

**SEX CRIMES AND THE UCMJ:**

**A REPORT FOR THE JOINT SERVICE COMMITTEE ON  
MILITARY JUSTICE**

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# **SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE**

## **EXECUTIVE SUMMARY**

On 28 October 2004, the President signed Public Law (P.L.) 108-375, the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, § 571 into law. P.L. 108-375, § 571 requires the Secretary of Defense to review the UCMJ and *MCM* “with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault” and to conform the Uniform Code of Military Justice (UCMJ), 10 United States Code (U.S.C.) §§ 801-946 and *Manual for Courts-Martial, United States* (2002 ed.) (2002 *MCM*),<sup>1</sup> “more closely to other Federal laws and regulations that address such issues.” This report is due not later than March 1, 2005, to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives. The report shall include the recommendations of the Secretary of Defense for revisions to the UCMJ and, “for each such revision, the rationale behind that revision.” P.L. 108-375, § 571 starts at page 357.

Prior to enactment of P.L. 108-375, the joint service committee on military justice (JSC) designated a subcommittee to review sexual offenses under the UCMJ and *MCM* and to propose potential alternatives to the current offenses. The subcommittee members are listed at Appendix I. The JSC subcommittee reviewed the current UCMJ, *MCM*, state laws, 18 U.S.C. §§ 2241-2244, 2246, H.R. 4709, H.R. 5391 and the Model Penal Code. In its review, the subcommittee discussed six options, which included changing Articles 120, and 125, UCMJ, as well as statutorily prohibiting some sexual offenses now prohibited in the *MCM*'s implementation of Article 134, UCMJ. The review addressed the military offenses of rape, sodomy, indecent assault, indecent acts, indecent liberties, prostitution offenses and indecent exposure.

After a thorough review, the subcommittee members were unable to identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and *MCM*. Based on this determination, the subcommittee unanimously concluded that change is not required. A majority of the subcommittee believed that the rationale for significant change was outweighed by the confusion and disruption that such change would cause. Nevertheless, a majority of the subcommittee members concluded that if higher authorities direct a UCMJ change to substantially conform to Title 18, Option 5 is the alternative that best takes into account unique military requirements.

The current UCMJ, *MCM*, regulations and orders permit charging any sexual offense necessary to uphold the needs of the services for good order and discipline.

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<sup>1</sup> Throughout this report the *MCM* appears in italics with the year of the version of the *MCM* being noted if not the current 2002 *MCM* version. The *MCM* is revised as the President periodically issues Executive Orders. The most recent *MCM* revisions were issued in 1995, 1998, 2000 and 2002.

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As such, no statutory, *MCM*, or regulatory change is likely to significantly increase the number of sexual offenses prosecuted. Indeed, if a new type of sexual misconduct becomes a problem, the military can easily and quickly issue appropriate general orders and regulations, making the conduct punishable under Article 92, UCMJ (punishment for violation of Article 92, UCMJ, includes a maximum of confinement for two years). The advantage of locally issued orders and regulations is the same as for local laws that civil jurisdictions enact. Such orders permit commanders to take into consideration local conditions, circumstances and sensitivities.

Military appellate courts have a well-developed, sophisticated jurisprudence concerning sexual offenses which is based on appellate review of thousands of sexual abuse cases over the previous fifty years. As in any common law system of criminal justice, judicial interpretation of the law provides an indispensable explanation of the Code and its application to specific factual situations. Judicial interpretation of military law gradually reduced the degree of force and eliminated the requirement for consent for rape under some circumstances. Appellate court decisions caused development of complex instructions pertaining to elements of offenses, defenses, and the like for sexual offenses. For example, military case law expanded the constructive force doctrine, and reduced the degree of force and resistance to a minimal level for rape where an accused is a supervisor or has command authority over the victim. Because of the special needs of the military, the UCMJ and *MCM* have criminal sanctions for many types of sexual conduct which are not criminal in civil American society, such as adultery and sexual harassment as a form of maltreatment.

Earlier in 2004, the DoD Care for Victims of Sexual Assault Task Force completed a review of how DoD responds to incidents of sexual assault, with particular emphasis on the care given to victims. The DoD Task Force found that there seemed to be confusion about definitions and terms. The DoD Task Force recommended that DoD bring greater transparency to the UCMJ, improve definitions of sexual assault, and resolve confusion over terms, behaviors and legal definitions.<sup>2</sup> Rape, indecent assault, and other sexual crimes cover such a broad range of conduct that it is necessary to delve into military caselaw to determine the scope of sexual offense statutes. The DoD Task Force report at page 56 described the Illinois statutory sexual abuse scheme as a “national model.” The JSC subcommittee carefully considered the Illinois scheme and included some modified statutory definitions from Illinois in Options 5 and 6.

Rape and sexual abuse have a devastating impact on victims. These offenses also negatively affect morale, good order and discipline and the unit cohesion and combat

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<sup>2</sup> See Joint Statement of Dr. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, and Ms. Ellen P. Embrey, Deputy Assistant Secretary of Defense for Force Health Protection and Readiness Before the House Armed Services Subcommittee on Total Force June 3, 2004, available at <http://www.house.gov/hasc/openingstatementsandpressreleases/108thcongress/04-06-03chuembrey.pdf>.

## **SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE**

effectiveness of military personnel and units. As Justice White wrote in the Supreme Court case of *Coker v. Georgia*, 433 U.S. 584, 597 (1977), “[s]hort of homicide, [rape] is the “ultimate violation of self.” Since the Revolutionary War, military law has recognized that rape is reprehensible conduct and prohibited it. Article 125 (sodomy) and most Article 134 sexual offenses (indecent assault, indecent acts with another, indecent acts or liberties with a child, and indecent exposure) became explicit offenses in the 1951 *MCM*. Article 125 prohibits every kind of unnatural carnal intercourse, whether accomplished by force or fraud, with or without consent. A brief discussion of the history of military rape and sodomy law begins at page 16. Recent decisions of the U.S. Supreme Court, and military appellate courts, have called into question the Constitutional vitality of cases involving consensual, non-commercial, private sodomy that does not involve superior-subordinate military ranks. See *infra* starting at page 49.

Military sexual abuse cases, like civilian sexual abuse cases, can involve an array of improper sexual conduct ranging from: a violent, physical attack by a stranger involving use or threatened use of a dangerous weapon; to a person who takes sexual advantage of an intoxicated date or acquaintance; to a military supervisor who threatens to harm the career of a subordinate, all causing victims to engage in sexual intercourse, sodomy or other sexual conduct. Under military case law, all three situations are labeled as rape, forcible sodomy, or indecent assault even though there may be significant variations in the degree of criminal culpability. Military statistics showing dispositions of rape, forcible sodomy or indecent assault allegations arguably do not reflect different degrees of culpability, although different degrees of culpability may be reflected in the level of disposition and punishment imposed. Many of the options the subcommittee considered, and discussed in the report establish different degrees of offenses based on the the culpability of the accused.

The subcommittee members diligently, and by comprehensive review and analysis, explored various options by which the UCMJ and *MCM* might be modified. The members evaluated six options and discussed each option’s positive and negative attributes. Support was not unanimous for any particular option. Subcommittee members expressed a preference for a different rank ordering of the options, however, a majority of the subcommittee members concluded that if Congress directs a UCMJ change to substantially conform to Title 18, Option 5 is the alternative that best takes into account unique military requirements. Options 1-6 are briefly summarized as follows:

**Option 1:** No change to the UCMJ or *MCM*. The pros and cons of no change are summarized at pages 16 to 66 of this report. The current military rape statute, Article 120, UCMJ, and related 2002 *MCM* provisions are at page 369. The current military sodomy statute, Article 125, UCMJ, and related 2002 *MCM* provisions start at page 372.

**Option 2 and Option 2A:** Option 2—no change to the UCMJ, but effect change by modification of the *MCM*. Option 2A—make Option 2’s changes and also modify Article 120, UCMJ, eliminating the words “without consent.” Create new *MCM* definitions for rape, sodomy and indecent assault based on levels of force or degrees of

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coercion applied to the victim; or based on the age or circumstances of the victim. Under Option 2 the government would still have to prove lack of consent as an element of the offense. Option 2 provides for nine types of rape, five types of aggravated forcible sodomy, five types of forcible sodomy, one type of sodomy, five types of aggravated indecent assault, and five types of indecent assault. *See infra* aggravated forcible sodomy at page 215, forcible sodomy at page 215, sodomy at page 215, indecent assault at page 218, and aggravated indecent assault at page 217. The pros and cons of Option 2 are summarized at pages 55 to 70 of this report. Option 2, Appendix A is at pages 209 to 220. *See infra* starting at page 71, discussing concerns of some subcommittee members in regard to whether Option 2's *MCM* amendments will be effectuated by the appellate courts.

**Options 3 and 4.** Option 3 is an adaptation of H.R. 4709, as introduced in the Congress on 23 June 2004. Option 3 essentially applies 18 U.S.C. §§ 2241-43, and § 2246, but does not include the non-penetrating sexual assaults in 18 U.S.C. § 2244 abusive sexual contact. H.R. 4709 replaces Articles 120 and 125, UCMJ. Option 4 has minimal changes for H.R. 4709 so that it will conform with military practice. Option 4 includes 18 U.S.C. § 2244. Many states define terms such as, “force” or “consent,” however, Options 3 and 4, do not do so, leaving the courts to define these terms on a case-by-case, ad hoc basis. One possible improvement to Option 4 would be to add from Option 5 the definitions of force (*see* subsection 920(u)(5) at page 298) and consent (*see* subsection 920(u)(21) at page 300) to Option 4. The pros and cons of Options 3 and 4 are summarized at pages 71 to 84 of this report. H.R. 4709 is at Appendix B, starting at page 221. Option 4 is at Appendix C, starting at page 229.

**Options 5 and 6:** Options 5 and 6 modify Option 4 and add several other sexual misconduct provisions currently punishable under Article 134, UCMJ, eliminating the prosecution's requirement to prove the conduct is prejudicial to good order and discipline. Options 5 and 6 generally rely on the individual military services to continue prohibitions against most sexual relationships between superiors and subordinates based on regulations, and orders under the authority of Article 92, UCMJ. Option 5 adds a prohibition against sexual relationships with trainees, recruits, and persons in officer initial qualification, training programs. Option 5 also adds provisions protecting detainees overseas such as in Iraq and Afghanistan, as well as in Cuba from sexual abuse by guards and other custodians. A section by section discussion of the sources and rationale for Option 5 is at Appendix E, starting at page 246. Option 5 uses definitions from military caselaw, the Federal Circuits, and the various states to define “force” at page 298, “consent” at page 300, and “mistake of fact as to consent” at page 300. Currently, Title 18, and Options 3 and 4, as well as Articles 120 and 125, UCMJ, leave these definitions for the courts to undertake on an ad hoc, case-by-case basis. Option 5 provides much more specific notice of the conduct that is unlawful, and explain when age, consent, marriage, and mistake of fact are applicable as affirmative defenses. Option 5 incorporates all the statutory prohibitions of 18 U.S.C. §§ 2241-2244, 2246 into the UCMJ.

Options 5 and 6, unlike Options 3 and 4, include offenses labeled “rape” or “rape

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of a child.” Other terms are possible, such as “aggravated sexual abuse by force or threat” or “aggravated sexual assault of a child.” Retention of the term, “rape” is the majority rule as it is still used by 26 states and in the Model Penal Code. Selection of names of offenses is discussed starting at page 178. Options 5 and 6 propose amending the *MCM*, to more clearly prohibit consensual sexual offenses, such as sodomy, adultery, and the like, so long as they are prejudicial to good order and discipline or service discrediting conduct. The primary difference between Options 5 and 6, aside from the way the definitions are written, is that Option 5 is closer to Title 18. For example, Option 6 separates the sexual acts of sodomy from intercourse, resulting in five additional crimes that are not in Title 18. The UCMJ and *MCM*’s provisions regulating sexual misconduct are scattered throughout these documents. Options 5 and 6 consolidate the most serious sexual offenses under the proposed Article 120.

Options 4-6 preserve the specialized judicially-created concepts that are protective of crime victims. Options 5 and 6 eliminate the lack of consent element while employing degrees of culpability. Option 5 conforms military law to federal civilian law, divides sexual crimes into degrees based on culpability of the defendant, provides notice of prohibited conduct by including definitions of force and indecent conduct; eliminates consent, mistake of fact as to consent, and marriage as an affirmative defense to some sexual crimes; and establishes affirmative defenses for other sexual crimes of consent, mistake of fact as to consent, and marriage. Options 5 and 6 consolidate the most serious sexual offenses under the new UCMJ Art. 120; and eliminate consensual sodomy as an offense unless it is prejudicial to good order and discipline or service discrediting conduct. Option 5 prohibits acts of prostitution involving sexual acts and contacts (currently *MCM* prohibits sexual intercourse for compensation).

