

SEX CRIMES AND THE UCMJ:

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

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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*),¹ “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.

¹ 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.² 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

² 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>.

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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

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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

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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.³

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.

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

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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.”⁴ 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.”⁵

The explanation accompanying Article 125 states that unnatural carnal copulation includes both oral and anal sexual intercourse,⁶ and this language has been upheld against vagueness challenges.⁷ 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.⁸ The *MCM* states that the maximum punishment for consensual sodomy between adults is a dishonorable discharge, forfeiture of all pay and allowances, and

⁴ *MCM*, Pt. I, ¶ 3.

⁵ Article 125, UCMJ; *MCM*, Pt. IV, ¶ 51.

⁶ *MCM*, Pt. IV, ¶ 51c.

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

⁸ *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.⁹ 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.¹⁰ Article 120, UCMJ, punishes both carnal knowledge of a person under the age of 16 and rape,¹¹ the latter carrying a maximum punishment of death.¹² Conduct unbecoming an officer and a gentleman is punished under Article 133, UCMJ,¹³ and can take the form of either sexually related conduct¹⁴ or sexually explicit speech.¹⁵

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

⁹ *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).

¹⁰ *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).

¹¹ *MCM*, Pt. IV, ¶ 45.

¹² *MCM*, Pt. IV, ¶ 45(e)(1).

¹³ *MCM*, Pt. IV, ¶ 59.

¹⁴ *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).

¹⁵ *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).

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

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

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

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

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

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

²⁰ *MCM*, Pt. IV, ¶ 62, *see infra* at page 376.

²¹ *MCM*, Pt. IV, ¶ 63, *see infra* at page 381.

²² *MCM*, Pt. IV, ¶ 65, *see infra* at page 382.

²³ *MCM*, Pt. IV, ¶ 69, *see infra* at page 383.

²⁴ *MCM*, Pt. IV, ¶ 83, *see infra* at page 384.

²⁵ *MCM*, Pt. IV, ¶ 87, *see infra* at page 386.

²⁶ *MCM*, Pt. IV, ¶ 88, *see infra* at page 388.

²⁷ *MCM*, Pt. IV, ¶ 89, *see infra* at page 389.

²⁸ *MCM*, Pt. IV, ¶ 90, *see infra* at page 391.

²⁹ 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.

³⁰ 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).

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unlawful carnal knowledge of a woman forcibly and against her will or consent.³¹ 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.”³² 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.³³ After Congress eliminated the two-percent limitation, the number of women increased to fifteen percent in 2003.³⁴ 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.”³⁵

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.³⁶ This movement gained momentum throughout the 1970s.³⁷ All fifty states and the federal government enacted some sort of rape law reform by the 1980s.³⁸ These reforms expanded the definition of rape to include a wider range

³¹ *In re Lane*, 135 U.S. 443 (1890).

³² *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.*

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

³⁴ *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.

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

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

³⁷ *Id.* at 20.

³⁸ *Id.* at 17.

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of abusive sexual assaults.³⁹ 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.⁴⁰ The reforms also led to changes in the rules of evidence and eliminated many of the “special rules” that applied to rape prosecutions.⁴¹

Some have suggested statutory clarification of the elements of rape, including the application of “constructive force.” Article 120, and the *MCM*,⁴² 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 BENCHBOOK⁴³ have addressed the issues of date rape, acquaintance rape, and constructive force; whereas, civilian jurisdictions have modernized their rape statutes.⁴⁴ 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

³⁹ *Id.* at 22.

⁴⁰ *Id.*

⁴¹ *See infra* notes 174 - 180 and accompanying text.

⁴² *See supra* note 32.

⁴³The 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>.

⁴⁴ “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.⁴⁵ However, most rape cases actually involve an accused and victim who know each other.⁴⁶ Often, the parties are on a date or have had a dating or sexual relationship in the past.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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 50th Anniversary of the UCMJ.⁵⁰ 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.⁵¹ First, Articles

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

⁴⁶ 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).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Webster*, 37 M.J. at 674 n.8.

⁵⁰ 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).

⁵¹ 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

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.

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. Section VI, starting at page 55, discusses the current law of rape in the military, including the concepts of force, resistance, consent and the mistake of fact defense.

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.⁵² In early 1775, the Provisional Congress of Massachusetts Bay approved the first written American military code, the Massachusetts Articles of War. The

⁵² 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 1774.⁵³

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.⁵⁴ George Washington headed the committee that prepared the 1775 Articles of War.⁵⁵ 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.⁵⁶ In *United States v. Solorio*, the Supreme Court relates:

⁵³ *Id.*

⁵⁴ *Id.*

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

⁵⁶ 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.⁵⁷

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.⁵⁸

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).⁵⁹ 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

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

⁵⁸ *Id.* at 667.

⁵⁹ 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.⁶⁰

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.⁶¹ The military adopted the common law definition of rape prevalent in most American jurisdiction at the time,⁶² the unlawful carnal knowledge of a woman forcibly and against her will or consent.⁶³

In *Coleman v. Tennessee*,⁶⁴ the Supreme Court upheld the military's exclusive authority to court-martial military personnel in the occupied state of Tennessee.⁶⁵ 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 1863.⁶⁶

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.⁶⁷

⁶⁰ WINTHROP, *supra* note 57, at 667.

⁶¹ *Id.* at 671.

⁶² *Id.* at 677.

⁶³ *Id.*

⁶⁴ 97 U.S. 509 (1878).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 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.⁶⁸ 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.⁶⁹

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

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).

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

⁶⁹ 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 1950⁷⁰ 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.⁷¹ 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.⁷²

The UCMJ combined the offenses of rape and carnal knowledge⁷³ into two sections of Article 120.⁷⁴ 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.”⁷⁵ *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).

⁷⁰ 64 Stat. 108 (1950).

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

⁷² 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.

⁷³ 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).

⁷⁴ 64 Stat. 108 (1950).

⁷⁵ 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,⁷⁶ the fresh complaint rule,⁷⁷ and evidentiary rules that allowed inquiry into the victim's sexual history.⁷⁸ Judicial interpretation of Article 120 from 1950 to today has refined the definition of "by force and without consent."⁷⁹

⁷⁶ 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.*

⁷⁷ *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.*

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

⁷⁹ 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.

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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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 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.⁸⁰ 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.”⁸¹

⁸⁰ 1969 *MCM*, Pt. XXVII ¶ 153a; 1951 *MCM*, Pt. XXVII, ¶ 153a.

⁸¹ 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."⁸² 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."⁸³ This evidence was admissible whether or not the witness testified.⁸⁴

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,⁸⁵ 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. 412.⁸⁶ 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.⁸⁷

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

⁸² 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).

⁸³ 1951 *MCM supra* note 75, Pt. XXVII, ¶ 153b.

⁸⁴ *Id.*

⁸⁵ Wood, *supra* note 218, at 13.

⁸⁶ *Id.*

⁸⁷ 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)⁸⁸ 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.*

⁸⁸ 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.⁸⁹ 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,

⁸⁹ 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.⁹⁰ 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;⁹¹ (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.⁹²

A. FORCE

The *MCM* definition of “force and without consent”⁹³ 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:

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

⁹¹ 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.

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

⁹³ 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.⁹⁴

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.

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).

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

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1. *Constructive Force*⁹⁵

The military courts apply constructive force in a variety of different circumstances.⁹⁶ 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.”⁹⁷ 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.⁹⁸ 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.⁹⁹

The doctrine of constructive force protects victims rendered incapable of giving consent due to physical or mental infirmities, such as unconsciousness¹⁰⁰ or

⁹⁵ 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).

⁹⁶ 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).

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

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

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

¹⁰⁰ 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.¹⁰¹ Constructive force may also apply in cases where the assailant uses express or implied threats of bodily harm.¹⁰² For example, in *United States v. Hicks*,¹⁰³ 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 Appeals¹⁰⁴ (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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

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

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

¹⁰² *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).

¹⁰³ *Hicks*, 24 M.J. at 6.

¹⁰⁴ 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)).

¹⁰⁵ *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).

¹⁰⁶ *Id.*

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

¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ However, the superior-subordinate relationship is just one factor to consider in determining if constructive force exists in a particular case.¹¹²

2. Actual Force

The UCMJ and *MCM* require that an act of sexual intercourse be accomplished by force.¹¹³ In *United States v. Bonano-Torres*,¹¹⁴ 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."¹¹⁵ 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

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").

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

¹¹⁰ *Id.* at 436.

¹¹¹ *See supra* note 108.

¹¹² *See infra* notes 155-235 and accompanying text.

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

¹¹⁴ 31 M.J. 175, 179 (1990).

¹¹⁵ *Id.*

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for conviction.”¹¹⁶ 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.¹¹⁷ The BENCHBOOK¹¹⁸ defines actual force as “when the accused uses physical violence or power to compel the victim to submit against her will.”¹¹⁹

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.¹²⁰ The fact finder evaluates the totality of the circumstances to determine whether the evidence establishes the element of force.¹²¹ 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.¹²² 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.”¹²³

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.¹²⁴ 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

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

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

¹¹⁸ *See supra* note 91.

¹¹⁹ *Id.* at 428-29.

¹²⁰ *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.

¹²¹ *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.

¹²² *Id.*

¹²³ *Simpson*, 55 M.J. at 695.

¹²⁴ *Clark*, 35 M.J. at 437 (Sullivan, J., concurring).

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

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.¹²⁷ 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.¹²⁸ 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.”¹²⁹ 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.¹³⁰ 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.¹³¹

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.¹³² From evidence of resistance, the fact finder may draw inferences as to the victim’s state of mind on the factual issue of

¹²⁵ *Bonano-Torres*, 31 M.J. at 178.

¹²⁶ *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).

¹²⁷ *Id.*

¹²⁸ *Id.* at 388.

¹²⁹ *Id.*

¹³⁰ *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).

¹³¹ *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.

¹³² *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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consent¹³³ and the accused's state of mind regarding the affirmative defense of mistake of fact.¹³⁴ 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.¹³⁵

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*.¹³⁶ 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.¹³⁷

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*.¹³⁸ The appellate courts overturned SSG Bonano-Torres's rape conviction.¹³⁹ 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.¹⁴⁰

B. WITHOUT CONSENT

¹³³ *Williamson*, 24 M.J. at 34.

¹³⁴ *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).

¹³⁵ *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.

¹³⁶ *Bonano-Torres*, 31 M.J. at 178.

¹³⁷ *Id.* at 176.

¹³⁸ *Id.*

¹³⁹ *Id.* at 177.

¹⁴⁰ *Id.*

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1. 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.¹⁴¹ The lack of consent required is more than mere lack of acquiescence.¹⁴² The courts apply a reasonable victim standard based on the victim's age, strength and surrounding circumstances.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ The degree of force required to overcome resistance is measured by referring to the mind of the victim.¹⁴⁶ Under Options 6 and 7, "forcible compulsion"¹⁴⁷ becomes the force necessary to overcome reasonable resistance.¹⁴⁸

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.¹⁴⁹ Sergeant Tollinchi, a Marine Corps recruiter, served alcohol to a

¹⁴¹ *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.

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

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

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

¹⁴⁵ *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).

¹⁴⁶ *Simpson*, 55 M.J. at 696.

¹⁴⁷ See *infra* notes 362 – 369 and accompanying text.

¹⁴⁸ *Webster*, 40 M.J. at 387.

¹⁴⁹ *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.¹⁵⁰ 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.¹⁵¹

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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ The accused must exercise due care and cannot be reckless or negligent with respect to the truth.¹⁵⁵

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.¹⁵⁶ In *United States v. King*,¹⁵⁷ the court

¹⁵⁰ *Id.* at 81.

¹⁵¹ *Id.*

¹⁵² *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).

¹⁵³ *Langley*, 33 M.J. at 278.

¹⁵⁴ *Id.*

¹⁵⁵ *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).

¹⁵⁶ *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.¹⁵⁸ 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.¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹ The common law of rape developed to protect the property rights of men in their wives and daughters.¹⁶²

¹⁵⁷ 32 M.J. 558 (A.C.M.R. 1991).

¹⁵⁸ *Id.* at 563-64.

¹⁵⁹ *Id.*

¹⁶⁰ 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).

¹⁶¹ *Id.*

¹⁶² *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.¹⁶³ In Sir Hale's treatise, *The History of the Pleas of the Crown*,¹⁶⁴ 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.¹⁶⁵

In *The History of the Pleas of the Crown*, Sir Hale defined rape as the unlawful carnal knowledge of a woman against her will.¹⁶⁶ American jurisdictions generally adopted Sir Hale's definition of rape.¹⁶⁷ However, many American jurisdictions also added that the rape must be forceful to prove that the act was against the victim's will.¹⁶⁸ 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.¹⁶⁹

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

¹⁶³ 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*).

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

¹⁶⁵ 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).

¹⁶⁶ HALE, *supra* note 164 at 627.

¹⁶⁷ *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)).

¹⁶⁸ *Id.*

¹⁶⁹ *In re Lane*, 135 U.S. 443 (1890).

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in American jurisdictions.¹⁷⁰ 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.”¹⁷¹ 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.¹⁷² 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.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ For example, some jurisdictions required the victim to resist to the utmost to establish that she did not consent.¹⁷⁶ Some state laws required independent corroboration of the victim’s testimony, such as injuries consistent with

¹⁷⁰ Ross, *supra* note 160, at 803.

¹⁷¹ HALE, *supra* note 164, at 633-34.

¹⁷² *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.

¹⁷³ *Id.* at 633.

¹⁷⁴ 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.

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

¹⁷⁶ *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.¹⁷⁷ Other jurisdictions imposed prompt complaint requirements in rape cases that required the rape victim to complain right away to establish credibility.¹⁷⁸ 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.¹⁷⁹ The rules of evidence permitted inquiry into a victim's past sexual behavior as probative of the element of consent and as character evidence.¹⁸⁰ 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.¹⁸¹

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.¹⁸² Feminists, social scientists and legal scholars criticized the common law definition of rape.¹⁸³ These reformers argued that rape was not a crime about sex but rather a crime of violence that should be

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

¹⁷⁸ *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).

¹⁷⁹ 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).

¹⁸⁰ 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.

¹⁸¹ 539 U.S. at 596 (Scalia, J. dissenting).

¹⁸² SPOHN & HORNEY *supra* note 36, at 20.

¹⁸³ *Id.* at 22.

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treated like other crimes of violence.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ The distrust of the victim inherent in the rape laws put the victim’s credibility on trial rather than the accused.¹⁸⁷

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.¹⁸⁸ 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.¹⁸⁹

Efforts to reform American rape statutes were very successful. Most American jurisdictions enacted some sort of rape reform by the 1980s.¹⁹⁰ 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

¹⁸⁴ Wictom, *supra* note 180, at 400.

¹⁸⁵ *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)).

¹⁸⁶ *Id.*

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

¹⁸⁸ SPOHN & HORNEY *supra* note 38, at 25-26.

¹⁸⁹ *Id.*

¹⁹⁰ *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.¹⁹¹ Legislatures eliminated the spousal exemption¹⁹² to protect spouses and removed gender language from state statutes to protect males from sexual assaults.¹⁹³

Several American jurisdictions eliminated their common law based rape statutes and enacted statutes that divided rape into categories or degrees of rape.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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.

¹⁹¹ 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).

¹⁹² 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.

¹⁹³ Futter & Mebane, *supra* note 191, at 78.

¹⁹⁴ See *infra* notes 440 - 443.

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* notes 447 - 450..

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Prior to the reform of American rape statutes, rape generally carried a maximum penalty of execution¹⁹⁷ or life imprisonment.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

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.²⁰¹ 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.²⁰² 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.²⁰³ 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.²⁰⁴

3. *The Consent Standard*

¹⁹⁷ 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.

¹⁹⁸ Ross, *supra* note 160, at 846.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 819.

²⁰³ *Id.*

²⁰⁴ 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."²⁰⁵ As stated previously, many jurisdictions, required the victim to resist to the utmost of her ability to demonstrate nonconsent.²⁰⁶ Other jurisdictions required that the victim demonstrate such earnest resistance as might reasonably be expected under the circumstances.²⁰⁷ The reformers argued that defining consent in terms of the victim's resistance put victims at risk of serious injury or death.²⁰⁸ The without consent element of rape, requiring victim resistance, shifted the inquiry away from the acts of the defendant to acts of the victim.²⁰⁹

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.²¹⁰ 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.²¹¹

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.²¹² This distrust of the victim put her credibility on trial rather than the accused.²¹³ The reformers further argued that

²⁰⁵ SPOHN & HORNEY, *supra* note 38, at 23.

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing Texas Penal Code § 21.02 (1974)).

²⁰⁸ *Id.* at 23.

²⁰⁹ *Id.*

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

²¹¹ SPOHN & HORNEY, *supra* note 38, at 23-24.

²¹² *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)).

²¹³ *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.²¹⁴ State legislatures or judges responded to the reformers' arguments and eliminated corroboration requirements and cautionary instructions.²¹⁵

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.²¹⁶ Rape reform advocates pointed out that this evidence was only admissible in rape cases and often put women through humiliating experiences.²¹⁷ 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.²¹⁸ By 1985, most American jurisdictions, including the federal system, had enacted rape shield laws²¹⁹ 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:

²¹⁴ Wicktom, *supra* note 180, at 399 n.78.

²¹⁵ *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).

²¹⁶ *See supra* notes 172 - 173 and accompanying text.

²¹⁷ SPOHN & HORNEY, *supra* note 38, at 25-26.

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

²¹⁹ 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.²²⁰

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.²²¹ 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.²²²

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

²²¹ *See supra* notes 603, 612 - 617.

²²² *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.²²³

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.²²⁴

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.

²²³ *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).

²²⁴ *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*²²⁵ was decided, 24 states and the District of Columbia provided criminal penalties for sodomy performed in private and between consenting adults.²²⁶ 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.”²²⁷

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.”²²⁸

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.”²²⁹ 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*.”²³⁰ On 29 September 2004, a second conviction for homosexual, consensual sodomy, was affirmed again emphasizing the senior subordinate relationship between the two men.²³¹ On 7 October 2004, and on 30 November 2004, in two separate cases, the Army Court of

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

²²⁶ *Lawrence*, 539 U.S. at 572.

²²⁷ *Id.* at 573.

²²⁸ *Id.*

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

²³⁰ *Id.* at 208.

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

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Criminal Appeals set aside convictions involving heterosexual, consensual sodomy citing *Lawrence*.²³²

V. THE NEED FOR MILITARY REFORM

Sexual assaults decrease military readiness and damage good order and discipline.²³³ A Department of Veteran's Affairs (VA) study on women's health reveals that sexual assaults profoundly affect female service members.²³⁴ The VA study found cases of depression occurred three times as often in women who were the victims of a sexual assault.²³⁵ Another study in the Journal of Interpersonal Violence focused on post-traumatic stress disorder on female Gulf War veterans. This study concluded that sexual assault or harassment was more closely related to anxiety symptoms than combat stress.²³⁶

A change to the *MCM* and UCMJ is appropriate if the change promotes good order and discipline and enhances the military justice system for service members.²³⁷ A rationale for changing Article 120 is that: First, the statute has not been substantially updated since the Revolutionary War. All cases of nonconsensual intercourse are consolidated into a broad category known as rape, a potentially capital offense. The overwhelming majority of civilian rape statutes have been reformed to divide rape into degrees based on culpability, whereas the military rape statute remains unchanged. Second, Article 120 does not provide specific notice of proscribed conduct.²³⁸ Third, the definitions of force and consent are not in the

²³² See *United States v. Barber*, Army 20000413 (Army Ct. Crim. App. 2004) (unpub.); *United States v. Bullock*, Army 20030534 (Army Ct. Crim. App. 2004) (unpub.). Copies of the *Barber* and *Bullock* unpublished opinions are available at <https://www.jagcnet.army.mil/ACCA>. Unpublished opinions may be persuasive, but are not binding precedent.

²³³ Major Jay Stone, Understanding Sexual Assaults sl. 17 (powerpoint presentation), available at <http://www.defenselink.mil/vwac/VWAP31.ppt> (last visited 15 December 2004).

²³⁴ *Id.* (citing Journal of Traumatic Stress, Oct. 1999).

²³⁵ *Id.* (citing Journal of Interpersonal Violence, Feb. 1998).

²³⁶ *Id.*

²³⁷ Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?* 48 A.F. L. REV. 185, 185 (2000).

²³⁸ See *infra* notes 247 - 259 and accompanying text.

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statute.²³⁹ Fourth the prohibitions against nonconsensual sexual misconduct are scattered through UCMJ arts. 93, 120, 125, 128, and 134 and the *Manual for Courts-Martial*. Fifth, the agreement of Congress and the President on what sexual conduct is criminal will increase their legitimacy to victims, defendants, court members, military personnel and the general public.

The counter arguments for change are essentially that the same offenses that would be prohibited by a new statute are already subject to prosecution under the more general statutes in use today. The definitions of force and lack of consent are found in detail in the case law. As a matter of law, case law provides notice to victims, defendants, court members, military personnel and the general public. A more thorough discussion of the arguments against change are at pages 1 - 2 of the Exsum.

A. MODERNIZING ARTICLE 120, UCMJ

Both federal and state jurisdictions made significant changes to their rape and sexual assault statutes based on changes in society.²⁴⁰ As stated previously in Part VII, the Coast Guard Court of Appeals, among others, has called on Congress to modernize Article 120.

Although we have found sufficient evidence of force and lack of consent, using the “totality of the circumstances” test, a better alternative would be explicit recognition of the trend toward defining rape as a sexual assault requiring only the lack of consent of the victim and establishing degrees of seriousness of the offense commensurate with the extent of force involved or other aggravating circumstances. In the absence of a reform of Article 120, UCMJ, we are left to the unguided ad hoc application of the trial court’s classification of “degrees” of rape, as reflected in the sentence adjudged . . . we are attempting to apply a 1950’s law to the post-“sexual revolution” morality [or lack of it] of the 1990’s. Acknowledgment of this problem calls for change in the law.²⁴¹

The Coast Guard Court Court described the problem of trying to apply Article 120 to the reality of sexual assaults in modern society. Today, the vast majority of rapes or

²³⁹ See *infra* notes 256 - 340 and accompanying text.

²⁴⁰ See *supra* notes 180 - 222 and accompanying text.

²⁴¹ *Webster*, 37 M.J. at 675 n.8.

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sexual assaults involve a victim and perpetrator who know each other.²⁴² Rape cases in the military are no different. The victim and the accused usually know each other and are often co-workers, or assigned to the same company or battalion-sized unit.²⁴³ Rapes between acquaintances are generally referred to as date rape or acquaintance rape. The court described the characteristics of date rape and acquaintance rape in detail.

The characteristics of date or acquaintance rape may include (1) kissing, “necking,” and fondling but no consent by the victim to subsequent sexual intercourse; (2) passive resistance by the victim to the sexual advances of her attacker; (3) the attacker’s disregard of the victim’s statement that she does not desire to engage in sexual intercourse; (4) the absence of physical threats by the attacker to his victim; (5) the failure of the victim to seize opportunities to escape from her attacker; (6) the failure of the victim to scream or cry out; (7) little or no observable physical injury to the victim; and (8) the failure of the victim to report the rape promptly.²⁴⁴

The *Webster* Court then described the problems with applying date rape or acquaintance rape scenarios to Article 120, as presently written.²⁴⁵ Article 120 requires force and lack of consent. Most, if not all of the characteristics of date rape and acquaintance rape fail to demonstrate physical violence or power that compels the victim to submit against her will.

The *Webster* Court also recognized the increased number of women in the military and the need to protect service members from sexual assaults.²⁴⁶ The UCMJ and *MCM* in their current form do not define the precise conduct that causes an offense committed, and instead rely on case law to define the scope of prohibited conduct. The focus of modern sexual assault laws in the military should be to deter sexual offenses. Modernizing the military prohibition against rape and other sexual offenses should help to reduce sexual assaults in the military by providing clear notice to all of what conduct is prohibited. A change to the UCMJ and *MCM* thereby providing clear notice improves the military justice system and increases protection to service members and other potential victims of date rape and acquaintance rape.

²⁴² See *supra* note 46.

²⁴³ Stone, *supra* note 233, sl. 16.

²⁴⁴ *Webster*, 37 M.J. at 674.

²⁴⁵ *Id.* at 674 - 75.

²⁴⁶ *Id.* at 675.

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B. NOTICE

Article 120(a) can be modified so that it more specifically describes what conduct is statutorily prohibited. Article 120(a) simply says rape is intercourse by force and without consent of the victim. Distinguishing between legal and illegal sexual intercourse is difficult because sexual intercourse between adults is not an inherently criminal act.²⁴⁷ Although rape is a general-intent crime, it nevertheless requires proof that the accused intended to have sexual intercourse without the victim's consent.²⁴⁸ As part of proving the requisite *mens rea*, the prosecution must show that the perpetrator was placed on reasonable notice that his behavior was criminal.²⁴⁹ The United States Supreme Court explained the notice necessary in a criminal statute in *Connally v. General Construction Co.*²⁵⁰ "A criminal statute must not be so vague that an ordinary person cannot distinguish between criminal and innocent behavior. If "application of the law depends . . . upon the probably varying impression of juries as to whether given areas are or are not to be included within" the statute, "the constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."²⁵¹ While the current Article 120(a) meets Constitutional notice requirements, it is equally clear that the more specific a statute, the better the notice its citizens receive of prohibited conduct.

In his dissenting opinion in *Clark*,²⁵² Judge Gierke addresses the problem with trying to apply Article 120 to nonviolent sexual assaults involving a victim in possession of her mental faculties.²⁵³ Judge Gierke wrote that SGT Clark knew his conduct was criminal in that he violated a lawful general order prohibiting fraternization, but that SGT Clark did not know he committed rape. Judge Gierke wrote, "In a rape prosecution in the military justice system, proof of the *mens rea* occurs by proving actual or constructive force or proving that the victim made her

²⁴⁷ *Clark*, 35 M.J. at 441 (Gierke, J. dissenting).

²⁴⁸ *Id.*

²⁴⁹ *Id.* (citing *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

²⁵⁰ 269 U.S. 385 (1926).

²⁵¹ *Id.* at 393.

²⁵² See *supra* note 97 and accompanying text.

²⁵³ *Clark*, 35 M.J. at 441 (Gierke, J., dissenting).

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lack of consent reasonably manifest.”²⁵⁴ In Judge Gierke’s opinion, the facts in *Clark* did not meet the Article 120’s definition of rape.

Because nonviolent sexual intercourse with a victim in possession of her mental faculties may result in a rape conviction, Article 120 should provide military members better notice that the elements of force and without consent can be accomplished without the accused’s use of physical force. Although ignorance of the law is generally not a defense to a criminal conviction,²⁵⁵ both the victim and potential accuser deserve some guidance and certainty as to what constitutes rape. In *Webster*, Judge Bridgman, expressed concern about Article 120’s application in situations involving minimal force. He wrote, “as Article 120(a), UCMJ is currently applied, the offense of rape in the military justice system is guided, not by law, but by individual perceptions of the offense. This is unsatisfactory.”²⁵⁶

Congress can improve Article 120’s notice by changing it to specifically list what constitutes criminal sexual misconduct. Clearer and more specific standards of conduct will improve the military justice system.

