond those already limited by policy or regulation, if done “without explicit authorization.”<sup>50</sup>

Having offered these vague explanations, the USNA offered three principles to guide their midshipmen: (1) lead midshipmen like you would lead enlisted sailors or Marines, (2) take a long term view and “emulate the positive, instructional aspects of boot camp” as part of plebe indoctrination, and (3) midshipmen were not to view their responsibilities as extending to “weed[ing] out” plebes unlikely to be able to perform well in a combat environment or while operating under the stress attendant to “a professional military regimen.”<sup>51</sup> Finally, the USNA appeared to reject the long-standing view that the offense of hazing was limited to a fourth-class victim, by extending it to peer-to-peer and even subordinate-to-superior conduct.<sup>52</sup>

The lack of clarity as to what conduct constitutes impermissible hazing did not improve with time. In 2012, at the request of the DoD’s Office of Diversity Management and Equal Opportunity, the RAND Corporation examined DoD’s hazing prevention policies and practices.<sup>53</sup> Significant for purposes of this Article, RAND determined that inconsistent definitions of hazing existed within the DoD and that “[c]onfusion persists regarding what actions constitute hazing and what do not.”<sup>54</sup>

In 2016, after examining military-hazing policies and their implementation, the GAO issued a report of its findings. Relevant to this Article, the GAO “found that the military services may not have provided service members with sufficient information to determine whether specific conduct or activities constitute hazing.”<sup>55</sup> After speaking with three groups of non-commissioned officers (NCO), the GAO found that the NCOs believed the military’s hazing definitions were insufficiently clear and, in fact, were so broad that they hampered the NCOs’ ability to perform their jobs for fear of being accused of improper conduct.<sup>56</sup> In 2019, the Congressional Research Service (CRS) issued a short report on hazing in the military, which noted that the line between permissible and impermissible behavior “can quickly blur,” particularly during the “physically and mentally rigorous training” of new recruits.<sup>57</sup>

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<sup>49</sup> *Id.* at 20 (emphasis added).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* USMA’s current definition of hazing follows a similar approach. DEP’T OF THE ARMY, REGULATION 150-1, UNITED STATES MILITARY ACADEMY: ORGANIZATION, ADMINISTRATION, AND OPERATION ¶¶ 6–15 (2019) [hereinafter AR 150-1] (“another military member, regardless of service or rank”).

<sup>53</sup> KELLER ET AL., *supra* note 5, at iii.

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

<sup>55</sup> GAO-16-226, *supra* note 1, at 21; *see also* First Lieutenant Ethan Brooks, *Hazing Versus Challenging*, MARINE CORPS GAZETTE, Aug. 2014, at 24 (“In some cases, because of the controversy over what actually counts as hazing, Marines do not recognize it when it occurs.”).

<sup>56</sup> GAO-16-226, *supra* note 1, at 24. Separately, a Marine NCO noted that implementation of the Marine Corps anti-hazing policy by eliminating incentive physical training was undermining discipline and was detrimental to NCO morale. For example, an NCO could no longer order a Marine who dropped his or her rifle to “follow the weapon down for pushups.” Gunnery Sergeant Jeffrey L. Eby, *Empowering NCOs To Lead*, MARINE CORPS GAZETTE, Mar. 1998, at 48.

<sup>57</sup> KAMARCK, *supra* note 1, at 1.

As discussed further below, the Uniform Code of Military Justice (UCMJ) has had no specific article defining or prohibiting hazing,<sup>58</sup> and recent changes to the UCMJ do not include a specific article for hazing.<sup>59</sup>

In 2018, DoD issued an Instruction containing its most recent definition of hazing. The DoD Instruction (DoDI) defines hazing:

A form of harassment that includes conduct through which Service members or DoD employees, *without a proper military or other governmental purpose* but with a nexus to military Service, physically or psychologically injures or creates a risk of physical or psychological injury to Service members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DoD civilian organization.<sup>60</sup>

The DoDI clarifies that hazing may occur in person, through social media, or through other electronic communications, and that hazing “is evaluated by a reasonable person standard.”<sup>61</sup>

The DoDI offers several examples of improper hazing “when performed without a proper military or other governmental purpose:

- (1) Any form of initiation or congratulatory act that involves physically striking another person in any manner or threatening to do the same;
- (2) Pressing any object into another person’s skin, regardless of whether it pierces the skin, such as ‘pinning’ or ‘tacking on’ of rank insignia, aviator wings, jump wings, diver insignia, badges, medals, or any other object;
- (3) Oral or written berating of another person with the purpose of belittling or humiliating;
- (4) Encouraging another person to engage in illegal, harmful, demeaning or dangerous acts;
- (5) Playing abusive or malicious tricks;
- (6) Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person;
- (7) Subjecting another person to excessive or abusive use of water;
- (8) Forcing another person to consume food, alcohol, drugs, or any other substance; and
- (9) Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of hazing.”<sup>62</sup>

Although these specific examples are helpful, the DoDI obviously cannot address comprehensively all of the various forms of conduct that may or

<sup>58</sup> GAO-16-226, *supra* note 1, at 8, 29, 67; *see also infra* note 328 and accompanying text.

<sup>59</sup> *See infra* notes 329–32 and accompanying text.

<sup>60</sup> DOD INSTRUCTION 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES ¶ 3.5 (2018) (emphasis added) [hereinafter DoDI 1020.03]. The DoD Instruction does not constitute a punitive regulation, although it does state that violations “*may* constitute violations” of the UCMJ “and *may* result administrative or disciplinary action.” *Id.* ¶ 1.2d (emphasis added).

<sup>61</sup> *Id.* ¶ 3.5. A reasonable person is a hypothetical person “who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others’ interests.” *Reasonable person*, BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>62</sup> DoDI 1020.03, *supra* note 60, ¶ 3.5a.

may not constitute improper hazing. Further, the DoDI did not reference or explain its relationship to the statutory prohibition on hazing for the service academies then set forth at 10 U.S.C. §§ 4352, 6964, 9352.

The DoDI makes clear that harassment does not constitute what otherwise would be impermissible hazing when it is part of “properly directed command or organizational activities that serve a proper military or other governmental purpose, or the requisite training activities required to prepare for such activities (e.g., administrative corrective measures, extra training instruction, or command-authorized physical training).”<sup>63</sup> Consent and the grade, rank, status, or Service of the victim does not authorize otherwise improper harassment.<sup>64</sup> Finally, the prohibition on hazing is all-inclusive, extending to “all circumstances and environments including off-duty or ‘unofficial’ unit functions and settings.”<sup>65</sup>

The most obvious qualifier for the DoD’s definition of hazing is that it be “without a proper military purpose or other governmental purpose.” A great deal of hazing-like conduct at the service academies, for example, was rationalized by its military benefit. Presumably this qualifier would permit the continuation of exceptional physically and mentally rigorous and stressful military training, such as what occurred at the service academies<sup>66</sup> and U.S. Marine Corps recruit training, to include some level of acerbic haranguing of the new entrants; at U.S. Army Ranger School, which uses hunger and sleep deprivation as part of its training program;<sup>67</sup> and at U.S. Navy SEAL training, which has included extensive use of calisthenics to the point of physical exhaustion, punishment exercises, deliberate exposure to extremely cold temperatures, and sleep deprivation.<sup>68</sup>

Unfortunately, rather than treating hazing as a stand-alone concept, the DoDI treats it as one type or subset of harassment, giving rise to potential confusion.<sup>69</sup> The Instruction notes that DoD “does not tolerate or condone harassment,”<sup>70</sup> which includes discriminatory harassment, sexual harassment, and bullying and hazing.<sup>71</sup>

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<sup>63</sup> *Id.* ¶ 3.5b.

<sup>64</sup> *Id.* ¶ 3.5c.

<sup>65</sup> *Id.* ¶ 3.5d.

<sup>66</sup> The current definition of hazing at USMA excludes “mission or operational activities or requisite training to prepare for such missions or operations; administrative corrective measures, such as verbal reprimands; extra military instruction; command-authorized physical training; and other similar activities authorized by the chain of command.” AR 150-1, *supra* note 52, ¶ 6-15. The Naval Academy apparently has no such exception specifically articulated in its definition of hazing. DEP’T OF THE NAVY, OFFICE OF THE COMMANDANT OF MIDSHIPMEN, U.S. NAVAL ACAD., COMDTMIDNINST 5400.6V, 3-1 (2019) [hereinafter COMDTMIDNINST 5400.6V].

<sup>67</sup> See DENVER, *supra* note 4, at 20, 122.

<sup>68</sup> *Id.* at 18, 36, 38, 41, 59, 61.

<sup>69</sup> The Congressional Research Service noted that “[o]ne of the main obstacles to effectively countering hazing is its similarity to other forms of unwelcome behavior, including harassment, bullying, and discrimination,” but opined that in the DoDI the DoD distinguished between these various types of misbehavior as part of a comprehensive service-wide policy. KAMARCK, *supra* note 1, at 1.

<sup>70</sup> DoDI 1020.03, *supra* note 60, ¶ 1.2(a).

<sup>71</sup> Harassment generally refers to “unwelcome or offensive” behavior “that creates an intimidating, hostile, or offensive environment” and includes “offensive jokes, epithets, ridicule or mockery, insults or put-downs, displays of offensive objects or imagery, stereotyping, intimidating acts, veiled threats of violence, threatened or provoking remarks, racial or other slurs, derogatory remarks about a person’s accent, or displays of racially offensive symbols.” *Id.* ¶ 3.1. Discriminatory harassment focuses on “unwelcome conduct based on race, color, religion, sex (including gender identity), national origin, or sexual orientation.” *Id.* ¶ 3.2. Sexual harassment focuses on *quid pro quo* and sexual comments or conduct that creates an intimidating, hostile, or offensive environment. *Id.* ¶ 3.3. Bullying is another subset of harassment “that includes acts of aggression by Service members or DoD civilian employees, with a nexus to military service, with the intent of harming a Service member

Even with the increased specificity provided through the DODI and service-specific guidance over the years, the definition of permissible and impermissible hazing remains elusive.

### III. HAZING AT THE MILITARY ACADEMIES

#### A. *The Old Corps*

Some form of hazing of fourth class cadets and midshipmen has existed at the service academies since before the Civil War. Pre-Civil War hazing was generally found during summer encampments and was limited to such “harmless pranks,” such as “pulling a sleeping plebe out of bed, cutting tent ropes in the middle of the night, and hiding a plebe’s clothes at night, causing him to be late for formation or to have to report wrapped in a blanket.”<sup>72</sup> Hazing as a form of misconduct prior to the Civil War was such a rare event as evidenced by the fact that in the first fifty-two years of its existence, the USMA had only two reported dismissals of cadets for hazing-type misconduct.<sup>73</sup>

Following the Civil War, however, an unwritten set of rules developed that determined how the upper class and the fourth class interacted, which USMA leadership eventually viewed as the beginning of improper hazing.<sup>74</sup> Hazing took a dark and violent turn.<sup>75</sup> One author opines that the violent hazing was the result of untested upperclassman attempting to exert their authority over plebes fresh from the war.<sup>76</sup> Another scholar opines that the decision at the end of the war to extend the period before the fourth-class cadets were formally accepted into the Corps of Cadets, from the end of their first summer until the end of their first academic year, increased the frequency and severity of hazing-related misconduct by prolonging the period that plebes were subject to hazing.<sup>77</sup> Regardless of its cause, some of the hazing became brutal, causing the Superintendents of both the USNA and USMA to condemn the practices.<sup>78</sup>

Congress officially outlawed hazing in 1874. Despite being outlawed, hazing continued and once again became problematic.<sup>79</sup> USNA plebes from the late 1800s and early 1900s reported being beaten with various items, such as broom handles and coat hangers.<sup>80</sup> Plebes were challenged to formal fist fights

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either physically or psychologically, without a proper military or other governmental purpose.” *Id.* ¶ 3.4.

<sup>72</sup> GAO/NSIAD-93-36, *supra* note 6, at 11.

<sup>73</sup> Alexander, *supra* note 14, at 4.

<sup>74</sup> DAVID W. GRANEY, *ROGUE INSTITUTION: VIGILANTE INJUSTICE, LAWLESSNESS, AND DISORDER AT THE AIR FORCE ACADEMY* 41 (2010). Some of the hazing-type conduct appears to have been embraced, or at least tolerated, by Academy officials. *See* THEODORE J. CRACKEL, *THE ILLUSTRATED HISTORY OF WEST POINT* 162 (1991) (summer training conducted by upperclassmen became known as “Beast Barracks” and developed into a form of sanctioned or “official hazing”).

<sup>75</sup> GAO/NSIAD-93-36, *supra* note 6, at 11 (“It extended throughout the fourth class year and became much more virulent in its form.”). The first time that the Naval Academy officially recognized improper conduct known as hazing dates to October 6, 1865, when the Superintendent appointed a board to investigate the “disgraceful” molesting of a Midshipman Sheeler. *Naval Academy-Hazing*, 18 Op. Atty. Gen. 292, 294 (1885).

<sup>76</sup> CAPTAIN CAROL BARKALOW WITH ANDREA RAAB, *IN THE MEN’S HOUSE: A INSIDE ACCOUNT OF LIFE IN THE ARMY BY ONE OF WEST POINT’S FIRST FEMALE GRADUATES* 35 (1990).

<sup>77</sup> Alexander, *supra* note 14, at 6; *see also* CRACKEL, *supra* note 74, at 162.

<sup>78</sup> GAO/NSIAD-93-36, *supra* note 6, at 11 (“In the 1870s, the West Point Superintendent labeled the practices ‘essentially criminal’ and called them a ‘vicious and illegal indulgence’; and the Superintendent of the Naval Academy referred to the hazing of junior class cadets as a ‘cruel and senseless practice.’”).

<sup>79</sup> *Id.* at 11.