Option 5 clarifies other UCMJ sexual offenses, specifically prohibits indecent acts that are commonly prosecuted, and moves some sexual offenses that are *per se* criminal out of Article 134, UCMJ, eliminating the need to prove the conduct is prejudicial to good order and discipline or service discrediting. Sexual crimes that are commonly prohibited by the states are specifically prohibited, such as sexual acts in the presence of a third party, masturbating in public, secretly video taping others having sex, etc. Such offenses are currently prosecuted as indecent acts under Article 134, UCMJ, but are not expressly prohibited. “Indecent” is currently defined in the *MCM* to signify “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave morals with respect to sexual relations.” *MCM*, Pt. IV, para. 90c.

### **PUBLIC LAW 108-375, § 571: SUBSTANTIALLY CONFORMING MILITARY LAW TO COMPLY WITH 18 U.S.C. §§ 2241-2244, 2246.**

Applying 18 U.S.C. §§ 2241-2244, 2246’s statutory scheme to the military would result in merger of military offenses currently prosecuted under Articles 120, 125, and 134, UCMJ into one new section. 18 U.S.C. §§ 2241-2244, 2246 explicitly describes and divides forcible sexual acts and sexual contacts, into offenses with different names and

## **SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE**

maximum punishments, each based on the degree of the accused's culpability. In sum, if the statutory scheme of the Sexual Abuse Act is applied to the military, it will result in rape, carnal knowledge, sodomy, indecent assault, and indecent acts with a child (currently prohibited in Articles 120, 125 and 134, UCMJ), being merged and then divided into ten more detailed, specific offenses.

Enactment of 18 U.S.C. §§ 2241-2244, 2246 into military law provides the following advantages:

1. All citizens, military or civilian, face similar prohibitions.
2. Divides sexual crimes into degrees based on culpability of defendant.
3. Provides more specific notice of prohibited conduct because offenses are more detailed (compare Article 120, UCMJ with 18 U.S.C. § 2242(2)(B)).
4. Eliminates Government's requirement to prove lack of consent as an element--reduces implied element that victim must resist.
5. Consolidates most serious sexual offenses under one UCMJ article.

Enactment of 18 U.S.C. §§ 2241-2244, 2246 into military law has several issues that should be addressed:

- Change requires additional training for investigators, attorneys, and victim advocates. During transition, change might result in more reversible errors. Military law has stricter standards than federal civilian law for appellate review.
- Change results in loss of judicial precedent defining crimes and defenses. Current military case law defines force, constructive force, consent, mistake of fact and other issues. Unlike many state statutes, 18 U.S.C. § 2246 does not define these terms.
- 18 U.S.C. § 2244(a)(3) overlaps with indecent acts or liberties with a child—both prohibit sexual touchings of persons age 12-15. Overlap creates a preemption problem.
- For some offenses the maximum confinement under Title 18 is too low.
  - Under 18 U.S.C. § 2244(a)(3), fondling of a 12-year old child's breasts is punishable by a maximum of only 2 years of confinement—under Article 134, UCMJ, maximum confinement is 7 years.
  - Under 18 U.S.C. § 2244(b), sexual contact without that other person's permission is punishable by a maximum of only 6 months of confinement—under Article 134, UCMJ, an indecent assault is punishable by maximum confinement of 5 years.
  - Any new statutory scheme should set interim maximum confinement and permit the President to set maximum confinement later as for other UCMJ offenses under 10 U.S.C. § 856.
- Title 18 does not prohibit sexual intercourse between minors ages 12-15 years and

## **SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE**

adults who are within 4 years of their age. Thus, an 18-year old service person could engage in sexual intercourse with a 14-year old, 8th grade student. Sexual relationships between minors and adult service personnel can have serious, negative repercussions, especially overseas.

- Title 18 uses the term, “knowingly,” which is not used for similar military UCMJ offenses. This could be misinterpreted to require a special *mens rea*.
- Title 18 includes the words, “or attempts to do so.” Attempted offenses are already prohibited by 10 U.S.C. § 880.
- Title 18 includes the term, “serious bodily injury” in 18 U.S.C. §§ 2241(a)(2), and defines “serious bodily harm” in 18 U.S.C. § 2246(4). Military practitioners are more familiar with the term, “grievous bodily harm” which is in 10 U.S.C. § 928(b)(1).
- 18 U.S.C. § 2241 does not prohibit causing another to engage in a sexual act by using a dangerous weapon or causing serious bodily injury. Probably causing serious bodily injury is part of the force or threat provision, but it could be clearer. Use of firearms is separately prohibited under Title 18, but the UCMJ does not contain a similar provision.
- Title 18 defines “minor” in 18 U.S.C. § 2243(a) as a person over the age of 11 years, but under the age of 16 years. In 10 U.S.C. § 943, a child is a person under the age of 16 years. The term, “minor” is not used in the UCMJ.
- Incapacity must be “substantial” in 18 U.S.C. § 2241(b)(2)(A), but is apparently absolute in 18 U.S.C. § 2242(2)(A).
- Additionally, 18 U.S.C. § 2244(b) includes the concept of “without permission,” as an element. Without permission is similar to the “without consent” element in rape, under Article 120, UCMJ. 18 U.S.C. § 2244(b) transfers focus from defendant’s conduct to the victim’s actions.
- 18 U.S.C. §§ 2241-2244, 2246 does not specify when or if consent, mistake of fact as to consent, or marriage are affirmative defenses. Age is an affirmative defense in 18 U.S.C. § 2241(d).
- 18 U.S.C. §§ 2241-2244, 2246 does not prohibit sexual abuse of detainees (for example, it would not protect detainees in Cuba or Iraq). It does not prohibit forcing someone to masturbate—an alleged offense committed against detainees in Iraq because 18 U.S.C. §§ 2246(2) and 2246(3) require a sexual touching or penetration of another.

Enactment of 18 U.S.C. §§ 2241-2244, 2246 does not eliminate the defendant’s right to present consent as an affirmative defense. Changing military law to be consistent with 18 U.S.C. §§ 2241-2244, 2246 is unlikely to significantly increase the number of sexual offenses prosecuted. When Congress passed the Sexual Abuse Act in 1986, the Congressional Budget Office predicted that the Sexual Abuse Act, “is not expected to result in an increased number of investigations.” See Legislative History at page 6201. This prediction proved to be accurate. In 1983, the Department of Justice (DoJ) brought

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140 sexual abuse prosecutions, *id.* at 6186 n.1, and in 2003, the DoJ brought approximately 275 sexual abuse prosecutions. This increase may be more attributable to the expansion over this twenty year period in jurisdiction to more federal prisons, larger populations, and the inclusion of new sexual offenses, such as forcible sodomy as a federal crime than to reform of federal sex crimes. About one-third of the 2003 DoJ sexual abuse prosecutions involved offenses with child-victims.<sup>3</sup>

This report is divided into 9 sections and 29 appendices.

- Section I, starting at page 8, is the introduction. Section II, starting at page 16, is a brief description of the history of the law of rape in the military.
- Section III, starting at page 28, discusses the current law of rape in the military, including the concepts of force, resistance, consent and the mistake of fact defense. Section IV, starting at page 38, provides a brief history of the development of the law of rape as it has evolved in the civilian community.
- Section V, starting at page 50, describes the rationale for change of the current *MCM* and UCMJ. Section VI, starting at page 55, compares maintenance of the status quo with making a minor UCMJ change, by deleting the words “without consent” from Article 120 and making substantial changes to the *MCM*. Section VIC, starting at page 66, discusses whether the *MCM* can substantively change enumerated UCMJ offenses, such as Articles 120 and 125.
- Section VII, starting at page 71, evaluates H.R. 4709, and suggests changes. H.R. 4709 appears at Appendix A, beginning at page 221. H.R. 4709 with necessary suggested modifications is at Appendix B, which begins at page 229.
- Section VIII, starting at page 84, compares Options 5 and 6. Section VIIIA, starting at page 87, discusses how Options 5 and 6 define the key concepts of force and consent. Section VIIIB, starting at page 113, describes division of rape, forcible sodomy and indecent assault into degrees. Section VIIIC, starting at page 178, discusses labeling sexual crimes as “first degree rape,” aggravated sexual abuse, or by some other label. Options 5 and 6, to a greater or lesser degree meet the need for reform, provide notice, and divide rape into degrees based on the accused’s culpability. Section IX, starting at page 207, is the report’s conclusion.

Because Public Law 108-375, § 571 requires the Secretary of Defense to review the UCMJ and *MCM* with the objective of conforming the UCMJ and *MCM* “more closely to other Federal laws and regulations that address such issues.” This report recommends that the Joint Service Committee consider changing Military Rule of Evidence 412, to make it as protective of victims of sexual crimes as FEDERAL RULE OF EVIDENCE 412.

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<sup>3</sup> As part of its review, the subcommittee discussed sexual offense prosecutions with Assistant U.S. Attorneys in the busiest jurisdictions for such prosecutions.

# SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

## I. INTRODUCTION

“The purpose of the military justice system is to promote justice, to assist commanders in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness within the military establishment, and thereby to strengthen the national security of the United States.”<sup>4</sup> The Uniform Code of Military Justice is found at Title 10, United States Code (U.S.C.), §§ 801 through 946. Congress enacted the UCMJ in 1950 as a major revision of then-existing military criminal law. Major revisions to the UCMJ and *MCM* occurred in 1969, and 1984. The UCMJ is implemented through Executive Orders of the President of the United States, pursuant to his authority under Article 36, UCMJ, and published in the *MCM*. Over the past 54 years, the UCMJ, *MCM* and service and DoD regulations have undergone numerous changes to meet the evolving legal requirements of commanders, service members, and at the request of Congress and the public. The Services also routinely promulgate implementing regulations and instructions. The goal is to maintain the military justice system as a fair and progressive system of criminal justice.

The UCMJ authorizes criminal penalties for service members who engage in a variety of sexual misconduct. Sodomy is one such act currently prohibited by Article 125, UCMJ, which provides: “Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.”<sup>5</sup>

The explanation accompanying Article 125 states that unnatural carnal copulation includes both oral and anal sexual intercourse,<sup>6</sup> and this language has been upheld against vagueness challenges.<sup>7</sup> Until 2003, the Supreme Court and the Court of Appeals for the Armed Forces declined to set aside convictions for consensual, noncommercial, private acts of sodomy between adults based on a Constitutional right to privacy.<sup>8</sup> The *MCM* states that the maximum punishment for consensual sodomy between adults is a dishonorable discharge, forfeiture of all pay and allowances, and

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<sup>4</sup> *MCM*, Pt. I, ¶ 3.

<sup>5</sup> Article 125, UCMJ; *MCM*, Pt. IV, ¶ 51.

<sup>6</sup> *MCM*, Pt. IV, ¶ 51c.

<sup>7</sup> *United States v. Scoby*, 5 M.J. 160, 162-63 (C.M.A. 1978).

<sup>8</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992) (relying on *Bowers*); *United States v. Henderson*, 34 M.J. 174, 178 (C.M.A. 1992).

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confinement for five years.<sup>9</sup> The law of consensual sodomy is currently in transition. A description of the current status of consensual sodomy starts at page 49.

In addition to sodomy, the UCMJ prohibits many other forms of sexual misconduct. Article 93, UCMJ, prohibits the maltreatment of subordinates, including sexual harassment.<sup>10</sup> Article 120, UCMJ, punishes both carnal knowledge of a person under the age of 16 and rape,<sup>11</sup> the latter carrying a maximum punishment of death.<sup>12</sup> Conduct unbecoming an officer and a gentleman is punished under Article 133, UCMJ,<sup>13</sup> and can take the form of either sexually related conduct<sup>14</sup> or sexually explicit speech.<sup>15</sup>

The general article, Article 134, UCMJ, prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces,”<sup>16</sup> any “conduct of a nature to bring discredit upon the armed forces,”<sup>17</sup> and “crimes and offenses not capital,”<sup>18</sup> which includes application of the Assimilative Crimes Act, 18 U.S.C. §

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<sup>9</sup> *MCM*, Pt. IV, ¶ 51(e)(4). If the sodomy is committed by force and without consent, or with a child under the age of 12 years at the time of the offense, the maximum punishment is dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty years. *Id.*, Pt. IV, ¶ 51e(1) to (e)(3).

<sup>10</sup> *MCM*, Pt. IV, ¶ 17(a). Assault, improper punishment, and sexual harassment may constitute maltreatment. *Id.*, Pt. IV, ¶ 17(c)(2). *See e.g.*, *United States v. Coleman*, 48 M.J. 420 (C.A.A.F. 1998); *United States v. Blanchard*, 48 M.J. 306 (C.A.A.F. 1998).

<sup>11</sup> *MCM*, Pt. IV, ¶ 45.

<sup>12</sup> *MCM*, Pt. IV, ¶ 45(e)(1).

<sup>13</sup> *MCM*, Pt. IV, ¶ 59.