C. DEFINITION OF TERMS

Article 120 fails to specifically define the crucial legal concepts of consent and force. The *MCM* combines consent and force into the element of “by force and without consent,” which leads to confusion. In 1992, the Coast Guard Court of Criminal Appeals wrote that, the current guidance on the elements of rape is less than lucid.²⁵⁷ “Force and lack of consent are sometimes treated as a single element and at other times distinguished from each other. Consent is sometimes treated as a state of mind and sometimes related to the physical manifestations of the victim conveying a lack of consent.”²⁵⁸

The problem with the absence of these definitions is the trial and appellate court judges are left with the responsibility to develop definitions on a case-by-case basis. Additionally, definitions will help alleviate the notice and lack of standards problems discussed in the previous section. The absence of definitions cause problems in determining whether conduct is legal or illegal.

²⁵⁴ *Id.*

²⁵⁵ *United States v. Gunter*, 42 M.J. 292, 299 (C.A.A.F. 1995).

²⁵⁶ *Webster*, 37 M.J. at 683 (Bridgman, J., concurring).

²⁵⁷ *Id.* at 683.

²⁵⁸ *Id.*

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Section VI, beginning at page 87, includes an analysis of the legal concepts of consent and force with proposed definitions for each term from Options 5 and 6. These definitions substantially improve Article 120, UCMJ.

D. DIVIDING THE OFFENSE OF RAPE INTO DEGREES

Congress can improve the military justice system by adopting an article that divides nonconsensual sexual offense into degrees. Article 120 groups all cases of nonconsensual intercourse together as rape, a potentially capital offense. The UCMJ does not grade sexual assaults based on the presence or lack of aggravating circumstances in a particular case. In contrast, the federal system, the District of Columbia and forty-six of the fifty American states have nonconsensual criminal sex statutes that distinguish the most egregious cases of rape from the less egregious cases.²⁵⁹

The division of the UCMJ offense of rape into degrees of sexual assault permits prosecutors to charge an accused with the appropriate degree of sexual assault that specifically prohibits the alleged conduct. The accused also benefits by dividing the offense of rape into degrees of sexual assault because he will not be convicted of an offense that exaggerates his criminal conduct. Additionally, the maximum possible punishment is decreased for lower degrees of sexual assault.

Dividing rape into degrees of sexual assault will result in greater transparency for the military justice system. Congress and the public will be able to monitor and evaluate the effectiveness of the military justice system based on the degree of criminal culpability of each case or type of cases. A military data base will be able to statistically distinguish, for example, between a sexual offense involving use of a dangerous weapon, and one involving sexual intercourse without physical force involving a 10-year-old child.

Options 3-6 all divide sexual abuse or rape into degrees of criminal sexual misconduct based on the presence or absence of aggravating factors. A database can easily track the offenses by statutory aggravating factors, and then conviction rates and punishments imposed can be analyzed.

VI. COMPARISON OF OPTION 1 (MAINTAIN STATUS QUO-THE CURRENT UCMJ AND MCM) WITH OPTION 2 (DELETE THE WORDS, "LACK OF CONSENT" FROM ARTICLE 120, UCMJ AND AMEND MCM ONLY).

Article 120(a) currently states:

²⁵⁹ See *infra* notes 440 - 443.

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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.”

The subcommittee considered two options: do not change Article 120, UCMJ, or delete the three italicized words from Article 120. A corollary to each option is that the President could change the *MCM*, if he chose to do so, dividing Article 120 into degrees, and changing the maximum punishments, himself to reflect the various degrees.

A. OPTION 1: MAINTAIN STATUS QUO-THE CURRENT UCMJ AND MCM

Any significant change in how military sexual offenses are defined reduces or eliminates the applicability of numerous military appellate court decisions. There are fewer appellate decisions addressing the elements and definitions of prosecutions under 18 U.S.C. §§ 2241-2244, 2246 as compared to sexual offenses under the UCMJ, especially in the area of sexual offenses involving minimal or no force.

No sexual conduct that the military has an interest in prosecuting has been identified that cannot be prosecuted under the UCMJ. As currently written, the UCMJ provides a mechanism to charge every sexual act which any of the proposed alternatives would also make criminal. If there was truly a sexual act that could not be prosecuted under the UCMJ, but was made criminal by Title 18, or as articulated in the other Options discussed in this report, those offenses could be assimilated under Article 134, UCMJ,²⁶⁰ or could be prosecuted as conduct to the prejudice of

²⁶⁰ Under military law the preemption doctrine applies only where a particular punitive UCMJ article already prohibits the conduct. *See United States v. Irvin*, 21 M.J. 184, 188 (C.M.A. 1986) (holding Colorado child abuse statute may not be applied because Irvin’s conduct fell within the purview of Article 128, UCMJ and stating, “the Assimilative Crimes Act [may not be used] as a means to apply local law which differs from Federal criminal statutes applicable to the same conduct”) (citing *Williams v. United States*, 327 U.S. 11 (1946)); *cf. United States v. McGuinness*, 35 M.J. 149, 151-52 (C.M.A. 1992) (holding prosecution permitted for violation of Federal Espionage Act, 18 U.S.C. § 793(e) despite similar prohibition in regulation prosecutable under Article 92, UCMJ); *United States v. Chadkowi*, 11 M.J. 606 (A.F.C.M.R. 1981) (obstruction of justice may be charged under either Article 134 (clause 1 & 2), *MCM*, Pt. IV, ¶ 96 or Article 134 (clause 3) assimilating 18 U.S.C. §1503 or 1505). *See also MCM*, Pt. IV ¶ 60c(5)(a) stating:

The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under

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good order and discipline or service discrediting conduct, also under Article 134, UCMJ. If the offense of rape is redefined to be consistent with most civilian sexual abuse laws, subcommittee members from the sea services suggested that other crimes currently assimilated from Title 18 United States Code by Article 134 should also be written into the UCMJ, such as laws prohibiting possession and distribution of child pornography and the like.²⁶¹

Rape and sexual abuse have devastating impact on victims. As Justice White wrote in *Coker v. Georgia*, 433 U.S. 584, 597 (1977), “[s]hort of homicide, it is the “ultimate violation of self.” Rape is reprehensible conduct. Those convicted of committing such conduct deserve to be called what they are – a rapist. Terms such as “sexual abuse” or even “aggravated sexual abuse” do not convey to the public at large the seriousness of what has occurred. For example, a person convicted of violating 18 U.S.C. § 2242 (2004), by engaging in a sexual act with another person who is “physically incapable of declining participation” has a conviction for “sexual abuse” whereas the military offense would be “rape,” in violation of Article 120, UCMJ. Arguably, the current, more derogatory label of “rape” for this conduct is more appropriate.

Military appellate courts have a well-developed, sophisticated jurisprudence concerning Articles 120 and 125, UCMJ. This jurisprudence is based on review by appellate courts of thousands of rape and forcible sodomy cases over the previous fifty years. As in any common law system of criminal justice, judicial interpretation

Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

²⁶¹ 18 U.S.C. § 2242 (2004) provides:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

See United States v. Tynes, 58 M.J. 704 (Army Ct. Crim. App. 2003), *affirmed in part*, ___ M.J. ___, 2004 CAAF LEXIS 885 (C.A.A.F. Sept. 9, 2004) (affirming conviction of 18 U.S.C. § 2242 (2004) under Article 134, UCMJ).

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of the law provides an indispensable explanation of the Code and its application to specific factual situations.

For example, to prove a violation of Article 120, rape, a military prosecutor must prove beyond a reasonable doubt that the accused committed an act of sexual intercourse and it was done by force and without consent. Recently, the United States Court of Appeals for the Armed Forces has reaffirmed the proposition that no actual force is required to prove rape, rather “constructive force” as determined by the totality of the circumstances is sufficient to prove the element.²⁶²

Appendix 23, Analysis of the Punitive Articles, in the *MCM*, periodically updates and explains Articles such as 120 and 125. In lieu of changing Articles 120 and 125, Appendix 23 could be expanded to reflect recent military court decisions. This would better inform the field of changes in the law of rape and forcible sodomy. It should be noted that these provisions do not however “constitute the official views of the Department of Defense . . . or any other authority of the Government of the United States,” and failure to comply with supplementary materials such as Appendix 23, does not constitute error.²⁶³

Despite some critics’ claim that the military’s sexual offenses are outdated, Article 120, in particular, “has been driven by judicial interpretation which reflects flexibility and a greater awareness broadening in the interpretation of the concepts of ‘force’ and ‘consent.’”²⁶⁴ As such, the law has been continuously updated by judicial decisions, and revision of the underlying statute is unnecessary.

The military crime of rape should continue to include as an element that the prosecutor must prove the victim’s lack of consent. Lack of consent is an implied

²⁶² See *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). The Court of Military Appeals held in 1989 that “military relationships . . . create[] a unique situation of dominance and control where explicit threats and display of force by the military superior [are] not necessary” for rape. *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) (affirming drill sergeant’s conviction for rape of youthful bride of recent recruit under direct supervision of accused where accused threatened to imprison victim’s husband and “engaged in bizarre conduct” that indicated his “power and control”); see *Simpson*, 58 M.J. at 377 (listing seven factors “demonstrating the relationship between the offenses at issue and Appellant’s superior rank and position”).

²⁶³ See *MCM*, Pt. I, ¶ 4 Discussion.

²⁶⁴ Timothy W. Murphy, A MATTER OF FORCE: THE REDEFINITION OF RAPE, 39 A.F.L. Rev. 19, 26 (1996).

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element in other military offenses. *See, e.g.*, Articles 121 (larceny) and 128, (assault). Lack of consent remains a critical issue in prosecutions under 18 U.S.C. § 2241 (2004) (aggravated sexual abuse).

B. OPTION 2: UCMJ-NO CHANGE OR DELETE “LACK OF CONSENT”; MODIFY MCM

If the words, “and without consent” were eliminated from Article 120 as it has been from most state statutes and from Title 18 Chapter 109A—Sexual Abuse, it is possible that appellate courts would still require this element as is required for indecent assault even though consent is not in the *MCM*.²⁶⁵ If Congress desires to shift the burden from the victim to the accused to raise the issue of consent before the prosecution has to prove lack of consent, this requirement should be added to the statute.²⁶⁶ But once evidence is introduced, either direct or circumstantial, of the affirmative defense of consent or mistake of fact as to consent the government must still disprove these affirmative defenses beyond a reasonable doubt.

Elimination of lack of consent as an element will not change what evidence is admissible at trial. Military victims of sex crimes are currently protected by Mil. R. Evid. 412 (also known as rape shield), a rule of evidence designed to protect the privacy of victims of nonconsensual sexual offenses. Military Rule of Evidence 412 is similar²⁶⁷ to Fed. R. Evid. 412, which is used to protect victims in U.S. District Courts.

²⁶⁵ Compare *MCM* elements of indecent assault, not listing lack of consent as an element. *see MCM*, Pt. IV, ¶ 63 at page 381 *with* standard judicial instruction for indecent assault at page 459 listing lack of consent as an element.

²⁶⁶ *See e.g.*, Option 5, which states:

“(t) **Consent and mistake of fact as to consent.** Lack of consent is not an element of any offense under section 920, except for subsection 920(o). Consent and mistake of fact as to consent are not affirmative defenses in a prosecution under any subsection, except for subsection 920(c)(1), and subsection 920(h) if the circumstances of the sexual contact would violate subsection 920(c)(1).”

Option 5’s requirement for consent as an affirmative defense appears at page 297. Option 5 defines consent at subsection 920(u)(21) at page 300, mistake of fact as to consent subsection 920(u)(22), at page 300, and affirmative defense at subsection 920(u)(23) at page 300.

²⁶⁷ Option 5 recommends that Mil. R. Evid. 412 be amended to more closely mirror Fed. R. Evid. 412, which instead of being limited to nonconsensual sexual offenses made it applicable to protect victims of all sexual offenses, and eliminates a confusing and unnecessary balancing test. *See* Option 5 at page 324.

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Ultimately, it is impossible to completely eliminate the focus on the victim's consent. "[A]lthough force and lack of consent are separate elements, our case law recognizes that there may be circumstances in which the two elements are so closely intertwined that both elements may be proved by the same evidence." *Simpson*, 58 M.J. at 277.

The benefits from revision of Articles 120 and 125 in Options 2 to 6 should be weighed against the resulting need for changes that will have to be made throughout the *MCM*²⁶⁸ and other regulations and orders to conform them to the new law and terminology. The new Article 120 will create a requirement to retrain not only the practitioners of military criminal law, but also all non-lawyer legal officers, investigators and others members of the armed forces who will be affected by these changes.

1. Explaining force and lack of consent

Option 2 proposes a revised *MCM* explanation of force and lack of consent in regard to rape and a lesser degree with respect to forcible sodomy and indecent assault. The explanation in rape, for example, is as follows:

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. In essence, the crime of rape occurs when the force applied to the victim overcomes the victim's will, thus the force element captures the lack of consent requirement for this 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, need not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, where the victim is unable to resist because of the lack of mental or physical faculties, or when, depending on the particular acts of the case including any senior/subordinate relationship between the accused and victim, the victim believes that they cannot resist. In cases where no actual force is applied to the victim, the doctrine of constructive force (or the force involved in penetration) would be the force necessary to substantiate the offense of rape.

²⁶⁸ The *MCM* changes for Option 5 start at page 303.

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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 based upon the particular facts and circumstances. 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.²⁶⁹

2. Types of sexual offenses

Option 2 recognizes multiple variations of sexual offenses under Articles 120, 125 and 134, based on differences in the level of force or coercion applied to overcome the victim's will or the age of the victim, which are different from the force factors in 18 U.S.C. §§ 2241-2244, 2246. These circumstances are not expressly contained in the underlying UCMJ articles for same UCMJ articles, nor do they expressly conflict with the underlying articles. Option 2 provides for nine types of rape. Option 2's different types of rape are described as follows:

- (a) Caused another person to engage in the act of sexual intercourse by threatening or placing that other person in fear that any person will be subjected to some bodily injury²⁷⁰ (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping).
- (b) Engaged in sexual intercourse with another person if that other person is—
 - (A) Incapable of appraising the nature of the conduct; or
 - (B) Physically incapable of declining participation in, or communicating unwillingness to engage in that sexual intercourse.
- (c) Engaged in non-consensual sexual intercourse with another person who is known to be—
 - (A) In official detention or confinement; and
 - (B) Under the custodial, supervisory, or disciplinary authority of the person so engaging.
- (d) Caused another person subject to the accused's authority to engage in the act of sexual intercourse by—

²⁶⁹ See *infra* Option 2 at page 210.

²⁷⁰ This limitation removes a threat against pecuniary interest, ratings, graduation, etc., as sufficient force to constitute a serious sexual offense.

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- (A) The accused's use of an actual threat; or
- (B) The accused's use of an implied threat.

(e) Caused another person to engage in the act of sexual intercourse by using force²⁷¹ against that other person.²⁷²

²⁷¹ Force as defined addresses the situation where the victim is able to manifest lack of consent but the subject uses physical power to cause the victim to engage in sexual intercourse.

²⁷² "Sexual abuse" under 18 U.S.C. § 2242 (2004) requires a lesser degree of threat or fear than "aggravated sexual abuse" under 18 U.S.C. § 2241, and includes a lesser maximum confinement of twenty years. The requisite fear in 18 U.S.C. § 2242 (2004) is a fear of harm to self or others, excluding fear of death, serious bodily injury or kidnapping. *United States v. Gavin*, 959 F.2d 788, 791 (9th Cir. 1992). 18 U.S.C. § 2242 (2004) recognizes that a broad range of definitional possibilities exist for both "fear" and "harm." *Id.* However, there are some harms, such as embarrassment that will not suffice. *Id.*

Congress intended to prohibit express or implied threats that would cause another person to engage in a sexual act by enacting 18 U.S.C. § 2242 (2004). *See United States v. Cherry*, 938 F.2d 748, 754 (7th Cir. 1991) (citing the Legislative History for H.R. Rep. No. 594, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6196). Implicit threats of harm arise in the adult parent and child relationship. When an adult attempts to sexually abuse a child, "there is always a substantial risk that physical force will be used to ensure the child's compliance." *United States v. Castillo*, 140 F.3d 874, 885 (10th Cir. 1998). A rational inference, from the nature of the circumstances, is that a parent who attempts or does engage in a sexual act with his child places them in fear of bodily harm. *Id.* In *Cherry*, a child-victim who was afraid of an adult-accused was found to be in fear of some bodily harm because she did not know what he would do to her and was frightened. 938 F.2d at 755.

The Eighth Circuit found sufficient evidence of fear where an accused's assumed the role as the victim's father and spiritual teacher. His control over the victim's activities inside and outside of the house, as well as his telling the victim that the sexual abuse was ordained by the spirits and that harm would come to her or her loved ones if she did not comply met the requirement for aggravated sexual abuse. *United States v. Johns*, 15 F.3d 740, 742-43 (8th Cir. 1994).

Fear can also be inferred from the disparity in power between the accused and victim in other circumstances where an accused controls a victim's everyday life. *Lucas* 1002-03. In *Lucas*, the accused had a high level of control over the victim's life since he oversaw the victim's jail, controlled the inmates' ability to move inside the jail and receive visits from the outside, determined the type of work assigned to inmates, and had the power to punish inmates. *Lucas* at 1003. Therefore, the Court

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(f) Caused another person to engage in the act of sexual intercourse by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.²⁷³

(g) Rendered another person unconscious and thereby engaged in sexual intercourse with that other person.

(h) The act of sexual intercourse was with a person who had not attained the age of twelve years regardless of whether the person knew that the other person engaging in the sexual intercourse had not attained the age of twelve years.

(i) Administered to another person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance and which substantially impaired the ability of that other person to appraise or control conduct and thereby engaged in sexual intercourse with that other person.

found that the accused's control over the victim was sufficient to imply fear as a result of the disparity in power between them. *Id.* The *Denjen* court additionally found implied fear when a lieutenant of a detention center told an inmate she would receive sanctions, such as time in disciplinary segregation, if she did not comply with his sexual advances. *United States v. Denjen*, 258 F. Supp. 2d 194, 195 (E.D.N.Y. 2003).

Fear may be inferred from the circumstances. The government is not required to prove that the victim of a sexual offense was verbally threatened or coerced. Proof of fear may be based upon the disparity in power between the victim and the accused and the accused's control over the victim and the victim's surroundings.

²⁷³ The force requirement of 18 U.S.C. § 2241(a)(1) is satisfied when a sexual contact results from the restraint upon the victim and the victim could not escape the sexual contact. *See United States v. Lauck*, 905 F.2d 15, 18 (2d Cir. 1990). The requisite "force does not have to be part of the sexual contact itself, but must be used only in order to make the contact." *Id.* The Second Circuit found that the requisite force was met since the accused restrained the victim in order to make sexual contact with her. *Id.* The court noted that the statute does not require "significantly violent action or threats," therefore, the accused's argument that "he did not use a weapon, threaten or harm [the victim] or injure or inflict pain on her" did not require reversal of his conviction because Congress' intent is to provide greater protection to the victim by reducing the need to demonstrate the use of excessive force. *Id.*

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Option 2 uses a *MCM* amendment to define primary three types of sodomy: (1) aggravated forcible sodomy, (2) forcible sodomy and (3) sodomy. There are five types of aggravated forcible sodomy, five types of forcible sodomy, and one type of sodomy.²⁷⁴

Option 2 employs a *MCM* amendment to define two types of indecent assault: (1) aggravated indecent assault, and (2) indecent assault. There are five types of aggravated indecent assault and five types of indecent assault.²⁷⁵

Changes to the definitions of sexual offenses as proposed by Options 2-6 will make statistical comparisons with previous years more complicated. For example, under current military law statistics for forcible intercourse (currently rape) and forcible sodomy are separate categories. If 18 U.S.C. §§ 2241-2244, 2246 were adopted, a sexual act will combine both intercourse and sodomy, and aggravated sexual abuse and sexual abuse would separate rape and forcible sodomy into a variety of statistical categories.²⁷⁶

Changes in terminology, elements, and proof may cause errors to occur during the adjustment phase. Although we have been unable to find any such problem in the appellate cases under 18 U.S.C. §§ 2241-2244, 2246, when the U.S. District

²⁷⁴ See *infra* Option 2 for sodomy at page 215, forcible sodomy at page 215, and aggravated forcible sodomy at page 215.

²⁷⁵ See *infra* Option 2 for indecent assault at page 218 and aggravated indecent assault at page 217.

²⁷⁶ The Army, for example, is aggressively pursuing development of its web-based eJustice Case Management System. With eJustice fully implemented, JAG offices worldwide, in garrison and deployed, will have a standardized means to manage courts-martial cases, nonjudicial punishments, administrative separations, reprimands, and criminal investigations. The system will be able to readily report data on all offenses, including sexual offenses, prosecuted at various levels of courts-martial or handled via nonjudicial punishment. It will also permit: (1) improved analysis of the circumstances of offenses, victims and defendants.; (2) tracking of cases from the start of the investigation, through final disposition, including instant case status information; (3) electronic filing of records of trial and appellate materials; (4) electronic filing of trial briefs, motions, and orders, as well as JAG Corps, command level, and public access to court-room trial schedules. (5) disposition and status reports based on type or location of offense; and (6) electronic distribution of disposition information to law enforcement and Finance—so that Finance can immediately implement forfeitures adjudged at Article 15 procedures and at courts-martial. Initial test deployment of the eJustice Case Management System is slated for calendar year 2005.

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Courts transitioned to the current sexual offense scheme in 1986, hypothetically, military appellate courts might reverse more cases, which inevitably will result in some miscarriages of justice and a requirement for victim's to testify in retrials. Of course, any appellate decisions should simply reduce the more aggravated sexual offense to a lesser offense that is established by the evidence at trial.²⁷⁷

Option 2 changes the *MCM* without changing Article 120 or 125, UCMJ. Option 2 does not add elements, offenses and definitions to make the sexual offenses clearer, more precise, nor does it divide the offense of rape into degrees of sexual abuse. Instead, Option 2 adds sentencing factors which if proven aggravates a base rape or sodomy offense from a maximum of ten years of confinement to twenty years of confinement, confinement for life or death. One argument for Option 2 is that because Option 2 varies the maximum sentence based on aggravating factors, rather than the offense itself, any error will only affect the sentence, and not the court's findings. At worst, a sentence rehearing will be required, which will not necessarily require the victim to testify.

Unlike Options 3-6, Option 2 does not change the current Article 120 requirement that rape be by force and without consent. However, Option 2 includes a variety of aggravating factors that do, in fact, change the elements of rape. For example, section c(3)(a) provides, "[The accused] caused another person to engage in the act of sexual intercourse by threatening or placing that other person in fear that any person will be subjected to some bodily injury (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)." Option 2 would significantly change how force and lack of consent are applied. Currently under military law, constructive force, a doctrine created by the appellate courts, is used to reduce the *MCM*'s requirement of a threat of *great* bodily harm to a threat of bodily harm. Constructive force has only been ratified by appellate courts in situations involving a direct duty relationship which has a strong coercive atmosphere, such as a trainee in basic training being coerced by a drill sergeant's threats of bodily harm unless she engages in sexual intercourse and in recognition of the coercive atmosphere in the home between children, minors and adults. This provision would expand the constructive force reduction of a threat to any situation or relationship.

Section c(3)(d) has an aggravating factor as follows, "[The accused] caused another person subject to the accused's authority to engage in the act of sexual intercourse by—(B) The accused's use of an implied threat." This rule is another expansion of the current military constructive force doctrine.

²⁷⁷ Article 59(b), UCMJ, states, "Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the findings as includes a lesser included offense."

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Two hypothetical examples illustrates the difficulty with Option 2's approach.

(1) Under section c(3)(a), a soldier, S, could be convicted of rape under the following facts. S has a sexual relationship with W, who is also dating another man, C. W believes that C is jealous and that C will slap W (some bodily harm) if C discovers that W is sexually involved with S. S threatens to tell C about his sexual relationship with W, causing W to continue to continue to engage in sexual intercourse with S.

(2) Under section c(3)(d), an Army specialist (E4) could be convicted of rape under the following facts. The specialist sells a car to a Army private (E2), who is not assigned to the specialist's unit. The private promised to and did pay the specialist an initial payment of \$500. The specialist promised to, but did not make a subsequent and final payment, 60 days later of \$1000, violating their agreement. The specialist asks the private to engage in sexual intercourse, but does not express any threat to inform the private's commander of the failure to pay a just debt.²⁷⁸ The private perceives an implied threat which caused the private to engage in sexual intercourse with the specialist.

Case law under UCMJ art. 120 currently requires threats of a more significant magnitude than in (1), and would require a more coercive duty relationship to invoke the constructive force doctrine than in (2).

The elements of force and without consent can not be negated by such an *MCM* change. Based on the next section, Option 2's proposal is problematic.

C. THE PRESIDENT LACKS AUTHORITY TO SUBSTANTIVELY CHANGE ARTICLES 120 AND 125, UCMJ BY EXECUTIVE ORDER, BUT MAY LAWFULLY CREATE PUNISHMENT FACTORS.²⁷⁹

The Supreme Court has repeatedly emphasized that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. As we recently reiterated, judicial deference . . . is at its

²⁷⁸ Dishonorably failing to pay a debt is a crime under Article 134, UCMJ, with a maximum punishment of a bad-conduct discharge, forfeiture of all pay and allowances and confinement for six months. *See MCM*, Pt. IV, ¶ 71.

²⁷⁹ This section borrows heavily from "JUDICIAL REVIEW OF THE *MANUAL FOR COURTS-MARTIAL*," 160 MIL. L. REV. 96, 129-130 (June 1999) by Professor Gregory E. Maggs.

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apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”²⁸⁰

The President has substantial authority to address the needs of discipline under his authority as Commander-in-Chief,²⁸¹ and Congress has delegated additional authority. Article 36 authorizes the President to create procedural and evidentiary rules. Articles 18 and 56 authorize the President to set limits on the punishment for violation of the punitive articles of the UCMJ. The President, DoD Secretary, and Service Secretaries have authority to promulgate punitive regulations under Article 92. The President has authority to designate offenses that are prejudicial to good order and discipline or service discrediting conduct under Article 134. Thus, if Congress repealed Articles 120 and 125, the President could prohibit these offenses under Article 134, UCMJ, set maximum punishments, to include the death penalty, and so forth. The President could define terms, and elements as he saw fit. The appellate courts would and have given substantial deference to prosecutions under Article 134, UCMJ.²⁸²

The UCMJ, however, contains no provision permitting the President to modify crimes and defenses that are already established by Congress. The Court of Appeals for the Armed Forces and its predecessor, the Court of Military Appeals, have on many occasions struck down *MCM* provisions that were believed to be in conflict with the UCMJ.²⁸³

²⁸⁰ *Solorio*, 483 U.S. 447 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) and *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)) (internal quotation marks omitted).

²⁸¹ See *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (upholding inherent power of President under Article II of the Constitution to provide commanding officers the authority to issue search warrants).

²⁸² See, e.g., *United States v. Negron*, 60 M.J. 136, 142 (C.A.A.F. 2004) (citing importance of President’s choice of definitions in *MCM*, Pt. IV, ¶ 89c and 90c).