<sup>80</sup> GALE G. KOHLHAGEN & ELLEN B. HEINBACH, *USNA: THE UNITED STATES NAVAL ACADEMY: A PICTORIAL CELEBRATION OF 150 YEARS* 98 (1995); *see* JOHN MCCAIN WITH MARK SALTER, *FAITH OF MY FATHERS: A FAMILY MEMOIR* 122 (1999) (noting that McCain’s father “Jack” (USNA 1931)

by upperclassmen.<sup>81</sup> In 1920, following Congressional investigations into the death of plebes after excessive hazing, the USNA Superintendent segregated the entire fourth class, and posted first-classman guards on the stairs with bayonets until the upper classes pledged in writing to stop the hazing.<sup>82</sup>

Although officially prohibited, hazing continued in practice because graduates, faculty, and students supported the practice.<sup>83</sup> Graduates defended the practices as “a method of suppressing the cockiness of the plebes,” pointing out that they had survived the practice without injury and had benefited from it.<sup>84</sup> Even the plebes did not object to the practice “because they felt it would make better men out of them and, by showing how much they could endure, increase their status among their peers.”<sup>85</sup> Further, the plebes refused to identify those members of the upper class who had hazed them,<sup>86</sup> and many upperclassmen adopted a code of silence.<sup>87</sup> In the unusual event that cadets were dismissed for hazing-related misconduct, frequently they were reinstated.<sup>88</sup>

Some of these practices, traditions, and behavioral norms eventually became part of the latter-day Fourth Class System.<sup>89</sup> For example, “official hazing” practices adopted at USMA in the wake of the Civil War continued well into the next century, such as bracing and double-timing (running between locations): “Heads back, chests out, stomachs in – they were constantly ordered about, berated and harassed.”<sup>90</sup> Most forms of extreme physical hazing, however, were eventually eliminated from the academies by the late 1950s and early 1960s.<sup>91</sup>

Some forms of hazing-type behavior were extremely physically stressful. For example, USNA plebes were ordered to hold stacks of books in their outstretched arms for extended periods of time or perform push-ups or deep knee bends until muscle failure.<sup>92</sup> While a plebe at USMA, Douglas MacArthur was forced to engage in vigorous exercise until he experienced muscle failure and collapsed.<sup>93</sup> Some plebes were required to assume an uncomfortable squatting position for long periods of time, sometimes fainting.<sup>94</sup> “Swimming to

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had been beaten with a “broom with its bristles cut to just below its stitching”) [used with permission of Random House, an imprint and division of Penguin Random House LLC, New York].

<sup>81</sup> GAO/NSIAD-93-36, *supra* note 6, at 11 (“If a plebe refused to comply [with hazing-related practices] he would be required to fight a member of the upper class.”).

<sup>82</sup> KOHLHAGEN & HEINBACH, *supra* note 80, at 99.

<sup>83</sup> GAO/NSIAD-93-36, *supra* note 6, at 12 (“Attempts to eliminate hazing [in the early 1900s] were largely unsuccessful because it was supported by the graduates and faculty and the plebes saw it as a point of honor not to reveal the names of those who hazed them.”).

<sup>84</sup> *Id.* at 11–12.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.*; CRACKEL, *supra* note 74, at 163.

<sup>87</sup> CRACKEL, *supra* note 74, at 163.

<sup>88</sup> *Id.* Between 1846 and 1909, 41 USMA cadets were separated for “hazing,” of which 18, or 42.8 percent, were readmitted. Alexander, *supra* note 14, app. 1-2.

<sup>89</sup> GAO/NSIAD-93-36 *supra* note 6, at 41 (“The [USMA] Academy administration adopted the system and codified it to curb abuses in the treatment of plebes. Over the years, the system evolved into a primary vehicle for leader development”). In 1955, the Air Force Academy was established, adopting much of the West Point Fourth Class System. GRANEY, *supra* note 74, at 41.

<sup>90</sup> CRACKEL, *supra* note 74, at 162.

<sup>91</sup> See BARKALOW WITH RAAB, *supra* note 76, at 35 (observing that certain forms of physical hazing were outlawed in the 1960s although some physical hazing was unofficially tolerated through at least 1976).

<sup>92</sup> KOHLHAGEN & HEINBACH, *supra* note 80, at 98, 99.

<sup>93</sup> GAO/NSIAD-93-36, *supra* note 6, at 12. At a 1901 congressional investigation into hazing, MacArthur refused to identify the cadets who had hazed him, to the extent they had not already identified themselves. *Id.*

<sup>94</sup> BANNING, *supra* note 6, at 23. The practice was referred to as “sitting on infinity.” *Id.*

Newburgh” involved a plebe balancing himself on his stomach on a chair or door and then simulating the breaststroke through imaginary water.<sup>95</sup>

In addition, some forms of hazing were humiliating. In the early 1900s, USNA plebes who could not properly answer questions from upperclassmen during meals “were sometimes ordered to eat under the table like dogs.”<sup>96</sup> Specifically, hazing appears to have been misused as a tool by some midshipmen to block the graduation of African-Americans from the USNA. Joseph H. Conyers, who entered the USNA in 1872 as its first African-American midshipman, was subjected to extensive hazing at the hands of some midshipmen. Such hazing included “assaulting him and in one incident forcing him, wearing almost no clothing, to climb a tree during a cold winter night and imitate a barking dog.”<sup>97</sup> The next two African-Americans to enter USNA—Alonzo McClellan in 1873 and Henry Baker in 1874—both were subjected to hazing, contributing to their struggles to perform academically and eventual resignations.<sup>98</sup>

It was not until the 1930s before USNA saw another African-American midshipman. In 1936, James Johnson reported to USNA as a midshipman but was given “an especially hard time” and dismissed in 1937 after academic deficiencies.<sup>99</sup> In 1937, George Trivers entered USNA but resigned after only three weeks.<sup>100</sup> Trivers remarked that he was unprepared “for the hazing and the isolation.”<sup>101</sup> A subsequent investigation reported that USNA officials “bent over backwards to see that the Negro midshipmen had fair and impartial treatment,” but that they had been the targets of individual acts of racism and had eventually left for personal reasons and the failure to meet USNA standards.<sup>102</sup>

Finally, in 1945, Wesley Brown entered USNA, graduated in 1949, and eventually retired as a Lieutenant Commander after 20 years of service in the U.S. Navy.<sup>103</sup> Although the target of “racial taunts and merciless hazing,”<sup>104</sup> during his time at USNA, Brown received the support of other midshipmen, the civilian Annapolis African-American community, and naval officers assigned specifically to monitor and ensure his safety and equitable treatment.<sup>105</sup>

In contrast, early African-American cadets at USMA were ignored or “silenced,”<sup>106</sup> rather than subjected to excessive hazing-type behavior.<sup>107</sup> USMA’s first African-American graduate, Henry Ossian Flipper (class of 1877),

<sup>95</sup> *Id.* Newburgh is a town north of USMA.

<sup>96</sup> KOHLHAGEN & HEINBACH, *supra* note 80, at 96.

<sup>97</sup> H. MICHAEL GELFAND, *SEA CHANGE AT ANNAPOLIS: THE UNITED STATES NAVAL ACADEMY, 1949–2000* 50 (2006). [Copyright 2006 by the University of North Carolina Press. Used by permission of the publisher. www.uncpress.org]. Some midshipmen had tried to protect him from excessive hazing. *Id.* Conyers departed USNA as an academic failure in 1873. *Id.*

<sup>98</sup> *Id.* at 50–51.

<sup>99</sup> *Id.* at 51.

<sup>100</sup> *Id.* at 51–52.

<sup>101</sup> *Id.* at 52.

<sup>102</sup> *Id.*

<sup>103</sup> T. Rees Shapiro, *His Stormy Voyage Through the Naval Academy Made History*, WASH. POST, May 26, 2012, at B1.

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

<sup>105</sup> *Id.* at B5; GELFAND, *supra* note 97, at 54.

<sup>106</sup> A silenced cadet was treated as if he did not exist. Major John H. Beasley, *The USMA Honor System—A Due Process Hybrid*, 118 MIL. L. REV. 187, 198 (1987) (“The ‘silenced’ cadet lived in a separate room, ate alone at a table in the Cadet mess, was not spoken to by any other cadet except for official purposes, and was otherwise completely ignored.”).

<sup>107</sup> See CRACKEL, *supra* note 74, at 164 (“Although they were not hazed in the traditional sense, the social climate among the cadets ensured that black cadets would be subject to scorn and maltreatment during the whole of their stay at West Point”).

experienced little hazing, but was instead largely ignored by other cadets.<sup>108</sup> Benjamin Davis Jr. (class of 1936), the first African-American to graduate from USMA in the twentieth century, wrote in his autobiography that “I was silenced for the entire four years of my stay at the Academy.”<sup>109</sup> Davis reported that he had no friends or roommates at USMA and other cadets spoke to him only as part of an official duty.<sup>110</sup>

Some of the first women to enter the academies also reported excessive hazing; others experienced ostracism and open hostility.<sup>111</sup> Many of the first female midshipmen believed that during the initial summer training period they had become the object of “particular attention and scorn from the upperclass.”<sup>112</sup> The attitude towards women at the academies quickly changed over time. By 1992, the GAO, reporting on treatment of fourth-class cadets and midshipmen at the three DoD academies, determined that women and minorities were not the recipients of any greater amounts of hazing-type treatment than other groups.<sup>113</sup>

Various forms of relatively harmless hazing-type conduct existed throughout the life of the service academies. During the 1870s, USNA midshipmen “had to mimic gorillas, bears and other animals while acting out amusing poems.”<sup>114</sup> By 1900, plebes “had to recite inane stories in the wardroom or sing their laundry lists to the tune of ‘Yankee Doodle.’”<sup>115</sup> A plebe from the class of 1924 reported that he was required “to sing ‘Anchor’s Away’ while standing on his head under the shower.”<sup>116</sup> Plebes were required to hide behind a study table, pop up their heads and say “cuckoo” before an upperclassman could SWAT them.<sup>117</sup> During the 1960s, at least one plebe was dispatched on a nighttime reconnaissance mission “to polish the brass balls of the statue of Bill the Goat.”<sup>118</sup>

At USMA, plebes were ordered to attend funerals for dead insects.<sup>119</sup> A common source of amusement were clothing formations, where the plebes were ordered to wear, and drill in, odd collections of uniform items, such as “full dress

<sup>108</sup> JANE EPPINGS, HENRY OSSIAN FLIPPER: WEST POINT’S FIRST BLACK GRADUATE 28 (1996).

<sup>109</sup> BENJAMIN O. DAVIS, JR., AMERICAN: AN AUTOBIOGRAPHY 27 (1991).

<sup>110</sup> *Id.* at 24–28.

<sup>111</sup> See, e.g., BARKALOW WITH RAAB, *supra* note 76, at 36 (“Women, in particular, became a target group for special hazing, though certainly men were not exempt.”); SHARON H. DISHER, FIRST CLASS: WOMEN JOIN THE RANKS AT THE NAVAL ACADEMY 61–62 (1998) (describing that although oftentimes ostracized by male midshipmen and occasionally subjected to offensive taunts, the women generally experienced the same level of hazing during their plebe year as the male plebes); DAVID LIPSKY, ABSOLUTELY AMERICAN: FOUR YEARS AT WEST POINT 50 (2003) (first women to USMA experienced open hostility by male upper class cadets) [© 2003 by David Lipsky, used with permission of the publisher Houghton Mifflin Harcourt Publishing Company]; cf. GAIL O’SULLIVAN DWYER, TOUGH AS NAILS: ONE WOMAN’S JOURNEY THROUGH WEST POINT 67 (2009) (explaining that although there were “a few bad apples,” the author—a member of USMA’s second class with women—did not experience hazing focused on her because of her gender); PETERSON, *supra* note 14, at 17–19, 25–26 (describing how a female cadet from the USMA class of 1982 recalled only one time that she believed she was “hazed” because of her gender; the offender was subsequently admonished by another cadet); *id.* at 72 (describing how during plebe year, the female cadet “didn’t feel singled-out because [she] was female”). The first women cadets arrived in 1976 and now constitute 20 percent of the USMA student body. Sarah Larimer, *N. Virginian is First Black Woman to Lead West Point’s Corps of Cadets*, WASH. POST, Aug. 6, 2017, at C3.

<sup>112</sup> GELFAND, *supra* note 97, at 143.

<sup>113</sup> GAO/NSIAD-93-36, *supra* note 6, at 24 (USNA), 36 (USAF), 50 (USMA).

<sup>114</sup> KOHLHAGEN & HEINBACH, *supra* note 80, at 98.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.*

<sup>119</sup> BANNING, *supra* note 6, at 27 (noting that all funeral participants came from the ranks of the plebes, “even the mourners”).

hat, a pair of underdrawers, leggings and white gloves – and nothing else.”<sup>120</sup> Not all clothing formations were quite as amusing. One cadet from the class of 1962 reported that they were required to dress “in sweat suits and raincoats and made to stand in steamy showers until they nearly fainted” and ordered repeatedly “to appear in certain uniform in an impossibly short period of time . . . until the plebes dropped from exhaustion.”<sup>121</sup>

Cadets and midshipmen embraced an elaborate set of unofficial traditions and customs that had developed over decades and perhaps longer.<sup>122</sup> For example, USMA plebes were required to recite their “poop” on demand.<sup>123</sup> One of the first female cadets at USMA (class of 1980) identified her poop as “Sir, I’m rough, tough, and full of stuff.”<sup>124</sup> Her classmate’s poop was: “Sir, I’m 125 pounds of twisted steel and sex appeal. The Lone Ranger would rather French kiss a rattlesnake than mess with me.”<sup>125</sup>

As part of the fourth-class system, cadets and midshipmen were required to memorize a host of information—news, history, trivia, the menu, days until graduation—and recite it upon demand or suffer the wrath of the upper class.<sup>126</sup> Both cadets and midshipmen were required to act as a form of “verbal alarm clock,” under the scrutiny of the upper class, assuming an assigned station and then yelling out the number of minutes until formation, the uniform of the day, the menu, and other information.<sup>127</sup>

<sup>120</sup> *Id.* Clothing formations continued at USMA until at least 1976, but sometimes without the same level of frivolity. BARKALOW WITH RAAB, *supra* note 76, at 34. As of 1992, the USNA did not view as hazing fourth class midshipmen being required to “repeatedly change uniforms, this activity is specifically cited as permissible in the fourth class indoctrination instruction.” GAO/NSIAD-93-36 *supra* note 6, at 24.

<sup>121</sup> RUGGERO, *supra* note 14, at 30–31 (noting that the graduate was “almost wistful” as he recalled “the hazing that helped shape him.”); see JOSEPH STEFFAN, HONOR BOUND: A GAY MIDSHIPMAN FIGHTS TO SERVE HIS COUNTRY 53 (1992) (describing an incident from the perspective of a USNA class of 1987 midshipman during which he and other plebes were required to wear raincoats over sweat gear in a hot enclosed environment while holding rifles straight out in front of them, and then exercised vigorously until a plebe passed out); RICHARD C. U’REN, IVORY FORTRESS: A PSYCHIATRIST LOOKS AT WEST POINT 21 (1974) (USMA plebes in the early 1970s were subject to uniform drills: “just before inspection, a new cadet may be ordered to appear in all his uniforms before an upperclassman. He then had to run up and down stairs in his dress uniform, his tropical worsteds, his gym clothes, and so on”).

<sup>122</sup> GAO/NSIAD-93-36, *supra* note 6, at 10 (“By tradition and custom, each of the fourth class systems has built up a variety of practices that have been part of the programs for decades, and some have been around for a century or more.”).

<sup>123</sup> Assigned to a plebe by his/her squad leader or other upper class cadet, poop “called attention to whatever surface characteristic they felt was the most grossly evident about us, alluding to our appearance, our attitude, or our performance.” BARKALOW WITH RAAB, *supra* note 76, at 30–31.