<sup>14</sup> *See e.g.*, *United States v. Modesto*, 39 M.J. 1055, 1061 (A.C.M.R. 1994) (affirming conviction of officer for cross-dressing in public).

<sup>15</sup> *See e.g.*, *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994) (affirming conviction of officer for sending letter to 14-year old girl that contained sexual language and nude photograph of himself).

<sup>16</sup> *MCM*, Pt. IV, ¶ 60c(2)(a), *see infra* at page 376.

<sup>17</sup> *MCM*, Pt. IV, ¶ 60c(3), *see infra* at page 377.

<sup>18</sup> *MCM*, Pt. IV, ¶ 60c(4), *see infra* at page 377.

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13.<sup>19</sup> The specific paragraphs listed under Article 134, UCMJ, punish, among other things, adultery,<sup>20</sup> indecent assault,<sup>21</sup> bigamy,<sup>22</sup> wrongful cohabitation,<sup>23</sup> fraternization,<sup>24</sup> indecent acts or liberties with a child,<sup>25</sup> indecent exposure,<sup>26</sup> indecent language,<sup>27</sup> and indecent acts with another.<sup>28</sup>

With the exception of two changes which did not change the essence of the military rape statute,<sup>29</sup> the current military rape statute is almost identical to the various common law statutes used to prosecute military members during the American Revolutionary War.<sup>30</sup> The common law definition of rape was the

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<sup>19</sup> *MCM*, Pt. IV, ¶ 60c(4)(c)(ii), *see infra* at page 377.

<sup>20</sup> *MCM*, Pt. IV, ¶ 62, *see infra* at page 376.

<sup>21</sup> *MCM*, Pt. IV, ¶ 63, *see infra* at page 381.

<sup>22</sup> *MCM*, Pt. IV, ¶ 65, *see infra* at page 382.

<sup>23</sup> *MCM*, Pt. IV, ¶ 69, *see infra* at page 383.

<sup>24</sup> *MCM*, Pt. IV, ¶ 83, *see infra* at page 384.

<sup>25</sup> *MCM*, Pt. IV, ¶ 87, *see infra* at page 386.

<sup>26</sup> *MCM*, Pt. IV, ¶ 88, *see infra* at page 388.

<sup>27</sup> *MCM*, Pt. IV, ¶ 89, *see infra* at page 389.

<sup>28</sup> *MCM*, Pt. IV, ¶ 90, *see infra* at page 391.

<sup>29</sup> In 1992, Congress made the language of the military rape statute gender neutral and eliminated the spousal exemption. Congress made rape gender neutral to protect both male and female victims and eliminated the spousal exemption which held that a man could never be guilty of raping his wife because sex was an integral part of the marriage contract). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992). In 1996, Congress created a mistake of fact as to age defense to a prosecution for carnal knowledge. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 STAT. 186, 462 (1996). *See also MCM*, Analysis of Punitive Articles, at App. 23-14.

<sup>30</sup> Major Martin Sims, "COERCIVE SEXUAL INTERCOURSE": A PROPOSAL TO AMEND ARTICLE 120, UCMJ, TO PREVENT THE MISAPPLICATION OF THE "PARENTAL DURESS" THEORY OF THE "CONSTRUCTIVE FORCE" DOCTRINE OF RAPE (1999) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's School Library).

## SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE

unlawful carnal knowledge of a woman forcibly and against her will or consent.<sup>31</sup> Today, Article 120(a), UCMJ, reads, “Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape.”<sup>32</sup> The only difference between the common law definition and the current article is that under the UCMJ, rape is gender neutral.

While the definition of rape in the military remains virtually unchanged, the military has experienced significant changes. One of the most important changes is the increased number of women serving throughout the armed forces. Prior to 1967, federal law limited the percentage of women in the military to two-percent of the total force.<sup>33</sup> After Congress eliminated the two-percent limitation, the number of women increased to fifteen percent in 2003.<sup>34</sup> The increase in the number of women in the Armed Forces results in men and women working together in the unique military environment. The analysis of the Military Rules of Evidence states, “Military life requires that large numbers of young men and women live and work together in close quarters that are often highly isolated. The deterrence of sexual offenses in such circumstances is critical to military efficiency.”<sup>35</sup>

In contrast to the military, the law of rape in civilian jurisdictions has dramatically changed. In the 1960s, a reform movement began in the United States to change rape laws.<sup>36</sup> This movement gained momentum throughout the 1970s.<sup>37</sup> All fifty states and the federal government enacted some sort of rape law reform by the 1980s.<sup>38</sup> These reforms expanded the definition of rape to include a wider range

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<sup>31</sup> *In re Lane*, 135 U.S. 443 (1890).

<sup>32</sup> *MCM*, Pt. IV, ¶ 45, *see infra* at page 26. The elements of rape under Article 120(a) are: (1) intercourse and (2) by force and without consent. *Id.*

<sup>33</sup> Public Law 90-30 removed the 2-percent cap on women in the military.

<sup>34</sup> *Active Duty Servicewomen by Branch of Service and Rank*, (U.S. Department of Defense, website-last visited 21 October 2004) at <http://web1.whs.osd.mil/mmid/military/miltop.htm>. In September 2003, there were 215,243 females out of 1,434,377 active duty DoD military personnel. They ranged in rank from E-1 to O-9.

<sup>35</sup> *MCM*, *supra* note 32, MIL. R. EVID. 412 analysis, App. 22, at A22-36.

<sup>36</sup> CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 17 (1992).

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.* at 17.

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of abusive sexual assaults.<sup>39</sup> Federal and state governments divided the common law offense of rape into degrees of rape or sexual assault. Differentiating between degrees of rape or sexual assault established different maximum punishments based on the aggravating circumstances present in individual cases.<sup>40</sup> The reforms also led to changes in the rules of evidence and eliminated many of the “special rules” that applied to rape prosecutions.<sup>41</sup>

Some have suggested statutory clarification of the elements of rape, including the application of “constructive force.” Article 120, and the *MCM*,<sup>42</sup> do not specifically define the crucial concepts of force and consent so that they can be applied to situations involving abuse of authority, such as a drill sergeant’s coercion of a basic trainee into sexual intercourse. Relevant caselaw and the MILITARY JUDGE’S BENCHBOOK<sup>43</sup> have addressed the issues of date rape, acquaintance rape, and constructive force; whereas, civilian jurisdictions have modernized their rape statutes.<sup>44</sup> Common-law based rape statutes such as Article 120 are excellent at deterring rape in terms of a “stereotypical rape” case. In such a case, a stranger stalks his victim, attacks and overpowers her, then has nonconsensual sexual intercourse

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<sup>39</sup> *Id.* at 22.

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

<sup>41</sup> *See infra* notes 174 - 180 and accompanying text.

<sup>42</sup> *See supra* note 32.

<sup>43</sup>The Military Judge’s BENCHBOOK, U.S. DEP’T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGE’S BENCHBOOK (15 Sept. 2002) [hereinafter BENCHBOOK] is used military courts-martial to instruct court members on the law and elements of offenses, and during providence inquiries to explain offenses to an accused who is pleading guilty. The BENCHBOOK is the most frequently updated source of military criminal law on crimes and defenses and is available at Army Court of Criminal Appeals Library link at <https://www.jagcnet.army.mil/ACCA>.

<sup>44</sup> “Date rape” is generally rape committed by a person with whom the victim has had some romantic attachment or actually is on a date. *See e.g., Key v. State*, 765 S.W.2d 848 (TEX. CT. APP. 1989). “Acquaintance rape” is a more general term and is applied to rape committed by a person who is known to the victim to such an extent that the victim probably would not anticipate the criminal conduct. *See e.g., Dolchok v. State*, 763 P.2d 977 (AK. CT. APP. 1988); *United States v. Webster*, 37 M.J. 670, 674 (C.G.C.M.R. 1993), *see also* DAPHNE EDWARDS, ACQUAINTANCE RAPE AND THE FORCE ELEMENT: WHEN “NO” IS NOT ENOUGH, 26 GOLDEN GATE U.L. REV. 241, 300 n.1 (1996) (discussing acquaintance rape).

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with her.<sup>45</sup> However, most rape cases actually involve an accused and victim who know each other.<sup>46</sup> Often, the parties are on a date or have had a dating or sexual relationship in the past.<sup>47</sup> The amount of force used does not reach the level of violence typically associated with a “traditional rape” scenario. Beyond the sexual intercourse itself, many times the victim is not physically harmed or injured.<sup>48</sup> In these situations, conviction of rape under Article 120(a), UCMJ is difficult because of the requirement that intercourse occur by force and without consent.

This report discusses six options from no change to several options which substantially change Article 120, UCMJ, into a comprehensive article that divides the offense of rape into different degrees of criminal conduct based on the aggravating factors present in each case.<sup>49</sup> Options 5 and 6 also define terms such as force and consent, rather than having appellate courts fill the statutory void by defining these terms on an *ad hoc*, case-by-case basis. The current Article 120, UCMJ merges all cases of nonconsensual intercourse together as rape and all other cases as either forcible sodomy or indecent assault without provision for degrees of culpability and without distinguishing the amount of force involved or the vulnerability of the victim. Yet, in practice, sexual offenses have innumerable permutations.

In May 2001, the National Institute of Military Justice, a private non-profit organization, sponsored and prepared a report for the Commission on the 50<sup>th</sup> Anniversary of the UCMJ.<sup>50</sup> Walter T. Cox III, Senior Judge of the Court of Appeals for the Armed Forces, chaired the Commission. One of the four recommendations of the Cox Commission was to replace Article 120, UCMJ, with a comprehensive criminal sexual misconduct article, and to repeal Article 125, UCMJ.<sup>51</sup> First, Articles

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<sup>45</sup> Susan Estrich, *Rape*, 95 YALE L.J. 1087, at 1092 (1986).

<sup>46</sup> Leonore M.J. Simon, *THERAPEUTIC JURISPRUDENCE: Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 496-97 (1999) (eighty-two percent of all sexual assaults committed against women age twelve and older are committed by someone they know).

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

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

<sup>49</sup> *Webster*, 37 M.J. at 674 n.8.

<sup>50</sup> Report of the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001). The Commission Executive Summary is at TAB BB, page 809 and can also be located at the website of the National Institute of Military Justice found at <http://www.nimj.org> (last accessed 15 Sept. 2004).

<sup>51</sup> The Cox Commission recommended:

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120 and 125 have not been substantially updated for more than fifty years. Second, serious sexual offenses should be consolidated as they are in most state criminal codes and under Title 18. Currently prohibitions against violent sexual crimes: rape, forcible sodomy, and indecent assault as well as sexual crimes perpetrated against children such as indecent acts and liberties are in divers parts of the UCMJ and *MCM*. Third, the UCMJ and the *MCM* do not specifically define prohibited conduct.

The rebuttal to the Cox Commission recommendation is essentially that: (1) all offenses that the military desires to prosecute can be prosecuted now; (2) the military can rapidly promulgate regulations to prohibit sexual misconduct; (3) military jurisprudence is advanced, flexible and sophisticated—this vast body of caselaw can be lost by statutory changes; (4) change requires training of attorneys and investigators; and (5) change may result in more cases being reversed. These features are discussed in detail in the Exsum at pages 1 - 2.

Articles 120 and 125 do not specifically define crucial terms, prohibited conduct, and they do not differentiate between degrees of rape or sexual abuse based on the presence or absence of aggravating factors. Options 3-6 all provide a more comprehensive criminal sexual misconduct article, and address these issues. They divide sexual offenses into different degrees of criminal sexual misconduct based on the aggravating circumstances present in each case. Options 5 and 6 propose new definitions for the legal concepts of force and consent. These definitions can only have binding implementation if made through a UCMJ change. A *MCM* change defining terms is advisory rather than binding to the appellate courts. It should also be recognized, however, that *MCM* changes usually require about two years after the UCMJ is signed into law by the President.

Five reasons militate against change: (1) all offenses that the military desires to prosecuted can be prosecuted now; (2) the military can rapidly promulgate regulations to prohibit sexual misconduct; (3) military jurisprudence is advanced, flexible and sophisticated—this vast body of caselaw can be lost by statutory changes; (4) change requires training of attoreneys and investigators; and (5) change may result in more cases being reversed. These features are discussed in detail in the Exsum at pages 1 - 2.

### **A. Description of Table of Contents**

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Repeal the rape and sodomy provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct. Replace them with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code.

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This report is divided into 9 sections and 29 appendices. Section I, starting at page 8, is the introduction. Section II, starting at page 16, is a brief description of the history of the law of rape in the military to illustrate how the law of rape has evolved.

Section III, starting at page 28, discusses the current law of rape in the military, including the concepts of force, resistance, consent and the mistake of fact defense. Section IV, starting at page 38, provides a brief history of the development of the law of rape as it has evolved in the civilian community. Section V, starting at page 50, describes the need for reform of the current *MCM* and UCMJ.