²⁸³ See e.g., *United States v. Johnpier*, 12 U.S.C.M.A. 90, 94, 30 C.M.R. 90, 94 (1961) (invalidating ¶ 55 n.7 in 1951 *MCM* which permitted suspending trial to permit obtaining the views of the convening authority); *United States v. Curtin*, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1957) (invalidating ¶ 171b in the 1951 *MCM* which permitted conviction upon a finding of “constructive” knowledge, as contrary to Article 92, UCMJ); *United States v. Cothorn*, 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957) (invalidating ¶ 164 n. 7 in the 1951 *MCM* which under certain facts permitted an inference of an intent to remain away permanently); *United States v. Drain*, 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954) (*MCM* provision conflicted with Article 27, UCMJ); *United States v. Littrice*, 3 U.S.C.M.A. 487, 454, 13 C.M.R. 43, 50 (1958) (limiting use of ¶ 38, n.7 in 1951 *MCM*, which denounces theft as a crime of moral turpitude); *United States v. Grier*, 3 U.S.C.M.A. 576, 578, 13 C.M.R. 132, 134 (1953) (*MCM* provision conflicted with Article 31, UCMJ); *United States v. Rosato*,

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Professor Maggs has indicated:

“[T]he President does not have the power to redefine the elements of punitive articles and thus change substantive criminal law.²⁸⁴ For example, in *United States v. Johnson*, the accused was charged with conspiracy in violation of Article 81.²⁸⁵ In reviewing the case, the Navy-Marine Corps Court of Military Review decided that it did not have to follow Part IV, paragraph 5c(1), which stated a rule for conspirators who join on-going conspiracies.²⁸⁶ The court explained that “whether an accused may be held liable for the over act alleged is a substantive issue. Therefore, we are not bound to follow the statement set forth in paragraph 5(c). . . .”²⁸⁷

3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953) (*MCM* provision conflicted with Article 31, UCMJ); *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953) (*MCM* provision conflicted with Article 55, UCMJ).

²⁸⁴ See *United States v. Omick*, 30 M.J. 1122 (N.M.C.M.R. 1989) (ignoring the definition of “distribute” in *MCM*, *supra* note 7, ¶37c(3), and stating that the “meaning and effect of this additional phrase need not be determined because in areas of substantive criminal law, the President has no authority to prescribe binding rules”); *United States v. Everett*, 41 M.J. 847, 852 (A.F.C.M.R. 1994) (stating that the President does not have authority to establish substantive rules of criminal law, but may establish a sentencing hierarchy); *United States v. Sullivan*, 36 M.J. 574, 577 & n.3 (A.C.M.R. 1992), *overruled by United States v. Turner*, 42 M.J. 689 (Army Ct. Crim. App. 1995) (invalidating the last sentence of *MCM*, *supra* note, Pt. IV, ¶54c(4)(a)(ii), which states that a dangerous weapon does not include an unloaded pistol on grounds that President’s authority is limited to matters of procedure and evidence and “does not include the power to exclude from the definition of ‘dangerous weapon’ those unloaded pistols used as firearms”). See also *United States v. Jones*, 19 C.M.R. 961, 968 n.12 (A.C.M.R. 1955) (expressing doubt that the President as commander in chief has authority to prescribe “substantive rules”); *United States v. Perry*, 22 M.J. 669, 670 n.2 (A.C.M.R. 1986) (expressing doubt that the President as commander in chief has authority to prescribe “substantive rules” in connection with *MCM* 1969, *supra* note 7, ¶199a’s discussion of the elements of the crime of rape). Quotation as well as footnotes, with minor modifications are from Maggs, 160 MIL. L. REV. at 129-30.

²⁸⁵ 25 M.J. 878, 884 (N.M.C.M.R. 1988).

²⁸⁶ See *id.*

²⁸⁷ See *id.*

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The Constitution grants Congress the power to regulate the land and naval forces. Congress has exercised this power by enacting Articles 120 and 125, UCMJ.

Arguably, Articles 120 and 125, as currently expressed are vague or ambiguous and subject to Presidential interpretation. Thus, it is appropriate for the President to provide the elements and explanations for these offenses, see MCM 2002, ¶ 45, at page 26, *infra*. In 1990, for example, the Court of Military Appeals while discussing force and lack of consent in *MCM*, ¶ 45c(1)(b), referred to the *MCM*'s explanation as "mere commentary."²⁸⁸ In a 2003 case, *United States v. Simpson*,²⁸⁹ the Court of Appeal for the Armed Forces, addressed MCM, ¶ 45c(b), which states, "Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of **death or great bodily harm. . .**" (emphasis added). The Simpson Court determined that if constructive force is present, such as involving the drill sergeant-trainee relationship, the threats need only create "a reasonable belief that the victim would suffer physical injury," and not death or great bodily harm.²⁹⁰

More recently, several MCM attempts to make changes to Congressionally enumerated articles have failed. In *United States v. Mance*, the Court of Military Appeals determined that *MCM* provision ¶¶ 37(c)(2) and (5) interpreting wrongfulness under Article 112a, UCMJ, as an affirmative defense rather than an element of the offense was not binding. The Court of Military Appeals stated, "Of course, while the views of . . . the President in promulgating [the Manual] are important, they are not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses—at least, those substantive offenses specifically delineated by Congress in Articles 77 through 132 of the Code."²⁹¹

²⁸⁸ See *United States v. Watson*, 31 M.J. 49, 52 (C.M.A. 1990).

²⁸⁹ *United States v. Simpson*, 58 M.J. 368, 377-379 (C.A.A.F. 2003).

²⁹⁰ *Id.* at 378-79.

²⁹¹ *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988) (citing *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988), see also *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262, 22 C.M.R. 51, 52 (1956); *United States v. Rushlow*, 2 U.S.C.M.A. 641, 644, 10 C.M.R. 139, 142 (1953) (both refusing to follow 1951 *MCM*'s provision pertaining to absence offenses). See also *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (stating, "[w]e have continually reiterated that the Uniform Code of Military Justice controls when an executive order conflicts with part of that Code," then holding that the effective date of Executive Order 13086, was not binding, even though it was more beneficial to the accused than the effective date of the 1996 amendment to Article 95, UCMJ); *United States v. Gonzalez*, 49 M.J. 469, 474 (C.A.A.F. 1995).

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In *United States v. Czeschin*,²⁹² the court determined that *MCM*, ¶ 31c(6)(a), which pertained to prosecutions for making false official statements, was merely a nonbinding description of caselaw then in effect, and not enforceable by the courts to benefit the accused. The *Czeschin* Court explained that Presidential interpretations of punitive articles in the *MCM* would be enforceable by the appellate judiciary under limited circumstances stating:

[T]he President has express authority under Article 36(a), UCMJ, 10 USC § 836(a), to promulgate the rules of procedure and evidence set forth in Parts II and III of the *Manual for Courts-Martial*. We also observed that, by contrast, the President's interpretations of substantive offenses in Part IV of the Manual -- the Part at issue in the present case -- are not binding on the judiciary, which has the responsibility to interpret substantive offenses under the Code. *Id.* at 486, citing *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). We emphasized, however, the difference between Presidential interpretation of substantive offenses and Presidential issuance of rules in Part IV protecting the rights of servicemembers, making it clear that the President has the authority to grant greater rights under Part IV than might be provided by statute. As a result, when a Presidential rule is unambiguous in terms of granting greater rights than provided by a higher source, the rule governs, unless it clearly contradicts the express language of the UCMJ.²⁹³

The Court of Appeals for the Armed Forces recently decided two cases involving homosexual, consensual sodomy.²⁹⁴ The court read into the elements a new factor, fraternization, which caused the consensual sodomy to fall “outside any protected liberty interest” recognized in the United States Supreme Court case of *Lawrence v. Texas*, 539 U.S. 558 (2003).²⁹⁵ The court did not even mention the *MCM*'s list of elements for sodomy in either decision.

D. CONCLUSION

Option 2 does not change the UCMJ. The definitions of force and lack of consent are a restatement of current military case law. As such, Option 2 does

²⁹² 56 M.J. 346, 348 (C.A.A.F. 2002).

²⁹³ *Czeschin*, 56 M.J. at 348 (citing *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998)).

²⁹⁴ *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

²⁹⁵ *Stirewalt*, 60 M.J. at 304.

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improve the military justice system by using the *MCM* as a vehicle for informing the field of current law.²⁹⁶ As for the definitions of types of rape, trial judges would be unlikely to use them to instruct court members because of they adversely affect the accused's rights and are not statute based. Option 2's clarification of the force element reduces the accused's possibility of acquittal through an assertion that conduct, such as a threat of bodily injury or an implied threat is "force."

Option 2 changes various punishment levels, and as such, change the scope of rape under Article 120, UCMJ, sodomy under Article 125, UCMJ; and indecent assault under Article 134, UCMJ; but, it does not address the following offenses, which are addressed by Option 5:

- (1) indecent acts or liberties with a child (Article 134, UCMJ);
- (2) indecent acts with another (Article 134, UCMJ);
- (3) indecent exposure (Article 134, UCMJ); and,
- (4) forcible pandering (Article 134, UCMJ).

VII. DISCUSSION OF OPTION 3 (ADOPT H.R. 4709) AND OPTION 4 (ADOPT H.R. 4709 WITH MODIFICATIONS ESSENTIAL TO DoD)

A. INTRODUCTION

H.R. 4709, introduced on 24 June 2004 includes many changes to Articles 120 and 125, UCMJ that make these offenses more specific in the conduct that is prohibited. A copy of H.R. 4709 (Draft) is at Appendix B.²⁹⁷ H.R. 4709 modifies 18 U.S.C. §§ 2241-2241, 2246 in several important ways that will make it more effective in the enforcement of good order and discipline in the military. The Department of Defense, *Care for Victims of Sexual Assault Task Force* Report, dated April 2004, chaired by Ms. Embrey was unable to compare crime statistics between the military and civilian jurisdictions.²⁹⁸ It noted that the current broad, vague

²⁹⁶ See *infra* Option 2 at pages 209 to 220.

²⁹⁷ See *infra* at Option 3, App. B, H.R. 4709, page 221.

²⁹⁸ The Department of Defense, *Care for Victims of Sexual Assault Task Force* Report, dated April 2004, chaired by Ms. Embrey report states at page viii:

In response to this Task Force, the Services were asked to provide the total number of alleged sexual assaults involving service member victims reported to criminal investigations for 2002 and 2003. Sexual assault included rape, forcible sodomy, indecent assault, and any attempts of these offenses. The Services reported a total of 1007 victims in 2002 and 1113 in 2003. This translates to prevalence rates of 69.1 and 70 alleged sexual assaults per 100,000 active duty members for 2002 and 2003, respectively. Again, because of differences in

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UCMJ and *MCM* definitions of rape, indecent assault and indecent acts may have contributed to the confusion and lack of transparency of the military justice system.

In regard to Option 2, which is to amend the *MCM* to create different degrees of rape and sodomy, trial judges would be unlikely to use the *MCM* to instruct court members because in some cases they adversely affect the accused's rights, and substantive changes to Articles 120 and 125 cannot be made by amending the *MCM*. Section VIC, at pages 66 to 70 explains that the appellate courts do not defer to the President with respect to *MCM* changes to Articles such as 120 and 125. Thus, *MCM* changes that affect elements and descriptions of offenses are ineffective. For example, Option 2 clarifies the force element of rape, but reduces the accused's possibility of acquittal through an assertion that conduct, such as a threat of bodily injury or an implied threat constitutes "force."

B. USE OF THE TERM "GRIEVOUS BODILY HARM"

H.R. 4709, 23 June 04, uses the traditional term under military law, "grievous bodily harm" instead of the term, "serious bodily harm." Grievous bodily harm requires a lesser, but still significant magnitude of injury, and is very familiar to military justice practitioners. The term, "grievous bodily harm" is substituted for "serious bodily harm" in 18 U.S.C. § 2241 (2004) to conform with military practice.

In contrast, the term, "serious bodily injury" is defined in 18 U.S.C. § 2246 (2004), and describes a more serious degree of injury. According to subsection 2246(4), "'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

Option 5 uses the term, "grievous bodily harm," in subsection 920(a)(2) at page 294, in lieu of serious bodily injury. "Grievous bodily harm" is defined in subsection 920(u)(3) at page 297. The term, "grievous bodily harm" is used in 10 U.S.C. § 928(b)(1), aggravated assault, and is defined in the *MCM*, Pt. IV, ¶ 54(c)(4)(iii) as, "serious bodily injury. It does not include minor injuries, such as a black eye or bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries."

C. INCLUSION AND DISCUSSION OF INTERIM MAXIMUM SENTENCES

H.R. 4709 (introduced 24 June 2004) states:

sampling and definition, comparisons with civilian crime reports are not possible and would be irresponsible.

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(e) INTERIM MAXIMUM PUNISHMENTS.—Until the President otherwise provides pursuant to section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), the punishment which a court-martial may direct for an offense under section 920 of such title (article 120 of the Uniform Code of Military Justice), as amended by this section, may not exceed the following limits:

(1) For aggravated sexual abuse or aggravated sexual abuse of a child, such punishment may not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.²⁹⁹

(2) For sexual abuse or sexual abuse of a minor, such punishment may not exceed dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty years.³⁰⁰

(3) For sexual abuse of a prisoner, such punishment may not exceed bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year.³⁰¹

Any change to Article 120 or 125 should include maximum punishments. Assuming Military Sexual Assault Crimes Revision Act of 2004, rescinds and replaces 10 U.S.C. Sections 920, and/or 925, their replacements should specify and include the new maximum punishments. Otherwise offenses which occur after the enactment of Military Sexual Assault Crimes Revision Act of 2004, but before the President signs an executive order under 10 U.S.C. § 856 providing for new punishments could result in offenses that cannot be prosecuted under either the old or new Section 920. We are mindful that typical, non-controversial changes to the

²⁹⁹ The maximum sentence for carnal knowledge with a minor under the age of 12 years is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for life in the current *MCM*. See *MCM*, Pt. IV, ¶ 45e(3) at page 371. The maximum sentence for rape of a minor includes death or confinement for life without eligibility for parole in the current *MCM*. See *MCM*, Pt. IV, ¶ 45e(1) at page 371.

³⁰⁰ This maximum sentence for carnal knowledge with a minor who has attained the age of 12 years is a dishonorable discharge, forfeitures of all pay and allowances, and confinement for twenty years in the current *MCM*. See *MCM*, Pt. IV, ¶ 45e(2) at page 371.

³⁰¹ This maximum sentence is the same as the maximum punishment for cruelty and maltreatment in the current *MCM*. See *MCM*, Pt. IV, ¶ 17e.

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MCM in recent years have taken on average about two years to process from DoD proposal to the President's signature.³⁰²

The division of sexual misconduct into four levels allows different maximum punishments based on the severity of the offense. Aggravated sexual abuse³⁰³ is defined as follows:

- (a) Any person subject to this chapter who knowingly—
 - (1) causes another person to engage in a sexual act by using force against that other person; or
 - (2) causes another person to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
 - (3) renders another person unconscious and thereby engages in a sexual act with that other person; or
 - (4) administers to another person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance and thereby—
 - (A) substantially impairs the ability of that other person to appraise or control conduct; and
 - (B) engages in a sexual act with that other person;
- is guilty of aggravated sexual abuse and shall be punished as a court-martial may direct.

Aggravated sexual abuse authorizes a maximum confinement of life imprisonment without the possibility of parole, the highest maximum punishment under H.R. 4709.³⁰⁴ H.R. 4709 eliminates the death penalty as a possible punishment for aggravated sexual abuse. In *United States v. Coker*,³⁰⁵ the Supreme Court ruled that the death penalty is not a constitutionally authorized punishment for rape of an adult woman because the death penalty violates the Eighth Amendment to the United States Constitution prohibition against cruel and unusual punishment. The decision in *Coker* effectively invalidated the death penalty authorization in Article 120 in the cases of rape involving adult victims in the absence of some particularly aggravating factor.³⁰⁶

³⁰² See *infra* pages 77 to 78 (discussing time necessary to amend *MCM*).

³⁰³ See *infra* aggravated sexual abuse at Option 3, App. B, H.R. 4709, page 222.

³⁰⁴ See *infra* maximum punishments at H.R. 4709, page 227.

³⁰⁵ 433 U.S. 584, 597 (1977).

³⁰⁶ *Id.*

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The Supreme Court has not ruled on the constitutionality of the death penalty as it applies to the rape of children. At least one state believes the death penalty is appropriate and constitutional for the rape of a child younger than twelve. In 1995, Louisiana amended its aggravated rape statute. LA. REV. STAT. ANN § 42.D allows the district attorney the discretion to seek the death penalty for cases involving the rape of a child under the age of twelve.³⁰⁷

Before Louisiana amended its aggravated rape statute, no state authorized the death penalty for rape.³⁰⁸ 18 U.S.C. § 2241 (2004) authorizes confinement for life; however, it does not authorize the death penalty for aggravated sexual abuse.³⁰⁹ Article 120, UCMJ, currently lists the death penalty as a potential punishment for rape. However, the last military execution for any offense took place over forty years ago.³¹⁰ Rule for Courts-Martial 1004 requires proof beyond reasonable doubt of aggravating factors before capital punishment can be imposed for rape.

Sexual abuse of a minor who has attained the age of 12 authorizes a maximum of twenty years confinement, recognizing the serious nature of the offense and that this offense is not as aggravated as sexual abuse of a younger child. A maximum punishment including twenty years confinement is currently authorized for carnal knowledge under Article 120, UCMJ.

A third level of sexual abuse authorizing a maximum punishment including ten years of confinement should be added in recognition of the serious nature of the offense, however, the offense is not as aggravated as those offenses authorizing twenty years of confinement.³¹¹

Sexual misconduct in the lowest degree applies to sexual abuse of prisoners, which includes confinement for one year.

³⁰⁷ LA. REV. STAT. ANN § 42.D (West 2004), *see infra* at page 599.

³⁰⁸ Yale Glazer, *Child Rapist Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 80, (1997).

³⁰⁹ 18 U.S.C. § 2241, *see infra* at page 394.

³¹⁰ The last military execution occurred on April 13, 1961. The military person executed was Army Private John Bennett for rape and attempted murder. Death Penalty Information Center, U.S. Military, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=32&did=988> (last visited Oct. 4, 2004). The death penalty ledger is available in the Library of the Army Clerk of Court.

³¹¹ *See infra* H.R. 4709, App. C, at page 229.

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The existing age limit for minor-victims in Article 120(b), UCMJ, for carnal knowledge for minors 12 to 15 years of age is preferable over the H.R. 4709's 4-year age difference limitation of section (e)(1). The 4-year difference age limitation has adverse consequences to relationships between military dependent minors and junior enlisted members, particularly at overseas locations with a large population of accompanied family members and/or teenagers in a Department of Defense Dependent System high school. For example, a military member aged 18 would no longer face potential prosecution under the UCMJ for engaging in consensual sexual intercourse with a military dependent 8th Grade student who is 14 years of age. Acts of this nature can present special concerns and problems within the unique environment of a military community. A similar circumstance in a civilian community hosting a military installation may also be problematic for the military. Eliminating such misconduct from the UCMJ might subject the military to criticism of abdicating both its responsibility to protect minors and to maintain good order and discipline for all its members.

The use of the term "child" for persons under the age of 12 years and the term "minor," for persons age 12 to 15 years is preferable for purposes of consistency with Section 551, National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), which set a separate statute of limitations under 10 U.S.C. § 843 for several UCMJ sexual offenses.

Abuse of a confinee is already prohibited by 10 U.S.C. § 893, Cruelty and maltreatment and as such H.R. 4709 need not include this provision. 10 U.S.C. § 893 prohibits sexual harassment, as well as other forms of maltreatment involving sexual activity where the victim is subject to the orders of the accused. The essence of maltreatment is abuse of authority. *See, e.g., United States v. United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002). Throughout the military services, sexual relationships where military authority can be easily abused is also prohibited by local regulations, which are authorized by 10 U.S.C. § 892. *See, e.g., United States v. Humpherys*, 57 M.J. 83, 93-95 (C.A.A.F. 2002).

D. AVOIDING PREEMPTION OF OTHER OFFENSES CURRENTLY PROSECUTED UNDER THE MCM

H.R. 4709 states:

(f) NO PREEMPTION.—The prosecution or punishment of an accused for an offense under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), as amended by this section, does not preclude the prosecution or punishment of that accused for any other offense.

Avoiding preemption, which bars prosecution of offenses currently enumerated under Article 134, the General Article in Part IV of the *MCM* (e.g.,

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adultery, consensual sodomy under conditions prejudicial to good order and discipline, fraternization, indecent language, indecent acts or liberties with another such as voyeurism, or secretly videotaping another during sexual activity, or indecent exposure) is desirable.³¹² While some nonconsensual sexual touchings are covered in H.R. 4709, it is important to avoid any gaps, which might otherwise result in a lack of adjudication for some traditional military, sexual offenses. The following preemption provision is recommended:

(f) NO PREEMPTION.—Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), does not preempt or preclude the prosecution or punishment of an accused for any other offense, including those the President has adopted in the *Manual for Courts-Martial* under Section 934 of title 10.

On the other hand, if Option 5 were enacted, preemption is desirable. For example, a service person should not be prosecuted under Article 125's sodomy provision or the *MCM*'s indecent assault provision (implementing Article 134), when a much more specific offense will be available under the new Article 120, UCMJ. Option 5 proposes elimination of those paragraphs in the *MCM* that overlap with the new Article 120 so that there will be no preemption issue.³¹³

E. EFFECTIVE DATE

H.R. 4709 states, “(d) EFFECTIVE DATE.—The amendments made by this section shall take effect 6 months after the date of the enactment of this Act and apply with respect to offenses committed after such effective date.”³¹⁴ This delay permits a train-up period for military justice practitioners and investigators. It is preferable to amend the *MCM*, including provision for elements of the new offenses, explanation of the new offenses, and sample specifications.

The *MCM* is widely used throughout the services by commanders, noncommissioned officers, judge advocates and others. Approximately every two years, more than 50,000 copies are published and distributed, far more than any other regulation. Premature rescission of the existing Articles 120 and 125 before implementation by executive order and publication in a new *MCM* may result in very

³¹² See *MCM*, Pt. IV, ¶ 60c(5)(a) (discussing preemption of Article 134 offenses by enumerated offenses), *infra* at page 378.

³¹³ See page 323, *infra*.

³¹⁴ See *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000) (holding that a statute is effective when the President signs it into law, unless the statute states otherwise and that the UCMJ controls in the event of a conflict with an executive order).

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confusion and uneven application in the field.³¹⁵ If the statute has sufficient definitions, and interim maximum punishments, an implementing Executive Order is less necessary.

F. AGES FOR OFFENSES INVOLVING CHILD-VICTIMS OF SEX CRIMES

Section 820(b) of H.R. 4709, is the same as 18 U.S.C. § 2241 (2004), aggravated sexual abuse. Section 820(b) states:

(b) Any person subject to this chapter who knowingly engages in a sexual act with another person who has not attained the age of twelve years is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct. In a prosecution under this subsection, it need not be proven that the accused knew that the other person engaging in the sexual act had not attained the age of twelve years.

Under current military law, carnal knowledge is prosecuted under Article 120(b)(2), UCMJ. Like 18 U.S.C. § 2241 (2004), Article 120(d)(1)(A), UCMJ, does not permit an affirmative defense of mistake of fact as to age of the child, provided the child is under 12 years of age.

H.R. 4709 states in Section 820(d):

(d)(1) Any person subject to this chapter who knowingly engages in a sexual act with another person who—

(A) has attained the age of twelve years but has not attained the age of sixteen years; and

(B) is not that person's spouse; is guilty of sexual abuse of a minor and shall be punished as a court-martial may direct.

(2) In a prosecution under this subsection, it need not be proven that the accused knew the age of the other person engaging in the sexual act.

(3) In a prosecution under this subsection, it is an affirmative defense that the accused reasonably believed that the other person had attained the age of sixteen years. The accused has the burden of proving a defense under this paragraph by a preponderance of the evidence.³¹⁶

³¹⁵ On December 3, 2004, the President signed the most recent *MCM* change, Executive Order 13365, 69 FR 71333, which is available at <http://www.whitehouse.gov/news/releases/2004/12/20041203-9.html>.

³¹⁶ See H.R. 4709, App. C at page 224 *infra*.

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This provision is the same as the existing provision for carnal knowledge under Article 120. Article 120(d)(1)(A), UCMJ, and H.R. 4709 both permit an affirmative defense of mistake of fact as to age of the minor, provided the minor is 12 to 15 years of age. The defense has the burden of proving the defense by a preponderance of evidence.

Adoption of four-year age differentials between minor-victims and accused set forth in 18 U.S.C. § 2241 (2004) is not desirable for DoD. 18 U.S.C. § 2241 (2004) has a proposed four-year age difference limitation, which would be a significant change from current law applicable within the military. Potential application of 18 U.S.C. § 2241 (2004), to relationships between military dependent children and junior enlisted members, would have adverse consequences to good order and discipline particularly at overseas locations with a large population of accompanied family members and/or teenagers in a Department of Defense Dependent System high school. A military member aged seventeen to nineteen under 18 U.S.C. § 2241 (2004), would not commit a sexual abuse offense if he or she engaged in a consensual sexual act with a military dependent high school student who is within four years of being the same age. For example, a military member aged 18 would no longer face potential prosecution under the UCMJ for engaging in consensual sexual intercourse with a military dependent 8th Grade student who is 14 years of age. Acts of this nature can present special concerns and problems within the unique environment of a military community. A similar circumstance in a civilian community hosting a military installation may also be problematic for the military. Eliminating such misconduct from the UCMJ might subject the military to criticism of abdicating both its responsibility to protect minors and to maintain good order and discipline for all its members.

G. PROHIBITING “SEXUAL CONTACTS” IN H.R. 4709

H.R. 4709(f) states:

- (f) In this section, the term ‘sexual act’ means—
- (1) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - (4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen

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years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.³¹⁷

H.R. 4709's definition of "sexual act" is taken verbatim from 18 U.S.C. § 2246 (2004). Although H.R. 4709 defines the term "sexual act" to include intentional touchings that are not through the clothing, it does not address intentional touchings of those same parts of the body that are for the same purpose but are through an article of clothing. For example, an accused forcibly touching the vagina or penis of a ten-year old child with their mouth, hand, or penis through clothing would not be prohibited by H.R. 4709. Similarly, a "sexual act" would not include an accused forcibly touching with their hands or penis a 16-year-old minor's breasts, inner thighs, penis or buttocks, with intent to abuse or gratify sexual desire.

Touching a minor with the accused's genitalia regardless of where on the minor's body it occurs should be prohibited. Abusive sexual contact is prohibited by 18 U.S.C. § 2244 (2004). "Sexual contact" is defined by 18 U.S.C. § 2246 (2004), as, "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." H.R. 4709 should incorporate 18 U.S.C. § 2244 (2004) and 18 U.S.C. § 2246 (2004). H.R. 4709 does not include abusive sexual contact as prohibited by 18 U.S.C. § 2244 (2004), which divides sexual touching, short of penetration into degrees in a manner similar to aggravated sexual abuse in 18 U.S.C. § 2241 (2004).³¹⁸ H.R. 4709 should prohibit touching of a minor with the accused's genitalia regardless of where on the body it occurs.