<sup>124</sup> *Id.* at 31 (“I considered it a compliment.”).

<sup>125</sup> *Id.* Another of Barkalow’s classmates was required to say: “I’m the Madwoman of Borneo—I have more hair on my chest than you have on your head.” *Id.* In the author’s company (USMA class of 1982), a plebe from the South was required to recite the “Arkansas poop,” which reportedly was an 1881 speech rendered before the Arkansas state legislature concerning how “Arkansas” should be pronounced, that is, ar-kan-zus or ar-kan-saw.

<sup>126</sup> Peggy O’Donnell, *The Politics of Pie Cutting at West Point’s Mess Hall*, ATLAS OBSCURA (June 27, 2017), <https://bit.ly/39Qezja>; GAO/NSIAD-93-26, *supra* note 6, at 15; COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 1 (“Fourth classmen must memorize and recite professional and nonprofessional topics, including the titles of movies, or, in season, athletic team rosters or coaches.”).

<sup>127</sup> STEFFAN, *supra* note 121, at 61–62 (referred to as “chow calls” at Annapolis); see also DISHER, *supra* note 111, at 119. Plebes at USMA performing a similar function were referred to as “minute callers.” See DWYER, *supra* note 111, at 18; *id.* at 71–72 (“Minute callers basically just stand in the hallway getting yelled at or waiting to get yelled at. At attention, standing like dingbats under the clocks in the hallways, ten minutes before each formation, eyes straight ahead, shooting ducks for upperclassmen to criticize them . . .”); PETERSON, *supra* note 14, at 74 (minute callers called out the number of minutes until formation, the menu, and uniform). Doolies at the USAFA were similarly required to call minutes. MARK L. NELSON, OUT OF THE BLUE: LEAVING THE AIR FORCE ACADEMY 25 (2016).

At the family-style meals, USMA cadets, while sitting at attention, were required to announce the arrival of the food, memorize the beverage preferences of all upper class cadets at their table, and cut the desert into perfectly even slices.<sup>128</sup> Plebes did not speak without permission and sat “at attention: *i.e.*, erect, hands in lap, heads up, eyes straight ahead, and using the bottom but not the back of the chair.”<sup>129</sup> At least through the late 1970s, USMA plebes who failed to perform table duties satisfactorily were still being “ordered to ‘pass out their plates,’” returning their uneaten meal to the mess hall waiter.<sup>130</sup> Occasionally plebes at USNA had to “shove out,” which meant they had to push their chair away, but maintain a sitting position while eating their meal.<sup>131</sup>

One popular tradition at USNA was to require plebes to “burble” a pea.<sup>132</sup> This entails a midshipman putting a pea between his lips, looking upward, and “[t]hen, ever so gently . . . blow[ing] a steady stream of air so as to lift the pea from your lips and keep it aloft about an inch or so above your mouth for an interminable ten seconds.”<sup>133</sup>

Some of the requirements imposed on the plebes were part of a highly regimented system of discipline.<sup>134</sup> For example, at USMA, plebes were required to “ping” when moving between locations, “which meant walking 180 steps per minute at attention.”<sup>135</sup> Plebes at USNA followed a similar practice.<sup>136</sup> They were “required to move at double-time (called ‘chopping’) . . . square their corners by pivoting at a 90-degree angle, and ‘sound-off’ with a spirit-related phrase (typically ‘Beat Army, Sir’).”<sup>137</sup>

At the USAFA, plebes were required to sit at attention during meals<sup>138</sup> and “double-time” across the compound.<sup>139</sup> Prior to the completion of the fourth class system, doolies at the USAFA had to undergo a week-long period of intense

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<sup>128</sup> O’Donnell, *supra* note 126; PETERSON, *supra* note 14, at 84–85; GAO/NSIAD-93-36, *supra* note 6, at 42. Plebes at the USNA had a similar experience. STEFFAN, *supra* note 121, at 42; *see also* RICH ZINO & PAUL LARIC, TALES FROM ANNAPOLIS: A RING-KNOCKERS’ BEDSIDE COMPANION 47 (2000) (while sitting at attention, midshipmen were required to recite “sports scores, current headlines from the morning paper, the names of movies being shown in town, and a host of other exercises in mental agility”); GAO/NSIAD-93-36, *supra* note 6, at 16 (“Mealtimes were a period of stress for plebes, who were required to eat at attention, sitting on the edge of their chair without touching the chair back, looking straight ahead (referred to as ‘eyes in the boat’), and eating their food with ‘three chews and a swallow.’”). Doolies at the USAFA engaged in similar meal time rituals. GAO/NSIAD-93-36, *supra* note 6, at 31. In the author’s plebe company, poor pie cutters were ordered to the rooms of upperclassmen during the evening hours to practice on Play-Doh pies.

<sup>129</sup> COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 1.

<sup>130</sup> RUGGERO, *supra* note 14, at 30.

<sup>131</sup> ZINO & LARIC, *supra* note 128, at 50 (describing how they “were literally sitting on air”).

<sup>132</sup> *Id.* at 48, 51 (describing memories of plebes from USNA classes of 1967 and 1949).

<sup>133</sup> *Id.* at 51.

<sup>134</sup> *See* GAO/NSIAD-93-36, *supra* note 6, at 41 (“Traditional fourth class life at West Point was highly regimented.”). At USMA, cadet rooms were inspected daily. PETERSON, *supra* note 14, at 74. Further, during the first semester USMA plebes were not authorized stereos or radios and could not watch television during plebe year. *Id.* at 79–80.

<sup>135</sup> DWYER, *supra* note 111, at 26; *see also* GAO/NSIAD-93-36 *supra* note 6, at 41 (“While inside the Academy’s buildings, fourth class cadets were expected to walk in a military manner, 120 steps per minute, with head and eyes to the front, an arm swing 9 inches to the front and 6 inches to the rear, as in marching.”), 42 (“Outside, cadets had to ‘ping’ (*i.e.*, move at double time) and square corners.”).

<sup>136</sup> DISHER, *supra* note 111, at 18; *see* MCCAIN WITH SALTER, *supra* note 80, at 121 (McCain, USNA class of 1958, noted: “We were expected to brace up, sit or stand at rigid attention with our chins tucked into our neck, whenever upperclassmen came into view.”).

<sup>137</sup> GAO/NSIAD-93-36, *supra* note 6, at 15; *see also* GELFAND, *supra* note 97, at 28.

<sup>138</sup> GAO/NSIAD-93-36, *supra* note 6, at 31. The cadets were also required to perform various table duties and were subject to correction for various infractions and table decorum. *Id.*

<sup>139</sup> GAO/NSIAD-93-36, *supra* note 6, at 30. The USAFA defined the term double-time as “an easy run, taking 180 steps (36 inches in length) per minute.” *Id.*

physical activity and harassment by upper class cadets, known as “hell week.”<sup>140</sup> For a concentrated period of time, upper class cadets yelled and screamed at the doolies, sometimes ganging-up on a single cadet; required them to brace at attention and perform rifle drills; grilled them on required knowledge; repeatedly inspected, wrecked, and re-inspected rooms; and frequently mandated strenuous physical activity, culminating in the required completion of an obstacle course under stressful conditions.<sup>141</sup>

### **B. Formalizing and Refining the Fourth-Class System**

During most of the twentieth century, USMA moved to formalize the fourth class system, fully cognizant of the hazing-type conduct aimed at fourth classmen.<sup>142</sup> In 1918, USMA’s Superintendent, Samuel Tillman, moved toward regularizing the fourth class system, including increased upper class cadet authority over plebes.<sup>143</sup> Although the Academy’s leadership was aware that the expansion of upper class leadership authority produced reports that plebes were unnecessarily harassed, “the tactical department was impressed by the soldierly results that were so quickly brought about by the sharp disciplinary control both in and out of ranks, and did little to change the practice.”<sup>144</sup> The Superintendent believed that the system would work so long as the upper class cadets did not abuse their authority or permit others to do so.<sup>145</sup>

The following year, the new Superintendent, Douglas MacArthur, ordered recent graduates to reduce to writing the customs of service of the Corps of Cadets and accepted proposed regulations from the recent graduates articulating the relationship between the upper class and plebes.<sup>146</sup> The fourth class system formalized by Tillman and MacArthur was reviewed again during the 1940s and 1950s, but underwent only minor changes.<sup>147</sup> Various critics of the fourth class system called for change in the late 1950s and early 1960s, with little success.<sup>148</sup> After studying the issue in 1963, Superintendent William Westmoreland reported to USMA graduates that “Beast Barracks is little changed from what you experienced” and that USMA continued to view the summer program as “a sound and effective training experience.”<sup>149</sup>

In 1979, Superintendent Andrew Goodpaster made additional refinements to the fourth class system, placing more emphasis on “professionalism and positive leadership” and “stripped out a great deal of the nonsense . . . that had grown up around the Plebe system.”<sup>150</sup> Changes included a reduction in the amount of material plebes were required to memorize, fewer inspections, and an emphasis on imposing more professional and positive leadership responsibilities on upper class cadets.<sup>151</sup> General Goodpaster continued to retain concerns about the fourth class system, but in reflecting on

<sup>140</sup> NELSON, *supra* note 127, at 61; *see* GAO/NSIAD-93-36 *supra* note 6, at 55 (noting that in 1983, “13 Air Force Academy fourth class cadets were hospitalized and 136 more were treated (most for dehydration) after rigorous Hell Week activities”).

<sup>141</sup> NELSON, *supra* note 127, at 61–67.

<sup>142</sup> The Naval Academy reviewed its fourth class system with an eye toward hazing. GELFAND, *supra* note 97, at 29 (explaining that at the USNA, “[a]t least seven superintendents and commandants have taken steps to reform the indoctrination process and reduce the occurrence of hazing”).

<sup>143</sup> CRACKEL, *supra* note 74, at 282.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 283.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

USMA's developmental mission, he recognized that the cadets had "to learn to handle authority."<sup>152</sup>

### C. *The New Corps*

The beginning of the end of the academies' traditional fourth class model began during the late 1980s when USMA initiated a comprehensive review of the cadet system.<sup>153</sup> In 1990, USMA significantly modified its fourth class system, followed by the USNA over the next two years.<sup>154</sup> The two academies shifted their focus to "using more positive leadership techniques" and eliminated portions of the fourth class system that the academies viewed as "abuse-prone."<sup>155</sup> USMA accelerated the date the plebes were "recognized"—"the effective end of 'plebe' status for the fourth class"—from the end of the academic year to the middle of the second academic semester.<sup>156</sup> Also that year, USMA introduced the Cadet Leader Development System (CLDS), which changed the fourth class system to a "four class system," focusing more on leadership as a developmental process.<sup>157</sup>

The CLDS sought to "establish a climate that is free of the abuses and dysfunctional aspects of the old fourth class system."<sup>158</sup> Of note, the CLDS eliminated the long-standing practice of placing plebes under stressful conditions during meals. Plebes could now "enjoy their meal sitting 'at ease,'" table duties were no longer performed exclusively by plebes, and plebes were no longer required to recite knowledge after the cadets were ordered to "take seats."<sup>159</sup> Indeed, the changes reduced knowledge memorization requirements.<sup>160</sup>

The CLDS also eliminated the exaggerated military bearing requirements previously associated with a rigorous system of discipline. As the GAO reported: "With regard to military bearing requirements, traditional practices that do not really constitute proper military bearing (such as ping, bracing, squaring corners, and hugging the walls) have been prohibited."<sup>161</sup> Current DoD policy mirrors these changes, recognizing the importance of "proper bearing, fitness, and posture" as part of the cadet and midshipmen leadership development system, but opines that "[e]xaggerated forms of posture, speech or movement generally do not constitute proper military bearing," cautioning the

<sup>152</sup> *Id.* at 284. See GAO/NSIAD-93-36, *supra* note 6, at 90 (responding to a GAO report, the DoD noted that part of the academies' leadership training program included teaching the upper class how "to distinguish what constitutes abuse of authority").

<sup>153</sup> GAO/NSIAD-93-36, *supra* note 6, at 45 ("In 1989, as part of an in-depth reassessment of virtually all aspects of Academy life, the Superintendent of the Military Academy commissioned three independent reviews of the fourth class system . . . . The three reviews arrived at substantially the same conclusion: the fourth class system was in need of major change.").

<sup>154</sup> GAO/NSIAD-93-36, *supra* note 6, at 4, 20; see also *id.* at 41 ("In 1990, the Military Academy overhauled its fourth class system.").

<sup>155</sup> *Id.* at 4.

<sup>156</sup> CRACKEL, *supra* note 74, at 284.

<sup>157</sup> GAO/NSIAD-93-36, *supra* note 6, at 46. USMA continued to follow the CLDS. Dep't of Army Regulation 210-26, United States Military Academy ¶ 2-2, at 9 (Dec. 9, 2009/RAR Sept. 6, 2011) (consolidated in, and superseded by, Dep't of Army Regulation 150-1, United States Military Academy: Organization, Administration and Operation (Mar. 5, 2019)).

<sup>158</sup> GAO/NSIAD-93-36, *supra* note 6, at 47.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* ("Required rote memorization of newspaper articles has been prohibited, as has memorization of trivia such as beverage preferences, complete menus, and sports scores."). The Academy established approved knowledge requirements for all four classes. *Id.* Current DoD policy permits the individual services to determine appropriate knowledge memorization requirements, but cautions that "[m]emorization of trivia, such as complete menus for meals, is generally inappropriate." DoDI 1322.22, *supra* note 23, at 12.

<sup>161</sup> GAO/NSIAD-93-36, *supra* note 6, at 47; see LIPSKY, *supra* note 111, at 22 ("plebes no longer have to ping – a kind of racewalk – between barracks.").

academies to monitor such practices and requiring Superintendent-level approval for their implementation.<sup>162</sup>

The success of the initial changes were measured, in part, by reduced attrition rates.<sup>163</sup> Under the old system, the academies had experienced relatively high attrition rates,<sup>164</sup> particularly during the first year.<sup>165</sup> To illustrate, the attrition rate for the class of 1977 was 41 percent at the USAFA, 46 percent at the USMA, and 33 percent at the USNA.<sup>166</sup> Similarly high attrition rates continued throughout the 1980s and into the early 1990s, when USMA began to implement the new four class system.<sup>167</sup> The initial summer training period, known as “Beast Barracks” at USMA,<sup>168</sup> reflected a disproportionately high attrition rate.<sup>169</sup>

Rather than filtering out in the first year those cadets who had difficulty handling stressful situations or who could not meet its exacting requirements, USMA’s focus shifted to retaining the new cadets with a view toward helping them achieve USMA’s standards and developing them into officers during their four years at the Academy.<sup>170</sup> Retention rates at USMA reflected that cultural shift. To illustrate, during the decade preceding the reform, the average graduation rate was only 68.14 percent, but during the 1990s, when the new system was being implemented, the average graduation rate rose to 75.93 percent.<sup>171</sup> Between 2000 and 2018, under the mature cadet model, USMA’s average graduation rate rose to slightly over 79 percent.<sup>172</sup> USMA’s plebe year is no longer the filter that it once was; depending on the class, between 93 and 96 percent of plebes returned for their second year.<sup>173</sup>

Changes at the academies were neither immediate nor embraced by cadets, staff, or alumni. Based on surveys conducted between 1990 and 1992, the

<sup>162</sup> DoDI 1322.22, *supra* note 23, at 12.