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Section VII, starting at page 71, evaluates the Military Sexual Abuse Assault Crimes Revision Act of 2004, H.R. 4709, and suggests changes. H.R. 4709 appears at Appendix A, beginning at page 221. H.R. 4709 with necessary suggested modifications is at Appendix B, which begins at page 229.

Section VIII, starting at page 84, compares Options 5 and 6. Section VIIIA, starting at page 87, discusses how Options 5 and 6 define the key concepts of force and consent. Section VIIIB, starting at page 113, describes how Options 5 and 6 divide the offenses of rape, forcible sodomy and indecent assault into degrees. Section VIIIC, starting at page 178, discusses labeling sexual crimes as “first degree rape,” aggravated sexual abuse, or by some other label. Options 5 and 6, to a greater or lesser degree meet the need for reform, provide notice, and divide rape into degrees. Section IX, starting at page 207, is the conclusion to the report.

### **II. HISTORY OF THE CRIMINAL OFFENSE OF RAPE IN THE UNITED STATES MILITARY JUSTICE SYSTEM**

The American military justice system, like the American civilian justice system, traces its roots back to Great Britain. Ironically, Colonial leaders embraced the British system of military justice at the outbreak of the Revolutionary War.<sup>52</sup> In early 1775, the Provisional Congress of Massachusetts Bay approved the first written American military code, the Massachusetts Articles of War. The

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<sup>52</sup> Captain David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145-146 (1980).

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Massachusetts Articles of War were based almost exclusively on the British Articles of War of 1774.<sup>53</sup>

### **A. AMERICAN REVOLUTIONARY WAR TO THE AMERICAN CIVIL WAR**

Later in 1775, the Continental Congress approved sixty-nine Articles of War to govern the conduct of the Revolutionary Army.<sup>54</sup> George Washington headed the committee that prepared the 1775 Articles of War.<sup>55</sup> The 1775 Articles of War did not specifically list rape as an offense, nor did they authorize a court-martial for a military member accused of rape. Instead, the Articles of War mandated that commanders turn over military members accused of rape, or any other civilian capital crime, to local civilian jurisdictions for prosecution and punishment in accordance with the laws of the local jurisdiction.<sup>56</sup> In *United States v. Solorio*, the Supreme Court relates:

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

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

<sup>55</sup> U.S. DEP'T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 12-13 (1975).

<sup>56</sup> Section X, Article 1 of the Articles of War of 1776 provided that:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to trial. If any commanding officer or officers shall willfully neglect or shall refuse, upon application aforesaid, to deliver over such accused person or person to the civilian magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

American Articles of War (1776) *reprinted in* WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 964 (2d ed. 1920 reprint).

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[I]n 1800, Congress enacted Articles for the Better Government of the Navy, which provided that “all offences committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea.” Act of Apr. 23, 1800, ch. 33, Art. XVII, 2 Stat. 47. Among the offenses punishable if committed at sea were murder, embezzlement, and theft. In addition, the Act also provided that “if any person in the navy shall, when on shore, plunder, abuse, or maltreat any inhabitant, or injury his property in any way, he shall suffer such punishment as a court martial shall adjudge.” Art. XXVII, 2 Stat. 48.

483 U.S. 435, 446 n.11 (1987).

Congress made significant changes to the Articles of War in 1776, 1786 and 1806; however, the requirement to turn over military members accused of rape (and other civilian capital criminal offenses) to the civilian jurisdiction upon request of civilian authorities continued until 1863, but military records reflect trials by court-martial for offenses against civilians and punishable under civil law.<sup>57</sup>

### **B. THE AMERICAN CIVIL WAR TO WORLD WAR II**

During the Civil War, Congress changed the rules concerning the prosecution of rape and other capital offenses committed by military members because of the unique aspects of the war. American forces occupied Confederate states without functioning civil court systems. The lack of functioning civilian courts and the prohibition against the use of courts-martial for civilian capital offenses meant that occupied territories did not have a forum to prosecute soldiers accused of rape and other civilian capital offenses.<sup>58</sup>

In 1863, Congress corrected this problem when it passed legislation entitled an “Act for Enrolling and Calling Out the National Forces and for Other Purposes” (National Forces Act of 1863).<sup>59</sup> The act gave the military exclusive jurisdiction over military members accused of rape (and other civilian capital offenses) in time of war, insurrection or rebellion. Congress’s grant of exclusive authority to court-martial military members for violent crimes including rape during times of war, insurrection or rebellion changed the role of the military in prosecuting rape

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<sup>57</sup> WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS*, 972 (2d ed. 1920 reprint), *see also Solorio*, 483 U.S. at 444.

<sup>58</sup> *Id.* at 667.

<sup>59</sup> 12 Stat. 736 (1863).

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offenses. After 1863, commanders became responsible for referring rape allegations made against military members to courts-martial.<sup>60</sup>

While the National Forces Act of 1863 gave the military authority to court-martial military members accused of the rape, the act did not define rape, nor was rape defined by any of the other statutes governing the military.<sup>61</sup> The military adopted the common law definition of rape prevalent in most American jurisdiction at the time,<sup>62</sup> the unlawful carnal knowledge of a woman forcibly and against her will or consent.<sup>63</sup>

In *Coleman v. Tennessee*,<sup>64</sup> the Supreme Court upheld the military's exclusive authority to court-martial military personnel in the occupied state of Tennessee.<sup>65</sup> Coleman was a soldier charged with and convicted of murder at a court-martial. At the time of the murder, Coleman was part of the United States military occupying Tennessee. The court-martial sentenced Coleman to death, but the sentence was never carried out. After the Civil War, the state of Tennessee prosecuted and convicted Coleman for the same murder and sentenced him to death. In overturning the conviction, the Supreme Court held that the military had exclusive jurisdiction over serious civilian offenses committed by military members while in occupied territories because of the National Forces Act of 1863.<sup>66</sup>

In 1874, Congress amended the Articles of War to include court-martial jurisdiction over rape and other serious offenses during time of war, insurrection or rebellion.<sup>67</sup>

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<sup>60</sup> WINTHROP, *supra* note 57, at 667.

<sup>61</sup> *Id.* at 671.

<sup>62</sup> *Id.* at 677.

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

<sup>64</sup> 97 U.S. 509 (1878).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 18 Stat. 228 (1874).

Article 58. - In the time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to

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Congress changed the Articles of War again in 1916 and 1920, but the changes did not significantly affect the substantive law regarding rape. The 1916 changes expanded the military's court-martial jurisdiction to include all common law felonies (e.g. manslaughter, mayhem, robbery, larceny and arson), except rape and murder committed in the United States during peacetime.<sup>68</sup> Rape and murder allegations still required the military to turn over service members to local jurisdictions for prosecution, unless offenses occurred outside the United States or during a time of war, insurrection or rebellion.<sup>69</sup>

In the 1917 *MCM* Article of War 92 states:

442. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

The 1917 *MCM* did not specifically prohibit sodomy.

### **C. THE ADOPTION OF THE UNIFORM CODE OF MILITARY JUSTICE IN 1950 TO TODAY**

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commit rape, shall be punishable by the sentence of a general court-martial, when committed by a person in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offence may have been committed.

*Id* (emphasis added).

<sup>68</sup> *Loving v. United States*, 517 U.S. 748, 753 (1996) (citing 39 Stat. 664 (1916)).

<sup>69</sup> 39 Stat. 619, 664 (1916).

Article 92. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may be direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in times of peace.

*Id.*

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The adoption of the UCMJ in 1950<sup>70</sup> was the most far-reaching change to military law in United States history. The UCMJ provided, for the first time, one criminal code applicable to all services.<sup>71</sup> The UCMJ provided jurisdiction over all offenses committed by military members. Commanders could now bring rape charges against military members regardless of where the offenses occurred or whether the United States was in a time of war, insurrection, rebellion.<sup>72</sup>

The UCMJ combined the offenses of rape and carnal knowledge<sup>73</sup> into two sections of Article 120.<sup>74</sup> The rape prohibition in Article 120(a), retained the common law definition of rape, which prohibited a male from engaging in, “an act of sexual intercourse with a female not his wife, by force and without her consent.”<sup>75</sup> *Id.* at ¶ 153a. The 1951 *MCM*, pt. XXVII, ¶ 199a contained the following language:

Discussion.-This article defines rape as the commission of an act of sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Force and want of consent are indispensable to the offense, but the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

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<sup>70</sup> 64 Stat. 108 (1950).

<sup>71</sup> *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975* at 203 (1976).

<sup>72</sup> Winthrop, *supra* note 57, at 667. From 1969 to 1987, military jurisdiction to prosecute rape and other sexual assault cases was limited to those cases with service connection. *See Solorio*, 483 U.S. at 451; *O’Callahan v. Parker*, 395 U.S. 258 (1969). In 1987, the Supreme Court in *Solorio* determined that the military had jurisdiction to prosecute any UCMJ violation by a servicemember world wide without regard to service connection. *Solorio*, 483 U.S. at 451.

<sup>73</sup> The Articles of War did not contain a specific article prohibiting carnal knowledge. Prosecutors used the general article, incorporating the carnal knowledge or statutory rape statute of the jurisdiction in which the offense occurred to court-martial military members who engaged in sexual intercourse with women under the legal age of consent. When the UCMJ replaced the Articles of War, Congress specifically prohibited carnal knowledge by adopting Article 120(b), UCMJ. *United States v. Osborne*, 31 M.J. 842 (N.M.C.M.R. 1990).

<sup>74</sup> 64 Stat. 108 (1950).

<sup>75</sup> 1951 *MCM*, Pt. XXVII, ¶ 199(a).

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Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . . ; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.

If there be actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child of such tender years that she is incapable of understanding the nature of the act, is not consent. A woman's prior lack of chastity is not a defense, but see [¶] 153b(2)(6) as to the admissibility of evidence of her unchaste character. Among the offenses which may be included in a particular charge of rape are assault with intent to commit rape, assault and battery, and assault. (emphasis added).

The military courts also retained many of the common law "special rules" for rape cases, including a requirement to corroborate the victim's testimony,<sup>76</sup> the fresh complaint rule,<sup>77</sup> and evidentiary rules that allowed inquiry into the victim's sexual history.<sup>78</sup> Judicial interpretation of Article 120 from 1950 to today has refined the definition of "by force and without consent."<sup>79</sup>

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<sup>76</sup> The 1951 *MCM* stated, "[a] conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense ... if such testimony is self-contradictory, uncertain, or improbable." *Id.*

<sup>77</sup> *Id.* at ¶ 142c. "In prosecutions for sexual offenses ... evidence that the alleged victim of such an offense made complaint thereof within a short time thereafter is admissible." *Id.*

<sup>78</sup> *Id.* at ¶ 153b. "For the purpose of impeaching the credibility of the alleged victim, evidence the victim has an unchaste character is admissible." *Id.*

<sup>79</sup> See, e.g., *United States v. Henderson*, 4 U.S.C.M.A. 268, 273, 15 C.M.R. 268, 273 (1954). Citing *People v. Cook*, 52 P.2d 538, 540 (Cal. 1935), the Court of Military

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The 1969 *MCM* was a significant revision of military law with addition of greater protections from unlawful command influence. The 1969 *MCM* required trial judges and military counsel for the accused at special courts-martial. The rape provision above was changed, yet the victim was still required to make her lack of consent “reasonably manifest” and she had to take “measures of resistance” or consent could be inferred, and repeated the statement that accusations of rape are “easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.”

The 1969 *MCM*, ¶ 199a stated:

Force and lack of consent are indispensable to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did in fact consent. Consent, however, will not be inferred if resistance would be futile, or where resistance is overcome by threats of death or great bodily harm, nor will it be inferred if she is unable to resist because of a lack of mental or physical faculties. In such a case there is no consent and the force involved in the act of penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed to resist only because of a reasonable fear of death or grievous bodily harm.

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Appeals wrote “[t]he old rule of ‘resistance to the uttermost’ . . . is neither justice, law nor sound reason.” *Henderson*, 4 U.S.C.M.A. at 273, 15 C.M.R. at 273. The Court continued, “[w]e are content to adhere to the view that a rape victim’s resistance need only be such as to make a want of consent and actual resistance reasonably manifest” taking into consideration the “surrounding circumstances.” The *Henderson* court was not as protective of victim’s right as the current court, endorsing the continued use of the instruction to court members, “‘Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent.’ They were expressly warned that the victim of an alleged rape must have taken such measures to frustrate the execution of her assailant’s design as she is able to take under the circumstances.” *Id.* at 4 U.S.C.M.A. at 274, 15 C.M.R. at 274. Like state courts across the country, military rape instructions have largely abandoned this heavy focus on the victim’s resistance in rape case.

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If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused’s knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a female child of such tender years that she is incapable of understanding the nature of the act, is not consent. A woman’s prior lack of chastity is not a defense, but see [¶] 153b(2)(6) as to the admissibility of evidence of her unchaste character. Among the offenses which may be included in a particular charge of rape are assault with intent to commit rape, assault and battery, and assault.