The most similar *MCM* offenses to 18 U.S.C. § 2244 (2004), abusive sexual contact, are indecent assault³¹⁹ and indecent acts or liberties with a child.³²⁰ These

³¹⁷ See H.R. 4709(f), *infra* at page 225.

³¹⁸ See *infra* 18 U.S.C. § 2241 at page 394 and 18 U.S.C. § 2244 (2004) at page 421.

³¹⁹ See *MCM*, Pt. IV, ¶ 63, *infra* at page 381. The elements of indecent assault are:

- (a) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
- (b) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

³²⁰ See *MCM*, Pt. IV, ¶ 87, *infra* at page 386. The elements for indecent acts or liberties with a child are:

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two *MCM* provisions, like the military rape statute, do not divide these offenses into degrees.

Indecent assault includes three additional elements not included in abusive sexual contact: (1) that the accused is not the spouse of the accused; (2) that the acts were done with the intent to gratify the lust or sexual desires of the accused and (3) that the acts were to the prejudice of good order and discipline or service discrediting. These offenses to the extent that they involve indecent touchings, should not be retained in the *MCM* implementation of Article 134 as there is no need for the prosecution to prove they are prejudicial to good order and discipline or service discrediting because they are inherently so. Furthermore there is no reason that a person should be permitted to indecently assault their spouse, when they are not permitted by military law to rape, rob, or commit an assault consummated by battery on their spouse.

(1) *Physical contact.*

- (a) That the accused committed a certain act upon or with the body of a certain person;
- (b) That the person was under 16 years of age and not the spouse of the accused;
- (c) That the act of the accused was indecent;
- (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
- (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *No Physical contact.*

- (a) That the accused committed a certain act;
- (b) That the act amounted to the taking of indecent liberties with a certain person;
- (c) That the accused committed the act in the presence of this person;
- (d) That this person was under 16 years of age and not the spouse of the accused;
- (e) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
- (f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

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Option 5 includes the same prohibitions as 18 U.S.C. § 2244 (2004). Option 5 specifically includes prohibiting those situations where the accused takes the hand of an sleeping child and places it on the sexual organs of the accused—a possible offense that is not explicitly precluded by 18 U.S.C. § 2244 (2004).³²¹

H. DELETION OF “KNOWINGLY” FOR EACH SECTION

The word, “knowingly,” is deleted as unnecessary from this and every other subsection. Under military practice, none of the other offenses in the Uniform Code of Military Justice, include the word, “knowingly.” A very few offenses explicitly include a knowledge requirement. *See e.g.*, 10 U.S.C. § 923a, making, drawing, or uttering check, draft, or order without sufficient funds. Knowledge is relevant in many offenses. For example, knowledge of superior rank and officer status in disrespect to commissioned officer offense; knowledge of order for failure to obey order; knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine); or knowledge of superior right of ownership in larceny. *See MCM*, Pt. IV., ¶¶ 13c(1)(2), 16c(2)(b), 37c(5), 46c(1)(c), *see also United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988). In Option 5, the definition of mistake of fact as to consent in subsection 920(u)(22) clarifies the important issue of when knowledge is relevant, and how it applies.

I. SUBSTANTIAL INCAPACITY OR IMPAIRMENT VERSUS ABSOLUTE STANDARD

18 U.S.C. § 2242 (2004) arguably sets an absolute standard for physical incapacity or impairment for victims who consume alcohol or drugs, whereas Options 4 and 5 require only substantial impairment.

J. PROTECTION OF FAMILY MEMBERS FROM SEXUAL ABUSE

Option 6 specifically protects family members from sexual abuse. One possible change would be to prohibit sexual acts and sexual contacts with family members. A suggested definition for family member is: “a parent, grandparent, or child, whether by whole blood, half-blood or adoption and includes a step-grandparent, step-parent or step-child. ‘Family member’ also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child for at least one year.” The discussion of the statutory protection of family members is *infra* from page 150 to page 156.

³²¹ Subsections 920(u)(1)(B) and 920(u)(2) include in their definitions of sexual act and sexual contact, respectively, a prohibition against, “intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of the accused of another person,” *see infra* at page 298 for subsections 920(u)(1)(B) and 920(u)(2).

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K. PROHIBITION AGAINST USE OF DANGEROUS WEAPONS IN SEXUAL ASSAULTS

Options 5 and 6 specifically protect victims from perpetrators using dangerous weapons to facilitate a sexual act. 18 U.S.C. §§ 2241-2244, 2246 and H.R. 4709 do not include a special prohibition against use of dangerous weapons because of other prohibitions in Title 18. A prosecutor in U.S. District Court, however, would likely also charge a violation of Title 18 U.S.C. § 924(c)(1)(A), which states, “any person who during and in relation to a crime of violence . . . uses³²² or carries a firearm, or who, in furtherance of such crime, possesses a firearm.” Section 924(c)(1) also details mandatory minimum confinement for such offenses. Use of a dangerous weapon also precludes probation under 18 U.S.C. § 924(c)(1)(D), and otherwise enhances the punishment under sentencing guidelines. Many states have such prohibitions, and its addition to a new Article 120, UCMJ is beneficial. The discussion of this proposed statutory prohibition is *infra* from page 118 to page 122.

For example, Option 5’s subsection 920(a) prohibits using force to cause anyone to engage in a sexual penetration.³²³ Subsection 920(u)(5) defines “force” as follows:

- (5) “force” means action to compel submission of another or to overcome or prevent another’s resistance by—
- (A) the use or display of a dangerous weapon;
 - (B) the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause another to believe it is a dangerous weapon; or
 - (C) physical violence, strength, power, or restraint applied to another, sufficient that the other person could not avoid or escape the sexual conduct.³²⁴

Option 5’s subsection 920(u)(4) then defines “dangerous weapons” as follows:

- (4) “dangerous weapon or object” under subsections 920(a)(1), 920(e) and 920(u)(5) means any firearm, whether operable, loaded or not, and

³²² See *United States v. Bousley*, 523 U.S. 614 (1998) (citing *Bailey v. United States*, 516 U.S. 137 (1995)) (interpreting § 924(c)(1) to require active employment of a firearm).

³²³ See subsection 920(a) at page 294 *infra*. For an explanation for subsection 920(a) see page 253 *infra*.

³²⁴ See subsection 920(u)(5) at page 298 *infra*. For an explanation for subsection 920(u)(5) see page 274 *infra*.

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whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.³²⁵

L. CONCLUSION

H.R. 4709 as a minimum should use the term “grievous bodily harm” in lieu of “serious bodily harm.” The term, “grievous bodily harm” should be defined. The preemption provision should be modified. Sexual abuse of a ward or prisoner should be modified as in Option 5 because it does not prohibit sexual abuse of detainees overseas. The four-year age difference in H.R. 4709(e)(1) is problematic for DoD and should be eliminated. The terms “child” and “minor” should be consistent with other statutes. Most importantly, 18 U.S.C. § 2244 (2004) and 18 U.S.C. § 2246 (2004) should be incorporated into H.R. 4709.

Option 4, which begins at page 229, contains some modifications to H.R. 4709 as discussed from page 71 to page 84 of this section. Option 5, which begins at page 294, contains several additional modifications, including definitions of force and consent. Option 5 prohibits use of dangerous weapons and causing anyone to engage in a sexual penetration by causing grievous bodily harm.³²⁶ The discussion of the statutory protection of family members is *infra* from page 150 to page 156. Option 5 also adds several sexual offenses from Article 134 that are widely understood to be *per se* criminal offenses.

VIII. COMPARISON OF OPTIONS 5 - 6

A. LIST OF OFFENSES UNDER OPTIONS 5 AND 6

In Option 5, the proposed UCMJ article 120 divides sexual misconduct into degrees based on the presence or absence of aggravating factors as described in 18 U.S.C. §§ 2241-2244, 2246, with minor modifications for consistency with other UCMJ

³²⁵ See subsection 920(u)(4) at page 297 *infra*. See page 273 *infra* for an explanation for subsection 920(u)(4).

³²⁶ See e.g., subsection 920(a) at page 294 *infra*, prohibiting use of force or causing grievous bodily harm to coerce a sexual penetration. For an explanation for subsection 920(a) see page 253 *infra*. See e.g., subsection 920(u)(21) at page 300 *infra*, defining “consent.” See page 280 *infra* for an explanation for the definition of consent.

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punitive articles. These differences and their rationale are described in detail. Options 5 and 6 classify the most egregious cases of sexual misconduct as rape. The criterion for classification at each level is based on the actual or potential harm to the victim, or the degree of depravity of the accused, or both. The levels of seriousness are generally listed in order with the most serious first.

Option 5 proposes that Congress prohibit:

1. Rape § 920(a) at page 294 is from 18 U.S.C. § 2241 (2004), rape combines aggravated sexual abuse by force or threat and aggravated sexual abuse by other means. For an explanation for differences between § 920(a) the title 18 offense *see* page 253.
2. Rape of a child § 920(b) at page 294 is from 18 U.S.C. § 2241 (2004), aggravated sexual abuse of a child. For an explanation for differences between the title 18 offense and § 920(b) *see* page 256.
3. Aggravated sexual assault § 920(c) at page 294 is from 18 U.S.C. § 18 U.S.C. § 2242 (2004), sexual abuse. For an explanation for differences between the title 18 offense and § 920(c) *see* page 256.
4. Aggravated sexual assault on a child § 920(d) at page 295 is from 18 U.S.C. § 2243 (2004), sexual abuse of a minor. For an explanation for differences between the title 18 offense and § 920(d) *see* page 257.
5. Aggravated sexual contact § 920(e) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact by force or threat and abusive sexual contact by other means. For an explanation for differences between the title 18 offense and § 920(e) *see* page 258.
6. Aggravated sexual abuse of a child § 920(f) is at page 295. 18 U.S.C. §§ 2241-2244 does not include aggravated sexual abuse of a child in this format. Subsection 920(f) protects children from lewd acts, which is defined by § 920(u)(10), at page 298. “Lewd act” includes the sexual act from 18 U.S.C. § 2246(2)(D), which is § 920(u)(10)(A). It also includes sexual conduct not specifically prohibited in 18 U.S.C. § 2246(2). The explanation for § 920(f) is at page 258 and for § 920(u)(10) is at page 277.
7. Aggravated sexual contact with a child at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact on a child. For an explanation for differences between the title 18 offense and § 920(g) *see* page 258.
8. Abusive sexual contact § 920(h) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact. For an explanation for differences between the title 18 offense and § 920(h) *see* page 259.
9. Abusive sexual contact with a child § 920(i) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact. For an explanation for differences between the title 18 offense and § 920(i) *see* page 259.
10. Sexual abuse of a detainee or a prisoner § 920(j) at page 295 is adapted from 18 U.S.C. § 2243 (2004), sexual abuse of a ward—however it is changed to include protection of overseas detainees from sexual abuse. For an explanation for differences between the title 18 offense *see* page 259.

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11. Indecent liberty with a child § 920(k) at page 296. For an explanation of this offense *see* page 260.
12. Sexual contact with a detainee or prisoner § 920(l) at page 296 is adapted from 18 U.S.C. § 2244 (2004), abusive sexual contact with a ward—however it is changed to include protection of overseas detainees from sexual abuse. For an explanation for differences between the title 18 offense *see* page 260.
13. Indecent act § 920(m) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 261.
14. Forcible pandering § 920(n) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 261.
15. Wrongful sexual contact § 920(o) at page 296 is derived from 18 U.S.C. § 2244 (2004). For an explanation for differences between the title 18 offense *see* page 261.
16. Indecent exposure § 920(p) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 262.

Indecent act or liberty with a child, indecent act with another, forcible pandering, indecent assault, and indecent exposure are currently punished under Article 134, UCMJ, known as the general article. Criminalizing these offenses under the new Article 120, UCMJ, obviates the current requirement for the government to have to prove that these offenses are prejudicial to good order and discipline or service discrediting. The other offenses are created by merging various UCMJ offenses based on whether the touching is a sexual act or contact and then dividing the existing offenses of rape (Article 120, UCMJ), carnal knowledge (Article 120, UCMJ), sodomy (Article 125, UCMJ), and indecent assault (Article 134, UCMJ) into different subsections based on the accused's culpability.

The offense of sexual abuse of a detainee or prisoner is new but could be charged as maltreatment of a subordinate under Article 93, UCMJ. However the maximum confinement for violation of Article 93, UCMJ is only one year.

Both Options 5 and 6 modify the *MCM* to prohibit all sexual acts and contacts that are prejudicial to good order and discipline or service discrediting conduct. The current *MCM* language that explains when adultery is prejudicial to good order and discipline or service discrediting conduct is used to explain when all sexual acts and contacts meet this element.

Option 6 recommends that Congress prohibit:

- (1) rape (*see* page 335);
- (2) aggravated sexual intercourse (*see* page 337);
- (3) carnal knowledge (*see* page 337);
- (4) aggravated forcible sodomy (*see* page 338);
- (5) forcible sodomy (*see* page 338);
- (6) sodomy with a child (*see* page 339);

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- (7) bestial sodomy (*see* page 339);
- (8) aggravated indecent assault (*see* page 339);
- (9) indecent assault (*see* page 340);
- (10) indecent acts with a child (*see* page 340);
- (11) indecent liberties with a child (*see* page 340);
- (12) indecent exposure (*see* page 340); and,
- (13) forcible pandering (*see* page 341).

Option 6 and Option 5 are similar, except Option 6 does not use the definition of sexual acts to combine all sexual penetrations. Option 6 does not define the terms of consent. Instead Option 6 defines lack of consent. Option 6 creates the other nine offenses by dividing up rape (Article 120, UCMJ), carnal knowledge (Article 120, UCMJ), sodomy (Article 125, UCMJ), and indecent assault (Article 134, UCMJ). Option 6 does not specifically prohibit indecent acts, which includes such conduct as a sexual act with a corpse, and engaging in sexual intercourse in a public place.

Option 6, unlike Option 5, does not specifically prohibit sexual penetrations (intercourse and sodomy and the like) and sexual contacts which involve abuse of a duty position between a prisoner's custodian and a prisoner.

A majority of the subcommittee recommended that Option 5 not include a specific prohibition against sexual penetrations and sexual contacts between: (1) a drill sergeant and a trainee; (2) a service academy cadet and a service academy instructor; (3) rated persons and their raters; or (4) a recruiter and a person being recruited into the military. The majority's rationale was that existing regulations already prohibit this misconduct. Should such conduct warrant a statutory prohibition, a proposal supported by some subcommittee members is discussed at page 161, which discussed abuse of authority in a military context.

B. Defining the Key Terms of Force, Coercion and Consent

The legal concepts of force and coercion are discussed from page 90 to 98; and consent is discussed from page 98 to 111. Options 5 and 6 include definitions for these concepts as part of Article 120, UCMJ, by combining different provisions from Chapter 109A, Title 18; state statutes; and from military caselaw. Option 6 uses the term, "forcible compulsion," and defines it, as do eight states. Option 5 does not use the term, "forcible compulsion."

Like many civilian jurisdictions Options 5 and 6 prohibit use of threats of death, serious bodily injury or kidnapping of anyone.

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American jurisdictions are split on how to classify sexual assaults involving coercion. Several states include the use of coercion as a first-degree offense.³²⁷ Other states define the use of coercion alone as a lower level offense.³²⁸ The federal statute and some state statutes distinguish between levels of coercion. Coercion that puts the victim in fear of any person being subject to death, serious bodily injury and kidnapping are treated as a higher degree of rape or sexual assault.³²⁹ Threats that cause fear but not rising to the level of death, serious bodily injury or kidnapping are treated as lesser offenses.³³⁰ Other state jurisdictions limit their highest-level criminal sexual offenses to the threatened use of a dangerous weapon or death.³³¹

Some jurisdictions reserve the highest-level offense for cases involving threats plus another aggravating factor such as injury to the victim, use of a

³²⁷ See, e.g., ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; N.H. REV. STAT. ANN. § 632-A:2 (2004), *infra* at page 656; N.Y. PENAL § 130.35 (Consol 2004), *see infra* at page 677; OHIO REV. CODE ANN. § 2907.02 (Anderson 2004), *see infra* at page 689; OKLA. STAT. ANN. tit. 21, § 1111 (West 2004), *see infra* at page 695; OR. REV. STAT. § 163.375 (2004), *see infra* at page 699; 18 PA. CONS. STAT. § 31013101 (2004), *see infra* at page 702; R.I. GEN. LAWS § 11-37-2 (2004), *see infra* at page 711.

³²⁸ IOWA CODE ANN. § 709.3 and 709.4 (West 2004), *see infra* at pages 585 and 586. (second and third-degree sexual abuse); MASS. GEN. LAWS ANN. ch 265, § 22 (West 2004), *see infra* at page 617 (threats plus injury to justify highest penalty); MICH. COMP. LAWS § 750.520b (2004), *see infra* at page 621 (threats plus injury to justify highest penalty); S.D. CODIFIED LAWS § 22-22-1 (Michie 2004), *see infra* at page 716 (reserves the highest penalty for sex with a child under 10); W.VA. CODE ANN. § 61-8B-4 (Michie 2004), *see infra* at page 761 (reserves the highest penalty for injury occurring during the sexual assault or use of a deadly weapon during the commission of the sexual assault).

³²⁹ See, e.g., 18 U.S.C. § 2241 (2004); MD. CODE ANN. CRIMINAL LAW § 3-303 (2004), *see infra* at page 612; N.D. CENT. CODE § 12.1-20-03 (2004), *see infra* at page 685; TEX. PENAL CODE ANN. § 22.021 (Vernon 2004), *see infra* at page 727; VT. STAT. ANN. tit. 13, § 3253 (2004), *see infra* at page 743; WYO. STAT. ANN. § 6-2-302 (Michie 2004), *see infra* at page 772.

³³⁰ See, e.g., 18 U.S.C. § 2242 (2004); MD. CODE ANN. CRIMINAL LAW § 3-304 (2004), *see infra* at page 613; N.D. CENT. CODE § 12.1-20-04 (2004), *see infra* at page 686; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724; VT. STAT. ANN. tit. 13, § 3252 (2004), *see infra* at page 742; WYO. STAT. ANN. § 6-2-303 (Michie 2004), *see infra* at page 773.

³³¹ See, e.g., CONN. GEN. STAT. § 53a-70a (2003), *see infra* at page 530; 720 ILL. COMP. STAT. ANN. 5/12-14 (West 2004), *see infra* at page 574; IND. CODE ANN. § 35-42-4-1 (Michie 2004), *see infra* at page 580.

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dangerous weapon or cases involving more than one assailant.³³² New Mexico divides the use of threats into three degrees of criminal sexual penetration: first-degree criminal sexual penetration is defined as the use of coercion and great bodily harm or mental anguish to the victim;³³³ second-degree criminal sexual penetration requires threats plus personal injury to the victim;³³⁴ and third-degree criminal sexual penetration requires the use of threats without other aggravating factors.³³⁵

Hawaii's sexual assault statute prohibits compulsion, which is the absence of consent, but requires a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.³³⁶ Hawaii distinguishes between sexual assault in the first and second degrees by differentiating between strong compulsion and compulsion.³³⁷

South Carolina uses the terms aggravated coercion and coercion to distinguish between criminal sexual conduct in the first-degree and second-degree.³³⁸

The determination of what level offense the use of threats justifies is similar to the analysis of force. Options 5 and 6 classify threatened use of a dangerous weapon as criminal sexual misconduct in the first-degree.³³⁹

Options 5 defines "consent" and Option 6 defines, "lack of consent." Defining "consent" alone is inadequate because the term "force" more accurately describes rape when the defendant uses physical violence or the threat of physical

³³² See, e.g., MINN. STAT. ANN. § 609.342 (West 2004), *see infra* at page 629; N.J. STAT. ANN. § 2C:14-2 (2004), *see infra* at page 661; N.M. STAT. ANN. § 30-9-11 (Michie 2004), *see infra* at page 668; N.C. GEN. STAT. § 14-27.2 (2004), *see infra* at page 681; TENN. CODE ANN. § 39-13-502 (2004), *see infra* at page 719; WASH. REV. CODE ANN. § 9A.44.040 (West 2004), *see infra* at page 752.

³³³ N.M. STAT. ANN. § 30-9-11 (Michie 2004), *see infra* at page 668.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ HAW. REV. STAT. ANN. § 707-700 (Michie 2004), *see infra* at page 563 .

³³⁷ HAW. REV. STAT. ANN. § 707-730 to 707-731 (Michie 2004), *see infra* at pages 564 to 565.

³³⁸ S.C. CODE ANN. §§ 16-3-652 to 16-3-653 (Law Co-op. 2004), *see infra* at pages 713 to 714.

³³⁹ *See infra* Part. VIII.C.1 at page 118.

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violence.³⁴⁰ The use of “force” alone is inadequate because it leaves the courts with the responsibility of defining consent. The failure to define consent results in more arbitrary decisions by fact finders and appellate courts, as they make decisions on a case-by case-basis, using their own personal definitions of consent.³⁴¹ Defining force and consent also helps to differentiate between different degrees of criminal sexual misconduct.

Many sexual abuse statutes define force and/or consent as it applies in rape or sexual assault crimes. Some states define none, one, or both of these terms. Options 5 and 6 define both terms.³⁴²

1. FORCE AND COERCION

Connecticut defines force as “the use of a dangerous instrument or use of actual physical force or violence or superior physical strength against a victim.”³⁴³ New Hampshire defines force as the “actual application of physical force, physical violence or superior physical strength.”³⁴⁴ South Carolina defines aggravated force as the use of physical force or physical violence of a high and aggravated nature to overcome the victim or includes the use of a dangerous weapon.³⁴⁵

Most statutes explicitly prohibit the use of force or the threatened use of force. In the jurisdictions that divide the offense of rape or sexual assault into degrees, there is a split on what degree to assign sexual assault accomplished through the use of force without other aggravating factors.³⁴⁶ Some jurisdictions,

³⁴⁰ *Id.*

³⁴¹ *See infra* notes 385 - 420 and accompanying text.

³⁴² *See, e.g.,* ARIZ. REV. STAT. § 13-1401.5 (2004), *see infra* at page 491; DEL. CODE ANN. tit. 11, § 761(h) (2004), *see infra* at page 540; MISS. CODE ANN. § 97-3-95 (2004), *see infra* at page 638; MONT. CODE ANN. § 45-5-501(1) (2004), *see infra* at page 645; NEB. REV. STAT. ANN. § 28-318(8) (Michie 2004), *see infra* at page 648; UTAH CODE ANN. § 76-5-402 (2004), *see infra* at page 732; WIS. STAT. ANN. § 940.225(4) (2004), *see infra* at page 765.

³⁴³ CONN. GEN. STAT. § 53a-65(7) (2003), *see infra* at page 529.

³⁴⁴ N.H. REV. STAT. ANN. § 632-A:2I(a) (2004), *infra* at page 656.

³⁴⁵ S.C. CODE ANN. § 16-3-651 (Law Co-op. 2004), *see infra* at page 713.

³⁴⁶ *See infra* notes 346 to 347.

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including the federal jurisdiction, classify sexual assaults accomplished through the use of force at the most serious level.³⁴⁷

North Carolina defines first-degree rape as nonconsensual, forcible intercourse plus one of three aggravating factors.³⁴⁸

§ 14-27.2. First-degree rape

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

In North Carolina, second-degree rape includes nonconsensual intercourse accomplished by force without any other aggravating element.³⁴⁹

Maryland is similar to North Carolina in that it requires force plus an additional element. Maryland defines rape in the first degree as follows:

§ 3-303. Rape in the first degree

(a) Prohibited. -- A person may not:

³⁴⁷ See, e.g., 18 U.S.C. § 2241 (2004), *see infra* at page 394; Ala. Code § 13A-6-61 (2004), *see infra* at page 481; KY. REV. STAT. ANN. § 510.040 (Michie 2004), *see infra* at page 595; LA. REV. STAT. ANN. §§ 42.A(1) and 42.1 (2004) *see infra* at page 600; MO. ANN. STAT. § 566.030 (2004), *see infra* at page 640; N.Y. PENAL § 130.35 (Consol 2004), *see infra* at page 677; OKLA. STAT. ANN. tit. 21, § 1114 (West 2004), *see infra* at page 696; OR. REV. STAT. § 163.375 (2004), *see infra* at page 699; 18 PA. CONS. STAT. § 3121 3101(2004), *see infra* at page 704; S.D. CODIFIED LAWS § 22-22-7.2 (Michie 2004), *see infra* at page 717; TENN. CODE ANN. § 39-13-502 (2004), *see infra* at page 719.

³⁴⁸ N.C. GEN. STAT. § 14-27.2 (2004), *see infra* at page 681.

³⁴⁹ N.C. GEN. STAT. § 14-27.3 (2004) *see infra* at page 682.

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(1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and

(2) (i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.³⁵⁰

In several states the term, “force” is used as part of another definition, which is included in the highest degree of sexual offense. For example, in Delaware, one element of first degree rape is “without consent.” The Delaware definition of “without consent” includes “by force.”³⁵¹ In Washington state, first degree rape,³⁵² includes the element, “forcible compulsion,” and forcible compulsion, includes the term, “force.”³⁵³

Sexual assaults involving force and injury to the victim are more aggravated than cases involving force but no injury. Generally, sexual assaults involving the use of dangerous weapons are more psychologically traumatizing and pose a greater potential danger than sexual assaults not involving dangerous weapons.

The District of Columbia defines force as the “use or threatened use of a weapon; the use of physical strength or violence that is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.”³⁵⁴ Illinois defines force or threat of force as:

³⁵⁰ MD. CODE ANN. CRIMINAL LAW § 3-303(A)(1) (2004) *see infra* at page 612.

³⁵¹ DEL. CODE. ANN. tit. 11, §§ 761(h) and 773 (2004), *see infra* at pages 540 and 537.

³⁵² WASH. REV. CODE ANN. § 9A.44.040 (West 2004), *see infra* at page 752.

³⁵³ WASH. REV. CODE ANN. § 9A.44.040 (West 2004), *see infra* at page 752.

³⁵⁴ D.C. CODE § 22-3001(5) (2004) *see infra* at page 544.

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“Force or threat of force” means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

- (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
- (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.³⁵⁵

Minnesota defines force as the:

Infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.³⁵⁶

Force and coercion are closely related. Many jurisdictions explicitly prohibit the use of threats or coercion. For example, the federal statute and some states prohibit intercourse obtained by “threatening or placing” another person “in fear that any person will be subject to death, serious bodily injury, or kidnapping”³⁵⁷ California, Colorado, Florida, New Hampshire and Rhode Island include in their state statutes threats to retaliate in the future against any person.³⁵⁸ California and Texas prohibit threats to use the authority of a public official against any person, along with the traditional definition of coercion.³⁵⁹ Some states prohibit the use of threats against property to establish non-consent.³⁶⁰

³⁵⁵ 720 ILL. COMP. STAT. ANN. 5/12-12 (d) (West 2004), *see infra* at page 573.

³⁵⁶ MINN. STAT. ANN. § 609.341 subdiv. 3 (West 2004), *see infra* at page 626.

³⁵⁷ 18 U.S.C. § 2241 (2004).