<sup>163</sup> GAO/NSIAD-93-36, *supra* note 6, at 21 (noting as a “positive effect” of changes to the USNA’s fourth class system was that “plebe summer attrition was significantly lower than it had been in the past”); see DIANA JEAN SCHEMO, SKIES TO CONQUER: A YEAR INSIDE THE AIR FORCE ACADEMY 50 (2010) (citing lower attrition as one factor evidencing the success of reforms undertaken by the Air Force Academy). *But cf.* GAO/NSIAD-93-36, *supra* note 6, at 66 (“DOD also stated that some attrition might be necessary to screen students so that those who were not adaptable to a stressful environment are not commissioned.”).

<sup>164</sup> GAO/NSIAD-93-36, *supra* note 6, at 61 (“For the classes of 1972 through 1991, attrition averaged about 28 percent at the Naval Academy, 37 percent at the Air Force Academy, and 35 percent at the Military Academy”); LIPSKY, *supra* note 111, at 19 (explaining that prior to CLDS, USMA’s attrition rate was about 40 percent; by 1998 it was down to 20 percent).

<sup>165</sup> GAO/NSIAD-93-36, *supra* note 6, at 61; U’REN, *supra* note 121, at 56 (twenty percent); see MCCAIN WITH SALTER, *supra* note 80, at 121 (describing how most “left during our plebe year, unable to cope with the pressures”).

<sup>166</sup> COMPTROLLER GEN. OF THE U.S., B-3324555, THE FIVE SERVICE ACADEMIES: A FOLLOWUP REPORT i–ii (Nov. 25, 1977), <https://bit.ly/30D3wXC>. USMA’s attrition rate had increased from 36 percent for the class of 1975 to 46 percent for the class of 1977, in part because of violations of the honor code. *Id.* at ii. In addition, the attrition rate for the class of 1977 at the Coast Guard Academy was 44 percent and at the Merchant Marine Academy was 38 percent. *Id.*

<sup>167</sup> Between 1980 and 1990, USMA’s graduation rate fluctuated between a low of 61.5 percent in 1980 and a high of 74.8 percent in 1989. 1980–2018 Graduation and Commissioning Rates, U.S. MILITARY ACADEMY AT WEST POINT [hereinafter USMA Graduation Rates], available at <https://bit.ly/2X76eTi> (last visited July 13, 2020).

<sup>168</sup> GAO/NSIAD-93-36, *supra* note 6, at 10 n.2.

<sup>169</sup> U’REN, *supra* note 121, at 58 (“A disproportionately large number of cadets—thirty-four percent of the four years’ total for any one class—leave voluntarily during the first three months of the year.”); *cf.* LIPSKY, *supra* note 111, at 8 (in the late 1990s USMA had a 10% drop out rate during the first summer).

<sup>170</sup> See Letter from LTG Robert L. Caslen, Jr. To the Men and Women of the Long Gray Line (Oct. 12, 2017) [on file with author].

<sup>171</sup> USMA Graduation Rates, *supra* note 167.

<sup>172</sup> *Id.*

<sup>173</sup> Student Consumer Information-Cadet Achievement, Retention Rates (classes 2012–2017), <https://bit.ly/3ijEmTW>.

GAO found that fourth class cadets at USMA, USNA, and USAFA were regularly “(1) subjected to upperclassmen screaming in their face; (2) verbally harassed, insulted, and ridiculed; (3) required to memorize and recite trivia; and (4) forced to use study hours to prepare for fourth class duties.”<sup>174</sup> At least initially, some USMA graduates and cadets resisted movement away from the traditional fourth class system.<sup>175</sup> Further, some degree of stressful harassment continued to be permitted at the academies,<sup>176</sup> and unofficial hazing was reportedly still tolerated.<sup>177</sup> One author noted that “[a]s late as 1995, plebe year [at USMA] was so frightening that new cadets would pee in their own sinks rather than risk the walk to the bathroom, where upperclassmen were probably ready and waiting with some kind of haze.”<sup>178</sup>

In 1997, under new leadership, USMA adopted a no-haze policy, which resulted in the reprimand of upper class cadets for yelling at plebes, and possible expulsion for repeat offenders.<sup>179</sup> Plebes were no longer required to ping and were given a host of privileges denied plebes in the pre-reform period, including permission to listen to music in their rooms during first semester and access to off-post privileges, room phones, and TV cards for their computers.<sup>180</sup> Some of the prior traditions continued, however, including minute calling and performing table duties.<sup>181</sup>

That same year, the USNA followed the lead of USMA and USAFA by reducing the period that plebes were subject to harassment by the upper class.<sup>182</sup> USNA plebes were still required to memorize large amounts of knowledge, “then recite it under interrogation by upperclassmen,” and were required to “march down the middle of the hallways, turning corners at rigid right angles.”<sup>183</sup> Reporting on the USNA, a 2002 *Washington Times* article indicated that USNA had moved even further away from the harassment associated with the old fourth class system. The article reported that plebes were being required to write essays rather than being ordered to perform pushups by upper classmen as corrective measures; that the word “kill” had been removed from the plebe vocabulary—“it was too early in their careers to think about the ‘kill piece’ of military training”; that upper class midshipmen had been removed from plebe training duties “after a plebe complained about being screamed at and scolded too harshly”; and that the USNA had removed spot corrections and cruelty from the process.<sup>184</sup>

<sup>174</sup> GAO/NSIAD-93-36, *supra* note 6, at 3, 14.

<sup>175</sup> RUGGERO, *supra* note 14, at 33; *cf.* GRANEY, *supra* note 74, at 44–45, 48 (many officers and upperclass cadets supported the fourth class system).

<sup>176</sup> See, e.g., *Academy Cuts First Stress: Scandal Changes Freshman Ritual*, WASH. TIMES (June 25, 2003) (describing how the first four days of a new cadet’s USAFA experience would be “low-stress,” and not follow the prior practice where “upperclassmen yelled at and otherwise hounded the ‘doolies’ from the moment they stepped on buses for the ride to campus”); Michael Hill, *Public Enlists For Cadet Abuse*, WASH. TIMES (June 80, 2008), at A4 (explaining that cadets learn how to receive new cadets, to include yelling at them).

<sup>177</sup> LIPSKY, *supra* note 111, at 21 (“Hazing—even after CLDS—had always been unofficially tolerated at West Point”).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 21.

<sup>180</sup> *Id.* at 22.

<sup>181</sup> *Id.* at 37 (noting that only breakfast and lunch were mandatory meals).

<sup>182</sup> Amy Argetsinger, *Less Humble Pie for Naval “Plebes,”* WASH. POST (Dec. 10, 1997), <https://wapo.st/3h3rm43> (describing how the USNA “shorten[ed] by at least a month this humbling initiation process, in which plebes are subjected to harangues and petty chores”).

<sup>183</sup> *Id.*

<sup>184</sup> *Naval Academy Considers Plebes’ Dignity*, WASH. TIMES (July 29, 2002), at B1. Naval Academy alumni expressed concerns with the changes. *Id.* at B2. A retired vice admiral remarked: “Human dignity is important, but I worry that we’re so concerned about someone’s dignity . . . that when they’re in a stressful situation, they’re very dignified but they fall apart.” *Id.*

As part of an academic thesis, a U.S. Marine Corps officer examined whether the USNA had reduced plebe “hazing and unsanctioned initiation practices” among members of USNA classes 2005 through 2008.<sup>185</sup> The officer-scholar found a “significant decrease” in the frequency of hazing-related conduct when compared to the GAO’s 1992 report on hazing.<sup>186</sup> Profanity and most forms of physical contact with plebes were prohibited, plebes were permitted to eat full meals, and punishment was closely monitored.<sup>187</sup>

However, the author found that the USNA still permitted certain hazing-like activities, but had taken steps to control these activities so as to preclude any excesses. For example, uniform races were still permissible—indeed they were “an approved teaching tool”—but were “tightly controlled” and conducted only after receiving the permission of the midshipman company commander.<sup>188</sup> “Bracing up”—tucking the midshipman’s chin into his/her neck while keeping the head upright—was limited to specified times and locations, but the USNA prohibited strenuous or creative bracing.<sup>189</sup> Also, poorly performing plebes could be required to perform multiple repetitions of exercises, “but only as a group incentive,” and were subject to “directive counseling.”<sup>190</sup>

Current USNA regulations still require fourth class midshipmen to “[c]hop with ‘eyes in the boat’ and square corners except when in [designated areas].”<sup>191</sup> Further, plebes are responsible for a wide variety of information, to include knowing “daily rates, including but not limited to the days; menus for the next three meals; names and billets of [certain duty officers], in-season varsity team captains, and [high-ranking midshipmen]; professional topic of the week; conversational knowledge of past professional topics; and conversational knowledge of three current news articles (international, national, and sports).”<sup>192</sup>

The author noted that three activities that the GAO viewed as hazing—bracing-up, uniform races, and performing multiple sets of exercises—were viewed by the USNA as permissible practices, at least when not performed to excess and in compliance with Academy standards.<sup>193</sup> In addition, the author used 23 hazing-like behaviors as part of his study, including upperclassmen screaming in a plebe’s face, uniform drills, memorizing and reciting trivia, bracing, pranks, and verbal harassment.<sup>194</sup> Within his surveyed population of midshipmen, over 81 percent of students did not consider any of the identified conduct to constitute hazing.<sup>195</sup> Midshipmen were still confused as to what fourth class practices were permissible.<sup>196</sup>

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<sup>185</sup> Groah, *supra* note 3, at 1, 3.

<sup>186</sup> *Id.* at 63–64.

<sup>187</sup> *Id.* at 41.

<sup>188</sup> *Id.* at 41, 84.

<sup>189</sup> *Id.* at 41.

<sup>190</sup> *Id.*

<sup>191</sup> COMDTMIDNINST 5400.6V, *supra* note 66, ¶ 6.5(1)(b)(2).

<sup>192</sup> *Id.* Reflecting the movement away from the old fourth class system and its unique upper class-plebe system on interaction, however, current USNA regulations sanction only practices “that would be reasonably and lawfully acceptable for use in the Fleet[.]” and caution that all practices should be measured through the prism of whether they could be defended to the *parents* of subordinates. *Id.* ¶ 3.2(2)(e) (emphasis added).

<sup>193</sup> Groah, *supra* note 3, at 41; *see id.* at 84 (noting that uniform races were permissible under controlled conditions).

<sup>194</sup> *Id.* at 56, 57.

<sup>195</sup> *Id.* at 88.

<sup>196</sup> *Id.*

At the USAFA, some degree of hazing continued at least through 2002,<sup>197</sup> to include a condensed but still robust version of hell week called “Recognition.”<sup>198</sup> In 2004, following a sexual abuse scandal in 2003, the USAFA appears to have taken an abrupt turn away from the old system that gave the upper class a free hand in training the doolies.<sup>199</sup> The USAFA moved toward an “officer development system,” curtailed numerous traditions, and cancelled Recognition for the classes of 2007 and 2008.<sup>200</sup> The officer development system shifted the focus away from training doolies to concentrating “on giving each class a role that corresponds to segments in the active-duty air force.”<sup>201</sup> Further, the USAFA brought in Air Force instructors from Lackland Air Force Base, experienced in training air force enlisted recruits, to teach the upper class how to properly train the doolies.<sup>202</sup>

Almost immediately, the cadet upper class trainers (cadre) and the Air Force instructors clashed over fundamental training philosophy, and the cadets resented the close supervision by, and criticism from, the Air Force instructors.<sup>203</sup> The two groups approached training the doolies with completely different mindsets; the instructors advocated for easing up on the doolies, providing greater protections to them, and adopting a more professional approach to training, while the cadets wanted tougher training that served to forge a special life-long bond through a shared and difficult experience and sought to weed out those who were not committed to remaining at the USAFA.<sup>204</sup> Further, the cadets overwhelmingly wanted a return to the traditional Recognition ritual, even though some cadets considered it to be a form of “organized hazing,” and indeed cadets placed a premium on Recognition “in direct proportion to the toughness of its challenges.”<sup>205</sup> Some members of the class of 2009, subjected to the restored tradition of Recognition, taunted those members of the upper class who had avoided it.<sup>206</sup> Further, some doolies felt cheated when they discovered that the training was not as rigorous as anticipated.<sup>207</sup>

By 2006, the USAFA had toned down Cadet Basic Training and Recognition.<sup>208</sup> Upperclassmen accused by the doolies of having treated them too harshly were relieved of their training duties.<sup>209</sup> Some vestiges of the old fourth class system survived, however, including a stressful initial entry period at the Academy, which many of the cadet cadre viewed as an opportunity to filter out the weak entrants.<sup>210</sup> During cadet basic training, doolies were required to sit at attention during meals and perform various table duties,<sup>211</sup> and were subject to frequent on-the-spot corrections by upperclassmen followed by corrective push-

<sup>197</sup> GRANEY, *supra* note 74, at 147 (“yelled and screamed at for nine months”).

<sup>198</sup> *Id.* (“one of the most arduous experiences of my life”).

<sup>199</sup> SCHEMO, *supra* note 163, at 47, 73.

<sup>200</sup> *Id.* at 40, 47, 49.

<sup>201</sup> *Id.* at 49. See generally HQ United States Air Force Academy, Pamphlet 36-3527, THE OFFICER DEVELOPMENT SYSTEM: DEVELOPING OFFICERS OF CHARACTER (Sept. 24, 2013) (discussing the purpose and structure of the USAFA Officer Development System).

<sup>202</sup> SCHEMO, *supra* note 163, at 49.

<sup>203</sup> *Id.* at 74, 108.

<sup>204</sup> *Id.* at 74–75.

<sup>205</sup> *Id.* at 48–49, 237, 247.

<sup>206</sup> *Id.* at 48, 73.

<sup>207</sup> *Id.* at 108.

<sup>208</sup> *Id.* at 3, 105, 119 (“tame”).

<sup>209</sup> During the third week of cadet basic training, a doolie accused an upperclassman of humiliating the new cadet by berating him in front of his unit. The upperclassman was confined to his room until the Academy investigated, and ultimately cleared the cadet of any wrongdoing. *Id.* at 56. Aware of the incident, other upper-class cadres became uncertain about the parameters of permissible training. *Id.*

<sup>210</sup> *Id.* at 17, 75, 123 (noting that Academy staff disagreed that the cadet cadre legitimately served such a role).