The 1951 *MCM*, and subsequent editions all prohibited sodomy. 1951 *MCM*, ¶ 204 prohibited sodomy as follows:

### **204. ARTICLE 125-SODOMY**

Discussion.-This article defines sodomy as engaging in unnatural carnal copulation, either with another person of the same or opposite sex, or with an animal. Any penetration, however slight, is sufficient to complete the offense and emission is not necessary. It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal. Proof.-That the accused engaged in unnatural carnal copulation with a certain other person or with an animal, as alleged.

Prior to 1980, the evidentiary rules applicable to courts-martial required corroboration of the victim’s testimony only in sex offense cases.<sup>80</sup> The 1969 *MCM* allowed the defense to request that the military judge instruct the court-martial panel that a conviction cannot be based upon the uncorroborated testimony given by an alleged victim if the testimony was “self-contradictory, uncertain, or improbable.”<sup>81</sup>

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<sup>80</sup> 1969 *MCM*, Pt. XXVII ¶ 153a; 1951 *MCM*, Pt. XXVII, ¶ 153a.

<sup>81</sup> 1969 *MCM supra* note 80, Pt. XXVII, ¶ 153a; 1951 *MCM supra* note 75, Pt. XVII, ¶ 153a; *United States v. Sandoval*, 18 M.J. 55, 66 (C.M.A. 1984) (citing *United States v. Weeks*, 15 U.S.C.M.A. 583, 36 C.M.R. 81 (1966)).

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One of the ways of corroborating or discrediting the victim's allegations was the fresh complaint rule. The 1951 and 1969 versions of the *MCM* provided that "evidence that the alleged victim failed to make a complaint of the offense within a reasonable time after its commission is admissible."<sup>82</sup> Military courts also allowed evidence of the victim's sexual history to be admitted into evidence. The rules of evidence in the 1951 *MCM* authorized the impeachment of a witness's "unchaste character."<sup>83</sup> This evidence was admissible whether or not the witness testified.<sup>84</sup>

In 1980, President Carter signed Executive Order 12198 promulgating the Military Rules of Evidence (Mil. R. Evid.). Military Rules of Evidence parallel the Federal Rules of Evidence,<sup>85</sup> replace the prior evidentiary rules and alter the types of admissible evidence at a court-martial of an accused charged with committing a nonconsensual sexual offense. The Military Rules of Evidence eliminated the corroboration requirement in sexual crimes, the fresh complaint rule and included a rape shield provision in Mil. R. Evid. 412.<sup>86</sup> Military Rule of Evidence 412 precluded testimony about the victim's reputation or opinions about the victim's promiscuity as well as evidence of the victim's prior sexual activity except in three limited circumstances.<sup>87</sup>

The 1984 *MCM* substantially revised procedural rules. However, the provision pertaining to rape and carnal knowledge remained the same, except the paragraph about the doubtful credibility of rape victims was deleted. Since 1984, Congress changed Article 120, UCMJ twice. *See* footnotes 88 and 89, *infra*. The

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<sup>82</sup> 1969 *MCM supra* note 80, Pt. XXVII, ¶ 142c. However, in *United States v. Thompson*, 3 M.J. 168, 170 (C.M.A. 1977), the fresh complaint had to be made while the victim was "in a state of shock, outrage, agony and resentment—the adrenergic circumstances which prompted the report." This judicial requirement made it similar to Federal Rule of Evidence 803(2) (excited utterances).

<sup>83</sup> 1951 *MCM supra* note 75, Pt. XXVII, ¶ 153b.

<sup>84</sup> *Id.*

<sup>85</sup> Wood, *supra* note 218, at 13.

<sup>86</sup> *Id.*

<sup>87</sup> The three limited circumstances are: (1) when the evidence is introduced to show a person other than the accused was the source of semen, injury or other physical evidence; (2) Prior sexual behavior with the accused; (3) Constitutionally required evidence. *MCM supra* note 32, MIL. R. EVID. 412.

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*MCM*, was modified three years later to incorporate these Congressional changes, but was not changed to incorporate appellate court decisions which primarily addressed the issues of consent, constructive force, and the victim's resistance. The 2002 *MCM* rape and carnal knowledge provision, which is still in effect, states:

**45. Article 120—Rape and carnal knowledge**

a. *Text.*

“(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.”

“(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen

years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

“(c) Penetration, however slight, is sufficient to complete either of these offenses.”

“(d)(1)<sup>88</sup> In a prosecution under subsection (b), it is an affirmative defense that—

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.”

b. *Elements.*

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<sup>88</sup> Congress added 10 U.S.C. Section 920d, amending Article 120, UCMJ, and creating a limited, affirmative mistake of fact defense to carnal knowledge. *See* Section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996). In 1998, the *MCM* was changed to reflect the statutory changes. *See* Executive Order 13086, 27 May 1998, published at *MCM*, App. 25, at A25-47 to A25-48.

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(1) *Rape.*

c. *Explanation.*

(1) *Rape.*

(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force and without consent of the victim.<sup>89</sup> It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.

(c) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

In 1994, the FED. R. EVID. 412, the "Rape Shield" evidentiary rule used in U.S. District Courts was substantially revised, eliminating an internal balancing test, which is confusing and unnecessary. The amended FED. R. EVID. 412 expanded its protections to include both consensual and nonconsensual sexual offenses. In 2004,

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<sup>89</sup> In 1992, Congress modified Article 120(a), UCMJ, to make the offense of rape gender neutral by striking the language "with a female" to make the offense applicable to both female and male victims. Congress also removed the spousal exception. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992). In 1995, the *MCM* was amended to reflect that statutory changes. See Executive Order 12960, 12 May 1995, published at *MCM*, App. 25, at A25-29 to A25-30. Under the spousal exemption, men could not be charged for raping their wives based on the common law theory that sex was an integral part of the marriage contract. See *supra* note 192.

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the United States Court of Appeals for the Armed Forces held that despite language in Mil. R. Evid. 412 to the contrary, it protects victim's of all sexual offenses.<sup>90</sup> This report at pages 183 to 207 recommends changing Mil. R. Evid. 412 so that it is more consistent with FED. R. EVID. 412.

The UCMJ definition of rape remains almost identical to the common law definition of the unlawful carnal knowledge of a woman forcibly and against her will or consent. Although the history of the law of rape in the military indicates some significant changes, those changes have primarily occurred in the areas of jurisdiction and the evidentiary rules.

### **III. CURRENT LAW OF RAPE IN THE UNITED STATES MILITARY**

*Despite its often vile nature and profound consequences, rape is a deceptively simple crime, with only two elements: (1) an act of sexual intercourse;<sup>91</sup> (2) done by force and without the consent of the victim. Practically speaking, however, rape is often a complex offense because of the interrelationships among the legal concepts of force, resistance, consent, and mistake of fact.<sup>92</sup>*

#### **A. FORCE**

The *MCM* definition of “force and without consent”<sup>93</sup> distinguishes between two types of rape cases, constructive force cases and actual force cases. In 1954, Judge Anderson described the two types of rape cases as follows:

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<sup>90</sup> *United States v. Banker*, 60 M.J. 216, 220 (C.A.A.F. 2004).

<sup>91</sup> The *MCM* defines sexual intercourse as any penetration, however slight, of the female sex organ by the penis. Ejaculation is not required. *MCM supra* note 32, Pt. IV, ¶ 45. The Military Judge's BENCHBOOK defines the female sex organ as including the vagina which is the canal that connects the uterus to the external opening of the genital canal, and the external genital organs including the labia majora and labia minora. *See supra* note 43 for information on the BENCHBOOK.

<sup>92</sup> *United States v. Simpson*, 55 M.J. 674, 695 (Army Ct. Crim. App. 2001).

<sup>93</sup> The *MCM* defines force and lack of consent as follows:

Force and lack of consent are necessary to the offense. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if

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The crime of rape quite commonly follows one of two more or less typical factual patterns. The first is found in cases where an accused has carnal knowledge of a prosecutrix despite her vigorous physical resistance, which he overcomes by the application of superior physical force. Under these circumstances, lack of consent on the part of the prosecutrix is demonstrated by her resistance and that the accused employed force is manifest from the very nature of his acts. A second more or less typical factual pattern is found in cases where there is little or no resistance on the part of the prosecutrix but she submits because of conduct on the part of the accused calculated to put her in fear of death or great bodily harm. Here again, the act of intercourse will be rape. Resistance by the woman is only one method by which lack of consent is manifested and, if she submits through fear of death or great bodily harm the mere fact that she failed to resist does not necessarily mean that she consented to the act of intercourse. And, whether regarded as constructive force or as one form of actual force, the threatening conduct of the accused and the act of intercourse effected by means of it without prosecutrix' consent is sufficient to constitute rape.<sup>94</sup>

The distinction between constructive force and actual force is important because the "by force and without consent" element of rape is defined differently depending upon whether the case is an actual force case or a constructive force case.

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resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.

*MCM*, *supra* note 32, Pt. IV, ¶ 45c(1)(b).

<sup>94</sup> *United States v. Kernan*, 11 C.M.R. 314, 321 (C.M.A. 1954) (Anderson, J., dissenting).

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### 1. *Constructive Force*<sup>95</sup>

The military courts apply constructive force in a variety of different circumstances.<sup>96</sup> In order to establish constructive force, the finder of fact must find that “resistance would have been futile,” resistance was “overcome by threats of death or great bodily harm,” or “the victim is unable to resist because of the lack of mental or physical faculties.”<sup>97</sup> The finder of fact must evaluate all the surrounding circumstances to determine whether a victim gave consent or whether the victim failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.<sup>98</sup> If the finder of fact determines constructive force is appropriate for a particular case then the “by force and without consent” element is satisfied upon proof of penetration.<sup>99</sup>

The doctrine of constructive force protects victims rendered incapable of giving consent due to physical or mental infirmities, such as unconsciousness<sup>100</sup> or

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<sup>95</sup> Military courts have long recognized the concept of constructive force. Colonel Winthrop discussed the topic of force necessary to accomplish rape in 1886, “[I]t is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion.” In 1917, the *Manual for Courts-Martial* provided: “Force, actual or constructive, and a want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient force where there is in fact no consent.” *United States v. Clark*, 35 M.J. 432, 436 (C.M.A. 1992).

<sup>96</sup> The BENCHBOOK contains eight separate instructions addressing common scenarios involving force and consent issues. Of these eight scenarios, seven deal with constructive force: (1) intimidation and threats; (2) abuse of military power; (3) parental or analogous compulsion; (4) child of tender years; (5) parental or analogous compulsion and child of tender years; (6) mental infirmity; and, (7) incapable of consent due to sleep, unconsciousness or intoxication. BENCHBOOK, 429-440 (A copy of the BENCHBOOK provisions start at page 433).

<sup>97</sup> *Clark*, 35 M.J. at 435; *MCM*, *supra* note 32, Pt. IV, ¶ 45c(1)(b).

<sup>98</sup> *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987).

<sup>99</sup> *MCM*, *supra* note 32, Pt. IV, ¶ 45c(1)(b).

<sup>100</sup> See, e.g., *United States v. Hughes*, 48 M.J. 214, 216-17 (C.A.A.F. 1998) (affirming rape conviction because of fraud in the *factum* as sleeping victim in darkened room erroneously thought the accused was her boyfriend); *United States v. Grier*, 33 M.J. 7, 8 (C.M.A. 1991) (affirming a rape conviction involving a victim who after she had passed out from excessive consumption of alcohol).

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severe mental retardation.<sup>101</sup> Constructive force may also apply in cases where the assailant uses express or implied threats of bodily harm.<sup>102</sup> For example, in *United States v. Hicks*,<sup>103</sup> Sergeant (SGT) Hicks found the girlfriend of one of his subordinates staying in the subordinate's barracks room, in violation of local regulations. Sergeant Hicks threatened to put the victim's boyfriend in confinement unless she agreed to his sexual demands. The United States Court of Military Appeals<sup>104</sup> (COMA) upheld SGT Hicks' conviction for rape because the threat constituted constructive force.

Through case law the military courts extend constructive force to cases of sexual intercourse between a parent and his or her child.<sup>105</sup> The appellate courts find constructive force if the parent uses his or her position of authority over the child to coerce the child into intercourse.<sup>106</sup> The "moral, psychological, or intellectual force a parent exercises over a child" under the totality of circumstances can constitute constructive force. If parental coercion rises to the level of constructive force, then the child need not resist and the act of intercourse alone satisfies the elements of force and without consent. The military courts refused to adopt a *per se* rule that sex between a parent and child always constitutes rape.<sup>107</sup>

Appellate courts resolve cases involving abuse of rank or duty position similarly to parental coercion.<sup>108</sup> In 1992, Sergeant (SGT) Clark's rape conviction

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<sup>101</sup> *United States v. Pingree*, 39 M.J. 884, 885 (A.C.M.R. 1994).