³⁵⁸ CAL. PENAL CODE § 261.6 (Deering 2004), *see infra* at page 505; COLO. REV. STAT. § 18-3-402(4)(b) and (c) (2004), *see infra* at page 523; FLA. STAT. ANN. § 794.011(1)(A) (West 2004), *see infra* at page 554; N.H. REV. STAT. ANN. § 632-A:2 (2004), *infra* at page 656; R.I. GEN. LAWS § 11-37-2 (2004), *see infra* at page 711.

³⁵⁹ CAL. PENAL CODE § 261.7 (Deering 2004), *see infra* at page 505; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724.

³⁶⁰ *See, e.g.*, ALASKA STAT. § 11.41. 470 (Michie 2004), *see infra* at page 489; ARIZ. REV. STAT. § 13-1401.5 (2004), *see infra* at page 491; IDAHO CODE § 18-6110 (Michie

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Eight states use the term forcible compulsion in their criminal sex offense statutes.³⁶¹ The term forcible compulsion describes includes force, threats or a combination of force and threats to cause another to engage in sexual activity.

Alabama defines forcible compulsion as “[p]hysical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person.”³⁶²

The threat portion of Oregon’s and Washington’s forcible compulsion statutes prohibits express or implied threats that place a person in fear of “immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.”³⁶³

Pennsylvania defines forcible compulsion as use of “physical, intellectual, moral, emotional or psychological force, either express or implied.”³⁶⁴ Next, we will discuss how Options 5 and 6 address force and/or coercion.

(a) Option 5

2004), *see infra* at page 570; OR. REV. STAT. § 163.305 (2004), *see infra* at page 698; WASH. REV. CODE ANN. § 9A.44.010(6) (West 2004), *see infra* at page 752.

³⁶¹ The eight states that use and define the term “forcible compulsion” are: Ala. Code § 13A-6-60(8) (2004), *see infra* at page 481; ARK. CODE ANN. § 5-14-101(2) (Michie 2004), *see infra* at page 501; KY. REV. STAT. ANN. § 510.010(2) (Michie 2004), *see infra* at page 594; MO. ANN. STAT. § 566.030(1) (2004), *see infra* at page 640; N.Y. PENAL § 130.00(8) and 130.35 (Consol 2004), *see infra* at pages 673 and 677; OR. REV. STAT. § 163.305 (2004), *see infra* at page 698; 18 PA. CONS. STAT. §§ 3101 and 3121(a)(1) 3101(2004), *see infra* at pages 702 and 704; and WASH. REV. CODE ANN. § 9A.44.010(6) (West 2004), *see infra* at page 752.

³⁶² *See, e.g.*, Ala. Code § 13A-6-60(8) (2004), *see infra* at page 481; ARK. CODE ANN. § 5-14-101(2) (Michie 2004), *see infra* at page 501; KY. REV. STAT. ANN. § 510.010(2) (Michie 2004), *see infra* at page 594.

³⁶³ OR. REV. STAT. § 163.305 (2004), *see infra* at page 698; WASH. REV. CODE ANN. § 9A.44.010(6) (West 2004), *see infra* at page 752.

³⁶⁴ 18 PA. CONS. STAT. §§ 3101 and 3121(a)(1) 3101(2004), *see infra* at pages 702 and 704.

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Option 5 uses the term “force” in one offense, “rape,” then in the definition section defines the term, “force.” Rape is similar to 18 U.S.C. § 2241 (2004). Rape, subsection § 920(a), at page 294, is defined as follows:

“(a) Any person subject to this chapter who causes another person to engage in a sexual act by—

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct is guilty of **rape** and shall be punished as a court-martial may direct.”

Option 5 does not include threats or causing death or grievous bodily harm in the definition of force because these are elements of the above offense. Option 5’s subsection 920(a) prohibits using force to cause anyone to engage in a sexual penetration.³⁶⁵ Subsection 920(u)(5) defines “force” as follows:

(5) “force” means action to compel submission of another or to overcome or prevent another’s resistance by—

- (A) the use or display of a dangerous weapon;³⁶⁶

³⁶⁵ See subsection 920(a) at page 294 *infra*. For an explanation for subsection 920(a) see page 253 *infra*.

³⁶⁶ Option 5’s subsection 920(u)(4) defines “dangerous weapons” as follows:

“(4) ‘dangerous weapon’ means any firearm, whether operable, loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.”

See subsection 920(u)(4) at page 297 *infra*. See page 273 *infra* for an explanation for subsection 920(u)(4). See pages 118 to 122 for a thorough discussion on inclusion of use of dangerous weapons as part of the force—aggravating component for rape.

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(B) the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause another to believe it is a dangerous weapon; or
(C) physical violence, strength, power, or restraint applied to another, sufficient that the other person could not avoid or escape the sexual conduct.³⁶⁷

(b) Option 6

Like Option 5, Option 6 defines force using dangerous weapons, threats and physical power.³⁶⁸ Use of weapons in the definition of force is similar to Connecticut, Washington D.C. and South Carolina.³⁶⁹ Option 6 excludes some of the provisions included by these states and the District of Columbia because Option 6's definition of consent includes these provisions.

Prohibition against the threatened use of adverse personnel actions against was considered as part of the definition of force. Such coercion should be prohibited as in *Bradley*³⁷⁰ and *Hicks*,³⁷¹ where NCOs abused their authority and coerced sexual activity from the wife and girlfriend of the military members they supervised.

Some subcommittee members believe that a threat to cause another serious physical injury should be at a more serious level as compared to a victim who is threatened with an adverse personnel action. While the threat of an adverse personnel action is harmful to morale, and damaging to good order and discipline, it lacks immediacy. Moreover such conduct in the business world is usually a civil matter.³⁷² Finally, this conduct is already prohibited by Article 93, UCMJ, as a form of maltreatment.

³⁶⁷ See subsection 920(u)(5) at page 298 *infra*. For an explanation for subsection 920(u)(5) see page 274 *infra*.

³⁶⁸ See *supra* notes 354 - 356 and accompanying text.

³⁶⁹ See *supra* notes 343 - 345 and accompanying text.

³⁷⁰ See *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989).

³⁷¹ See *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987).

³⁷² See generally, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding a woman who has sex with her boss because she feared that she would lose her job can sue for sexual harassment, and her employer can be held liable for sexual harassment committed by supervisors if he knew or should have known about the conduct and did nothing to correct it).

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Force alone should be sufficient to cause an offense to be at the highest level. Use of physical force and violence to cause someone to engage in a sexual act is a very serious sexual crime, and only a small minority of states require force plus an additional element to be the most aggravate level of sexual crime. If force is made an element of the most serious crime, deletion of (a)(1) which employs the factor of dangerous weapons would follow. Arguably, causing a person to engage in a sexual act by using a threat to kill someone is as aggravated as claiming that one possesses a dangerous weapon.

Option 6 defines the term, “forcible compulsion” as follows:

Forcible compulsion means to compel by physical force, by the use of a dangerous weapon, or by threats of immediate death, bodily injury, or kidnapping.³⁷³

Option 6 employs the term, “forcible compulsion” in rape,³⁷⁴ aggravated forcible sodomy,³⁷⁵ and aggravated indecent assault.³⁷⁶ In Option 6, forcible compulsion is used in rape, for example, as follows:

- (a) Any person, subject to this chapter who—
 - (1) commits an act of sexual intercourse,

³⁷³ See Option 6, App. G, at page 343, defining “forcible compulsion.” In Option 6 this definition is provided in a change to *MCM*, Pt. IV, ¶ 45. A better alternative would be to make all definitions part of Article 120 itself. See discussion at pages 66 to 71, *supra*, indicating *MCM*’s definitions of terms in Articles 120 and 125, UCMJ, are unlikely to be accepted by Court of Appeals for the Armed Forces.

Several states use the term “forcible compulsion.” The closest version to Option 6 is from Ala. Code § 13A-6-60(8) and 13A-60-61(a)(1) (2004), *see infra* at pages 481 and 482. For other states definitions of forcible compulsion *see* N.Y. PENAL § 130.00 and 130.35 (2004), *see infra* at page 673 and 677; ARK. CODE ANN. § 5-14-103(a)(1) (Michie 2004), *see infra* at page 496; MO. ANN. STAT. § 566.030(1), *see infra* at page 640; and 18 PA. CONS. STAT. § 3121(a)(1), *see infra* at page 704.

³⁷⁴ *See infra* Option 6, App. G, defining offense of rape at page 335.

³⁷⁵ *See infra* Option 6, App. G, defining the offense of aggravated forcible sodomy at page 338.

³⁷⁶ *See infra* Option 6, App. G, defining the offense of aggravated indecent assault at page 339.

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- (A) by **forcible compulsion**;³⁷⁷ or
- (B) with a person who is less than 12 years of age; or
- (C) with a person who is at least 12 years of age but less than 16 years of age and is:
 - (i) a member of the accused’s household; or
 - (ii) a relative, within the fourth degree, of the accused; or
 - (iii) subjected to the accused’s authority and coerced into engaging in sexual intercourse by the accused; or
- (D) with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual conduct at issue; or
- (E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual conduct at issue.³⁷⁸

In Option 6, the term, “physical force” is defined in the *MCM*, rather than Article 120, UCMJ, as follows:

(4) *Physical Force*. Physical force is physical violence or power applied by the accused to the victim to overcome or prevent active resistance. A sexual act occurs “by physical force” when the accused uses physical violence or power to compel the victim to submit against the victim’s will.³⁷⁹

Issues that should be resolved before Option 6 is enacted are discussed at page 175.

2. Consent

(a) Introduction

According to the UCMJ, *MCM* and case law, if an individual with capacity not to consent, does consent to the act of sexual intercourse then it is not rape. Consent should be as clearly defined as possible so that: (1) a victim will know what to do to be protected by the law; (2) an accused will know what conduct is permitted and what conduct is illegal; (3) judges can explain to court members the meaning of

³⁷⁷ In the alternative, the term “forcible compulsion,” could be replaced by the phrase “physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping.” This phrase is derived from the Model Penal Code, § 213.1(1)(a) [*see infra* at page 326].

³⁷⁸ *See infra* Option 6, App. G, defining offense of rape at page 335.

³⁷⁹ *See infra* Option 6, App. G, defining “physical force” at page 345.

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“consent;” and (4) fact finders will be able to do justice for the accused and victim alike. This section summarizes the development of definitions of consent in the military and states.

As with civilian jurisdictions across the country, descriptions of force and lack of consent required for rape have substantially changed in the military since the UCMJ became effective for all the services on 31 May 1951.³⁸⁰

Some jurisdictions, including the military, define lack of consent rather than defining consent.³⁸¹ The Arizona definition of lack of consent provides an example of a comprehensive definition that specifically prohibits a wide variety of conduct.³⁸² Arizona defines lack of consent as when the victim is coerced by threats of force, or when the victim is incapable of consent because “of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition” or when the victim is deceived regarding the nature of the act or deceived so they believe they are engaging in intercourse with their spouse.³⁸³

³⁸⁰ See *infra* for the 1951 *MCM* and 1969 *MCM* provisions discussing force and lack of consent respectively at pages 21 and 23.

³⁸¹ See *infra* notes 87. KY. REV. STAT. ANN. § 510.020 (Michie 2004) provides a particularly good definition of lack of consent:

§ 510.020. Lack of consent

- (1) Whether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim.
- (2) Lack of consent results from:
 - (a) Forcible compulsion;
 - (b) Incapacity to consent; or
 - (c) If the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
- (3) A person is deemed incapable of consent when he is:
 - (a) Less than sixteen (16) years old;
 - (b) Mentally retarded or suffers from a mental illness;
 - (c) Mentally incapacitated; or
 - (d) Physically helpless.

See *infra* at page 595.

³⁸² ARIZ. REV. STAT. § 13-1401 (2004), see *infra* at page 491.

³⁸³ *Id.*

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A few states passed statutes designed to prohibit nonviolent intercourse without the consent of the victim.³⁸⁴ For example, the Pennsylvania legislature changed Pennsylvania's sexual assault statute after the Pennsylvania Supreme Court overturned a nonviolent rape conviction.³⁸⁵ In *Commonwealth v. Berkowitz*,³⁸⁶ the victim clearly and repeatedly communicated her lack of consent.³⁸⁷ Despite the victim's protests, Berkowitz locked the door to the apartment they were in, pushed her on the bed removed her underwear and penetrated her. The Pennsylvania Supreme Court ruled that the state statute did not contain a consent element and that the analysis focuses on the accused's use of force.³⁸⁸ The *Berkowitz* Court then held the amount of force used by Berkowitz did not rise to the level of rape.³⁸⁹ The Pennsylvania sexual assault statute now states, "a person commits a felony of the second-degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent."³⁹⁰ However, this sexual abuse statute does not define the terms, "consent" or "without consent."

Wisconsin's third degree sexual assault provision prohibits "sexual intercourse with a person without the consent of that person."³⁹¹ Wisconsin defines consent as "words or overt actions by a person competent to give informed consent indicating a freely given agreement to have intercourse."³⁹²

³⁸⁴ See e.g., N.Y. PENAL §130.25(3) (Consol 2004), see *infra* at page 676 (New York added this provision in 2000); 18 PA. CONS. STAT. § 3107 (2004), see *infra* at page 704.

³⁸⁵ Rosemary J. Scalo, *Note: What Does "No" Mean In Pennsylvania? - The Pennsylvania Supreme Court's Interpretation Of Rape And The Effectiveness Of The Legislature's Response Commonwealth v. Berkowitz*, 40 VILL. L. REV. 193 (1995).

³⁸⁶ 641 A.2d 1161, 1164 (Pa. 1994).

³⁸⁷ *Id.* at 1164.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1166.

³⁹⁰ 18 PA. CONS. STAT. § 3124.1 (2004), see *infra* at page 706. Forcible compulsion is defined in 18 PA. CONS. STAT. § 3101 (2004), see *infra* at page 702.

³⁹¹ WIS. STAT. ANN. § 940.225(3) (2004), see *infra* at page 764.

³⁹² *Id.* § 940.225(4).

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Nine American jurisdictions define consent in their statutes prohibiting rape or sexual assault.³⁹³ Vermont defines consent as “words or actions by a person indicating a voluntary agreement to engage in a sexual act.”³⁹⁴ In Washington state, consent means, “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreements to have sexual intercourse or sexual contact.”³⁹⁵

At least three states specifically address the issue of consent as it relates to a current or previous relationship. California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent.”³⁹⁶ Colorado law states, “cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent.”³⁹⁷ In Minnesota, consent means:

Words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular act.³⁹⁸

Some states address the issue of resistance by the victim in their definition of consent. The District of Columbia defines consent as “words or overt actions

³⁹³ CAL. PENAL CODE § 261.6 (Deering 2004), *see infra* at page 505; COLO. REV. STAT. § 18-3-401(1.5) (2004) *see infra* at page 522; D.C. CODE § 22-3001(4) (2004) *see infra* at page 544; FLA. STAT. ANN. § 794.011(1)(a) (West 2004), *see infra* at page 554; 720 ILL. COMP. STAT. ANN. 5/12-17 (West 2004), *see infra* at page 578; MINN. STAT. ANN. § 609.341 (West 2004), *infra* at page 626; VT. STAT. ANN. tit. 13, § 3251 (2004), *see infra* at page 742; WASH. REV. CODE ANN. § 9A.44.010 (West 2004), *see infra* at page 752; WIS. STAT. ANN. § 940.225(4) (2004), *see infra* at page 764.

³⁹⁴ VT. STAT. ANN. tit. 13, § 3251 (2004), *see infra* at page 742.

³⁹⁵ WASH. REV. CODE ANN. § 9A.44.010 (West 2004), *see infra* at page 752.

³⁹⁶ CAL. PENAL CODE § 261.6 (Deering 2004), *see infra* at page 505.

³⁹⁷ COLO. REV. STAT. § 18-3-401(1.5) (2004) *see infra* at page 522.

³⁹⁸ MINN. STAT. ANN § 609.341.4a (West 2004), *infra* at page 626.

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indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats or coercion by the defendant shall not constitute consent.”³⁹⁹ Florida defines consent as “intelligent, knowing and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance.”⁴⁰⁰ Illinois defines consent as:

“Consent” means “A freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.”⁴⁰¹

Wisconsin both defines consent and creates a rebuttable presumption of incapacity to consent in certain circumstances.⁴⁰² The Wisconsin statute defines consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”⁴⁰³ Consent is not an issue when the victim is incapable of consent. An individual is incapable of consent when he or she is incapable of appraising his or her conduct because he or she is mentally impaired, under the influence of an intoxicant or unconscious. The Wisconsin statute also holds that a patient or resident of certain state facilities is incapable of consenting to intercourse with an employee of the state facility. The defendant can rebut the presumption of incapacity.⁴⁰⁴ Wisconsin defines consent and then prohibits intercourse without consent.

Some state jurisdictions use “no means no” to define lack of consent. Nebraska and Utah include in their definition of without consent cases when the

³⁹⁹ D.C. CODE § 22-3001(4) (2004) *see infra* at page 544.

⁴⁰⁰ FLA. STAT. ANN. § 794.011(1)(a) (West 2004), *see infra* at page 554.

⁴⁰¹ 720 ILL. COMP. STAT. 5/12-17 (2004), *see infra* at page 577.

⁴⁰² WIS. STAT. ANN. § 940.225(4) (2004), *see infra* at page 764.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

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victim expresses his or her lack of consent through words or conduct.⁴⁰⁵ New York defines lack of consent as when the victim fails to expressly or impliedly acquiesce to the sexual act.⁴⁰⁶

Other states define lack of consent to prohibit intercourse between individuals based on status. For example, Delaware, New York and Utah define lack of consent to include intercourse between certain professionals and their patients or clients.⁴⁰⁷ Montana and New York laws provide that individuals incarcerated in correctional facilities cannot consent to sexual activity with those who work at the facility.⁴⁰⁸

Statutes that define consent are superior to statutes that define lack of consent. In jurisdictions that require proof of lack of consent the prosecutor is forced to prove a negative, that the intercourse occurred without the consent of the victim. Defining consent as an affirmative defense rather than lack of consent as an element eliminates the prosecution's burden of proving a negative. More importantly, defining rape in terms of the victim's lack of consent does not accurately characterize what is actually criminal about rape. Rape is an act of violence, anger, and power, distinguished by its coercive and sometimes brutal nature.⁴⁰⁹ The essence of rape is the force or coercion used by the defendant, not the lack of consent of the victim.⁴¹⁰ The problem with focusing on the conduct of the victim is that the unfair "special rules" that governed rape prosecutions until the 1970s may influence modern prosecutions.⁴¹¹ For example, corroboration

⁴⁰⁵ NEB. REV. STAT. ANN. § 28-318 (Michie 2004), *see infra* at page 648; N.Y. PENAL § 130.05 (Consol 2004), *see infra* at page 674; UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735.

⁴⁰⁶ N.Y. PENAL § 130.05 (Consol 2004), *see infra* at page 674.

⁴⁰⁷ DEL. CODE. ANN. tit. 11, § 761(h) (2004), *see infra* at page 540; N.Y. PENAL § 130.05 (Consol 2004), *see infra* at page 674; UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735.

⁴⁰⁸ MONT. CODE ANN. § 45-5-501 (2004), *see infra* at page 645; N.Y. PENAL § 130.05 (Consol 2004), *see infra* at page 674.

⁴⁰⁹ Christina Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1529 (1983).

⁴¹⁰ *Id.*

⁴¹¹ Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986).

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requirements and resistance requirements are potential problems in the analysis of the accused's conduct in determining consent or a lack of consent.⁴¹²

(b) Option 5

Option 5 defines consent and Option 6 defines lack of consent. The proposed definitions relating to consent combine parts of various state statutes.

Option 5 is similar to the Vermont and Washington's definitions of consent because it clearly states that by words or actions a sexual partner must express their consent to intercourse. The requirement for affirmative consent is designed to reduce the confusion of whether a victim consented to intercourse or not. By requiring affirmative consent both parties must express agreement to engage in intercourse.

Options 5 and 6 include the Washington D.C., Illinois and Florida prohibitions against coerced consent. This portion of the definition prevents the use of threats or coercion to obtain a statement to engage in intercourse that is not truly consensual. Option 5 also incorporates the provision from California, Colorado and Minnesota stating that a dating relationship does not equal consent. This provision is designed to specifically address date rape cases such as *Webster*.⁴¹³

Option 5 is similar to the Wisconsin statute because the proposed definition clearly states when an individual is not capable of consenting. This portion of the definition of consent is designed to specifically prohibit intercourse with victims who are underage, physically helpless or incapacitated. By expressly indicating when an individual is incapable of consenting to intercourse then the notice problem expressed by the accused in *United States v. Grier* who stated he did not know it was rape to have intercourse with an incapacitated victim may be avoided.⁴¹⁴

Option 5 defines, "consent," subsection 920(u)(21), at page 300, as follows:

"(21) 'consent' means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent."⁴¹⁵ Lack of verbal

⁴¹² *Id.*

⁴¹³ *See supra* note 241- 246.

⁴¹⁴ *See infra* note 517.

⁴¹⁵ This provision is known as "no means no," and is from UTAH CODE ANN. § 76-5-406(1) (2004), *see infra* at page 735. *See United States v. Ayers*, 54 M.J. 85, 97 (C.A.A.F. 2000) (Crawford, C.J., dissenting) (the majority set aside indecent assault

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or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused to the sexual conduct at issue shall not constitute consent.⁴¹⁶ A person cannot consent to sexual activity if:

- (A) under sixteen years of age;
- (B) substantially incapable of:
 - (1) appraising the nature of the sexual conduct at issue due to:
 - (i) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or
 - (ii) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;
 - (2) physically declining participation in the sexual conduct at issue;
 - (3) physically communicating unwillingness to engage in the sexual conduct at issue.⁴¹⁷

This detailed definition of consent reduces the impact of cases like *United States v. Tomlinson*,⁴¹⁸ which held in part that a victim “can honestly believe that she was raped when as a matter of law she had not, because she failed to make her lack of consent reasonably manifest.”⁴¹⁹ Option 5 also statutorily clarifies sexual assaults similar to the *Bonano-Torres* and *Webster* cases. In both cases, the appellate courts struggled with the application of Article 120 in its present form. In *Bonano-Torres* the court overturned the conviction,⁴²⁰ and in *Webster* the court upheld the

conviction of NCO-instructor even though trainee-victim told him to stop poking her with his penis, and nevertheless he continued to do so because as a matter of law consent was established).

⁴¹⁶ The underlined portions of the definition of consent as an affirmative defense are from ILL. COMP. STAT.5/12-17 (2004). See page 577.

⁴¹⁷ Military law stated that “a person is capable of consenting to an act of sexual intercourse unless her mental ability is so severe that she is incapable of understanding the act, its motive, and its possible consequences.” See BENCHBOOK, ¶ 3-45-1d n.10. Thus, a victim had to fail all three tests before she lacked capacity to consent. This definition of consent protects victims who fail any one of the three tests.

⁴¹⁸ 20 M.J. 897 (A.C.M.R. 1985).

⁴¹⁹ *Id.* at 902.

⁴²⁰ The Court of Military Appeals stated, “where there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more

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conviction.⁴²¹ Option 5 if enacted will somewhat reduce the totality of the circumstances approach by adding a statutory framework to decision-making by fact finders and appellate courts.

Most importantly, under Option 5, the accused must raise the victim's consent as an affirmative defense. Affirmative defense is defined in subsection 920(u)(23) at page 300 and is consistent with R.C.M. 916(a) and (b), which define affirmative defenses as follows:

“(23) ‘Affirmative defense’ means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The enumeration in section 920 of some affirmative defenses shall not be construed as excluding the existence of others.”⁴²²

With respect to the affirmative defenses of consent and mistake of fact, subsection 920(t) at page 297(t)(t), defines when these two defenses apply:

“(t) **Consent and mistake of fact as to consent.** Lack of permission is an element of the offense in subsection 920(o). Consent and mistake of fact as to consent are not an issue, or an affirmative defense in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsections 920(a), 920(c), 920(e), and 920(h).”⁴²³

than the incidental force involved in penetration is required for conviction.”
Bonano-Torres, 31 M.J. at 179.

⁴²¹ In *Webster*, the accused “restrained the victim by grabbing her arms, lifted her on the kitchen counter, and prevented her from moving.” 40 M.J. at 387. The victims repeated verbal protests were sufficient resistance to show lack of consent. *Id.*

⁴²² The sentence, “The enumeration in section 920 of some affirmative defenses shall not be construed as excluding the existence of others.” is from the definition of affirmative defenses in GA. CODE ANN. § 16-1-3 (1) (2004).

⁴²³ See also explanation for subsection 920(t) at page 265. UTAH CODE ANN. § 76-5-406 (2004), see *infra* at page 732, provides a similar list of situations where consent does not apply:

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**Sexual offenses against the victim without consent of victim --
Circumstances**

An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy upon a child, attempted sodomy upon a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

- (1) the victim expresses lack of consent through words or conduct;
- (2) the actor overcomes the victim through the actual application of physical force or violence;
- (3) the actor is able to overcome the victim through concealment or by the element of surprise;
- (4) (a) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or
(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;
- (b) as used in this Subsection (4) “to retaliate” includes but is not limited to threats of physical force, kidnaping, or extortion;
- (5) the victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist;
- (6) the actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it;
- (7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim’s spouse;
- (8) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim’s knowledge;
- (9) the victim is younger than 14 years of age;
- (10) the victim is younger than 18 years of age and at the time of the offense the actor was the victim’s parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Subsection 76-5-404.1(4)(h);

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This will reduce the possibility that the accused will receive a mistake of fact instruction without even testifying that he was mistaken about the victim's consent.

(c) Option 6

Option 6 defines “without consent,”⁴²⁴ rather than consent. Option 6 retains “without consent” as an element, rather than as an affirmative defense in three offenses, aggravated sexual intercourse, forcible sodomy and indecent assault. Eight states have retained “without consent” as an element. Seven of the eight states also define the term “without consent.”⁴²⁵

(11) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4); or

(12) the actor is a health professional or religious counselor, as those terms are defined in this Subsection (12), the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested. For purposes of this Subsection (12):

(a) “health professional” means an individual who is licensed or who holds himself out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling including, but not limited to, a physician, osteopathic physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor; and

(b) “religious counselor” means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

⁴²⁴ “Without consent” is from the current Article 120 as defined in the *MCM*, Pt. IV, ¶ 45. The definition is provided in a change to *MCM*, Pt. IV, ¶ 45.

⁴²⁵ See Ala. Code § 13A-6-70 (2004), *see infra* at page 484; ALASKA STAT. § 11.41.470(8) (Michie 2004), *see infra* at page 489; ARIZ. REV. STAT. § 13-1401.5 (2004), *see infra* at page 491; DEL. CODE. ANN. tit. 11, § 761(h) (2004), *see infra* at page 540; MONT. CODE ANN. § 45-5-501(1) (2004), *see infra* at page 645; NEB. REV. STAT. ANN. § 28-318(8) (Michie 2004), *see infra* at page 648; New Mexico § 76-5-406 at

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For the offenses of aggravated sexual intercourse, indecent assault and forcible sodomy, Option 6 provides:

Anyone subject to this chapter who:

(2) under circumstances not amounting to rape, commits an act of sexual intercourse by threat or coercion of sufficient consequence reasonably calculated to cause submission **without consent**⁴²⁶ is guilty of aggravated sexual intercourse⁴²⁷ and shall be punished as a court-martial may direct;⁴²⁸

(5) under circumstances not amounting to aggravated forcible sodomy, engages in sodomy with another person, by threat or coercion of sufficient

page 735. In Wyoming “without consent” is an element in some sexual crimes, but it is not statutorily defined. *See e.g.*, sexual assault in the first degree, WYO. STAT. ANN. § 6-2-302(a)(iii) (Michie 2004), *infra* at page 772.