<sup>211</sup> SCHEMO, *supra* note 163, at 28.

ups and other exercises.<sup>212</sup> The stressful treatment associated with basic training was significantly reduced, however, as the doolies transitioned into the academic year.<sup>213</sup> Doolies continued to perform duties as minute callers, regularly were quizzed on various knowledge memorization requirements, could not carry their rucksacks on their shoulders, and were addressed only by their last names.<sup>214</sup>

Although firmly entrenched at the academies, modern reforms, including the developmental model, have not been fully embraced by academy graduates and remain the object of criticism.<sup>215</sup> An open question remaining, however, is whether the modern developmental system is better than the earlier attrition model, which tested cadets’ mental toughness and resilience before it invested significant amounts of money and resources in them.<sup>216</sup> Are the current Academy graduates going into the military with skill sets that could have been better developed in a more stressful environment? Did the reduction of hazing-like activity impact the quality of officer produced, particularly in terms of ability to deal with adversity, to overcome failure, to not quit when things get tough? In sum, is the modern developmental system better or just different?

#### **D. The Purpose of Hazing-Related Activities at The Academies**

The various forms of hazing-type activities have been leveled almost exclusively at fourth class cadets and midshipmen. Historically, the fourth class system was intended to indoctrinate the new cadets and midshipmen and transition them from civilians into the military.<sup>217</sup> The system promoted “self-discipline, professional knowledge, physical fitness, ethics, teamwork, and esprit de corps . . . .”<sup>218</sup>

Complementing other training and educational activities, the fourth class system was designed to develop such characteristics as discipline, habit, command presence, time organizational skills, an ability to think well under pressure and exercise good judgment, superior military bearing and appearance, etiquette, familiarity with professional military topics, and basic leadership principles.<sup>219</sup> USMA’s requirement to memorize huge amounts of knowledge was “meant to teach [plebes] to establish priorities within a short time, to respond effectively under stress . . . and to ‘generate an appropriate sense of curiosity and enthusiasm for matters pertaining to the army, the military profession, and world

<sup>212</sup> *Id.* at 33.

<sup>213</sup> *Id.* at 109, 124–25.

<sup>214</sup> *Id.* at 156, 190–91.

<sup>215</sup> In response to widely-circulated open letter criticizing policies at USMA and a perceived decline in standards, the Superintendent of the USMA took the unusual step of posting a response on the Academy’s public website, seeking to refute the criticisms. See Caslen, *supra* note 170. The Superintendent acknowledged that USMA had shifted from “an ‘attritional model to a ‘developmental’ model,” which he recognized “did not sit well” with many graduates, but posited that USMA had made the shift without compromising its standards. *Id.* at 4.

<sup>216</sup> The initial training program for SEALs, for example, has an extremely high attrition rate and deliberately attempts to weed out those without the requisite mental toughness. DENVER, *supra* note 4, at 23 (describing a 70–80 percent attrition rate), 29–30. The majority of SEAL candidates who depart do so in the first week of the course, with almost all departures occurring in the first five weeks. *Id.* at 33. Cf. Major Carl Forsling, *Keeping the Right People: Tougher Screening and Training Is Required*, MARINE CORPS GAZETTE 73, 74 (May 2014) (arguing that the Marine Corps should impose more difficult training and higher standards to “weed out” those that do not want to be Marines badly enough and that some level of attrition should be built into the process).

<sup>217</sup> GAO/NSIAD-93-36, *supra* note 6, at 10, 15, 29 (“The first year at the Air Force Academy is designed to be a time of intense indoctrination and serves as a demanding transition from civilian to military life.”).

<sup>218</sup> *Id.* at 10.

<sup>219</sup> COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 2–3.

affairs.”<sup>220</sup> The entire spectrum of fourth class activities was “designed to challenge the cadets to discover their limits . . . and to learn to cope with demanding, stressful situations, such as those encountered in combat.”<sup>221</sup> Character development was a frequently cited justification for many stress-inducing activities of the fourth class system.<sup>222</sup>

Prior to the major revisions of the fourth class system in the 1990s, cadets and midshipmen suffered a verbal assault as soon as they reported for duty.<sup>223</sup> As one graduate described it: there was “the noise, the screaming; the nose-to-nose, spittle-flying screeching of upper class into the faces and ears of shocked new cadets.”<sup>224</sup> The extremely stressful entry into the academies served as a rite of passage,<sup>225</sup> toughened the new cadets,<sup>226</sup> and the cadets and midshipmen viewed the rigors of the first year, and particularly the first summer, as part of a vetting process to weed out those unsuited for military service.<sup>227</sup> The stressful atmosphere encouraged teamwork and facilitated a bond among the fourth class and a recognition that they needed to support each other to survive their ordeal.<sup>228</sup>

One USMA graduate noted “hazing was specifically related to . . . learning time-management and self-disciplinary skills that would enable a potential officer to function in a high-stress military environment.”<sup>229</sup> The harassment was not designed to be “directed at their gender, religion or race.”<sup>230</sup> In addition, the system oftentimes reflected various traditions and customs, developed over time, which were viewed as harmless and “done in a spirit of fun.”<sup>231</sup> Significantly, although the fourth class system envisioned leadership development of the upper class vis-a-vis the fourth class, the harassment aspect of the relationship was never intended to be a leadership technique that academy graduates were to transport to their units following graduation.<sup>232</sup>

<sup>220</sup> U’REN, *supra* note 121, at 34; *see* SCHEMO, *supra* note 163, at 59 (part of the military indoctrination effort), 61 (learn to perform under pressure).

<sup>221</sup> COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 3 (discussing the USAFA).

<sup>222</sup> *Id.* at 1; *see* PETERSON, *supra* note 14, at 186 (explaining how stress builds character).

<sup>223</sup> U’REN, *supra* note 121, at 19 (“[E]very new cadet is physically and mentally – there is no other word for it – assaulted.”).

<sup>224</sup> RUGGERO, *supra* note 14, at 30; *see also* RICK ATKINSON, THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT’S CLASS OF 1966 17 (1989) (“[T]he intensity of disdain from the upper-class cadre, who barked and shrieked until spittle flecked the faces of the pathetic creatures cowering before them, was unnerving.”). One female cadet from the class of 1981 described her first day at USMA as similar to being in labor for 24 hours, “off-the-chart contractions, crashing into each other, no breaks, no drugs.” DWYER, *supra* note 111, at 23.

<sup>225</sup> U’REN, *supra* note 121, at 18; BARKALOW WITH RAAB, *supra* note 76, at 30; *see* ZINO & LARIC, *supra* note 128, at 125.

<sup>226</sup> BARKALOW WITH RAAB, *supra* note 76, at 33.

<sup>227</sup> *Id.* (explaining how students are “subjected to a host of physical, mental, and emotional stresses designed either to eliminate them from the Corps or to make them worthy of further ascent”); PETERSON, *supra* note 14, at 38 (“The first eight weeks . . . are designed to weed out the weakest very early . . .”); GELFAND, *supra* note 97, at 27 (“test plebes to see whether or not they can take it”); U’REN, *supra* note 121, at 32 (“identify cadets unable to function under stress”). *But cf.* GAO/NSIAD-93-36, *supra* note 6, at 20 (describing how in a memorandum dated July 13, 1990, the Commandant of the USNA stated “midshipmen should not presume that it is their job to ‘weed out’ plebes who will not perform well in combat or those who cannot handle the stress of a professional military regimen”).

<sup>228</sup> STEFFAN, *supra* note 121, at 43, 46; *see* U’REN, *supra* note 121, at 4 (“Because the multitude of tasks imposed upon them is so great, cadets learn to help each other early in their careers . . . [and] lay the groundwork for intense loyalty to each other.”); *cf.* KAMARCK, *supra* note 1, at 1 (“Some believe that shared experiences of hardship during initiation rituals lead to greater group commitment and dependency.”).

<sup>229</sup> BARKALOW WITH RAAB, *supra* note 76, at 36.

<sup>230</sup> *Id.*

<sup>231</sup> GAO/NSIAD-93-36, *supra* note 6, at 4, 10.

<sup>232</sup> *See* RUGGERO, *supra* note 14, at 33 (“Graduates who defend what the old system did for plebes never add, ‘and it taught good leadership techniques to the upperclass cadets.’”).

A psychiatrist stationed at USMA from 1970 to 1972 examined the fourth class system and determined that the stressful summer training, coupled with the “isolation, fatigue, tension, and the use of vicious language[,]” were deliberately planned and were designed to make the new cadets “vulnerable to new ideas, attitudes and behavior” and to force them to “relinquish their individuality and freedom completely,” facilitating their conversion from civilian to soldier.<sup>233</sup> The psychiatrist concluded that when comparing the new cadets who arrived in July with those who completed the arduous summer training at the end of August: “[t]hat Beast Barracks accomplishes its goals is beyond doubt.”<sup>234</sup> The experience enhanced cadet self-esteem after completing an extremely stressful and rigorous training program, and facilitated forging of close personal bonds with other cadets, group solidarity and identity, obedience, institutional conformity, and a sense of intense personal and institutional loyalty.<sup>235</sup>

Significantly, hazing as part of the fourth class system served as the great equalizer for new cadets.<sup>236</sup> The child of privilege and the impoverished, the Sergeant’s son and the General’s daughter, the jock and the intellectual, the popular kid and the social misfit were all brought down to the same base level and then rebuilt in the image of the Service Academy’s choosing. As one observer noted: “[E]very cadet is treated harshly; no allowance is made or recognition given for past achievements . . . .”<sup>237</sup> Isolated and under constant scrutiny and criticism, the new cadet can only rebuild his self-esteem “by adhering to the military way . . . .”<sup>238</sup> The equalization process is not unique to the academies but is common within the military and reflects a desire to achieve uniformity among a diverse group of new entrants.<sup>239</sup>

Despite the long-standing efforts of Congress and Academy officials to curb hazing, the upperclassmen continued to embrace various practices with the unofficial approval of faculty.<sup>240</sup> Further, many of the service academy graduates who had to endure hazing found merit with the practice.<sup>241</sup> USMA’s first African-American graduate (Class of 1877) defended the practices “because he believed it would be impossible to mold and polish the ‘amalgamation’ of West Point without it.”<sup>242</sup> Another famous graduate, General of the Army Omar Bradley (class of 1915), supported hazing of plebes.<sup>243</sup>

A 1962 USMA graduate, who led a relief force to an infantry company during heavy combat in Vietnam, and then successfully withstood repeated enemy assaults once his unit became besieged, attributed his success to the experiences of his plebe year.<sup>244</sup> “Plebe year is supposed to teach you how to function under

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<sup>233</sup> U’REN, *supra* note 121, at 18, 24, 25.

<sup>234</sup> *Id.* at 28.

<sup>235</sup> *Id.* 28–30. There was a downside to the extreme levels of stress. In addition to cadets resigning during Beast Barracks, there have been “psychiatric casualties,” including some suicidal gestures. *Id.* at 60.

<sup>236</sup> George Pappas, *What If The Academy Had Been Abolished in 1830?*, ASSEMBLY, May 1995, at 12, 17 (“The hazing of plebes, bright answers and all, is designed to reduce all newcomers to a common denominator of brotherhood and then raise them up with a healthy respect for their superiors.”).

<sup>237</sup> U’REN, *supra* note 121, at 39.

<sup>238</sup> *Id.*

<sup>239</sup> *See id.* at 3.

<sup>240</sup> *See* notes 83, 144, 175 *supra* and accompanying text.

<sup>241</sup> *See* BARKALOW WITH RAAB, *supra* note 76, at 34 (“it did build you up”); GAO/NSIAD-93-36, *supra* note 6, at 12.

<sup>242</sup> EPPINGS, *supra* note 108, at 28.

<sup>243</sup> STEVEN L. OSSAD, OMAR NELSON BRADLEY: AMERICA’S GI GENERAL 36 (2017).

<sup>244</sup> RUGGERO, *supra* note 14, at 31.

pressure, how to control your emotions and still make decisions when people are counting on you. I'm not sure plebe year does that anymore."<sup>245</sup>

Rear Admiral James B. Stockdale, who had survived almost eight years as a prisoner of war in North Vietnam, pointed favorably to his experience as a USNA plebe when discussing training that had prepared him for the prisoner of war (POW) experience.<sup>246</sup> Admiral Stockdale stated: "I came out of prison being very happy about the merits of plebe year at the Naval Academy. I hope we do not ever dilute those things. You have to practice being hazed. You have to learn to take a bunch of junk and accept it with a sense of humor."<sup>247</sup>

More than four decades after graduating, another USNA graduate and former Vietnam POW, John McCain, reflected on the harsh hazing that accompanied his plebe year.<sup>248</sup> Service academies are unique; they "are not just colleges with a uniform dress code."<sup>249</sup> The academies' purpose is to prepare cadets and midshipmen for the profession of arms and for combat command.<sup>250</sup> "The Academy experience is intended to determine whether you are fit for such work . . . . If you aren't, the Academy wants to discover your inaptitude as quickly as possible . . . .The period of discovery is your plebe year, when you are subjected to as much stress as the law and a civilized society will allow."<sup>251</sup> Although he hated his plebe year, McCain still found merit with the system.<sup>252</sup>

A 1983 USMA graduate who commanded a cavalry troop during the Gulf War defended the fourth class system in a widely circulated e-mail.<sup>253</sup> While conducting nighttime operations under extremely chaotic and dangerous circumstances, the graduate came to appreciate the merits of the fourth class system.<sup>254</sup> The officer continued: "Its goal was not harassment, ridicule or punishment. Its goal was to train the neural network to deal with an overwhelming amount of disjointed information, quickly process that information, categorize it, and make rapid, sound decisions."<sup>255</sup>

In short, both neutral professional observers and service academy graduates, determined that the previous fourth class system had merit. The now discarded system quickly transformed civilians into cadets and midshipmen, generated quality officers, and gave graduates skill sets that served them well later in their military careers.

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<sup>245</sup> *Id.*

<sup>246</sup> Read Admiral James B. Stockdale, *Experiences as a POW in Vietnam*, 27 NAVAL WAR C. REV. 2, 2 (1974).

<sup>247</sup> *Id.* at 3; see GRANEY, *supra* note 74, at 49 (a 2001 Air Force Academy Plebe was informed that USAFA POWs "were grateful for their Fourth Class experience, because it helped them cope with a similar environment at the POW camp"). The Department of Defense and academy officials have rejected POW preparation as a justification for hazing. GAO/NSIAD-93-36, *supra* note 6, at 69. The GAO noted that "many other POWs who have not undergone rigorous plebe treatment also survived that ordeal." *Id.*

<sup>248</sup> MCCAIN WITH SALTER, *supra* note 80, at 120 ("organized torment").