<sup>102</sup> *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) (affirming the rape conviction of a drill sergeant who obtained sex from a trainee's wife by threatening to put her husband in jail for three years unless she complied with his "request" for sexual favors).

<sup>103</sup> *Hicks*, 24 M.J. at 6.

<sup>104</sup> See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (renaming the United States Court of Military Appeals (C.M.A.) to the United States Court of Appeals for the Armed Forces (CAAF)).

<sup>105</sup> *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *United States v. Ortiz*, 25 M.J. 840 (A.F.C.M.R. 1987); *United States v. Dejonge*, 16 M.J. 974 (A.F.C.M.R. 1983).

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

<sup>107</sup> *United States v. Dunning*, 40 M.J. 641, 646 (C.A.A.F. 1994).

<sup>108</sup> See generally *United States v. Williamson*, 24 M.J. 32, 34 (C.M.A. 1987) ("Resistance is not required [for rape] . . . when it would be futile; the totality of the

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was affirmed after he engaged in sexual intercourse with a trainee under his supervision. Sergeant Clark ordered the trainee to accompany him to a storage shed to get supplies. She complied with the order. While in the shed, SGT Clark grabbed and held her and while he had intercourse with her.<sup>109</sup> She said that she did not actively resist because she was scared. The court found her fear to be reasonable based on SGT Clark's rank, status, physical size and the location of the assault.<sup>110</sup> The appellate court cited a number of other cases that held that the superior-subordinate relationship could be considered when deciding if constructive force existed.<sup>111</sup> However, the superior-subordinate relationship is just one factor to consider in determining if constructive force exists in a particular case.<sup>112</sup>

### 2. Actual Force

The UCMJ and *MCM* require that an act of sexual intercourse be accomplished by force.<sup>113</sup> In *United States v. Bonano-Torres*,<sup>114</sup> the Court of Military Appeals acknowledged the lack of a complete definition of force in the *MCM*. "Admittedly, the Manual explanation of the element of force in the crime of rape stops short of explaining what is sufficient force in the non-constructive force cases."<sup>115</sup> The Court of Military Appeals determined that "[w]here there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more than the incidental force involved in penetration is required

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circumstances, including the level of resistance, are to be considered by the fact finders in determining whether consent was lacking."); *Hicks*, 24 M.J. at 6 ("The existence and reasonableness of the victim's fear of bodily harm under the totality of the circumstances are questions of fact."); *United States v. Jackson*, 25 M.J. 711 (A.C.M.R. 1987) (lack of consent found in victim's evasive actions to advances by platoon sergeant who was much larger physically than victim); *United States v. McFarlin*, 19 M.J. 790, 794 (A.C.M.R. 1985) (lack of consent found in the "passive acquiescence prompted by appellant's superior rank and position").

<sup>109</sup> *United States v. Clark*, 35 M.J. 432, 433-34 (C.M.A. 1992).

<sup>110</sup> *Id.* at 436.

<sup>111</sup> *See supra* note 108.

<sup>112</sup> *See infra* notes 155-235 and accompanying text.

<sup>113</sup> *MCM*, *supra* note 32, Pt. IV, ¶ 45c(1)(b).

<sup>114</sup> 31 M.J. 175, 179 (1990).

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

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for conviction.”<sup>116</sup> The element of force in an actual force rape case contemplates an application of force to overcome the victim’s will and capacity to resist.<sup>117</sup> The BENCHBOOK<sup>118</sup> defines actual force as “when the accused uses physical violence or power to compel the victim to submit against her will.”<sup>119</sup>

The determination of whether the accused’s application of physical violence or power compelled the victim to submit against her will is determined on a case-by-case basis.<sup>120</sup> The fact finder evaluates the totality of the circumstances to determine whether the evidence establishes the element of force.<sup>121</sup> The fact finder looks to the actions of the accused, the actions of the victim and all the surrounding circumstances in assessing the sufficiency of the force.<sup>122</sup> The fact finder then applies the facts to the legal concepts of force, resistance, consent and mistake of fact to determine if the evidence proves the element of “by force and without consent.”<sup>123</sup>

### 3. Resistance

The use of physical force is often obvious, such as when the assailant uses a weapon or overpowers the victim using brute, physical power.<sup>124</sup> If physical violence is used, then the element of force is met. When the application of physical force is less obvious the appellate courts look to the victim’s actions, especially the victim’s resistance, to determine if the amount of force applied compelled the victim

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<sup>116</sup> *Id.* (citing *United States v. Short*, 442, 16 C.M.R. 11, 16 (C.M.A. 1954)).

<sup>117</sup> *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>118</sup> *See supra* note 91.

<sup>119</sup> *Id.* at 428-29.

<sup>120</sup> *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000); *United States v. Webster*, 40 M.J. 384 (C.A.A.F. 1994); *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992); *Bonano-Torres*, 31 M.J. at 175.

<sup>121</sup> *Webster*, 40 M.J. at 386; *Bonano-Torres*, 31 M.J. at 179; *Henderson*, 4 U.S.C.M.A. at 273, 15 C.M.R. at 273.

<sup>122</sup> *Id.*

<sup>123</sup> *Simpson*, 55 M.J. at 695.

<sup>124</sup> *Clark*, 35 M.J. at 437 (Sullivan, J., concurring).

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to submit to intercourse.<sup>125</sup> The force necessary to establish rape is the force necessary to overcome reasonable resistance.<sup>126</sup>

Military case law concerning whether and how much the victim of rape must resist is unclear. A majority of the Court of Appeals for the Armed Forces implied that a victim might not need to resist in all rape cases.<sup>127</sup> Then the court affirmed the conviction, finding that the victim verbally resisted by repeatedly saying, “no” to the accused’s sexual overtures and by asking appellant to leave her residence.<sup>128</sup> Judge Cox and Judge Crawford wrote concurring opinions stating that nothing in Article 120(a), UCMJ, “suggests or implies that any measure of resistance is required of a rape victim.”<sup>129</sup> The confusion on the resistance issue exists because resistance is not an element, but proof of resistance or lack thereof, is highly relevant in all rape cases where the victim has the capacity to resist.<sup>130</sup> In an actual-force rape case the victim must make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances.<sup>131</sup>

When the victim has the capacity to resist, military courts consider the totality of the circumstances to determine if the element of “force and lack of consent” are proven beyond a reasonable doubt.<sup>132</sup> From evidence of resistance, the fact finder may draw inferences as to the victim’s state of mind on the factual issue of

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<sup>125</sup> *Bonano-Torres*, 31 M.J. at 178.

<sup>126</sup> *Webster*, 40 M.J. at 387 (citing Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) (cases cited therein)). “The inquiry into consent and force are virtually identical, both of which are defined in terms of the victim’s resistance; ‘forcible compulsion’ becomes the force necessary to overcome reasonable resistance.” *Id.* (quoting *Estrich*, *supra*, at 1107).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 388.

<sup>129</sup> *Id.*

<sup>130</sup> *United States v. King*, 32 M.J. 558, 563 (C.M.R. 1991); *Bonano-Torres*, 31 M.J. at 179; *United States v. Townsend*, 34 M.J. 882, 884 (C.G.C.M.R.1991).

<sup>131</sup> *Tollinchi*, 54 M.J. at 82; *Webster*, 40 M.J. at 387; *United States v. Mathai*, 34 M.J. 33, 36 (C.M.A. 1992); *Palmer*, 33 M.J. at 9.

<sup>132</sup> *Webster*, 40 M.J. at 386; *Bonano-Torres*, 31 M.J. at 179; *Henderson*, 4 U.S.C.M.A. at 273, 15 C.M.R. at 273.

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consent<sup>133</sup> and the accused's state of mind regarding the affirmative defense of mistake of fact.<sup>134</sup> While resistance is tangentially probative of the issues of consent and mistake of fact, proof of resistance is central to finding the element of force.<sup>135</sup>

An example of a case where appellate courts reversed a rape conviction because the victim either did not resist sufficiently or failed to clearly manifest her lack of consent is *United States v. Bonano-Torres*.<sup>136</sup> Staff Sergeant (SSG) Bonano-Torres and Specialist (SPC) C finished their military duties and went out on the town. Specialist C consumed more than her normal limit of alcohol. She returned to her hotel room with SSG Bonano-Torres where she either went to sleep or passed out. Specialist C testified that she awoke to discover SSG Bonano-Torres undressing her and preparing to engage in sexual intercourse with her.<sup>137</sup>

Specialist C testified that SSG Bonano-Torres had been very persistent, and that he would continue to harass her until he got what he wanted. She permitted SSG Bonano-Torres to have sexual intercourse with her because she believed that when it was over, he would not bother her further and she could go back to sleep. Specialist C did not yell, scream, or attempt to leave the hotel room. She did not get off the bed or otherwise attempt to get away from the SSG *Bonano-Torres*.<sup>138</sup> The appellate courts overturned SSG Bonano-Torres's rape conviction.<sup>139</sup> The court analyzed the conduct of SPC C and determined that based on the totality of the circumstances she did not act reasonably because she did not resist sufficiently to manifest her lack of consent to the accused.<sup>140</sup>

### B. WITHOUT CONSENT

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<sup>133</sup> *Williamson*, 24 M.J. at 34.

<sup>134</sup> *See, e.g., United States v. Carr*, 18 M.J. 297, 299 (C.M.A. 1984) (stating that the victim offered no resistance and did not scream).

<sup>135</sup> *Webster*, 40 M.J. at 386; *Bonano-Torres*, 31 M.J. at 178; *King*, 32 M.J. at 563; *Townsend*, 34 M.J. at 884.

<sup>136</sup> *Bonano-Torres*, 31 M.J. at 178.

<sup>137</sup> *Id.* at 176.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 177.

<sup>140</sup> *Id.*

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## *I. Consent*

Military courts analyze the victim's conduct in context of the totality of the circumstances to determine whether or not the victim consented to intercourse. In an actual force rape case, the victim must make his or her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances.<sup>141</sup> The lack of consent required is more than mere lack of acquiescence.<sup>142</sup> The courts apply a reasonable victim standard based on the victim's age, strength and surrounding circumstances.<sup>143</sup> If the victim does not reasonably resist based on the totality of the circumstances, then the inference may be drawn that victim consented and the intercourse is not rape.<sup>144</sup>

The victim's resistance and the lack of consent requirement are closely related and often rely on the same evidence. Inquiry into consent and force is virtually identical, and both are defined in terms of the victim's resistance.<sup>145</sup> The degree of force required to overcome resistance is measured by referring to the mind of the victim.<sup>146</sup> Under Options 6 and 7, "forcible compulsion"<sup>147</sup> becomes the force necessary to overcome reasonable resistance.<sup>148</sup>

In 2000, the United States Court of Appeals for the Armed Forces reversed Sergeant Tollinchi's rape conviction holding that the victim did not demonstrate her lack of consent.<sup>149</sup> Sergeant Tollinchi, a Marine Corps recruiter, served alcohol to a

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<sup>141</sup> *Tollinchi*, 54 M.J. at 82; *Webster*, 40 M.J. at 386; *Mathai*, 34 M.J. at 36; *Palmer*, 33 M.J. at 8; *Bonano-Torres*, 31 M.J. at 179.

<sup>142</sup> *Webster*, 40 M.J. at 386; *Palmer*, 33 M.J. at 8; *Bonano-Torres*, 31 M.J. at 179.

<sup>143</sup> *Palmer*, 33 M.J. at 10; *Henderson*, 4 U.S.C.M.A. at 273, 15 C.M.R. at 273.

<sup>144</sup> *MCM*, *supra* note 32, Pt. IV, ¶ 45(1)(b).

<sup>145</sup> *Webster*, 40 M.J. at 387 (citing *Estrich*, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) (cases cited therein)). [T]he inquiry into consent and force are virtually identical, both of which are defined in terms of the victim's resistance; 'forcible compulsion' becomes the force necessary to overcome reasonable resistance[.]” *Id.* (quoting *Estrich*, *supra*, at 1107).

<sup>146</sup> *Simpson*, 55 M.J. at 696.

<sup>147</sup> See *infra* notes 362 – 369 and accompanying text.

<sup>148</sup> *Webster*, 40 M.J. at 387.

<sup>149</sup> *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000).