⁴²⁶ The phrase “of sufficient consequence reasonably calculated to cause submission without consent” is based on COLO. REV. STAT. § 18-3-402(1)(a) (2004), *see infra* at page 523, and recognizes that not all threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping will be sufficient to turn an act of sexual intercourse into “aggravated sexual intercourse,” an act of sodomy into “forcible sodomy,” or sexual contact into an “indecent assault.” A threat or coercion is of sufficient consequence if the person complies with the accused’s demands out of a reasonable fear that non-compliance would result in the accused or another harming or injuring the person, the person’s property, or person or property of another. Whether a threat or coercion is of sufficient consequence depends upon the circumstances of each case. It may include a threat or coercion to cause physical injury to some person; cause destruction or damage to property; accuse some person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of position, rank, or authority, adversely affect some person. Proof that the accused actually intended to engage in the above conduct is not required.

⁴²⁷ “Aggravated sexual intercourse” is a term of art used to denote a less aggravated version of rape; it is akin to the term “second degree rape” used in some jurisdictions.

⁴²⁸ *See infra* Option 6 for the offense “aggravated sexual intercourse” at page 337, “forcible sodomy” at page 338 and “indecent assault” at 340 .

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consequence reasonably calculated to cause submission **without consent**⁴²⁹ is guilty of forcible sodomy⁴³⁰ and shall be punished as a court-martial may direct;⁴³¹

(9) under circumstances not amounting to aggravated indecent assault, engages in sexual contact⁴³² with another person, by threat or coercion of sufficient consequence reasonably calculated to cause submission **without consent**⁴³³ is guilty of indecent assault⁴³⁴ and shall be punished as a court-martial may direct;⁴³⁵

Option 6 defines “lack of consent” as follows:

(3) *Lack of Consent.*⁴³⁶ The term “consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of

⁴²⁹ See explanation in footnote 426 *supra* for origin of “of sufficient consequence reasonably calculated to cause submission without consent.”

⁴³⁰ The analysis and rationale of forcible sodomy follows the analysis and rationale of “aggravated sexual intercourse,” the only difference being the nature of the sexual act, i.e. sodomy as opposed to sexual intercourse.

⁴³¹ See *infra* at Option 6, App. G, for the offense “forcible sodomy” at page 338.

⁴³² Option 6 proposes expanding the definition of “indecent acts” to include not only those acts done with the “intent to arouse, appeal to, or gratify the lust, passions, or desires of the accused, the victim, or both” but also to include those acts done with the “intent to abuse, humiliate, harass, or degrade.” The latter language was added to the definition of “sexual contact” in recognition of the fact that sexual acts or often engaged in to abuse, humiliate, harass, or degrade. See New York State Consolidated Laws § 130.52 [*see infra* at page 678].

⁴³³ See explanation in footnote 426 *supra* for origin of “of sufficient consequence reasonably calculated to cause submission without consent.”

⁴³⁴ The analysis and rationale of this offense follows the analysis and rationale of Option 6’s proposed “aggravated sexual intercourse” and “forcible sodomy” articles . . . the only difference being the nature of the sexual act, i.e. an intentional touching of the sexual organs, either directly or through the clothing, as opposed to sexual intercourse or sodomy.

⁴³⁵ See *infra* at Option 6, App. G at page 340.

⁴³⁶ Majority of language derived from DA Pamphlet 27-9 and existing military case law.

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the nature of the act. A person is deemed incapable of giving consent when he or she is less than 16 years of age; lacks, because of a mental disability or mental incapacity, the mental ability to understand the nature of the act; or, lacks, because of a physical incapacity, the physical ability to consent to the act. Thus, consent of the victim is not an issue in alleged violations of subdivisions (1)(B-E), (3), (4)(B-E), (6), (7), (8)(B-E), (10), and (11) of this article. Whether or not specifically stated, consent is an element of the offenses listed in subdivisions (1)(A), (2), (4)(A), (5), (8), (9), (12), and (13) of this article, that the sexual act was committed without the consent of the victim. A victim does not have an independent, affirmative duty to manifest a “lack of consent.” However, where there is no manifestation of a “lack of consent,” an inference may be drawn that the victim consented or a reasonable inference may be raised that an accused was reasonably and honestly mistaken as to the victim’s consent. Moreover, a finding of “lack of consent” does not require proof that the victim physically resisted the attacker. A victim can manifest a “lack of consent” in ways other than by physical resistance and “lack of consent” is determined by the totality of circumstances. For example, when an accused’s actions, words or conduct, coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or serious physical injury would be inflicted on her and that further resistance would be futile, the sexual act would be accomplished without consent.

3. CONCLUSION.

The *MCM* does not define “consent.” However, the *MCM* does define “lack of consent,” which is an element of rape. The *MCM* also provides examples of situations where a victim need not show or demonstrate lack of consent. The 2002 *MCM* states:

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense [of rape]. 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

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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.⁴³⁷

The *MCM*'s explanation is inconsistent with current case law—which recently expanded the definition of constructive force, reducing the level of the victim's resistance. Option 6's proposed definitions, and many of the state laws reviewed by the subcommittee are more supportive of victims than the *MCM*.⁴³⁸ There are six reasons for amending the *MCM*'s explanation of rape.

First, the *MCM* requires the prosecution to prove lack of consent as an element. Option 5 makes consent an affirmative defense that must be raised by a preponderance of the evidence—just as Article 120(d)(1), UCMJ made mistake of fact as to age of a victim between the age 12 to 15 an affirmative defense;

Second, the *MCM* puts the burden on the victim to show “more than a mere lack of acquiescence.” This requires that the victim say and do more than just say, “no.” She must “tak[e] such measures of resistance as are called for by the circumstances.” Option 5 states that when a victim says or communicates by her actions that she does not want sexual activity, it means she does not consent.

Third, the *MCM* states that “threats of death or great bodily harm” are required before “resistance is overcome” and permits the victim to “cease[] to resist only because of a reasonable fear of death or grievous bodily harm.” Option 5 states that the victim need not say “no” if the accused uses force, threats or places the victim in fear. The force or threats need not be to the degree required by the *MCM*.

Fourth, the *MCM* provides as to incapability, that the victim must be to the accused's knowledge “of unsound mind or unconscious to an extent rendering him or her incapable of giving consent.” Option 5 states the victim is incapable of consenting if unable to apprise his or her conduct, which means unable to understand the act, its motive, or its possible consequences.”

Fifth, the *MCM* states 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.” Option

⁴³⁷ *MCM*, *supra* note 32, Pt. IV, ¶ 45c(1)(b).

⁴³⁸ *See supra* pages 90 to 111 (discussing key terms of force, coercion and consent).

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5 makes it clear that a person under 16 years of age is incapable of consenting to the sexual act or contact.

Sixth, the *MCM* does not define “constructive force,” the situation where a senior noncommissioned officer or commissioned officer uses his rank or position to obtain sexual gratification from a subordinate. A majority of the subcommittee recommended that Option 5 not include a specific prohibition against sexual penetrations and sexual contacts between: (1) a drill sergeant and a trainee; (2) a service academy cadet and a service academy instructor; (3) rated persons and their raters; or (4) a recruiter and a person being recruited into the military. The majority’s rationale was that existing regulations already prohibit this misconduct. Should such conduct warrant a statutory prohibition, a proposal supported by some subcommittee members is at page 161, along with a discussion about the merits of a statutory prohibition.

As discussed *supra* at pages 66 to 71, an executive order to change the *MCM*’s explanation of rape will be helpful, because it puts military personnel on notice of the law, some subcommittee members concluded that an *MCM* change could not substantively change Article 120. The appellate courts view the *MCM*’s explanation of rape as mere advice or commentary, rather than binding for the use as instructions to court members. If the legislature and the executive branches join together in a statute, and define “consent,” the appellate courts will be much more deferential. Including the definitions of force and consent in the statute provides much better notice to both potential victims and potential accused about what conduct is criminal. Statutes also have greater legitimacy as it is the product of two branches of the Federal government. Finally, consent should be an affirmative defense, rather than having the element of lack of consent, which the prosecutor must prove beyond a reasonable doubt.⁴³⁹

C. DIVIDING THE OFFENSE OF CRIMINAL SEXUAL MISCONDUCT INTO DEGREES

The definitions of consent and force established in the previous sections form the building blocks for the proposed revision to the UCMJ and the *MCM*. This section develops the remainder of the proposed UCMJ article and makes recommendations for changes to the *MCM* as well. This section includes an analysis of the current nonconsensual sexual assault statutes in the federal jurisdiction, Washington D.C. and all fifty states. The analysis of relevant civilian law provides examples of potential recommendations for changes to the UCMJ and the *MCM*.

⁴³⁹ R.C.M. 916, which lists the *MCM*’s affirmative defenses, should also be amended, adding consent as an affirmative defense. R.C.M. 916 does not create an affirmative defense to sexual offenses under Article 120, UCMJ, but it does inform practitioners of the existence of an affirmative defense.

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The federal system,⁴⁴⁰ the District of Columbia⁴⁴¹ and forty-seven of the fifty American states adopted nonconsensual criminal sex statutes that distinguish rape or sexual assaults based on the presence or absence of aggravating circumstances.⁴⁴² The military and three states have a variety of sex crimes, but do not divide rape, or sodomy into multiple degrees or provide for different punishments based on the aggravating factors of a particular case to the same extent as the majority of jurisdictions.⁴⁴³

American jurisdictions distinguish the most egregious cases of rape or sexual assault in two different ways. Many American jurisdictions divide rape or sexual assault into degrees based on the presence or absence of aggravating factors in a particular case.⁴⁴⁴ Other American jurisdictions authorize enhanced penalties if certain aggravated factors exist.⁴⁴⁵

Some jurisdictions retain the term rape in their criminal code and divide rape into degrees of rape.⁴⁴⁶ Other states use terms other than rape, such as sexual

⁴⁴⁰ 18 U.S.C. § 2241-18 U.S.C. § 2242 (2004) (2004) (the federal criminal sex offenses are divided into two degrees, sexual abuse and aggravated sexual abuse).

⁴⁴¹ D.C. CODE ANN. §§ 22-3004 to 22-3006 (2004) (sex offenses are divided into five degrees of sexual abuse), *see infra* at pages 545 to 547.

⁴⁴² *See infra* notes 446 - 450.

⁴⁴³ GA. CODE ANN. § 16-6-1 (2004) (very similar to Article 120, UCMJ), *see infra* at page 558; IDAHO CODE § 18-6101 (Michie 2004), *see infra* at page 569; UTAH CODE ANN. § 76-5-402 (2004), *see infra* at page 732 (has a two “rape” offenses, it also has more child sexual offenses than the military system); VA. CODE ANN. § 18.2-61 (2004), *see infra* at page 745 (has more variations in sexual offenses than Article 120, UCMJ).

⁴⁴⁴ *See infra* notes 446 - 449.

⁴⁴⁵ *See infra* note 451.

⁴⁴⁶ ALA. CODE § 13A-6-61 to 13A-6-67 (2004), *see infra* at pages 482 - 483; DEL. CODE. ANN. tit. 11, §§ 770 - 773 (2004), *see infra* at pages 535 and 537; KY. REV. STAT. ANN. §§ 510.040 to 510.060 (Michie 2004), *see infra* at page 595; LA. REV. STAT. ANN §§ 42 to 43 (West 2004), *see infra* at pages 599 to 600; MD. CODE ANN. CRIMINAL LAW § 3-303 to 3-304 (2004), *see infra* at pages 612 to 613; MO. ANN. STAT. §§ 566.030 to 566.070 (2004), *see infra* at pages 640 to 642; N.Y. PENAL §§ 130.20 – 130.80 (2004), *see infra* at page 676; N.C. GEN. STAT. § 14-27.1 to 14-27.5 (2004), *see infra* at pages 681 to 682; OKLA. STAT. ANN. tit. 21, § 1114 (West 2004), *see infra* at page 696; OR. REV. STAT. § 163.355 to 163.375 (2004), *see infra* at pages

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assault,⁴⁴⁷ sexual abuse,⁴⁴⁸ criminal sexual conduct,⁴⁴⁹ or various other terms prohibiting unlawful sexual intercourse.⁴⁵⁰ The jurisdictions that removed the term rape from their penal codes generally divided their criminal sex offenses (with whatever title it is given) into different degrees with different maximum punishments. A few jurisdictions do not divide rape or sexual assault into degrees but do have enhanced punishments if certain aggravating factors are present.⁴⁵¹

698 to 699; 18 PA. CONS. STAT. §§ 3121 to 3124.2 3101(2004), *see infra* at pages 704 and 706; S.D. CODIFIED LAWS § 22-22-1 (Michie 2004), *see infra* at page 716; TENN. CODE ANN. § 39-13-502 to 39-13-506 (2004), *see infra* at pages 719 to 720; WASH. REV. CODE ANN. § 9A.44.040 to 9A.44.060 (West 2004), *see infra* at page 754.

⁴⁴⁷ ALASKA STAT. § 11.41.410 - 450 (Michie 2004), *see infra* at pages 485 to 488; ARK. CODE ANN. §§ 5-14-103, 5-14-124, 5-14-127 (Michie 2004), *see infra* at pages 496, 498, and 500; COLO. REV. STAT. § 18-3-402 (2004), *see infra* at page 523; CONN. GEN. STAT. §§ 53a-70a to 53a-73a (2003), *see infra* at pages 530 to 532; HAW. REV. STAT. ANN. § 707-730 to 707-733 (Michie 2004), *see infra* at pages 564 to 566; 720 ILL. COMP. STAT. 5/12-13 to 5/12-16 (2004), *see infra* at pages 573 to 576; ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; MONT. CODE ANN. §§ 45-5-502 to 503 (2004), *see infra* at pages 645 to 646; NEB. REV. STAT. ANN. § 28-319 to 320 (Michie 2004), *see infra* at page 649; N.H. REV. STAT. ANN. § 632-A:2 TO 632-A:4 (2004), *infra* at pages 656 to 658; N.J. STAT. ANN. § 2C:14-2 to 2C:14-3 (2004), *see infra* at pages 661 to 662; R.I. GEN. LAWS § 11-37-2 to 11-37-8 (2004), *see infra* at page 711; TEX. PENAL CODE ANN. § 22.011 to 22.021 (Vernon 2004), *see infra* at pages 724 to 727; VT. STAT. ANN. tit. 13, § 3252 to 3253 (2004), *see infra* at pages 742 to 743; W.VA. CODE ANN. § 61-8B-3 to 61-8B-9 (Michie 2004), *see infra* at pages 760 to 762; WIS. STAT. ANN. § 940.225 (2004), *see infra* at page 764; WYO. STAT. ANN. § 6-2-302 to 6-2-304 (Michie 2004), *see infra* at pages 772 to 773.

⁴⁴⁸ IOWA CODE ANN. § 709.2 and 709.4 (West 2004), *see infra* at pages 585 and 586; S.C. CODE ANN. §§ 16-3-652 to 16-3-655 (Law Co-op. 2004), *see infra* at pages 713 to 714.

⁴⁴⁹ MICH. COMP. LAWS § 750.520b to 750.520e (2004), *see infra* at pages 621 to 624; MINN. STAT. ANN §§ 609.342 – .345 (West 2004), *infra* at page 626.

⁴⁵⁰ N.M. STAT. ANN. § 30-9-11 (Michie 2004) (criminal sexual penetration), *see infra* at page 668; N.D. CENT. CODE § 12.1-20-03 to 12.1-20-07 (2004), *see infra* at pages 685 to 686 (sexual imposition).

⁴⁵¹ ARIZ. REV. STAT. §§ 13-1404 to 13-1406 and 13-1423 (2004), *see infra* at pages, 492 492, and 495; CAL. PENAL CODE § 261 (Deering 2004), *see infra* at page 503; FLA. STAT. ANN. § 794.011 (West 2004), *see infra* at page 554; IND. CODE ANN. §35-42-4-1 (Michie 2004), *see infra* at page 580; KAN. STAT. ANN. § 21-3502 (2003-Lexis does not have update), *see infra* at page 588; MASS. GEN. LAWS ANN. ch 265, §

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A review of the statutes in American jurisdictions that divide the offense of rape or sexual assault into degrees shows that the statutory schemes range from the simple to the complex. The federal statute is an example of a moderate division of the common law offense of rape into a statutory scheme designed to prohibit criminal sexual conduct. The federal criminal code consists of two offenses, aggravated sexual abuse and sexual abuse.⁴⁵² In the federal system four aggravating factors justify classifying a sexual assault as aggravated sexual abuse.⁴⁵³ Sexual abuse applies to nonconsensual intercourse when none of the four aggravating factors justifying aggravated sexual abuse are present.⁴⁵⁴ An example of a more complex statutory scheme is New York, which consists of three degrees of rape, three degrees of sodomy, three degrees of sexual abuse, four degrees of aggravated sexual abuse, two degrees of sexual conduct against a child, sexual misconduct, forcible touching, and persistent sexual abuse.⁴⁵⁵

Most American jurisdictions that divided the offense of rape or sexual assault into degrees adopted statutes that are closer to the Federal scheme than the more complex New York statutory scheme described above. Because each jurisdiction has the power to regulate conduct to protect the health, safety and morals of people within its borders, there is no uniform approach to defining which aggravating factors justify the highest degree of rape or sexual assault. Rather, each state fashions its criminal code to carry out its policy objectives.

22 (West 2004), *see infra* at page 617; MISS. CODE ANN. § 97-3-95 (2004), *see infra* at page 638; NEV. REV. STAT. ANN. § 200.366 (Michie 2004), *see infra* at page 653; OHIO REV. CODE ANN. § 2907.02 - 2907.06 (Anderson 2004), *see infra* at pages 689 to 694.

⁴⁵² 18 U.S.C. § 2241-18 U.S.C. § 2242 (2004) (2004). *See* App. I and J, at pages 394 and 394. , respectively.

⁴⁵³ The four aggravating factors justifying aggravated sexual abuse are sexual penetration or attempted sexual penetration: (1) with children under twelve; (2) accomplished by the use of force or threats of death, kidnapping or serious bodily injury; (3) the use of drugs to impair the victim; or (4) when the accused has rendered the victim unconscious. 18 U.S.C. § 2241 (2004). *See* Tab H, at page 394.

⁴⁵⁴ Sexual abuse is defined as sexual penetration or attempted sexual penetration: (1) when the victim is unconscious but not through the actions of the accused; (2) when the victim is incapable of appraising the nature of the conduct; (3) if the intercourse is obtained by threats other than threats of death, kidnapping or serious bodily injury. 18 U.S.C. § 2242 (2004). *See* App. I, at page 409.

⁴⁵⁵ N.Y. PENAL §§ 130.20 – 130.80 (2004), *see infra* at page 676.

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The military is a unique society and should develop criminal laws designed to carry out its policy objectives. The three major policy objectives for the military, as it relates to sexual criminal offenses are deterrence,⁴⁵⁶ readiness,⁴⁵⁷ and good order and discipline. These policy objectives form the basis for the proposed changes to the UCMJ and *MCM* discussed in this report.

Determining which aggravating factors justify classification, as a higher versus a lower degree of rape or sexual assault is a difficult task. There are numerous methods an accused may use to accomplish nonconsensual sexual activity. One author described the methods as follows.

They use physical force; they beat, choke and knock their victims unconscious. They kidnap and restrain them. They use weapons and threats of immediate force to subdue their quarry. They come in groups with the superior strength of their number. They exploit the element of surprise. They coerce, extort and blackmail others into sexual submission. They lie, pretend, impersonate, and defraud, trapping the unwary in webs of deceit. They victimize mentally ill, mentally disabled, physically weak, and physically incapacitated persons. They abuse their positions of trust and authority to overcome their patients, clients, students, foster children, and prisoners. They sexually assault members of their own family. They prey on children.⁴⁵⁸

⁴⁵⁶ The deterrence of sexual offenses in the military is especially critical because of the unique military environment that requires large numbers of young men and women to work together in close quarters that are often highly isolated. *See supra* note 35. Moreover, sexual offenses committed by military personnel overseas tend to discredit the military service and by extension the United States government. The recent sexual abuse of military detainees by military personnel overseas provides a timely example of the impact of sexual misconduct overseas.

⁴⁵⁷ Pentagon health care experts identified military sexual trauma as a major deployment and readiness issue that must be dealt with. Rape victims often experience post-traumatic stress symptoms such as anxiety, depression and intrusive thoughts, and are more likely to develop post-traumatic stress in other situations, according to military research. Sgt. 1st Class Kathleen T. Rhem, *Services Move to Lower Instances of Rape in the Ranks*, USA American Forces Press Service available at <http://www.defenselink.mil/news/Apr2001/n04052001200104054.html>, (last visited Sept. 2, 2004).

⁴⁵⁸ Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).

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All the proposed UCMJ articles and *MCM* changes prohibit nonconsensual sexual intercourse in a variety of different circumstances. Options 4 and 5 propose the title of the UCMJ article to be “sexual misconduct” because this term more accurately describes the prohibited conduct than the title rape. This report discusses starting at page 178 whether the label “rape,” versus another name such as aggravated sexual abuse should be used to describe a forcible sexual penetration. The title sexual misconduct fits the broad prohibitions contained in subsequent specific prohibitions in the proposed article 120.

1. Dangerous Weapons

American jurisdictions are split on the best method to prohibit the use of dangerous weapons in sexual assaults. Many states specifically include the use of dangerous weapons in the statute prohibiting rape or sexual assault.⁴⁵⁹ For example, the Colorado sexual assault statute provides that, “Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if . . . [t]he actor is armed with a deadly weapon.”⁴⁶⁰

The federal sexual abuse statute and some state statutes do not specifically prohibit the use of dangerous weapons in their sexual crimes chapter.⁴⁶¹ A prosecutor in U.S. District Court, however, would likely also charge a violation of

⁴⁵⁹ See, e.g., COLO. REV. STAT. § 18-3-402(5)(a)(III) (2004), *see infra* at page 523; DEL. CODE ANN. tit. 11, § 773(a)(3) (2004), *see infra* at pages 537; 720 ILL. COMP. STAT. 5/12-12(d) (2004), *see infra* at page 573; LA. REV. STAT. ANN § 42A(3) (West 2004), *see infra* at page 599; MD. CODE ANN. CRIMINAL LAW § 3-303(a)(2) (2004), *see infra* at page 612; MICH. COMP. LAWS § 750.520b(e) to 750.520e (2004), *see infra* at pages 621 to 624; MINN. STAT. ANN § 609.342(d) (West 2004), *infra* at page 626; N.J. STAT. ANN. § 2C:14-2a(4) (2004), *see infra* at page 661; N.C. GEN. STAT. § 14-27.2(a)(2)a (2004), *see infra* at page 681; TENN. CODE ANN. § 39-13-502(a)(1) (2004), *see infra* at pages 719; TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv) (Vernon 2004), *see infra* at page 727; UTAH CODE ANN. § 76-5-405(1)(b) (2004), *see infra* at page 735; VT. STAT. ANN. tit. 13, § 3253(a)(5) (2004), *see infra* at page 743; WASH. REV. CODE ANN. § 9A.44.040(1)(A) (West 2004), *see infra* at page 754; W.VA. CODE ANN. § 61-8B-3(a)(1)(ii) (Michie 2004), *see infra* at page 760; WIS. STAT. ANN. § 940.225(1)(b) (2004), *see infra* at page 764.

⁴⁶⁰ COLO. REV. STAT. § 18-3-402(5)(a)(III) (2004), *see infra* at page 523.

⁴⁶¹ See, e.g., 18 U.S.C. § 2241 (2004); ALA. CODE § 13A-6-61 to 13A-6-67 (2004), *see infra* at pages 482 - 483; CONN. GEN. STAT. § 53a-65(7) (2003), *see infra* at page 529; D.C. CODE ANN. § 22-3001 (2004), *see infra* at page 544; KY. REV. STAT. ANN. § 510.040 (Michie 2004), *see infra* at page 595; S.C. CODE ANN. § 16-3-651 (Law Co-op. 2004), *see infra* at page 713.

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Title 18 U.S.C. § 924(c)(1)(A), which states, “any person who during and in relation to a crime of violence . . . uses⁴⁶² or carries a firearm, or who, in furtherance of such crime, possesses a firearm.” Section 924(c)(1) also details mandatory minimum confinement for such offenses. Use of a dangerous weapon also precludes probation under 18 U.S.C. § 924(c)(1)(D), and otherwise enhances the punishment under sentencing guidelines. 18 U.S.C. § 2241 (2004) defines aggravated sexual abuse as a sexual act caused by the use of a threat that places the victim in “fear of death, serious bodily injury or kidnapping.”⁴⁶³ In jurisdictions that do not specifically include the use of dangerous weapons in the rape or sexual assault statutes, the finder of fact must determine if the use of a dangerous weapon in a sexual assault fits the definition of force, forcible compulsion or threats that place the victim in fear of bodily injury.

Specifically listing the “use of a dangerous weapon” in the rape or sexual assault statute is superior to not listing this element. The use of a dangerous weapon increases the risk of serious injury or death as well as the victim’s emotional and mental trauma. As such, it should be specifically prohibited. Explicitly including the use of a dangerous weapon in the statute makes it easier to establish the element of force. 18 U.S.C. § 2246 (2004) does not define the term, “force.” In Option 5, the use of a dangerous weapon is included in the definition of force.⁴⁶⁴

Jurisdictions specifically prohibiting the use of dangerous weapons in their rape or sexual assault statutes classify such rapes or sexual assaults as aggravated

⁴⁶² See *United States v. Bousley*, 523 U.S. 614 (1998) (citing *Bailey v. United States*, 516 U.S. 137 (1995) (interpreting § 924(c)(1) to require active employment of a firearm).

⁴⁶³ See 18 U.S.C. § 2241 (2004), *infra* at page 394.

⁴⁶⁴ Option 5’s subsection 920(a) prohibits using force to cause anyone to engage in a sexual penetration.⁴⁶⁴ Subsection 920(u)(5) defines “force” as follows:

- (5) “force” means action to compel submission of another or to overcome or prevent another’s resistance by—
- (A) the use or display of a dangerous weapon;⁴⁶⁴
 - (B) the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause another to believe it is a dangerous weapon; or
 - (C) physical violence, strength, power, or restraint applied to another, sufficient that the other person could not avoid or escape the sexual conduct.

See subsection 920(u)(5) at page 298 *infra*. For an explanation for subsection 920(u)(5) see page 274 *infra*.