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 120–21.

<sup>252</sup> *Id.* at 120–23.

<sup>253</sup> RUGGERO, *supra* note 14, at 31–32.

<sup>254</sup> *Id.* at 32.

<sup>255</sup> *Id.* at 32–33.

#### IV. HAZING WITHIN THE RANKS

Historically, some forms of hazing within the military has been an accepted practice, within certain limits.<sup>256</sup> Rituals that involve some degree of hazing-like conduct are even officially sanctioned. In its 2016 report, the GAO noted that “because hazing can be associated with rites of passage and traditions, the Army, Navy and the Marine Corps—either in their policies or through supplemental guidance—permit command-authorized rituals, customs, and rites of passage that are not cruel or abusive, and require commanders to ensure that these events do not include hazing.”<sup>257</sup>

Various forms of hazing-like conduct have frequently been associated with entry into a unit. Some of these initiation rituals were harmless fun,<sup>258</sup> others were improper.<sup>259</sup> Other hazing-related rituals involved promotions,<sup>260</sup> the completion of specialized training,<sup>261</sup> and significant unit events such as when a sailor crossed the equator or the international dateline for the first time.<sup>262</sup> Hazing has also been associated with intra-unit efforts to correct the behavior of unit members perceived as low-performing.<sup>263</sup>

Within the armed forces, Marine Corps recruit training enjoys the reputation for having one of the most physically demanding and mentally stressful

<sup>256</sup> See Groah, *supra* note 3, at 19 (“In the military a degree of hazing is not only accepted but expected.”).

<sup>257</sup> GAO-16-226, *supra* note 1, at 15.

<sup>258</sup> When the author joined his artillery unit in 1983, he was required to “send a round down range” during the unit’s initiation ceremony. This ritual involved loading a projectile (raw egg) in the officer’s mouth, followed by adding propellant (alcohol) and then firing the round (swallowing).

<sup>259</sup> See *United States v. Roberts*, 14 M.J. 671, 672 (N-M.C.M.R. 1982), *rev’d* (as to Roberts), 15 M.J. 106 (C.M.A. 1983) (summary disposition) (describing how a sailor is “greased,” that is, “they pull your pants off and put a grease gun in your seat and pump you full of grease and coffee grounds and cigarette butts and anything that will fit through the tubing”); *United States v. Barnes*, 60 M.J. 950, 953–54 (N-M. Ct. Crim. App. 2005) (discussing how three sailors were repeatedly beaten as part of an initiation to their ship); Groah, *supra* note 3, at 17 (A 1993 television story featured the “Hell Night” initiation of a Marine Corps Silent Drill Team. Naked Marines had “their genitalia covered in edge dressing while being sprayed with urine.”).

<sup>260</sup> Rod Powers, *What Is The Marine Corps Hazing Policy?*, THE BALANCE (Sept. 8, 2016), <https://bit.ly/39PeD2w> (“One past ritual, known as “the gauntlet,” may have been conducted amongst Marine noncommissioned officers as a Marine entered the NCO ranks. This painful process involved the newly promoted Marine getting kned in the thigh by his fellow Marines, in an effort to leave a continuous bruise running up and down each leg to create a literal ‘blood stripe.’”); see *Bd. Vet. App. No. 0933949* (Sept. 10, 2009) (Appellant “reported that when he made E-4 rank he was subjected to the ‘blood stripe’ hazing ritual where several other non-commissioned officers kned him in both knees . . . .”), available at <https://bit.ly/2XiCAug>; *Marines Convict Six of Hazing at New River*, WILMINGTON STAR NEWS (Dec. 3, 2002) (related to Marine’s promotion to corporal), <https://bit.ly/3fgZSXH>.

<sup>261</sup> See *Bd. Vet. App. No. 1538432* (Sept. 9, 2015) (Appellant alleged “that he was awarded the Aircrew Badge by having the badge punched into his chest 13 times”), <https://bit.ly/2Pg5y9I>; *Bd. Vet. App. No. 0932360* (Aug. 27, 2009) (Appellant alleged that he participated in various “hazing incidents including receiving ‘blood wings’”), <https://bit.ly/3gwd5I>; *Bloody Hazing by Marines*, ARIZ. REPUBLIC (Jan. 11, 1997), at A8 (jump wings beaten into Marines’ chests).

<sup>262</sup> See *Bd. Vet. App. No. 18101842* (May 10, 2018) (“[T]he Veteran reported that he was forced to participate in an initiation ceremony when the ship crossed the equator, where he was forced to crawl on his hands and knees, submerge his head in a bucket of garbage, and inappropriately interact with other sailors who were dressed as women.”), <https://bit.ly/2Pip3i2>; *Bd. Vet. App. No. 1514544* (Apr. 3, 2015) (“The Board finds that the appellant’s stressor of being hazed as a tradition for crossing the Equator as credible given the history of that tradition.”), <https://bit.ly/3gxSeK1>. Cf. GAO-16-226, *supra* note 1, at 15 (discussing a “crossing the line ceremony” conducted under strictly controlled conditions).

<sup>263</sup> *United States v. Davis*, 47 M.J. 484, 485, 487–88 (C.A.A.F. 1998); see *Bd. Vet. App. No. 1759803* (Dec. 21, 2017) (“he had a blanket party on him (i.e. was hazed)”), <https://bit.ly/2BOhBYE>; *Bd. Vet. App. No. 1534047* (Aug. 10, 2015) (“[T]he Veteran alleges that he was the recipient of an army ‘blanket party’ during basic training . . . [which] consisted of unit members pinning him to his bunk with a blanket and then striking him with bars of soap held in socks.”), <https://bit.ly/3glFtSA>.

training regimes. For many Americans, the popular movie *Full Metal Jacket* exemplifies the Marine Corps recruit training experience.<sup>264</sup> Within the Marine Corps, a significant degree of hazing-like conduct has been a deliberate and long-standing component of recruit training.<sup>265</sup>

Similar to the earlier academy system, the Marine Corps intentionally sought to initially disorient new entrants as they received them into their institutions to facilitate the transition from civilian to members of the armed forces,<sup>266</sup> shifted the new entrant's focus from himself/herself to that of the group/team,<sup>267</sup> pushed them to the point of physical and mental exhaustion,<sup>268</sup> heavily indoctrinated them in the history, values and culture of the institution,<sup>269</sup> and used stress and fear to facilitate training,<sup>270</sup> replete with a heavy dose of “in your face” yelling and screaming.<sup>271</sup> Also, as with the academies' earlier fourth class system, the treatment of Marine recruits was not something intended to be replicated in units.<sup>272</sup>

Further, like the academies, Marine recruit training has experienced abuses.<sup>273</sup> Although officially banned, some hazing-like practices and maltreatment continued to exist and were a frequent part of recruit training.<sup>274</sup>

Some form of hazing-like conduct has existed in recruit training since 1915, when the Marine Corps formalized recruit training at its training depot in Parris Island, South Carolina.<sup>275</sup> In the years following the formalization of recruit

<sup>264</sup> R. Lee Ermey, who played a drill instructor in the movie about a platoon of Marines that are trained at Parris Island and then serve together in Vietnam, had served as a Marine Corps drill instructor at Parris Island before being wounded in Vietnam. Harrison Smith, *Ex-Drill Instructor Turned Actor*, WASH. POST (Apr. 17, 2018), at B6.

<sup>265</sup> Groah, *supra* note 3, at 19 (“in Marine Corps recruit training hazing is an instrumental and planned portion of initial training”); *see also* JOHN C. STEVENS III, COURT-MARTIAL AT PARRIS ISLAND 155 (1999) (during the early 1950s moderate levels of physical force known as “thumping” were an “integral part” of recruit training) [cited with permission of the Naval Institute Press]; LtCol Brandon D. McGowan, *Improving Our Ethical Foundation at Recruit Training*, MARINE CORPS GAZETTE, Feb. 2013, at 28 (“institutionally accepted hazing”).

<sup>266</sup> RICKS, *supra* note 3, at 28, 40, 42; *see* KEITH FLEMING, THE U.S. MARINE CORPS IN CRISIS: RIBBON CREEK AND RECRUIT TRAINING 3 (1990) (through the mid-1950s, “shock treatment” resulting in recruit disorientation was a fundamental part of the training regimen) [cited with permission of the University of South Carolina Press].

<sup>267</sup> McGowan, *supra* note 265, at 27; Captain Stephan G. Page, *Recruit Training*, MARINE CORPS GAZETTE 66 (Aug. 2013) (“recruits are introduced to an environment of team building and an idea of something bigger than oneself”). *Cf.* U.S. Marine Corps, MCWP 6-11, Leading Marines 16 (Nov. 27, 2002) [hereinafter *Leading Marines*] (“Everything that the Marine Corps does is a team effort.”).

<sup>268</sup> RICKS, *supra* note 3, at 47; FLEMING, *supra* note 266, at 3.

<sup>269</sup> RICKS, *supra* note 3, at 37, 43, 66; McGowan, *supra* note 265, at 27 (“immersed in our Corps’ culture”). *Cf.* *Leading Marines*, *supra* note 267, at 11 (“Marines undergo a personal transformation at recruit training . . . [T]hey are ingrained with a sense of service, honor, and discipline.”).

<sup>270</sup> RICKS, *supra* note 3, at 67 (“use of fear as an educational device”); *see* Company Commanders, *supra* note 4, at 60 (“[O]ur general approach, with its emphasis on the application of appropriate levels of stress, is highly effective.”).

<sup>271</sup> RICKS, *supra* note 3, at 60–61; FLEMING, *supra* note 266, at 3 (describing “shouting, cursing drill instructors . . . with face-to-face, nose-to-nose harangues”).

<sup>272</sup> *See* McGowan, *supra* note 265, at 26 (at Marine recruit training “we have intentionally set aside our ‘train as we fight’ philosophy”).

<sup>273</sup> STEVENS, *supra* note 265, at 13 (in the early 1950s mistreatment of recruits, including broken noses, was not uncommon); Dan Lamothe, *Marine Corps Recruit’s Skin ‘Liquefied’ in SC Hazing Incident by Instructor*, WASH. POST (May 4, 2017), at A3 (required to exercise on floor covered in bleach and required to stay in wet uniform). A Vietnam-era Marine reported that during recruit training three recruits were required to insert their penises into the breeches of their rifles, close the bolt, and run while singing the Marine Corps Hymn. RICKS, *supra* note 3, at 90.

<sup>274</sup> STEVENS, *supra* note 265, at 13, 61, 155 (physical force such as pushing, shoving, slapping the back of the head or kicking a recruit in the rear end were accepted practices); *see* Smith, *supra* note 264, at B6 (Vietnam-era drill instructors occasionally “raised a hand” to privates who failed to follow orders”).

<sup>275</sup> FLEMING, *supra* note 266, at 10.

training, drill instructors required recruits to walk long distances with packs filled with sea water, carried buckets of sand for extended periods, performed hundreds of repetitions of raising and lowering the his rifle over his head, and drill instructors required the recruits to stand motionless in a sandy area while bitten by sand fleas<sup>276</sup> and forced recruits to run a gauntlet where other recruits hit him with their belts.<sup>277</sup>

Noticeably absent from recruit training, until World War II, was physical mistreatment of the recruits by the drill instructors.<sup>278</sup> During World War II, less-experienced drill instructors began to rely on corporal punishment, profanity, and various forms of hazing as part of recruit training.<sup>279</sup> The surge of recruits during the Korean War again taxed the Marine Corps’ training capabilities, and additional forms of hazing became more common place.<sup>280</sup>

During 1956, Marine Corps Recruit Depot Parris Island suffered through the infamous Ribbon Creek incident during which six recruits drowned when a drill instructor, frustrated with a perceived discipline problem, marched his platoon into a swampy tidal pool at night.<sup>281</sup> The drill instructor was eventually charged with several offenses, but was convicted of only involuntary manslaughter by simple negligence and drinking in the barracks.<sup>282</sup> Ultimately, the drill instructor was sentenced to three months hard labor and reduction in rank from staff sergeant to private.<sup>283</sup>

In the post-Vietnam era, a combination of inadequate drill instructor training, overworked drill instructors, and poor-quality recruits<sup>284</sup> facilitated widespread harassment and abuse of the recruits and resulted in at least one recruit being beaten to death during pugil stick training.<sup>285</sup> Though the Marine Corps increased supervision of recruit training and emphasized positive leadership, the drill instructor community opposed these changes due to a belief that to produce quality Marines, drill instructors needed to maintain their “heavy-handed, high stress approach,”<sup>286</sup> a perspective widely shared within the Marine Corps.<sup>287</sup>

<sup>276</sup> *Id.* at 11, 13, 14 (explaining that standing motionless while being bitten by sand fleas was designed to teach the recruits to ignore distractions as riflemen, a skill useful when in combat).

<sup>277</sup> *Id.* at 11, 13; *see* Bd. Vet. App. No. 0839499 (Nov. 17, 2008) (finding as “arguably credible” the “hazing-type” allegations of a former Marine at Parris Island in 1945 that included “being stripped, pushing an object across the floor with his nose, wearing a bucket on the head, being made to lie quietly despite cold weather, running a ‘belt line’ gantlet [and] standing at attention for prolonged periods . . . .”), <https://bit.ly/3gmerKT>.

<sup>278</sup> FLEMING, *supra* note 266, at 11.

<sup>279</sup> *Id.* at 15.

<sup>280</sup> *Id.* at 17.

<sup>281</sup> STEVENS, *supra* note 265, at 1–10.

<sup>282</sup> *Id.* at 150.

<sup>283</sup> *Id.* at 153. The court-martial panel sentenced the drill instructors to nine months hard labor, reduction to private, and a bad conduct discharge, but the Secretary of the Navy reduced the sentence.

<sup>284</sup> *Id.*  
In 1974, only 50 percent of Marine recruits were high school graduates. COMP. GEN., MARINE CORPS RECRUITING AND RECRUIT TRAINING POLICIES AND PRACTICES, B-157371, at 5 (1977). This improved to 53 percent in 1975 and 61 percent in 1976. *Id.* In 1975, the San Diego Recruit Depot reported 3553 nonjudicial punishments (NJPs) and 47 courts-martial. *Id.* at 10. Disciplinary actions significantly decreased in 1976, however, to 2079 NJPs and 19 courts-martial. *Id.* *See generally* BGen Bernard E. Trainor, *The Personnel Campaign Issue Is No Longer in Doubt*, MARINE CORPS GAZETTE, Jan. 1978, at 22 (discussing the Marine Corps’ difficulty obtaining high-quality recruits in the post-Vietnam era).