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new recruit and the recruit's girlfriend at the recruiting station. Sergeant Tollinchi talked the recruit and his girlfriend into getting undressed and then he convinced them to perform various sex acts on each other. He then joined the couple in the sex acts. He performed oral sodomy on the recruit's girlfriend and then penetrated her vagina with his penis. The girlfriend whispered to her boyfriend to stop SGT Tollinchi, and the recruit pushed SGT Tollinchi away.<sup>150</sup> The court noted that the victim saw what SGT Tollinchi was doing and about to do and did nothing to express her lack of consent to sexual intercourse.<sup>151</sup>

### *2. Mistake of Fact*

The military courts recognize mistake of fact as a defense to rape. If the accused had an honest and reasonable belief that the victim consented to the act of sexual intercourse, then he is not guilty of rape.<sup>152</sup> Because the mistake must be honest and reasonable, not every mistake suffices. The accused's mistaken belief must be true and sincere rather than feigned or mere pretext, and it must be reasonable.<sup>153</sup> To be reasonable, the belief must have been based on information, or lack of it, which would indicate to a reasonable person that the victim was consenting to the sexual intercourse.<sup>154</sup> The accused must exercise due care and cannot be reckless or negligent with respect to the truth.<sup>155</sup>

In deciding whether the accused was under the mistaken belief that the victim consented, fact finders evaluate probability or improbability of the evidence. The fact finder considers the accused's age, education, experience, prior contact with the victim, the nature of any conversations between the accused and the victim along with any other relevant information.<sup>156</sup> In *United States v. King*,<sup>157</sup> the court

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<sup>150</sup> *Id.* at 81.

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

<sup>152</sup> *United States v. Langley*, 33 M.J. 278, 278 (C.M.A. 1991); *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988); *United States v. Baran*, 22 M.J. 265, 267 (C.M.A. 1986).

<sup>153</sup> *Langley*, 33 M.J. at 278.

<sup>154</sup> *Id.*

<sup>155</sup> *United States v. Greaves*, 40 M.J. 432, 437 (C.M.A. 1994); *Langley*, 33 M.J. at 278; *United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978).

<sup>156</sup> *United States v. Ginter*, 35 M.J. 799 (N.M.C.M.R. 1992).

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reversed Captain (CPT) King's rape conviction based on mistake of fact. Captain King met Ms. R in a bar. Ms. R went to CPT King's apartment so he could play her a song he composed. Ms. R held CPT King's hand as they left the bar and sat very close to him as they drove to his apartment. At CPT King's apartment they engaged in sexual intercourse. Captain King tried to get Ms. R to perform oral sex on him, but she refused. Ms. R did not call out for help even though the intercourse took place in an apartment complex. The alleged victim returned to her residence and told her husband that CPT King raped her.

At court-martial, the military judge found CPT King guilty of rape. The appellate court determined that even if the intercourse was not consensual, the government failed to prove that the accused did not have a reasonable belief that the alleged victim consented.<sup>158</sup> The appellate court reasoned that because of the romantic nature of the contact between the alleged victim and the accused, it was possible that he reasonably believed that she consented to the intercourse.<sup>159</sup>

### **IV. THE HISTORY OF THE CRIMINAL OFFENSE OF RAPE IN CIVILIAN JURISDICTIONS**

The history of the law of rape in American jurisdictions can be divided into two time periods. The common law period that starts in the 1700s and ends in the 1970s. The reform period begins in the 1970s and extends to the present.

#### **A. THE COMMON LAW PERIOD**

##### **1. Rape**

The law of rape in America, as in all English-speaking countries, developed as part of the English common law in the early seventeenth century.<sup>160</sup> In the 1600s, the prevailing view was that a woman was the property of her father until marriage, and then she became the property of her husband.<sup>161</sup> The common law of rape developed to protect the property rights of men in their wives and daughters.<sup>162</sup>

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<sup>157</sup> 32 M.J. 558 (A.C.M.R. 1991).

<sup>158</sup> *Id.* at 563-64.

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

<sup>160</sup> Beverly J. Ross, *Does Diversity In Legal Scholarship Make a Difference?: A Look At the Law of Rape*, 100 DICK. L. REV. 795, 803 (1996).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

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Sir Matthew Hale, the highly respected Chief Justice of the Court of the King's Bench from 1671 to 1675, recorded the English common law in scholarly treatises.<sup>163</sup> In Sir Hale's treatise, *The History of the Pleas of the Crown*,<sup>164</sup> he wrote extensively on the English common law. Sir Hale's writings greatly influenced American law in a number of different areas, including the law of rape.<sup>165</sup>

In *The History of the Pleas of the Crown*, Sir Hale defined rape as the unlawful carnal knowledge of a woman against her will.<sup>166</sup> American jurisdictions generally adopted Sir Hale's definition of rape.<sup>167</sup> However, many American jurisdictions also added that the rape must be forceful to prove that the act was against the victim's will.<sup>168</sup> This addition led to the American common law definition of rape mentioned earlier — the unlawful carnal knowledge of a woman forcibly and against her will.<sup>169</sup>

Sir Hale's writings not only influenced the definition of rape, but they also influenced most of the rules governing the criminal prosecution of rape allegations

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<sup>163</sup> EDMUND HEWARD, MATTHEW HALE (1972) (stating that Matthew Hale was one of the outstanding judges of the seventeenth century, a lawyer of great learning and a fearless judge who resisted all pressures put on him and could not be solicited by bribes or any other inducements; Hale's legal influence does not lie in his judgments but in his statements of the existing law contained in books such as, *The History of the Pleas of the Crown*).

<sup>164</sup> SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] 627 (2d ed. 1847).

<sup>165</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 330, (2001) (misdemeanor arrest authority); *Wilson v. Arkansas*, 514 U.S. 927, 932 (1995) (knock and announce rule); *United States v. Watson*, 423 U.S. 411, 429 (magistrates may rely on the information supplied by others when making a probable cause determination); *Reid v. Covert*, 354 U.S. 1, 26, (martial law).

<sup>166</sup> HALE, *supra* note 164 at 627.

<sup>167</sup> *In re M.T.S.*, 129 N.J. 422, 431-32 (N.J. 1992) (citing Cynthia A. Wicktom, *Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988)).

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

<sup>169</sup> *In re Lane*, 135 U.S. 443 (1890).

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in American jurisdictions.<sup>170</sup> Sir Hale wrote that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>171</sup> Because Sir Hale believed that a rape case was easy to allege but difficult to defend he viewed rape allegations with a certain amount of distrust and he held the victim-witness to a high standard of credibility.<sup>172</sup> Sir Hale distinguished between women of “good fame” and those who were not of “chaste” character. Sir Hale considered a woman who reported the rape right away as more credible than a woman who waited to report the offense. Sir Hale expected a woman to fight, resist and call for help at the risk of physical injury to bolster her credibility.<sup>173</sup>

As a result of Sir Hale’s influence, American jurisdictions imposed at least five “special rules” on rape prosecutions in the United States that did not exist in any other area of criminal law.<sup>174</sup> These “special rules” distinguished the prosecution of rape allegations from other crimes because the “special rules” required the finder of fact to evaluate the conduct of the victim rather than the conduct of the accused.<sup>175</sup> For example, some jurisdictions required the victim to resist to the utmost to establish that she did not consent.<sup>176</sup> Some state laws required independent corroboration of the victim’s testimony, such as injuries consistent with

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<sup>170</sup> Ross, *supra* note 160, at 803.

<sup>171</sup> HALE, *supra* note 164, at 633-34.

<sup>172</sup> *Id.* Sir Hale’s belief is based on his personal experience. He tells the story of two rape trials he presided over in which false accusations were made against innocent men who were almost put to death. In one of the cases the defendant was able to demonstrate that due to a physical deformity it was impossible for him to have intercourse. In the other case, the defendant was convicted of rape; however, before sentencing it was discovered that his accusers lied. *Id.* at 634-35.

<sup>173</sup> *Id.* at 633.

<sup>174</sup> The five “special rules” were: (1) The prompt complaint rule; (2) The corroboration requirement; (3) The resistance requirement; (4) Rules of evidence that allowed inquiry into a victim’s past sexual history; (5) Cautionary instructions. Ross, *supra* note 160, at 844 - 57.

<sup>175</sup> *In re M.T.S.*, 129 N.J. 422, 435-36 (N.J. 1992).

<sup>176</sup> *See, e.g., Starr v. State*, 237 N.W. 96, 97 (1931); *Reidhead v. State*, 72, 250 P. 366, 367 (1926); *Brown v. Wisconsin*, 106 N.W. 536, 538 (1906)

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resistance.<sup>177</sup> Other jurisdictions imposed prompt complaint requirements in rape cases that required the rape victim to complain right away to establish credibility.<sup>178</sup> Many American jurisdictions, including the military, gave cautionary instructions to the finder of fact highlighting that rape was easy to allege and difficult to defend.<sup>179</sup> The rules of evidence permitted inquiry into a victim's past sexual behavior as probative of the element of consent and as character evidence.<sup>180</sup> Most of these "special rules" existed in American jurisdictions from the 1700s until the 1970s.

### 2. Sodomy

According to the Supreme Court in *Lawrence v. Texas*:

Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the Union had criminal sodomy laws.<sup>181</sup>

## **B. THE REFORM OF RAPE LAWS IN AMERICAN JURISDICTIONS**

The common law definition of rape and the "special rules" associated with rape cases came under attack in the 1960s and 1970s.<sup>182</sup> Feminists, social scientists and legal scholars criticized the common law definition of rape.<sup>183</sup> These reformers argued that rape was not a crime about sex but rather a crime of violence that should be

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<sup>177</sup> See, e.g., *Texter v. Nebraska*, 102 N.W.2d 655 (1960); *People v. Radunovic*, 234 N.E.2d 452 (1959).

<sup>178</sup> *Washington v. Murley*, 212 P.2d 801 (1949); see generally MODEL PENAL CODE § 213.6 cmt. at 423 (bars prosecution unless the victim notifies authorities within three months of the rape).

<sup>179</sup> See *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984); (1980); *People v. Nye*, 237 P.2d 4 (Cal. 1951). The MCM also included Hale's quote until it was removed in the 1984 edition of the *Manual for Courts-Martial*. MCM, 1951, Pt. XXVIII, ¶ 199(a); MCM, 1969, Pt. XXVII ¶ 199(a).

<sup>180</sup> Cynthia Ann Wicktom, *Note: Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 405-06.

<sup>181</sup> 539 U.S. at 596 (Scalia, J. dissenting).

<sup>182</sup> SPOHN & HORNEY *supra* note 36, at 20.

<sup>183</sup> *Id.* at 22.

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treated like other crimes of violence.<sup>184</sup> The rape laws treated rape as a sex crime because the laws were designed to protect the property rights of men in their wives and daughters and not protect females from attack.<sup>185</sup> The reformers also attacked the “special rules” used in rape prosecutions. The corroboration requirements and cautionary instructions wrongly stereotyped rape victims as inherently less trustworthy than other victims of criminal attack.<sup>186</sup> The distrust of the victim inherent in the rape laws put the victim’s credibility on trial rather than the accused.<sup>187</sup>

The rules of evidence that allowed the victim’s sexual history to be admitted into evidence came under attack because such evidence was generally not admissible in other than rape cases.<sup>188</sup> Reformers argued that this evidence was of minimal probative value and was greatly outweighed by the damage it did to the victims of rape. These rules of evidence sometimes put victims through a humiliating experience that discouraged other women from reporting sexual assaults. Victims were reluctant to report rapes because they did not want to go through a trial in which their sexual history, and reputation and opinion testimony would be admitted before the jury and the public.<sup>189</sup>

Efforts to reform American rape statutes were very successful. Most American jurisdictions enacted some sort of rape reform by the 1980s.<sup>190</sup> The reforms focused on five areas: the definition of rape, resistance requirements, the consent standard, corroboration requirements, cautionary instructions, and evidentiary reform.

### 1. *Defining Rape*

Many American jurisdictions changed the definition of rape, to prohibit more specific types of abusive sexual conduct. This change was designed to provide

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<sup>184</sup> Wictom, *supra* note 180, at 400.

<sup>185</sup> *In re M.T.S.*, 129 N.J. 422, 437 (N.J.1992) (citing SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 377 (1975)).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (citing Lucy Reid Harris, *Toward a Consent Standard*, 43 U. CHI. L. REV 613, 626 (1976)).

<sup>188</sup> SPOHN & HORNEY *supra* note 38, at 25-26.

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

<sup>190</sup> *Id.* at 17.

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protection to additional victims. For example, jurisdictions prohibited all forms of nonconsensual penetration by changing the definition of intercourse to include all types of penetration rather than being limited to vaginal intercourse.<sup>191</sup> Legislatures eliminated the spousal exemption<sup>192</sup> to protect spouses and removed gender language from state statutes to protect males from sexual assaults.<sup>193</sup>

Several American jurisdictions eliminated their common law based rape statutes and enacted statutes that divided rape into categories or degrees of rape.<sup>194</sup> The division of rape into different degrees allowed differentiated the most egregious rape cases from the less egregious cases based on the presence or absence of aggravating factors in a particular case. State and federal legislatures then determined the appropriate maximum punishment for each degree of rape or sexual abuse. Jurisdictions differentiated between the different degrees of rape or sexual abuse based on a number of different factors, for example: the amount of force used, the seriousness of the act, the extent of the injury inflicted on the victim and the age of the victim.<sup>195</sup>

Other jurisdictions eliminated the term “rape” from their penal codes completely and replaced rape statutes with statutes that defined a range of criminal conduct each classified as a different degree of sexual assault or criminal sexual conduct.<sup>196</sup> Once again, the different degrees of the criminal sexual offenses allowed the states and the federal government to define what type of sexual assaults were the most egregious and thus subject to the higher criminal penalty based on the aggravating factors in a particular case.