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offenses.⁴⁶⁵ In the jurisdictions that divide the offense of rape or sexual assault into degrees, nearly every jurisdiction classifies rape or sexual assaults involving dangerous weapons as the highest-level offense.⁴⁶⁶ In other jurisdictions the use of a dangerous weapon during a sexual assault is an aggravating factor authorizing an enhanced punishment.⁴⁶⁷

The use of a dangerous weapon poses a great risk to the victim's health and puts his or her life in danger. The potential danger to the victim makes the sexual assault aggravated. The proposed UCMJ article specifically prohibits the use of a dangerous weapon during a sexual assault and classifies sexual assaults involving the use of a weapon as first-degree sexual misconduct. The proposed UCMJ article includes the aspect of dangerous weapons in the definition of force, and further defines the term, "dangerous weapon."

American jurisdictions use a variety of definitions for the term dangerous weapon. The *MCM* currently defines a dangerous weapon "as a weapon used in a manner likely to produce death or grievous bodily harm."⁴⁶⁸ Hawaii defines dangerous weapon in its sexual assault statutes as any "firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily

⁴⁶⁵ See *infra* notes 466 - 18.

⁴⁶⁶ See, e.g., COLO. REV. STAT. § 18-3-402(5)(a)(III) (2004), see *infra* at page 523; DEL. CODE ANN. tit. 11, § 773(a)(3) (2004), see *infra* at page 535; 720 ILL. COMP. STAT. 5/12-12(d) (2004), see *infra* at page 573; LA. REV. STAT. ANN § 42A(3) (West 2004), see *infra* at page 599; MD. CODE ANN. CRIMINAL LAW § 3-303(a)(2) (2004), see *infra* at page 612; MICH. COMP. LAWS § 750.520b(e) (2004), see *infra* at page 621; MINN. STAT. ANN. § 609.342(d) (West 2004), *infra* at page 626; N.J. STAT. ANN. § 2C:14-2a(4) (2004), see *infra* at page 661; N.C. GEN. STAT. § 14-27.2(a)(2)a (2004), see *infra* at page 681; TENN. CODE ANN. § 39-13-502(a)(1) (2004), see *infra* at page 719; TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv) (Vernon 2004), see *infra* at page 727; UTAH CODE ANN. § 76-5-405(1)(b) (2004), see *infra* at page 735; VT. STAT. ANN. tit. 13, § 3253(a)(5) (2004), see *infra* at page 743; WASH. REV. CODE ANN. § 9A.44.040(1)(A) (West 2004), see *infra* at page 754; W.VA. CODE ANN. § 61-8B-3(a)(1)(ii) (Michie 2004), see *infra* at page 760; WIS. STAT. ANN. § 940.225(1)(b) (2004), see *infra* at page 764.

⁴⁶⁷ See, e.g., D.C. CODE ANN. § 22-3002 (2004), see *infra* at page 545; IND. CODE ANN. §35-42-4-1(b)(2) (Michie 2004), see *infra* at page 580; MASS. GEN. LAWS ANN. ch 265, § 22 (West 2004), see *infra* at page 617.

⁴⁶⁸ *MCM*, *supra* note 32, Pt. IV, ¶ 54c(4)(a)(I).

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injury.”⁴⁶⁹ Another approach is to make a list of dangerous weapons. Iowa defines dangerous weapons as including, “any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.”⁴⁷⁰

The current *MCM* definition of a dangerous weapon is inadequate because it requires the use of the weapon in a manner likely to produce death or grievous bodily harm. The definition does not prohibit the displaying of a weapon. A perpetrator displaying a weapon to a victim can be extremely coercive. The *MCM* definition of a dangerous weapon also fails to consider cases in which the accused claims to have a weapon and through his actions displays an item that the victim believes is a weapon. The Iowa definition specifically listing types of weapons is inadequate because the items that can be used as weapons are almost limitless. An attempt to list them all is nearly impossible.

The best definition of a dangerous weapon for use in the military is a combination of the Illinois and the Hawaii definitions. Hawaii’s definition is comprehensive and specifically tailored to prohibit the use of deadly weapons in cases involving sexual assaults. The definition specifically prohibits the use of firearms and generally prohibits the use of other weapons. The dangerous weapon definition includes the accused’s actual use of the weapon and the weapon’s intended use. By including both the actual use and intended use of the dangerous weapon, the definition more accurately defines the criminal use of weapons in a sexual assault. The Hawaii definition of force-dangerous instrument is:

any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

The Illinois definition includes the concept of the reasonable belief of the victim, as opposed to viewing the situation from the standpoint of the accused. The Illinois definition of force-dangerous weapon is:

the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon⁴⁷¹

⁴⁶⁹HAW. REV. STAT. ANN. § 707-700 (Michie 2004), *see infra* at page 563.

⁴⁷⁰IOWA CODE ANN. § 702.7 (West 2004), *see infra* at page 587.

⁴⁷¹*See* 720 ILL. COM. STAT.5/12-14(a)(1) (2004), at page 575.

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Option 5's subsection 920(u)(4) defines "dangerous weapons" as follows:

"(4) 'dangerous weapon' means any firearm, whether operable, loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm."

See subsection 920(u)(4) at page 297 *infra*. See page 273 *infra* for an explanation for subsection 920(u)(4).

B. Injury to the Victim

Many state statutes classify sexual assaults resulting in serious injury to the victim as aggravated sexual assaults.⁴⁷² Most American jurisdictions that divide the offense of rape into degrees recognize injury to the victim as an aggravating factor justifying classification as the highest degree of rape or sexual assault.⁴⁷³ Iowa classifies serious injury to the victim as the only aggravating factor justifying sexual abuse in the first-degree.⁴⁷⁴ If an accused attacks a victim and forces the victim to have a sex act resulting in serious injury to the victim, then the crime justifies classification as first-degree sexual misconduct. Options 3 through 6 unlike 18

⁴⁷² See *infra* notes 473.

⁴⁷³ See, e.g., ALASKA STAT. § 11.41.410 (Michie 2004), see *infra* at page 485; 720 ILL. COMP. STAT. 5/12-12(d) (2004), see *infra* at page 573; MICH. COMP. LAWS § 750.520b (2004), see *infra* at page 621; MINN. STAT. ANN. § 609.342 (West 2004), *infra* at page 626; NEV. REV. STAT. ANN. § 200.366 (Michie 2004), see *infra* at page 653; N.J. STAT. ANN. § 2C:14-2 (2004), see *infra* at page 661; N.C. GEN. STAT. § 14-27.2 (2004), see *infra* at page 681; N.D. CENT. CODE § 12.1-20-03 (2004), see *infra* at page 685; TENN. CODE ANN. § 39-13-502 (2004), see *infra* at page 719; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), see *infra* at page 724; UTAH CODE ANN. § 76-5-405 (2004), see *infra* at page 735; VT. STAT. ANN. tit. 13, § 3253 (2004), see *infra* at page 743; WASH. REV. CODE ANN. § 9A.44.040 (West 2004), see *infra* at page 754; W.VA. CODE ANN. § 61-8B-3 (Michie 2004), see *infra* at page 760; WIS. STAT. ANN. § 940.225 (2004), see *infra* at page 764.

⁴⁷⁴ IOWA CODE ANN. § 709.2 (West 2004), see *infra* at page 585.

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U.S.C. § 2241 (2004) classify sexual assaults resulting in grievous bodily harm or serious bodily injury as the most serious level of criminal sexual misconduct.⁴⁷⁵

In the jurisdictions that categorize sexual assaults resulting in serious injury as aggravated, there is a split as to whether the injury must be to the victim or if it can be to another person besides the victim. In most states, the injuries sustained in the sexual assault must be to the victim.⁴⁷⁶ Indiana, Maryland and a few other jurisdictions recognize injury to the victim or injury to another as justifying first-degree rape.⁴⁷⁷ Recognizing injury to another as an aggravating factor is a better approach than only recognizing injury to the victim. If an accused attacks and injures another man or a child to facilitate the sexual abuse of a family member, then the sexual assault is aggravated. There are many other scenarios that can be imagined that justify classification of sexual assaults resulting in injury to someone other than the victim as an aggravated offense. Like 18 U.S.C. § 2241 (2004), Options 3 through 7 classify sexual assaults resulting in grievous bodily harm to the victim or another as aggravated sexual abuse, the most serious level of sex crime.

American jurisdictions define serious bodily injury in a variety of ways. The *MCM* defines serious bodily injury or grievous bodily harm as “not including minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.”⁴⁷⁸ 18 U.S.C. § 2246 (2004) at page 430 defines “serious bodily injury” as, “bodily injury that involves a substantial risk of

⁴⁷⁵ See e.g., Option 5, subsection 920(a) at page 294 and definition of “grievous bodily harm” at subsection 920(u)(3) at page 297.

⁴⁷⁶ See, e.g., ALASKA STAT. § 11.41.410 (Michie 2004), see *infra* at page 485; 720 ILL. COMP. STAT. 5/12-12(d) (2004), see *infra* at page 573; MICH. COMP. LAWS § 750.520b (2004), see *infra* at page 621; MINN. STAT. ANN. § 609.342 (West 2004), *infra* at page 626; NEV. REV. STAT. ANN. § 200.366 (Michie 2004), see *infra* at page 653; N.J. STAT. ANN. § 2C:14-2 (2004), see *infra* at page 661; N.D. CENT. CODE § 12.1-20-03 (2004), see *infra* at page 685; TENN. CODE ANN. § 39-13-502 (2004), see *infra* at page 719; UTAH CODE ANN. § 76-5-405 (2004), see *infra* at page 735; WASH. REV. CODE ANN. § 9A.44.040 (West 2004), see *infra* at page 754; WIS. STAT. ANN. § 940.225 (2004), see *infra* at page 764.

⁴⁷⁷ IND. CODE ANN. §35-42-4-1 (Michie 2004), see *infra* at page 580; MD. CODE ANN. CRIMINAL LAW § 3-303 (2004), see *infra* at page 612; N.C. GEN. STAT. § 14-27.2 (2004), see *infra* at page 681; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), see *infra* at page 724; VT. STAT. ANN. tit. 13, § 3253 (2004), see *infra* at page 743; W.VA. CODE ANN. § 61-8B-3 (Michie 2004), see *infra* at page 760.

⁴⁷⁸ *MCM*, *supra* note 32, Pt. IV, ¶ 54b(4)(a).

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death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”⁴⁷⁹ Washington D.C. defines bodily injury as an “injury involving the loss of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.”⁴⁸⁰ Florida defines serious personal injury as “great bodily harm or pain, permanent disability, or permanent disfigurement.”⁴⁸¹

All of the definitions of physical injury, discussed above, provide good definitions for serious physical injuries. In many respects they are very similar. The current *MCM* definition of grievous bodily harm is the best because military justice practitioners are familiar with it. The *MCM* differentiates between short-term injuries such as black eyes and bloody noses and long-term injuries such as bone fractures and serious damage to internal organs. This distinction provides a good framework for distinguishing between injuries that are serious and minor injuries. The *MCM* definition includes the provision, “and other serious bodily injuries,”⁴⁸² which can be confused by the term in 18 U.S.C. § 2246 (2004) at page 430, defines “serious bodily injury.” The words “severe injury to the body” replace “serious bodily injury” to avoid the possibility that a court will read into Option 5, subsection 920(u)(3) the definition from 18 U.S.C. § 2246 (2004). The *MCM* definition accurately describes the types of injuries that justify an enhanced penalty for sexual conduct resulting in significant injury to the victim. Options 4 and 5 retain the current *MCM* definition of grievous bodily harm, with a small variation. with the definition of “serious 18 U.S.C. § 2246. Option 5 at subsection 920(u)(3) at page 297 states:

“(3) ‘grievous bodily harm’ means severe injury to the body. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.”

⁴⁷⁹ 18 U.S.C. § 2241(a)(2) (2004), prohibits a sex act caused, “by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping.” The proposed Article 120 is similar, but also prohibits a sex act caused by actual death, serious bodily injury, or kidnapping. *See e.g.*, Option 5 Option 5, subsection 920(a)(3) at page 294.

⁴⁸⁰ D.C. CODE ANN. § 22-3001 (2004), *see infra* at page 544.

⁴⁸¹ FLA. STAT. ANN. § 794.011(1)(a) (West 2004), *see infra* at page 554.

⁴⁸² *MCM*, *supra* note 32, Pt. IV, ¶ 54b(4)(a).

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The mental trauma of a sexual assault can affect a victim profoundly.⁴⁸³ The victim may suffer long-term mental injuries that affect the victim just as profoundly as long-term physical injuries. Rape trauma syndrome (RTS) is a type of post-traumatic stress disorder recognized by the psychiatric community.⁴⁸⁴ Symptoms of RTS include severe loss of control over the victim's everyday activities, inability to eat or sleep, intestinal disorders and fears of physical abuse or death, long-term sleep disorder and depression.⁴⁸⁵

Delaware, Michigan and New Mexico list physical injuries and mental injuries in their sexual assault statutes.⁴⁸⁶ Michigan lists mental anguish as part of its definition of personal injury but does not define mental anguish in the statute.⁴⁸⁷ Delaware lists serious mental or emotional injury as an aggravating factor justifying first-degree rape but does not define serious mental or emotional injury. In contrast, New Mexico provides a comprehensive definition of great mental anguish. New Mexico defines great mental anguish as “psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms.”⁴⁸⁸ The New Mexico definition of great mental anguish identifies victims suffering long-term serious mental trauma from their attack. When an accused causes his victim to suffer long-term mental trauma as a result of a sexual assault, then the sexual assault is aggravated and justifies classification as an aggravated sexual assault.

One provision not included in any option is inclusion of sexual misconduct resulting in serious physical or mental injury to the victim, or another, as an aggravating factor, by including the following definitions:

⁴⁸³ JUDITH ROWLAND, *THE ULTIMATE VIOLATION* 336-37 (1985).

⁴⁸⁴ Bridget A. Clarke, *Comment: Making the Woman's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 *UCLA L. REV.* 251, 256 (1991).

⁴⁸⁵ *Id.*

⁴⁸⁶ *See, e.g.*, DEL. CODE. ANN. tit. 11, § 773(a)(3) (2004), *see infra* at page 535; MICH. COMP. LAWS § 750.520b (2004), *see infra* at page 621; N.M. STAT. ANN. § 30-9-11 (Michie 2004), *see infra* at page 668.

⁴⁸⁷ MICH. COMP. LAWS § 750.520a (2004), *see infra* at page 620.

⁴⁸⁸ N.M. STAT. ANN. § 30-9-10 (Michie 2004), *see infra* at page 667.

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Injury to the Victim. Any person subject to this chapter who commits an act of nonconsensual sexual intercourse and causes serious bodily injury or great mental anguish to the victim, or another, is guilty of criminal sexual misconduct in the first-degree.

Serious bodily injury. Does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

Great Mental Anguish. Psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms.

The counter argument is that including mental anguish, which is difficult to quantify because it is subjective, as a basis for increasing the level of a sexual offense may result in a battle of expert witnesses, and an accused may vigorously contest the sincerity of the victim's statements of mental anguish. Moreover, information about victim impact is admissible, aggravation information that the government may present during the pre-sentencing phase of military trials.⁴⁸⁹

3. Multiple Assailants

An option that was proposed, but not incorporated into any of the options in this report is to include a specific provision with sexual assaults involving multiple assailants as a new aggravating element. This option was incorporated because involvement of multiple assailants would automatically involve a conspiracy, which could be an additional charge under military law. Like military law, 18 U.S.C. §§ 2241-2244 does not include multiple assailants as an aggravating element. The next three pages describes how some states incorporate multiple assailants as an aggravating feature of their sexual offense scheme.

A sexual assault by multiple assailants is one of the most heinous and dangerous types of sexual assaults.⁴⁹⁰ A study comparing sexual assaults involving multiple assailants or "gang rapes" to rapes involving one accused revealed that the

⁴⁸⁹ See R.C.M. 1001(a)(4), stating, "Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused. . ."

⁴⁹⁰ Ullman, S.E. A Comparison of Gang and Individual Rape Incidents, Violence and Victims, 14, 123- 33 (1998).

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victims of gang rape tended to be younger, the sexual assaults more severe and the number of serious injuries higher.⁴⁹¹ Gang rapes in the military are especially troubling, particularly when the victim is young and vulnerable and the perpetrators are people the victim should be able to trust.

Two cases illustrate the potentially devastating impact of a gang rape in a military setting. In *United States v. Natkie*,⁴⁹² the victim Airman Basic (AB) H was seventeen years old. She arrived at her unit five days before being invited to a dormitory party. An NCO hosted the dormitory party that the court described as follows, “As is too often the case ... the dormitory party was open to anybody in the dormitory, and copious quantities of alcohol were made available without regard to age, duty status, or condition.”⁴⁹³ Airman Basic H became intoxicated and passed out. During the night various male members of her unit came by her room. They discovered she was out of it. After discovering her condition two members of her unit retrieved a video camera. They returned to her room and taped the gang rape of AB H.⁴⁹⁴

Single, junior-enlisted military personnel generally live in the barracks, many of which are gender-integrated. The potential for alcohol use and abuse is significant. Youth, alcohol abuse, and availability of victims are sometimes cited as factors which increase the possibility of a gang rape.⁴⁹⁵

Many state statutes specifically identify sexual assaults or rapes committed by more than more person as aggravated. Florida’s rape statute states, “a rape committed by force, or against the will of the victim, by more than one person presents a great danger to the public and is extremely offensive to civilized society and deserving to be classified as rape in the first-degree.”⁴⁹⁶ Another state statute prohibiting rape by multiple assailants is Maryland’s first-degree rape statute.⁴⁹⁷

⁴⁹¹ *Id.*

⁴⁹² ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996) (unpub.).

⁴⁹³ *Id.* at *1-2.

⁴⁹⁴ *Id.* at *4-5.

⁴⁹⁵ A study comparing gang rapes to rapes involving one accused revealed that the victims of gang rape tended to be younger, the sexual assaults more severe and the number of serious injuries higher. Ullman, S.E. *A Comparison of Gang and Individual Rape Incidents, Violence and Victims*, 14, 123- 33 (1998).

⁴⁹⁶ FLA. STAT. ANN. §794.023 (West 2004), *see infra* at page 556.

⁴⁹⁷ MD. CODE ANN. CRIMINAL LAW § 3-303 (2004), *see infra* at page 612.

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Maryland lists five aggravating factors justifying a first-degree rape charge including a rape committed “while aided and abetted by another.”⁴⁹⁸

In the states that divide the offense of rape or sexual assault into degrees, nine classify a rape by multiple assailants or “gang-rape” as an aggravating factor justifying the highest degree of rape or sexual assault.⁴⁹⁹ In states that do not divide the offense of rape or sexual assault into degrees, many recognize the aggravated nature of a “gang-rape” by authorizing an enhanced criminal penalty for a rape or sexual assault committed by multiple assailants.⁵⁰⁰ A very small minority of states including Iowa and New Mexico classify “gang-rape” as a second-degree offense.⁵⁰¹ Iowa reserves the offense of first-degree sexual abuse exclusively for sexual assaults resulting in serious injury.⁵⁰² New Mexico limits its first-degree criminal sexual penetration statute to sexual assaults resulting in great bodily harm or great mental anguish to the victim and sexual penetration of children under thirteen.⁵⁰³

While sexual assaults accomplished by multiple perpetrators on a single victim have a devastating effect on good order and discipline and is a heinous and dangerous crime, a military accused who engages in such conduct with others can be charged with conspiracy as well as with the predicate offense.⁵⁰⁴ The text of a provision pertaining to multiple sexual abuse by assailants, might provide:

⁴⁹⁸ *Id.*

⁴⁹⁹ *See, e.g.*, COLO. REV. STAT. § 18-3-402(5)(a)(I) (2004), *see infra* at page 523; CONN. GEN. STAT. § 53a-70a (2003), *see infra* at page 530; FLA. STAT. ANN. §794.023 (West 2004), *see infra* at page 556; LA. REV. STAT. ANN § 42 (West 2004), *see infra* at page 599; MD. CODE ANN. CRIMINAL LAW § 3-303 (2004), *see infra* at page 612; MICH. COMP. LAWS § 750.520b(1)(d) (2004), *see infra* at page 621; N.J. STAT. ANN. § 2C:14-2 (2004), *see infra* at page 661; N.C. GEN. STAT. § 14-27.2(a)(2)c (2004), *see infra* at page 681; TEX. PENAL CODE ANN. § 22.021 (Vernon 2004), *see infra* at page 727; WIS. STAT. ANN. § 940.225 (2004), *see infra* at page 764.

⁵⁰⁰ *See, e.g.*, CAL. PENAL CODE §264.1 (Deering 2004), *see infra* at page 507; CONN. GEN. STAT. § 53a-70a (2003), *see infra* at page 530; MONT. CODE ANN. § 45-5-503 (2004), *see infra* at page 646; UTAH CODE ANN. § 76-5-405 (2004), *see infra* at page 735.

⁵⁰¹ *See, e.g.*, IOWA CODE ANN. § 709.3 (West 2004), *see infra* at page 585; N.M. STAT. ANN. § 30-9-10 (Michie 2004), *see infra* at page 667.

⁵⁰² IOWA CODE ANN. § 709.3 (West 2004), *see infra* at page 585.

⁵⁰³ N.M. STAT. ANN. § 30-9-10 (Michie 2004), *see infra* at page 667.

⁵⁰⁴ *See* Article 81, UCMJ.

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Multiple Assailants. Any person subject to this chapter who commits an act of nonconsensual sexual intercourse and is aided or abetted by one or more persons is guilty of criminal sexual misconduct in the first-degree.

All six options presented in this report rely on traditional concepts of military criminal law to include others who facilitate incapacitation of the victim. Based on Article 77, UCMJ, the *MCM* provides:

A person who aids, abets, counsels, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of that offense as one who commits it directly and may be punished to the same extent.⁵⁰⁵

Article 81, UCMJ, prohibits conspiracy to commit any other UCMJ offense.

4. Incapacity/Intoxicants

Many jurisdictions specifically prohibit sexual activity with an incapacitated person.⁵⁰⁶ The definition of incapacity varies by jurisdiction. One of the most comprehensive definitions of incapacity is found in Iowa's criminal code. Iowa separates incapacity into three sections as follows:

'[I]ncapacitated' means a person is disabled or deprived of ability, as follows:

1. '*Mentally incapacitated*' means that a person is temporarily incapable of apprising or controlling the person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.
2. '*Physically helpless*' means that a person is unable to communicate an unwillingness to act because the person is unconscious, asleep, or is otherwise physically limited.
3. '*Physically incapacitated*' means that a person has a bodily impairment or handicap that substantially limits the person's ability to resist or flee.⁵⁰⁷

⁵⁰⁵ See *MCM*, Pt. IV, ¶ 1b(1).

⁵⁰⁶ See *supra* notes 507, 509, 512 - 516, 523 - 537.

⁵⁰⁷ IOWA CODE § 709.1A(1) (2004), see *infra* at page 585.

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The use of intoxicants, especially the use of “date-rape” drugs that incapacitate victims became a more serious problem in the 1990s.⁵⁰⁸ The federal government and some states passed legislation prohibiting sexual acts with victims incapacitated through the use of date-rape drugs.⁵⁰⁹ Sexual assaults accomplished after the victim ingests a drug or intoxicant that incapacitates the victim usually follows two basic fact patterns.⁵¹⁰ The first scenario involves a victim who becomes incapacitated for reasons unrelated to the accused. The victim consumes too much alcohol or other intoxicant, causing the victim to become incapacitated or incapable of consenting to sexual activity. The assailant in this scenario takes advantage of the situation and engages in sexual acts with the incapacitated victim. The second situation involves an accused who procures an intoxicant and slips the intoxicant into a drink which the victim imbibes without being aware of the intoxicant’s presence therein. After the intoxicant incapacitates the victim, the accused engages in sexual acts upon the person’s body.⁵¹¹

There are four general types of statutes that prohibit sexual assaults on victims incapacitated by intoxicants. First, some statutes specifically prohibit intercourse with a victim incapacitated by intoxicants.⁵¹² Second, others integrate language regarding intoxicants into the definition of mental incapacitation and use the term mental incapacitation in their sexual abuse statutes.⁵¹³ Third, some jurisdictions

⁵⁰⁸ National Institute on Drug Abuse, *Info Facts Rohypnol and GHB*, available at <http://www.nida.nih.gov/Infobox/RohypnolGHB.html> (last visited Sep. 15, 2004).

⁵⁰⁹ See, e.g., 18 U.S.C. § 2241(b)(1)(2004) at page 394 *infra*; ARIZ. REV. STAT. § 13-1401(5) (2004), see *infra* at page 491; MONT. CODE ANN. § 45-2-101(39), (40), (57) (2004); TEX. PENAL CODE ANN. § 22.011(b)(3)-(6) (Vernon 2004), see *infra* at page 724.

⁵¹⁰ Falk, *supra* note 458, at 133-34.

⁵¹¹ *Id.*

⁵¹² See, e.g., 18 U.S.C. § 2242 (2004), see *infra* at page 409; COLO. REV. STAT. § 18-3-402(4)(d) (2004), see *infra* at page 523; D.C. CODE ANN. § 22-3002(4) (2004), see *infra* at page 545; LA. REV. STAT. ANN § 43A.1 (West 2004), see *infra* at page 600; OHIO REV. CODE ANN. § 2907.02(A)(1)a (Anderson 2004), see *infra* at page 689.

⁵¹³ See, e.g., HAW. REV. STAT. ANN. § 707-730 (Michie 2004), see *infra* at pages 564; MISS. CODE ANN. § 97-3-97(c) (2004), see *infra* at page 638; N.J. STAT. ANN. 2C:14-1(i) (2004), see *infra* at page 660; W.VA. CODE ANN. § 61-8B-1(4) (Michie 2004), see *infra* at page 759.

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include incapacitation caused by intoxicants as part of the analysis of the requirement that the intercourse be without the victim's consent,⁵¹⁴ or in their definition of force.⁵¹⁵ Fourth, a very small number of jurisdictions, including the military, do not specifically prohibit the use of intoxicants to incapacitate a victim anywhere in their rape or sexual assault statutes.⁵¹⁶ The military's prohibition against intercourse with victims incapacitated by intoxicants developed through case law.⁵¹⁷

Specifically prohibiting sexual activity with persons who are incapacitated is better than the absence of any explicit prohibition or placing incapacity within other legal terms such as force or consent. The absence of any prohibition can lead to confusion on whether an intoxicated victim can consent. For example, in *United States v. Grier*,⁵¹⁸ the accused and another soldier had sexual intercourse with a woman who had imbibed about six drinks of alcohol. She testified that she was intoxicated by alcohol and did not remember any sexual activity that evening. Private First Class Grier told investigators that she was intoxicated, and was not in her right mind to give consent. Private First Class Grier concluded his statement, "At the time this happened, I did not know if a woman is not capable of giving consent, it is rape. Now I know it is rape."⁵¹⁹ Appellant testified that she told him she wanted to have sex with him and actively participated in their sexual activity.⁵²⁰ The Court of Appeals for the Armed Forces determined that the military judge in *Grier* correctly instructed the members:

When a victim is incapable of consenting because she is asleep or unconscious or intoxicated to the extent that she lacks the mental

⁵¹⁴ See, e.g., ARIZ. REV. STAT. § 13-1401(5) (2004), see *infra* at page 491; MONT. CODE ANN. § 45-2-101(39), (40), (57) (2004); TEX. PENAL CODE ANN. § 22.011(b)(3)-(6) (Vernon 2004), see *infra* at page 724.