<sup>285</sup> *See* Trainor, *supra* note 284, at 25 (describing how improper practices by drill instructors “became institutionalized”), 29 (“abuse . . . were by-products of low quality recruit input”); Dan Lamothe, *Often-Forgotten Boot-Camp Scandals Had Prompted Marine Corps Reforms*, WASH. POST (Oct. 4, 2016), at A13 (the death of a recruit during pugil stick training in San Diego and the shooting of another in Parris Island led to disciplinary actions and reform of recruit training).

<sup>286</sup> Trainor, *supra* note 284, at 29.

<sup>287</sup> *Id.* at 30.

More recently, the Marine Corps convicted a drill instructor of several Uniform Code of Military Justice (UCMJ) violations for abusing recruits.<sup>288</sup> The drill instructor reportedly slapped and punched recruits and ordered a recruit into a commercial clothes dryer.<sup>289</sup> An investigation led to charges against four additional drill instructors, at least one of whom was acquitted.<sup>290</sup>

Like the academies, the Marine Corps has instituted various reforms over time. Following the Ribbon Creek incident, the Marine Corps relieved several drill instructors<sup>291</sup> and imposed a higher level of supervision over recruit training.<sup>292</sup> Many drill instructors resisted the reforms that followed the Ribbon Creek incident, however.<sup>293</sup> Based on input from drill instructors, the Marine Corps implemented several additional reforms benefiting drill instructors. For example, recruit training was extended two weeks; drill instructors were afforded greater prestige, including the return of the campaign hat; drill instructor living quarters improved; and drill instructors received free laundry services to maintain their impeccable appearance.<sup>294</sup> Interestingly, one of the drill instructor-requested reforms was an official definition of “hazing.”<sup>295</sup> Despite these reforms, however, the Marine Corps retained its “shock treatment” approach to new recruits, and grabbing a recruit by the collar and “shaking him up a bit” remained a common practice.<sup>296</sup>

Although retaining its rigor, the Marines continued to reform recruit training. Currently, Marine Corps recruiting policy does not permit profanity or physical harm directed at recruits.<sup>297</sup> However, the media has continued to report that a culture of hazing-like conduct continues to exist.<sup>298</sup>

<sup>288</sup> United States v. Felix, No. 201088871, 2019 W.L. 2525841, \*1 (N-M. Ct. Crim. App. June 19, 2019) (convicted “of eight specifications of violating a lawful general order, three specifications of maltreatment, and a single specification each of making a false official statement and drunk and disorderly conduct, in violation of Articles 92, 93, 107, and 134”).

<sup>289</sup> See *id.* at \*2–5 (describing the physical abuse).

<sup>290</sup> *Id.* at \*15 (one drill instructor pled guilty at a summary court-martial to Recruit Training Order violations, maltreatment, and disorderly conduct); Jeff Schogol, *Parris Island Drill Instructor Found Not Guilty in First Hazing Scandal Court-Martial*, MARINE CORPS TIMES (May 25, 2017), <https://bit.ly/2W9xakC>. Approximately 20 Marines were investigated for potential criminal charges relating to this event. Dave Philipps, *Marines Scrutinize a Culture of Toughness After a Muslim Recruit’s Death*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2ZkhAo9>.

<sup>291</sup> RICKS, *supra* note 3, at 105; see STEVENS, *supra* note 265, at 61 (although without fault, senior leadership was reassigned).

<sup>292</sup> STEVENS, *supra* note 265, at 61 (reforms included greater oversight); see Company Commanders, *supra* note 4, at 60 (“officer supervision in recruit training can be traced back to this notorious training mishap”).

<sup>293</sup> Fleming, *supra* note 266, at 94.

<sup>294</sup> *Id.* at 2.

<sup>295</sup> *Id.* at 59.

<sup>296</sup> *Id.* at 94. The drill instructors argued that it was a better practice to physically shake up a recruit than to permanently damage his record by resorting to the UCMJ. *Id.*

<sup>297</sup> U.S. Marine Corps, Order 5354.1E, Marine Corps Prohibited Activities And Conduct Prevention and Response Policy ¶ 010401(b) (“physically striking another to inflict pain . . . verbally berating another . . . threatening or offering violence or bodily harm to another”) (15 June 2018); RICKS, *supra* note 3, at 56, 68, 86; Dan Lamothe, *Hazing Marine Battled Boot Camp “Hell,”* WASH. POST, Sept. 30, 2016, at A2 (noting how Marine drill instructors are taught not to physically abuse recruits).

<sup>298</sup> Dan Lamothe, *More Than 20 Marines Disciplined For Abuse, Racism in Calif. Boot Camp*, WASH. POST, Oct. 6, 2019, at A12 (“verified allegations of Marines assaulting recruits by kicking, punching and shoving . . .”); Janet Reitman, *The Making–And Breaking–of Marines*, N.Y. TIMES MAG. 32, 36 (Jul. 9, 2017) (“The Marines have . . . investigated hundreds of hazing allegations in the past five years alone.”); *id.* at 37 (“[d]rill instructors scream”); Lamothe, *supra* note 297, at A2 (“a culture of hazing and bullying recruits remains”); see Philipps, *supra* note 290 (quoting a retired Marine LtCol as saying “[y]ou can make all these rules, but Parris Island still has a permissive culture,” she said. . . . ‘The culture was allowed to flourish,’ [she] said. ‘There is a hands-off approach. There is a belief that officers don’t make Marines, Marines make Marines . . .’”).

Historically, with its reliance on hazing or hazing-like conduct, the Marine Corps recruit training system, like the academy fourth class system - has enjoyed a high degree of success in transitioning civilians into disciplined, high quality members of the armed forces. Further, many graduates of recruit training have expressed a profound sense of accomplishment associated with successfully completing recruit training<sup>299</sup> and point to numerous positive results, including developing strong bonds with each other,<sup>300</sup> and profess a strong loyalty to the institution.<sup>301</sup> Other Marines continued to defend the harsh recruit training as a rite of passage.<sup>302</sup>

In the wake of the Ribbon Creek incident, the Marine Corps conducted a survey of prior recruits and determined that the vast majority (83%) believed that “they had been treated as marines should be treated.”<sup>303</sup> The overwhelming number of survey responses defended the harsh training, with many calling to make it more difficult.<sup>304</sup> Similar to many academy alumni, a high percentage of Marines believe that modern reform efforts have reduced the difficulty and effectiveness of new entrant training,<sup>305</sup> resulting in the unmerited graduation of many recruits.<sup>306</sup>

More recently, the GAO conducted a limited survey of servicemembers at two bases in California, Marine Corps Base Camp Pendleton and U.S. Naval Base Coronado.<sup>307</sup> One survey question asked: “Some activities that are traditions in the Marine Corps/Navy are now considered hazing. Is it important to continue any of these activities?”<sup>308</sup> The majority of the Navy and Marine Corps servicemembers surveyed replied “yes.”<sup>309</sup>

## V. THE LEGAL RESPONSE TO HAZING

The first reported court-martial of a cadet for hazing-related misconduct occurred in July 1846, when USMA Cadet John Tammany was dismissed pursuant to a General Court-Martial order following the ill-treatment of a plebe.<sup>310</sup> The dismissal was based on a violation of a USMA regulation stating that a cadet shall not “traduce or defame another.”<sup>311</sup>

The first attempt to criminalize the specific criminal offense of “hazing” at the academies dates to 1874, when Congress passed legislation requiring the Superintendent of the USNA to court-martial midshipmen for hazing.<sup>312</sup> Even

<sup>299</sup> RICKS, *supra* note 3, at 245.

<sup>300</sup> *Id.* at 230, 249.

<sup>301</sup> *Id.* at 238.

<sup>302</sup> Philipps, *supra* note 290, at A13; see Trainor, *supra* note 284, at 30 (Marines defended harsh training conditions as “an initiation rite”).

<sup>303</sup> STEVENS, *supra* note 265, at 157.

<sup>304</sup> *Id.*

<sup>305</sup> RICKS, *supra* note 3, at 89, 91; see Forsling, *supra* note 216, at 73 (“we’ve made it too easy”), 74 (“make recruit training and Officer Candidates School longer and more difficult”) (“weed out those who don’t want the title badly enough”).

<sup>306</sup> RICKS, *supra* note 3, at 91 (the lower 10 percent should not have graduated); cf. Dave Moniz, *Gone Soft?*, ARMY TIMES (Aug. 7, 2000), at 18 (Army basic training attrition rate dropped dramatically after changes designed to get struggling recruits to graduation prompting inquiries that the Army is sacrificing the quality of its force).

<sup>307</sup> GAO-16-226, *supra* note 1, at 57.

<sup>308</sup> *Id.* at 61.

<sup>309</sup> *Id.* Of the Naval personnel, 31 replied yes, 10 replied no, and 14 were unsure. Of the Marines, 27 replied yes, 19 replied no and 9 were unsure. *Id.*

<sup>310</sup> Alexander, *supra* note 14, at 4 (citing USMA, *Casualties of the Corps of Cadets*, Vol. 1, 1802 to 1915 (West Point, NY: Office of the Adjutant, USMA Archives)).

<sup>311</sup> *Id.*

<sup>312</sup> GAO/NSIAD-93-36, *supra* note 6, at 13 (citing Act of June 23, 1874, ch 453, 18 Stat. 203).

before this statutory basis for court-martial, both the Naval and Military Academies administratively dismissed midshipmen and cadets for improper hazing.<sup>313</sup> Under the 1874 Act “several” midshipmen were subject to court-martial for the offense of hazing, including at least one second class midshipman for “pulling the nose . . . and otherwise mistreating” and “striking at . . . and otherwise annoying” a fourth classman.<sup>314</sup>

In *Melvin v. United States*,<sup>315</sup> Midshipman Melvin unsuccessfully challenged the military’s jurisdiction after his court-martial conviction for hazing in violation of the Act of 1874 and subsequent 1906 dismissal. Melvin’s charged misconduct was “causing certain midshipmen of the fourth class to stand on their heads, to hang from a locker, and to do a physical exercise known as the sixteenth.”<sup>316</sup>

In 1906, the Secretary of the Navy dismissed Midshipman Stephan Decatur from the USNA following Decatur’s court-martial conviction for hazing.<sup>317</sup> Rejecting defense counsel’s argument that hazing was limited to physical cruelty, the court convicted Decatur after he used one Midshipman to send a “nonsensical message” and ordered another Midshipmen to bring him breakfast.<sup>318</sup>

Currently, there exist three laws specifically prohibiting hazing at the military academies: (1) 10 U.S.C. § 8464 (formerly 10 U.S.C. § 6964, USNA), (2) 10 U.S.C. § 7452 (formerly 10 U.S.C. § 4352, USMA), and (3) 10 U.S.C. § 9452 (formerly 10 U.S.C. § 9352, USAFA).<sup>319</sup> However, there are few, if any, reported hazing convictions associated with these statutes.<sup>320</sup> Any cadet or midshipman dismissed from an academy for hazing under the authority of these statutes may not be reappointed as a cadet or midshipman and may not be appointed as a commissioned officer “in a regular component of the Army, Navy, Air Force or Marine Corps, until two years after graduation of his class.”<sup>321</sup> Cadets at the USMA and the USAFA have a statutory right to trial by court-martial before they may be dismissed for hazing.<sup>322</sup> Midshipmen may not be “dismissed for a *single* act of hazing except by sentence of court-martial.”<sup>323</sup>

As with other members of the armed forces, cadets and midshipmen of the service academies are subject to court-martial under the UCMJ.<sup>324</sup> The United States Coast Guard Academy, which is part of the Department of Homeland

<sup>313</sup> Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 293 (1885) (“[m]any cadets were dropped from the roll for the offense of hazing”), 294 (an 1868 order from the Superintendent noted that the Naval Academy had “dismissed those midshipmen who were leaders in the *hazing* or maltreatment of the fourth-class midshipmen”), 29–96 (an 1872 order referenced “action taken by the Naval Department last year, in dismissing parties who were found guilty of ‘hazing’”); Alexander, *supra* note 14, at Appx 2-1 (between July 1846 and September 1874, five upper-class cadets were dismissed, and one resigned, for hazing-related misconduct).

<sup>314</sup> Hazing at the Naval Academy, 18 Op. Atty. Gen. 376 (1886).

<sup>315</sup> 45 Ct. Cl. 213 (1910).

<sup>316</sup> *Id.* at 215–16.

<sup>317</sup> *Decatur Is Dismissed*, N.Y. TIMES (Jan. 26, 1906), <https://nyti.ms/3fhwmRu>.

<sup>318</sup> *Court Defines Hazing*, N.Y. TIMES (Jan. 10, 1906), <https://nyti.ms/2Xm6rC3>.

<sup>319</sup> GAO/NSIAD-93-36, *supra* note 6, at 13; *see also* DoDI 1322.22, *supra* note 23, at 21 (prohibiting the practice of hazing) (citing 10 U.S.C. §§ 4352, 6964, 9542).

<sup>320</sup> *See* 10 U.S.C.A. §§ 4352, 6964, 9352 (2010 & Supp. 2018) (no cases listed).

<sup>321</sup> 10 U.S.C. §§ 7452(c), 8464(f), 9452(c); *see also* DoDI 1322.22, *supra* note 23, at 21; AR 150-1, *supra* note 52, at 19 ¶ 6-15(b).

<sup>322</sup> 10 U.S.C. §§ 7452(b), 9452(b).

<sup>323</sup> 10 U.S.C. § 8464(c) (emphasis added).

<sup>324</sup> *See generally* Michael J. Davidson, *Court-Martialing Cadets*, 36 CAP. UNIV. L. REV. 635 (Spring 2008).

Security, also retains court-martial jurisdiction over its cadets, although the first court-martial of a Coast Guard Academy cadet did not occur until 2006.<sup>325</sup>

The UCMJ did not specifically criminalize “hazing,”<sup>326</sup> and the military does not desire a separate enumerated offense for hazing, viewing it as duplicative with other existing offenses.<sup>327</sup> The recently enacted Military Justice Act of 2016,<sup>328</sup> which became effective not later than January 1, 2019,<sup>329</sup> similarly elected not to contain a punitive article specifically targeting hazing.<sup>330</sup>

The academies have rarely charged a cadet or midshipman with hazing-related misconduct as a criminal offense.<sup>331</sup> Instead, the academies have punished upper class cadets and midshipmen for hazing-type misconduct through their internal disciplinary processes.<sup>332</sup> Although relatively rare, cadets have been charged under the UCMJ for hazing-type misconduct.<sup>333</sup> For example, two upper class cadets at the USAFA were charged with arson under Article 126 after they set a plebe’s room on fire at night and then sprayed the plebe with whipped cream as he exited his room.<sup>334</sup> In addition, hazing-related forms of misconduct have been prosecuted under other articles, such as Article 93 (Cruelty and Maltreatment) and Article 128 (Assault).<sup>335</sup> Also, cadets and midshipmen have received nonjudicial punishment via Article 15 of the UCMJ.<sup>336</sup> To illustrate, in 1987 an USAFA first class cadet received an Article 15 for “conduct unbecoming an officer candidate” after striking a fourth class cadet.<sup>337</sup>

In comparison to cadets and midshipmen, the UCMJ has been applied to other members of the armed forces with a greater level of frequency for hazing-type misconduct.<sup>338</sup> For example, the Coast Guard convicted seven crew

<sup>325</sup> *Coast Guard Sex Case Leads to Expulsion, Six-Month Sentence*, WASH. POST (June 29, 2006), at A15 (describing the “first student court-martialed in the academy’s 130 year history”).