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<sup>191</sup> Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L. J. 72, 78 (2001).

<sup>192</sup> The spousal exemption can also be traced to the writings of Sir Matthew Hale. In *The History of the Pleas of the Crown*, Sir Hale states that a husband cannot rape his wife because “by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” Before removal of the spousal exemption a husband could not be guilty of raping his wife. HALE, *supra* note 164, at 629.

<sup>193</sup> Futter & Mebane, *supra* note 191, at 78.

<sup>194</sup> See *infra* notes 440 - 443.

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

<sup>196</sup> See *supra* notes 447 - 450..

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Prior to the reform of American rape statutes, rape generally carried a maximum penalty of execution<sup>197</sup> or life imprisonment.<sup>198</sup> Because of the severity of rape penalties, many juries refused to convict defendants for any rape other than those involving aggravated assault and serious injury.<sup>199</sup> Permitting lesser penalties was designed to increase juries' willingness to convict defendants in sexual assault cases. Consequently, many American jurisdictions eliminated the death penalty for rape.<sup>200</sup>

### 2. *Resistance Requirements*

Reformers argued that rape was not primarily a crime about sex. Rape involved violence and warranted treatment equivalent to other crimes of violence.<sup>201</sup> Reformers stressed the unfairness of a requirement for a rape victim to resist to the utmost of her ability, whereas there was no such requirement in other crimes of violence, such as robbery and aggravated assault.<sup>202</sup> For example, the law did not require a robbery victim to resist the forceful taking of their property to sustain a conviction. Yet, the rape victims had to attempt to fight off their attackers to establish credibility and lack of consent. The resistance requirements put victims in positions where they had to choose between resisting and putting their own safety at risk, or not resisting and allowing the rapist to go unpunished.<sup>203</sup> American jurisdictions generally eliminated the requirement for the victims of rape to resist to the utmost; however, evidence of resistance remained admissible concerning the issue of consent.<sup>204</sup>

### 3. *The Consent Standard*

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<sup>197</sup> Sir Hale's influence is also seen in the punishment authorized in rape trials. He wrote that rape is a most detestable crime and therefore ought to severely and impartially be punished by death. HALE, *supra* note 164, at 633-34.

<sup>198</sup> Ross, *supra* note 160, at 846.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 819.

<sup>203</sup> *Id.*

<sup>204</sup> 18 PA. CODE § 3107 (1976); MONT. CODE ANN. § 45-5-511 (1973).

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The rape statutes based on the common law that evolved in most American jurisdictions made the victim's nonconsent an essential element of the crime by including phrases such as "by force and against her will."<sup>205</sup> As stated previously, many jurisdictions, required the victim to resist to the utmost of her ability to demonstrate nonconsent.<sup>206</sup> Other jurisdictions required that the victim demonstrate such earnest resistance as might reasonably be expected under the circumstances.<sup>207</sup> The reformers argued that defining consent in terms of the victim's resistance put victims at risk of serious injury or death.<sup>208</sup> The without consent element of rape, requiring victim resistance, shifted the inquiry away from the acts of the defendant to acts of the victim.<sup>209</sup>

In response to criticisms of the consent standards, some American jurisdictions made changes. Some jurisdictions eliminated the requirement that the victim resist as proof of the victim's lack of consent.<sup>210</sup> Other jurisdictions attempted to remove the ambiguity in the consent standard by allowing the finder of fact to presume lack of consent in cases when the accused used a weapon or injured the victim.<sup>211</sup>

#### 4. Corroboration Requirements and Cautionary Instructions

Reformers successfully argued that the corroboration requirements and cautionary instructions wrongly stereotyped rape victims as inherently less trustworthy than other victims of criminal attack.<sup>212</sup> This distrust of the victim put her credibility on trial rather than the accused.<sup>213</sup> The reformers further argued that

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<sup>205</sup> SPOHN & HORNEY, *supra* note 38, at 23.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (citing Texas Penal Code § 21.02 (1974)).

<sup>208</sup> *Id.* at 23.

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

<sup>210</sup> *See, e.g.*, 18 PA. CODE § 3107 (1976); MONT. CODE ANN. § 45-5-511 (1973); SPOHN & HORNEY, *supra* note 38, at 23.

<sup>211</sup> SPOHN & HORNEY, *supra* note 38, at 23-24.

<sup>212</sup> *In re M.T.S.*, 129 N.J. 422, 437 (N.J. 1992) (citing *House Urges New Definition of Rape*, 61 A.B.A.J. 464 (1975)).

<sup>213</sup> *Id.* (citing Lucy Reid Harris, *Toward a Consent Standard*, 43 U. CHI. L. REV 613, 626 (1976)).

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the rape victim's testimony is as reliable as any other form of evidence and called for the elimination of the corroboration requirements and cautionary instructions.<sup>214</sup> State legislatures or judges responded to the reformers' arguments and eliminated corroboration requirements and cautionary instructions.<sup>215</sup>

### 5. Evidentiary Reforms

The evidentiary rules in existence before the reform period of the 1970s allowed evidence into trial concerning the victim's sexual history. The belief that an unchaste woman was less credible than a more virtuous woman justified the admissibility of evidence of the victim's sexual history.<sup>216</sup> Rape reform advocates pointed out that this evidence was only admissible in rape cases and often put women through humiliating experiences.<sup>217</sup> These experiences discouraged other women from reporting rapes. Rape reform advocates successfully argued that the evidence of the victim's sexual history had only a tenuous connection to the offense being tried and served no real purpose other than to embarrass the victim.<sup>218</sup> By 1985, most American jurisdictions, including the federal system, had enacted rape shield laws<sup>219</sup> that restricted the use of the victim's prior sexual history.

### 6. History of sexual offense prosecutions under Title 18

Rape and carnal knowledge (similar to current Art. 120, UCMJ) were prohibited under 18 U.S.C. § 2031 and predecessor statutes since 1825 and 1889, respectively. *See Williams v. United States*, 327 U.S. 711, 722-23 (1946). In *Williams* the Supreme Court listed the following dates for federal statutory sexual offense prohibitions:

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<sup>214</sup> Wicktom, *supra* note 180, at 399 n.78.

<sup>215</sup> *See, e.g.*, MICH. COMP. LAWS § 750.520h (2004), *see infra* at page 625; *United States v. Sheppard*, 569 F.2d 114, 117 (D.C. Cir. 1977). *See generally* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1137 n.155 (1986).

<sup>216</sup> *See supra* notes 172 - 173 and accompanying text.

<sup>217</sup> SPOHN & HORNEY, *supra* note 38, at 25-26.

<sup>218</sup> Deborah Wood, *Applying MRE 412: Should It Be Used at Article 32 Hearings?*, ARMY LAW., July 1982, at 13.

<sup>219</sup> Ross, *supra* note 160, at 844. Rape shield laws limit the admissibility of evidence concerning the victim's sexual history. Futter & Mebane *supra* note 191, at 79.

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Rape: (1825) 4 Stat. 115, applied to the high seas but not to federal enclaves; (1874) Rev. Stat. § 5345 applied to federal enclaves; (1909) 35 Stat. 1143. Assault with intent to commit rape: (1825) 4 Stat. 121, on high seas but not within federal enclaves; (1874) Rev. Stat. § 5346; (1909) 35 Stat. 1143. Carnal knowledge: (1889) 25 Stat. 658, age of consent fixed at 16; (1909) 35 Stat. 1143. Adultery: (1887) 24 Stat. 635, in connection with the amendment of bigamy statutes; (1909) 35 Stat. 1149. Fornication: (1887) 24 Stat. 636, in connection with revision of bigamy statutes; (1909) 35 Stat. 1149. *See also*, Criminal Code, § 312, obscene literature (1873); § 313, polygamy (1862); § 314, unlawful cohabitation (1882); § 317, incest (1887). 18 U.S.C. §§ 512-517.

*Id.* at 723 n.28. In 1986, Congress replaced 18 U.S.C. §§ 2031 and 2032, with 18 U.S.C. §§ 2241-2244, 2246 in order to: (1) criminalize all forcible sexual penetrations (including forcible sodomy, which was not then prohibited); (2) divide sexual crimes into degrees based on culpability of defendant; (3) eliminate gender bias (previously only females could be victims); (4) remove spousal immunity; (5) expand jurisdiction to cover federal prisons; and (6) eliminate Government's requirement to prove lack of consent or victim's resistance.<sup>220</sup>

The UCMJ arts. 120 and 125 currently: (1) criminalizes all forcible sexual penetrations; (2) has no gender bias; (3) has no spousal immunity; and (4) has no reason to expand jurisdiction (applies to all offenses worldwide without regard to situs of offense). The UCMJ could be conformed to 18 U.S.C. §§ 2241-2244, 2246 by (1) eliminating the Government's requirement to prove lack of consent or victim's resistance; and (2) dividing sexual crimes into degrees based on culpability of defendant.

### **C. CONTINUING REFORM - ABUSE OF A POSITION OF AUTHORITY**

The rape reform movement resulted in many changes, including the way the federal and state government defined rape. Many states also adopted penal statutes to deal with the problem of individuals violating positions of trust and authority to obtain sexual intercourse from individuals they have a duty to protect.<sup>221</sup> The abuse of authority laws prohibited intercourse based on the status of the perpetrator and the victim. For example, some states criminalized sexual relationships between parents and their children, doctors (especially psycho-therapists) and their patients, students and teachers, and inmates and prison guards.<sup>222</sup>

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<sup>220</sup> Legislative History for H.R. Rep. No. 99-594, 1-10 (1986), reprinted in 1986 U.S.C.C.A.N. 6186-6190).

<sup>221</sup> *See supra* notes 603, 612 - 617.

<sup>222</sup> *Id.*

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The question of abuse of position is controversial in many states. For example, in Montana, the principal of a high school threatened a student with nongraduation if she did not submit to his sexual advances. The Montana Supreme Court held that the state had to show that the victim submitted due to physical force or threats of physical force because under Montana's definition of "without consent," the principal's threat was not sufficiently serious. In response, Montana amended the law.<sup>223</sup>

### **D. STATUS OF STATE LAWS PROHIBITING SODOMY**

In 2003, the U.S. Supreme Court declared in *Lawrence v. Texas* that a Texas law prohibiting homosexual sodomy was unconstitutional, stating:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>224</sup>

The *Lawrence* Court reasoned that a trend towards decriminalization of sodomy in the states in part, merited revisiting a prior Supreme Court decision which concluded that the states could Constitutionally criminalize private, consensual sodomy.

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<sup>223</sup> *State v. Thompson*, 243 M 28, 792 P2d 1103 (1990). *See also* infra at page 645 for the 1991 amendment, § 4-5-501, which defines "force" as follows:

(a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or

**(b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.**

(emphasis added).

<sup>224</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

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In 1961, all 50 states outlawed sodomy. By 1986, when *Bowers v. Hardwick*<sup>225</sup> was decided, 24 states and the District of Columbia provided criminal penalties for sodomy performed in private and between consenting adults.<sup>226</sup> The Supreme Court stated that by 2003 when *Lawrence* was decided, 13 states still prohibited private, consensual sodomy and “4 enforce their laws only against homosexual conduct.”<sup>227</sup>

In sum, according to the Supreme Court, by 2003, nine states and the military prohibit and prosecute heterosexual and homosexual sodomy.

### **E. STATUS OF MILITARY LAW PROHIBITING CONSENSUAL SODOMY**

Article 125, UCMJ, prohibits an act of sodomy “committed in the privacy of one’s home, with no person present other than the sexual partner.”<sup>228</sup>

On August 23, 2004, the United States Court of Appeals for the Armed Forces, the highest court below the Supreme Court, which reviews convictions under the UCMJ, determined that the *Lawrence* decision applied to military cases, but used a “contextual, as applied analysis.”<sup>229</sup> The *Marcum* Court affirmed a consensual, sodomy conviction involving two males because the defendant “testified that he knew he should not enter in a sexual relationship with someone he supervised,” and the conduct clearly violated an Air Force instruction, which prohibited all sexual relationships between senior personnel and those they supervise. Thus, the court determined under the specific facts in *Marcum* that sodomy “was outside the protected liberty interest identified in *Lawrence*.”<sup>230</sup> On 29 September 2004, a second conviction for homosexual, consensual sodomy, was affirmed again emphasizing the senior subordinate relationship between the two men.<sup>231</sup> On 7 October 2004, and on 30 November 2004, in two separate cases, the Army Court of

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<sup>225</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

<sup>226</sup> *Lawrence*, 539 U.S. at 572.

<sup>227</sup> *Id.* at 573.

<sup>228</sup> *Id.*

<sup>229</sup> *United States v. Marcum*, 60 M.J. 190 (C.A.A.F. 2004).

<sup>230</sup> *Id.* at 208.

<sup>231</sup> *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).