<sup>326</sup> KAMARCK, *supra* note 1, at 2; GAO-16-226, *supra* note 1, at 8 (“no specific article”); KELLER ET AL., *supra* note 5, at 2 (as of 2015, “hazing was not an enumerated offense under the Uniform Code of Military Justice”).

<sup>327</sup> GAO-16-226, *supra* note 1, at 7 (“All of the armed services agreed that a separate enumerated offense of the UCMJ for hazing would be duplicative.”).

<sup>328</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2894 (2016).

<sup>329</sup> *Id.* § 5542, 130 Stat. 2967.

<sup>330</sup> *Id.* §§ 5401-5542, 130 Stat. 2937-2960.

<sup>331</sup> GAO/NSIAD-93-36, *supra* note 6, at 2.

<sup>332</sup> *See id.*, at 19, 32, 44; GAO-16-226, *supra* note 1, at 8. For a description of lesser punishments that may be imposed on USMA cadets for hazing see AR 150-1, *supra* note 52, at 16 ¶ 6-4.

<sup>333</sup> *See* Stephen Losey, *Air Force Academy Cadets Face Charges, Possible Court-Martials, For Swim Team Hazing*, AIR FORCE TIMES (Sept. 14, 2018), <https://bit.ly/2PkSff3>. Eventually, the USAFA dropped the charges. *Air Force Academy Dismisses Hazing Charges Against 3 Cadets*, AIR FORCE TIMES (Mar. 6, 2019), <https://bit.ly/3aUIRD4>.

<sup>334</sup> GAO/NSIAD-93-36, *supra* note 6, at 32. The cadets were convicted and were sentenced to receipt of “30 demerits, 40 hours of marching, 2 months of restriction, and were ordered to pay for the damage.” *Id.* at 33.

<sup>335</sup> GAO-16-226, *supra* note 1, at 8; *cf.* GAO/NSIAD-93-36, *supra* note 6, at 13 (“A cadet who commits a hazing-related infraction can be charged under the [UCMJ] for conduct unbecoming an officer candidate.”).

<sup>336</sup> 10 U.S.C. § 815. Since at least 2009, USMA cadets have not been subject to NJP under Article 15. AR 150-1, *supra* note 52, at 16 ¶ 6-1; DEP’T OF THE ARMY, Reg. No. 210-16, UNITED STATES MILITARY ACADEMY, 16 ¶ 6-1 (Dec. 9, 2009); AR 150-1, *supra* note 52, at 16 ¶ 6-1.

<sup>337</sup> GAO-93-36, *supra* note 6, at 32. As punishment, the cadet received “60 demerits, 120 hours of marching, 6 months of restriction [and] was placed on probation . . .” *Id.*

<sup>338</sup> *See, e.g.*, Lamothe, *supra* note 297, at A3; Dan Lamothe, *Marine Instructors Face Hazing Charges*, WASH. POST, Apr. 7, 2017, at A3; Vergakis, *supra* note 13; Tony Perry, *Ex-Marine Drill Instructor Convicted of Mistreating Recruits at Boot Camp*, LA TIMES (Nov. 15, 2007), <https://lat.ms/2Dsjuul>; *Marines Convict Six of Hazing at New River*, WILMINGTON STAR NEWS (Dec. 3, 2002), <https://bit.ly/2DoRYy6> (an additional nine Marines received NJP). *Cf. Ex-Drill Sgt. Charged With Abuse*, ARMY TIMES (Oct. 16, 2000), at 3 (Army drill sergeant charged with physically abusing recruits).

members of the Coast Guard Cutter *Venturous* for hazing-related misconduct occurring between 2007 and 2009.<sup>339</sup> The conduct included giving shipmates a “pink belly” (slapping the individual’s abdomen), tying the person’s hands and feet, mixing baby powder and liquid from “glow sticks” on his chest and abdomen, and teabagging the person, “that is, place his genitals on or close to the individual’s face or head, while the individual was tied up.”<sup>340</sup> Hazing-related misconduct has been prosecuted pursuant to various UCMJ articles, to include Article 92, Failure to obey order or regulation,<sup>341</sup> Article 93, Cruelty or maltreatment,<sup>342</sup> Article 128, Assault,<sup>343</sup> and Article 81, Conspiracy.<sup>344</sup>

Although the 1956 Ribbon Creek incident resulted in a court-martial conviction, at the time charges were rarely brought against drill instructors who mistreated recruits and convictions were difficult to obtain.<sup>345</sup> Courts-martial of drill instructors remain relatively rare in more recent times.<sup>346</sup>

During the Ribbon Creek court-martial, the defense called other experienced drill instructors who testified that they also took their platoons into the marshes and swamps at night.<sup>347</sup> Recruits who survived the night time march into the swamp supported the DI.<sup>348</sup> In addition, defense counsel persuaded the Commandant of the Marine Corps, General Randolph Pate, to testify, who questioned the severity of the charges, and suggested that if he had been in charge of Parris Island, the drill instructor’s punishment would have been limited to reduction to private and a transfer.<sup>349</sup>

Further, the defense called Marine Corps legend LTG (Ret.) Lewis B. “Chesty” Puller to testify.<sup>350</sup> Called by the defense as an expert on Marine Corps training, Puller testified about the importance of *esprit de corps*, that discipline was the most important aspect of military training, and through hypothetical questions generally supported the accused’s decision to take his platoon into the

<sup>339</sup> GAO-16-226, *supra* note 1, at 1. *Coast Guard Courts-Martials Cutter Venturous Crew Members For Hazing*, COAST GUARD NEWS (June 24, 2011), <https://bit.ly/31eTyuL>.

<sup>340</sup> *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

<sup>341</sup> 10 U.S.C. § 892. *See e.g.*, *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017) (describing a violation of Army Reg. 600-20, Personnel-General, Army Command Policy (Mar. 18, 2008), when recklessness is the *mens rea* required for a conviction of the regulatory prohibition on hazing); *In re Carrillo*, 79 M.J. 716 (N-M. Ct. Crim.App. 2019); *United States v. Offutt*, No. 20120804 (Army Ct. Crim. App. Oct. 22, 2014); *United States v. Hill*, 71 M.J. 678 (Army Ct. Crim. App. Oct. 19, 2012); *United States v. Isaacs*, 2003 WL 21785753, at \*1 (N-M. Ct.Crim.App. July 30, 2003). *Cf.* *United States v. Hill*, 71 M.J. 678 (Army Ct.Crim.App. Oct. 19, 2012) (noting that soldier had been charged with violating a lawful general regulation that prohibited hazing). The Air Force has not issued a punitive anti-hazing regulation. *The Military Commander and the Law* 205 (14<sup>th</sup> ed. 2017), <https://bit.ly/3kns51>.

<sup>342</sup> 10 U.S.C. § 893. *See e.g.*, *United States v. Morrow*, No. 20111135 (Army Ct. Crim. App. Feb. 27, 2014); *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

<sup>343</sup> 10 U.S.C. § 928. *See e.g.*, *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998); *United States v. Isaacs*, 2003 WL 21785753, at \*1 (N-M. Ct.Crim.App. July 30, 2003); *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

<sup>344</sup> 10 U.S.C. § 881. *See e.g.*, *United States v. Isaacs*, 2003 WL 21785753, at \*1 (N-M. Ct.Crim.App. July 30, 2003 (“convicted of conspiracy to commit assault and hazing”).

<sup>345</sup> STEVENS, *supra* note 265, at 13.

<sup>346</sup> Perry, *supra* note 338. Between 2005 and 2007, of the 500 drill instructors at the Marine Corps Recruit Depot in San Diego, California, 44 were disciplined administratively, but only two were subject to court-martial. *Cf.* Lamothe, *supra* note 297, at A12 (noting that the Marine Corps elected not to court-martial drill instructors in multiple cases).

<sup>347</sup> STEVENS, *supra* note 265, at 136–37.

<sup>348</sup> *Id.* at 168.

<sup>349</sup> FLEMING, *supra* note 26, at 83.

<sup>350</sup> STEVENS, *supra* note 265, at 137. Puller had served in the Marine Corps for over 35 years and was the recipient of five Navy Crosses. *Id.* at 139.

swamp.<sup>351</sup> Based on Pate’s earlier testimony, Puller opined that the Marine Corps regretted court-martialing the accused.<sup>352</sup>

## VI. CONCLUSION

“Hazing” within the armed forces has been difficult to define. Service members continue to labor under regulations, instructions, and policies that fail to clearly articulate the line between permissible and impermissible behavior. Regardless of its technical definition, few would disagree that members of the armed forces should not be subject to physical assault, or targeted because of race, color, national origin, religion, gender, and sexual orientation.

Hazing-like conduct within the armed forces has proved controversial and oftentimes abusive. The academies, military entry level training programs such as Marine Corps recruit training, and various operational units have suffered significant abuses involving egregious misconduct. With regard to the academies, one 1992 study determined that a “strong correlation exists between exposure to such treatment and a number of undesirable outcomes, including higher levels of physical and psychological stress among cadets and midshipmen, lower grade point averages, attrition from the academies, and reduced career motivation.”<sup>353</sup> Critics viewed such activities “as a waste of time . . . [that] reduce[d] a servicemember’s ability to perform at their psychological and physical peaks.”<sup>354</sup>

Within the armed forces generally, the GAO reported that various traditional ceremonies and rites of passage have sometimes “included cruel or abusive behavior,” and further noted that hazing may migrate into, or be combined with, incidents of sexual assault.<sup>355</sup> Further, as discussed in this Article, a review of reported courts-martial incidents and other reports of hazing indicate that such conduct can occasionally exceed all bounds of acceptable behavior, even under the broadest of training rationales.

However, there is merit to some forms of hazing-like activities within the military when conducted in a controlled environment.<sup>356</sup> Traditions are important to the military; they boost morale, forge bonds, and create *esprit de corps*. In addition, it is important that members of the military learn to operate effectively in stressful environments and be able to quickly recover from short-term failures. Significant portions of the armed forces have embraced some level of hazing-like conduct as part of entry-level military training, often ignoring or opposing institutional attempts to mitigate or eliminate past practices. For those with a deep sense of commitment to an institution, it is understandable that they want to preserve the high standards they experienced as students and deny entry to those who are unwilling or unable to meet those standards or embrace the culture embodied by the institution.

Many young Americans historically have sought the rigorous challenge these institutions provide. Further, proponents of many of the now-disfavored past practices point to the successful products these institutions have generated.

<sup>351</sup> *Id.* at 139–40; FLEMING, *supra* note 266, at 84.

<sup>352</sup> FLEMING, *supra* note 266, at 84.

<sup>353</sup> Statement of Paul L. Jones, Director, Defense Force Management Issues, National Security and International Affairs Division, GAO/T-NSIAD-92-41, DOD Service Academies: Status Report on Reviews of Student Treatment 2 (June 2, 1992); *see also* GAO/NSIAD-93-36, *supra* note 6, at 65; Groah, *supra* note 3, at 43.

<sup>354</sup> KAMARCK, *supra* note 1, at 1.

<sup>355</sup> GAO-16-226, *supra* note 1, at 1, 9.

<sup>356</sup> *See* Company Commanders, *supra* note 4, at 60 (recruit training “must be conducted in a controlled, deliberate and sober manner . . .”).

It is difficult to dispute that the earlier academy system—with its extremely stressful fourth class system, rigid honor code, longstanding traditions, and strict disciplinary system—and the Marine Corps' rigorous recruit training regime, had value. The academy system was widely viewed as one that quite simply worked and set the standard by which other officer programs were measured.<sup>357</sup> The Marine Corps similarly, and rightfully, boasts of a time-tested recruit training process that has proven highly effective.<sup>358</sup> Indeed, the Marine Corps unapologetically embraces its harsh entry-level training regime as foundational.<sup>359</sup> Many graduates of both the “old corps” academies and earlier Marine Corps recruit training found merit in the arduous and stress-inducing training programs, and left with skill sets that served them well as they progressed through their careers.<sup>360</sup>

If history is an indicator, the armed forces will continue to grapple with an understandable and workable definition of hazing. Clearly there are two extremes, one encompassing morale building and unit bonding traditions, customs and initiations; and one reflecting unacceptable misconduct levied at members of the armed forces, which is the proper subject matter for the military's disciplinary system.

Department of Defense Instruction 1020.03 is an improvement over earlier attempts to define hazing, but its examples are not comprehensive, it fails to link itself to the statutory prohibitions on hazing, and it perpetuates the historic confusion by treating hazing as a subset of harassment, rather than treating it as a stand-alone concept. To preserve legitimate military traditions, and to provide greater clarity to those charged with training servicemembers, the military would be better served by abandoning its attempts to define hazing as a legal concept, and simply focus on providing more specific guidance to servicemembers on how they may celebrate their traditions and properly conduct various forms of training.

The UCMJ has proven itself sufficient to address hazing-like misconduct and requires no modification to criminalize “hazing.” The existing punitive articles cover any misconduct in this area. That the military has struggled to define “hazing” for decades, and that three statutes specifically designed to criminalize “hazing” have failed to produce a reported conviction, support the military's decision not to adopt a punitive article for “hazing.”

Within the spectrum of hazing-like activities, however, are the harsh, stressful, uncompromising, and humiliating conduct that has been used with success to transition civilian entrants into disciplined military professionals capable of successfully operating in the most challenging of conditions. It is within that sphere that the armed forces will struggle most when drawing the line between permissible and impermissible conduct.

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<sup>357</sup> U'REN, *supra* note 121, at xi (“the standard set at West Point is considered the ideal for the rest of the army”); GAO/NSIAD-93-36, *supra* note 6, at 10 (“Officers graduating from the academies have long been considered the standard for military professionalism.”).

<sup>358</sup> See Company Commanders, *supra* note 4, at 60 (“[M]any generations of experience have proven that our general approach, with its emphasis on the application of appropriate levels of stress, is highly effective.”).

<sup>359</sup> “All Marines pass through the crucible of our entry level training. In that harsh and uncompromising forge, their steel is tempered to withstand the stresses of future challenges even more severe and testing. It is here that we lay the foundation.” Leading Marines, *supra* note 267, at 31.

<sup>360</sup> See *supra* notes 239–53, 297 and accompanying text.