⁵¹⁵ See, e.g., MO. ANN. STAT. §§ 566.030, 566.060 (2004), see *infra* at pages 640 and 641; N.M. STAT. ANN. § 30-9-10 (Michie 2004), see *infra* at page 667.

⁵¹⁶ See, e.g., *MCM*, *supra* note 32, Pt. IV, ¶ 45; NEB. REV. STAT. ANN. § 28-319(1) (Michie 2004), see *infra* at page 649; NEV. REV. STAT. ANN. § 200.366(1) (Michie 2004), see *infra* at page 653.

⁵¹⁷ See *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000); *Mathai*, 34 M.J. at 33.

⁵¹⁸ 53 M.J. 30 (C.A.A.F. 2000).

⁵¹⁹ *Id.* at 33.

⁵²⁰ *Id.* at 32.

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capacity to consent, then no greater force is required than that necessary to achieve penetration.

* * *

If [the victim] was incapable of giving consent and if the accused knew or had reasonable cause to know that [the victim] was incapable of giving consent because she was asleep or unconscious or intoxicated, the act of sexual intercourse was done by force and without her consent.⁵²¹

Explicit prohibition against sexual activity with intoxicated or incapacitated persons provides statutory notice about the conduct that is prohibited, deterring persons from taking advantage of intoxicated persons and protecting such vulnerable persons from abuse. Others involved in the military justice process, such as commanders, investigators, and court members also need clear, easily located explanations for crimes and defenses.⁵²²

Many jurisdictions specifically prohibit an accused from knowingly causing a person to lose their capacity to consent.⁵²³ For example, many jurisdictions prohibit an accused from administering a incapacitating drug to the victim without the victim's knowledge or consent to cause another to submit to sexual activity.⁵²⁴ A

⁵²¹ *Id.* at 33.

⁵²² The best way to achieve awareness of the protections for persons who lack capacity to consent to sexual activity is to include this information in the *MCM*. More than 50,000 copies of the *MCM* are printed when it is reissued.

⁵²³ *See, e.g.*, 18 U.S.C. § 2241(b)(1) (2004), *infra* at page 394; COLO. REV. STAT. § 18-3-402(4)(d) (2004), *see infra* at page 523; D.C. CODE ANN. § 22-3002(a)(4) (2004), *see infra* at page 545; FLA. STAT. ANN. § 794.011(4)(d) (West 2004), *see infra* at page 554; IDAHO CODE § 18-6101(4) (Michie 2004), *see infra* at page 569; 720 ILL. COMP. STAT. 5/12-14(a)(7) (2004), *see infra* at page 574; IND. CODE ANN. § 35-42-4-1(b)(4) (Michie 2004), *see infra* at page 580; ME. REV. STAT. tit. 17a § 253(2)(A), (3) (West 2004), *infra* at page 603; N.H. REV. STAT. ANN. § 632-A:2(1)(f) (2004), *infra* at page 656; N.D. CENT. CODE § 12.1-20-03(1)(b)-(c) to 12.1-20-07(1)(c) (2004), *see infra* at pages 685 to 686; OHIO REV. CODE ANN. § 2907.02(A)(1)a (Anderson 2004), *see infra* at page 689; OKLA. STAT. ANN. tit. 21, § 1111(A)(4) (West 2004), *see infra* at page 695; 18 PA. CONS. STAT. §§ 3121(a)(4)3101 (2004), *see infra* at pages 704; VT. STAT. ANN. tit. 13, § 3252(a)(5) (2004), *see infra* at pages 742; WYO. STAT. ANN. § 6-2-303(a)(iii) (Michie 2004), *see infra* at page 773.

⁵²⁴ *Id.*

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few jurisdictions prohibit an accused from joining with another to administer the drug or intoxicant to the victim.⁵²⁵ A minority of jurisdictions do not distinguish between cases when the victim was incapacitated by actions of the accused and cases when the victim became incapacitated by their own actions.⁵²⁶

Some jurisdictions that divide the offense of sexual abuse into degrees differ on whether sexual activity with an incapacitated victim is a first-degree offense, second-degree offense. Other jurisdictions treat all cases of sexual activity with an incapacitated victim as a first-degree offense.⁵²⁷ Other jurisdictions treat all cases of intercourse with an incapacitated victim as a second or third-degree offense.⁵²⁸

If the accused causes the victim's incapacity, then the offense is classified as the highest-level offense or is authorized an enhanced punishment.⁵²⁹ For example, aggravated sexual abuse by other means, 18 U.S.C. § 2241 (2004), states:

(b) By other means. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

⁵²⁵ See, e.g., IDAHO CODE § 18-6101(4) (Michie 2004), *see infra* at page 569; LA. REV. STAT. ANN § 89.1 (West 2004), *see infra* at page 602.

⁵²⁶ See, e.g., CAL. PENAL CODE § 261(a)(3) (Deering 2004), *see infra* at page 503; KAN. STAT. ANN. § 21-3502(a)(1)(C) (2003-Lexis does not have update), *see infra* at page 588; S.D. CODIFIED LAWS § 22-22-7.4 (Michie 2004), *see infra* at page 717; WIS. STAT. ANN. § 940.225 (2004), *see infra* at page 764.

⁵²⁷ See, e.g., MICH. COMP. LAWS § 750.520b (2004), *see infra* at page 621; MO. ANN. STAT. §§ 566.030, 566.060 (2004), *see infra* at pages 640 and 641; NEB. REV. STAT. ANN. § 28-319 (Michie 2004), *see infra* at page 649; N.H. REV. STAT. ANN. § 632-A:2 (2004), *infra* at page 656.

⁵²⁸ See, e.g., MD. CODE ANN. CRIMINAL LAW § 3-304 (2004), *see infra* at page 613 (second-degree rape); MINN. STAT. ANN. § 609.344(d) (West 2004), *infra* at page 626 (criminal sexual conduct in the third-degree); N.C. GEN. STAT. § 14-27.3 (2004) (second-degree rape), *see infra* at page 682.

⁵²⁹ See, e.g., 18 U.S.C. § 2241(b)(1) (2004), *infra* at page 394; D.C. CODE ANN. § 22-3002 (2004), *see infra* at page 545; LA. REV. STAT. ANN § 42.1 (West 2004), *see infra* at pages 599; OHIO REV. CODE ANN. § 2907.02 (Anderson 2004), *see infra* at page 689.

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(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. (emphasis added).⁵³⁰

If the accused did not cause the victim's incapacity then the offense is usually a lower-level offense.⁵³¹ For example, sexual abuse, under 18 U.S.C. § 2242 (2004), provides:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both. (emphasis added).⁵³²

Louisiana classifies rape as aggravated, forcible or simple.⁵³³ If the accused administers an intoxicant to the victim then engages in intercourse, the offense is forcible sexual abuse.⁵³⁴ If the accused does not cause the victim's intoxication the offense is simple sexual abuse.⁵³⁵

⁵³⁰ 18 U.S.C. § 2241(b)(1)(2004), *infra* at page 394.

⁵³¹ *See, e.g.*, 18 U.S.C. § 2242 (2004), *infra* at page 409; D.C. CODE § 22-3003 (2004), *see infra* at page 545; LA. REV. STAT. ANN § 43 (West 2004), *see infra* at page 600; OHIO REV. CODE ANN. § 2907.02 (Anderson 2004), *see infra* at page 689.

⁵³² 18 U.S.C. § 2242 (2004), *see infra* at page 409.

⁵³³ LA. REV. STAT. ANN §§ 14:42.1 to 43 (West 2004), *see infra* at pages 599 to 600.

⁵³⁴ *Id.* § 14:42.1.

⁵³⁵ *Id.* § 14:43.

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Ohio classifies cases in which the accused administers the intoxicant to the victim without the victim's consent as rape.⁵³⁶ If the accused does not administer the intoxicant he commits the lesser offense of sexual battery.⁵³⁷

The accused's increased culpability and potential danger to the victim are best illustrated in cases involving the use of date-rape drugs. An accused that uses date-rape drugs to facilitate a sexual assault must carefully plan and execute his assault. First, the accused must obtain the intoxicant. Second, the accused must slip the intoxicant to the victim without the victim's knowledge. When an accused spikes a victim's drink with a date-rape drug, he puts the victim at risk because he does not know what affects the drug will have on the victim.⁵³⁸ Date-rape drugs can cause death.⁵³⁹ Third, the accused must then move the victim to a location where the assault can take place. Fourth, the accused must hide the crime. The culpability of the accused and the danger to the victim when the accused incapacitates the victim justifies classification at the most serious level of criminal sexual misconduct.

(a) Option 5.

Option 5 is similar to the federal statute in prohibiting sexual activity with an incapacitated victim. The classification as a first or second-degree offense depends on the accused's culpability and the danger to the victim. Option 5, which defines the offense as **rape**, is very similar to 18 U.S.C. § 2241 (2004), as follows:

⁵³⁶ OHIO REV. CODE ANN. § 2907.02 (Anderson 2004), *see infra* at page 689.

⁵³⁷ *Id.* at § 2907.03, *see infra* at page 691.

⁵³⁸ For example a common date-rape drug, gamma-hydroxybutyrate (GHB) can cause nausea, vomiting, delusions, depression, vertigo, visual disturbances, seizures, respiratory distress, loss of consciousness, amnesia, coma and death. When combined with alcohol or other drugs the potential for death greatly increases. National Institute on Drug Abuse, *Info Facts Rohypnol and GHB*, available at <http://www.nida.nih.gov/Infofax/RohypnolGHB.html> (last visited Sept. 20, 2004).

⁵³⁹ GHB a date-rape drug caused the deaths of two teenage girls. Ms. Hillory Farias, age seventeen, and Ms. Samantha Reid, age fifteen drank sodas laced with GHB and died shortly after drinking the sodas containing GHB. Neither victim knew someone put the GHB in her drink. Congress responded to deaths caused by the date-rape drug GHB by passing the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999. Pub. L. No. 106-172, 114 STAT.7 (2000).

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“(a) Any person subject to this chapter who causes another person to engage in a sexual act by—

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) **administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct** is guilty of **rape** and shall be punished as a court-martial may direct.”⁵⁴⁰

(Emphasis added).

Subsection 920(c) of Option 5 is very similar to 18 U.S.C. § 2242 (2004), except that the word, “substantially” is added in subsection 920(c)(2) because arguably 18 U.S.C. § 2242 (2004) sets an absolute standard, which is too high for a prosecutor to meet. Option 5 defines the offense of sexual abuse, as follows:

“(c) Any person subject to this chapter who —

- (1) causes another person to engage in a sexual act by—
 - (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
 - (B) causing bodily harm; or
- (2) engages in a sexual act with another person if that other person is **substantially incapacitated or substantially incapable of —**
 - (A) **appraising the nature of the sexual act;**
 - (B) **physically declining participation in the sexual act; or**
 - (C) **physically communicating unwillingness to engage in the sexual act**is guilty of **aggravated sexual assault** and shall be punished as a court-martial may direct.”⁵⁴¹

⁵⁴⁰ See *infra* Option 5, subsection 920(a) at page 294. See also *infra* at page 253 for an explanation for differences between 18 U.S.C. § 2241 (2004) and Option 5, subsection 920(a) at page 294.

⁵⁴¹ See *infra* Option 5, subsection 920(c) at page 294. See also *infra* at page 256 for an explanation for differences between 18 U.S.C. § 2242 (2004) and subsection 920(c) at page 294.

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18 U.S.C. § 2246 (2004) does not define the term, “apprise or control conduct” nor does it explain how substantial impairment relates to consent. Option 5, however, defines apprise or control conduct as a person who is unable to understand the act, its motive, or its possible consequences. Option 5 defines, “consent,” subsection 920(u)(21), at page 300, as follows:

“(21) ‘consent’ means words or overt acts indicating a freely given agreement to the sexual conduct in question by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused to the sexual conduct in question shall not constitute consent. **A person cannot consent to a sexual activity if:**

(A) under sixteen years of age;

(B) substantially incapable of:

(1) appraising the nature of the sexual conduct at issue due to:

(i) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, **or otherwise; or**

(ii) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;

(2) physically declining participation in the sexual conduct at issue;

(3) physically communicating unwillingness to engage in the sexual conduct at issue.⁵⁴²

(Emphasis added).

(b) Option 6

Option 6 precludes sexual intercourse and sodomy with a person who is physically or mentally incapable. However, Option 6 does not address the accused’s use of intoxicants versus the victim’s consensual use of intoxicants to facilitate a nonconsensual sexual act. Option 6’s definition of “lack of consent,”⁵⁴³ includes the

⁵⁴² Military law stated that “a person is capable of consenting to an act of sexual intercourse unless her mental ability is so severe that she is incapable of understanding the act, its motive, and its possible consequences.” See BENCHBOOK, ¶ 3-45-1d n.10. Thus, a victim had to fail all three tests before she lacked capacity to consent. This definition of consent protects victims who fail any one of the three tests.

⁵⁴³ The term “lack of consent” is not part of Option 6’s proposed Article 120. Consent should be listed as an affirmative defense and refer to R.C.M. 916. See e.g., MCM, Pt. IV, ¶ 50c(4).

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sentence, “A person is deemed incapable of giving consent when he or she . . . lacks because of mental disability or mental incapacity, the mental ability to understand the nature of the act; or lacks because of a physical incapacity, the physical ability to consent to the act.”⁵⁴⁴

Unlike Options 5, Option 6 does not address an accused’s use of intoxicants to facilitate a nonconsensual sexual act as an aggravated factor. It is no more serious an offense for an accused to slip a knock-out drug to an unsuspecting victim, or to strike her head with an object, knocking her unconscious and then to have sexual intercourse with her than it is to have sexual intercourse with someone who has consensually consumed too much alcohol and is physically incapable of consenting to the sexual act.

5. HIV Infected Accused

One proposal not included in any option was to add an aggravating element for a sexual assault involving an accused infected with acquired immune deficiency syndrome (AIDS) or with the antibodies of the human immunodeficiency virus (HIV). A victim, who is exposed to this disease potentially faces a long, painful illness that is almost always fatal.⁵⁴⁵ A judge in Oregon described the gravity of a rape committed by an HIV positive accused. Before imposing sentence, the trial judge said:

You know that you carry in your body one of the most deadly and dangerous diseases to hit the earth since the 13th Century. This is a crime that approaches attempted murder, whether or not you were charged with it. It’s about the -- the most reprehensible behavior I can imagine, to put an innocent girl, someone who is legally incapable of consenting, in danger of her life, in a circumstance in which she could have a prolonged illness and suffer for years, and die one of the most horrible deaths possible.⁵⁴⁶

American jurisdictions deal with the issue of AIDS and HIV and sexual assaults in different ways. None of the American jurisdictions specifically list AIDS or HIV as an aggravating factor that justifies classifying the sexual assault as a first-degree offense. However, through case law at least one state treats sexual assaults by HIV positive individuals as a first-degree offense. Texas classifies cases in

⁵⁴⁴ See *infra* Option 6 at page 344.

⁵⁴⁵ Rebecca Ruby, *Note: Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV*, 36 AM. CRIM. L. REV. 313 (1999).

⁵⁴⁶ *Oregon v. Guayante*, 783 P.2d 1030, 1032 (Or. Ct. App. 1989).

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which the accused knows he or she is HIV positive and has intercourse as an aggravated sexual assault that causes serious bodily injury.⁵⁴⁷ A few state jurisdictions specifically list an enhanced punishment for the commission of sexual assaults committed by an accused with knowledge that he or she is HIV positive.⁵⁴⁸ In other jurisdictions the courts allow increased punishment based on case law.⁵⁴⁹

If a victim contracts AIDS from a sexual assault the victim will suffer the rest of his or her life because of the sexual assault. The victim's immune system slowly deteriorates.⁵⁵⁰ The victim becomes vulnerable to infections that would not affect them if his or her immune system were healthy. The infections ravage the victim's body until the victim's death.⁵⁵¹ A provision classifying a sexual assault by an accused who has AIDS or is HIV positive provides as follows:

AIDS/HIV. Any person subject to this chapter who knows or should have known that they are infected with the AIDS virus or are HIV positive and engages in nonconsensual intercourse commits the offense of criminal sexual misconduct commits criminal sexual misconduct in the first-degree.

The options do not specifically address HIV infection as an aggravating feature because military law currently punishes sexual acts involving the exchange of bodily fluids known to be infected with HIV as an aggravated assault,⁵⁵² in addition to the underlying sexual offense. Moreover, if the victim contracts any sexually transmitted disease as a result of a sex crime, whether the accused was

⁵⁴⁷ *Zule v. Texas*, 802 S.W. 2d 28 (Tex. Ct. App. 1990).

⁵⁴⁸ *See, e.g.*, CAL. PENAL CODE § 12022.85 (Deering 2004), *see infra* at page 521; COLO. REV. STAT. § 18-1.3-1004 (2004), *see infra* at page 526; IND. CODE ANN. § 35-38-1-7.1(b)(8) (2002); WIS. STAT. ANN. § 973.017(4)(a) (2002).

⁵⁴⁹ *See, e.g.*, *Oregon v. Guayante*, 783 P.2d 1030, 1032 (Or. Ct. App. 1989); *Perkins v. State*, 559 N.W.2d 678 (Minn. 1997).

⁵⁵⁰ AIDS, Health Library: Find information on AIDS at MerckSource, *available at* http://www.mercksource.com/pp/us/cns/cns_home.jsp (last visited Sept. 15, 2004).

⁵⁵¹ *Id.*

⁵⁵² *See United States v. Warden*, 51 M.J. 78 (C.A.A.F. 1999); *United States v. Weatherspoon*, 49 M.J. 209 (C.A.A.F. 1998); *United States v. Klauck*, 47 M.J. 24 (C.A.A.F. 1997); *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997); *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994).

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aware or not of his or her infection, this additional adverse impact on the victim is admissible to aggravate the sentence that may be imposed.⁵⁵³

6. Sexual Acts with Children and Minors⁵⁵⁴

All American jurisdictions proscribe adults from engaging in sexual activity with children. Children need special protection because they are not mature enough or capable of defending themselves or resisting the sexual advances of adults.⁵⁵⁵ Children are also incapable of making significant life-altering decisions such as whether to engage in intercourse.⁵⁵⁶ A study conducted by the National Institute of Justice and the Centers for Disease Control questioned 8,000 women about their experience with rape, physical assault and stalking.⁵⁵⁷ Of the women who reported being raped at some point in their life, fifty-four percent were raped before they were seventeen.⁵⁵⁸ In addition to harming the victim, intercourse between adults and children imposes a burden on society due to the number of teenage pregnancies. Statistics indicate that seventy-five percent of all teenage pregnancies result from intercourse between a minor female and an adult male.⁵⁵⁹ In *Michael M. v. Superior Court*,⁵⁶⁰ the Supreme Court recognized society's interest in protecting children or adolescents from pregnancy as a constitutionally valid basis for enacting criminal carnal knowledge laws.⁵⁶¹

⁵⁵³ See R.C.M. 1001(b)(4) (permitting trial counsel to present aggravating evidence of the medical impact on the victim of an offense).

⁵⁵⁴ Carnal Knowledge is defined as sexual intercourse not amounting to rape, between an adult and a minor or an adult and a child.

⁵⁵⁵ *State v. Wilson*, 685 So. 2d 1063, 1067 (La. 1996).

⁵⁵⁶ Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1 (1997).

⁵⁵⁷ Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Finding From the National Violence Against Women Survey* (November 1998).

⁵⁵⁸ *Id.*

⁵⁵⁹ Anne C. Lewis, *Lay Off the Kids*, available at <http://www.pdkintl.org/kappan/kwash971.htm> (last visited Sept. 30, 2004).

⁵⁶⁰ 450 U.S. 464 (1981).

⁵⁶¹ *Id.* at 474.

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Many jurisdictions divide the offenses of sexual acts with children and minors into two, three or four degrees based on the age of the victim.⁵⁶² In the jurisdictions that divide carnal knowledge into degrees, the higher-degree offenses apply to cases of intercourse with younger children. The age used to define the most aggravated offense differs by jurisdiction. The age established may be as low as ten, eleven or twelve years.⁵⁶³ However, the majority of American jurisdictions use higher ages, such as thirteen,⁵⁶⁴ fourteen,⁵⁶⁵ fifteen,⁵⁶⁶ sixteen⁵⁶⁷ or even eighteen.⁵⁶⁸ The UCMJ

⁵⁶² See, e.g., ALASKA STAT. § 11.41.434, .436, .438 (Michie 2004), (penetration offenses against victims aged under 13, 13-15, and 16-17), *see infra* at pages 487 to 488; CAL. PENAL CODE § 288 (Deering 2004) (lewd and lascivious acts against children under 14, and 14-15), *see infra* at page 513; IOWA CODE ANN. § 709.3 to 709.4 (West 2004), *see infra* at pages 585 to 586 (penetration offense against victim aged under 12, 12-13, and 14-15); KY. REV. STAT. ANN. §§ 510.040 to 510.090 (Michie 2004) (different offenses for intercourse or sodomy with victims under age 12, 14, and 16), *see infra* at pages 595 to 596; OR. REV. STAT. § 163.355 to 163.411 (2004), *see infra* at pages 698 to 700 (different offenses for intercourse or sodomy with victims under age 12, 14, 16, and 18); S.C. CODE ANN. § 16-3-655 (Law Co-op. 2004) (sexual battery offenses for victims aged under 11, 11-14 and 14-15), *see infra* at page 714; WASH. REV. CODE 9A.44.073 to 9A.44.089 (2002) (penetration and contact offenses against victim aged under 12, 12-13, and 14-15), *see infra* at pages 754 to 755; WIS. STAT. ANN. §§ 948.02, .09 (2002) (penetration offenses against victim aged under 13, under 16, and 16-17); WYO. STAT. ANN. § 6-2-303 (Michie 2004), *see infra* at page 773 (penetration offenses against victim aged under 12, under 16, and under 18).

⁵⁶³ See, e.g., Under 10 Years Old: S.D. CODIFIED LAWS § 22-22-1 (Michie 2004), *see infra* at page 716; VT. STAT. ANN. tit. 13, § 3253 (2004), *see infra* at page 743. Under 11: S.C. CODE ANN. § 16-3-655 (Law Co-op. 2004) (sexual battery offenses for victims aged under 11, 11-14 and 14-15), *see infra* at page 714. Under 12: 18 U.S.C. § 2241 (2004); ALA. CODE § 13A-6-61 (2004), *see infra* at pages 482; FLA. STAT. ANN. § 794.011 (West 2004), *see infra* at page 554; KY. REV. STAT. ANN. § 510.040 (Michie 2004), *see infra* at page 595.

⁵⁶⁴ See, e.g., 720 ILL. COMP. STAT. 5/12-14.1 (2004), *see infra* at page 574; MINN. STAT. ANN. § 609.342 (West 2004), *infra* at page 626; N.H. REV. STAT. ANN. § 632-A:2(I) (2004), *infra* at page 656; N.C. GEN. STAT. § 14-27.2 (2004), *see infra* at page 681; TENN. CODE ANN. § 39-13-506 (2004), *see infra* at page 720.

⁵⁶⁵ See, e.g., ARK. CODE ANN. § 5-14-103 (Michie 2004), *see infra* at page 496; IND. CODE ANN. § 35-42-4-3 (Michie 2004), *see infra* at page 581; KAN. STAT. ANN. § 21-3502 (2003-Lexis does not have update), *see infra* at page 588; MISS. CODE ANN. § 97-3-95 (2004), *see infra* at page 638; UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735.

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provides different protections under Article 120 based on the age of the victim with rape being an offense regardless of age, and carnal knowledge being an offense involving sexual activity with children and minors under the age of 16.⁵⁶⁹ The UCMJ does not explicitly have a similar prohibition for sodomy with a child or minor versus sodomy with an adult. Under Article 125, UCMJ, all sodomy is prohibited.

Options 4-6 divide the offense of sexual activity with children and minors into different degrees based on the age of the child or minor. The division into degrees allows a clearer distinction between cases involving sexual acts between adults and young children, adults and minors.

Currently, the UCMJ does not exclude from its definition of carnal knowledge cases where the victim and accused are relatively close to the same age. The federal statute and some state statutes require an age differential before criminal liability will attach.⁵⁷⁰ The federal statute requires that the victim be at least four years younger than the accused to qualify as aggravated sexual abuse.⁵⁷¹ Military members may enlist with parental consent when they are seventeen.⁵⁷² Article 120, applies to military members who are seventeen even though he or she may only be two years older than their victim.

While a case involving an accused who is only two or three years older than a victim is not nearly as aggravated as case involving a larger age disparity,⁵⁷³ such

⁵⁶⁶ ARIZ. REV. STAT. § 13-1405 (2004), *see infra* at page 492; N.D. CENT. CODE § 12.1-20-03 (2004), *see infra* at page 685.

⁵⁶⁷ GA. CODE ANN. § 16-6-3 (2004) (very similar to Article 120, UCMJ), *see infra* at page 559; MONT. CODE ANN. § 45-5-501 (2004), *see infra* at page 645.

⁵⁶⁸ IDAHO CODE § 18-6101 (Michie 2004), *see infra* at page 569.

⁵⁶⁹ *MCM*, *supra* note 32, Pt. IV, ¶ 45 (rape). *See also* Pt. IV, ¶ 51 (sodomy).

⁵⁷⁰ *See, e.g.*, 18 U.S.C. § 2241 (2004); CAL. PENAL CODE § 261.5 (Deering 2004), *see infra* at page 504; D.C. CODE § 22-3008 (2004), *see infra* at page 547; IND. CODE ANN. § 35-42-4-9 (Michie 2004), *see infra* at page 584; KY. REV. STAT. ANN. §§ 510.050, 510.060 (Michie 2004), *see infra* at page 595.

⁵⁷¹ 18 U.S.C. § 2241 (2004).

⁵⁷² 10 U.S.C. § 505 (2002).

⁵⁷³ *See generally, United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002).

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incidents can have a very negative impact on good order and discipline with the military community and with military relations with a civilian community.

In cases of carnal knowledge there is a split on whether the accused may raise the defense of mistake of fact concerning the victim's age. In jurisdictions that allow the defense of mistake of fact there are different requirements to establish the defense. Alaska and the military courts treat the defendant's mistake of fact concerning the victim's age as an affirmative defense.⁵⁷⁴ California requires that the defendant raise enough evidence to create a reasonable doubt as to his guilt.⁵⁷⁵ While Washington allows a mistake of fact defense if the victim says he or she is above a certain age, it does not allow the defense based on other factors such as the victim's appearance.⁵⁷⁶

A few American jurisdictions allow the defense of mistake of age in certain cases and not in others. For example, the federal statute, and the UCMJ allow the mistake of fact defense for cases where the victim is an adolescents but not if the victim is under 12 years of age.⁵⁷⁷ Minnesota determines whether the mistake of fact defense exists based on the age of the accused and the age of the victim. Minnesota § 609.342 criminal sexual conduct in the first degree is defined as follows:

A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a

⁵⁷³ See, e.g., *Langley*, 33 M.J. at 278.

⁵⁷⁴ See, e.g., *Langley*, 33 M.J. at 278; *Taylor*, 26 M.J. at 128; *Baran*, 22 M.J. at 267; *State v. Fremgen*, 889 P.2d 1083 (Alaska Ct. App. 1995).

⁵⁷⁵ *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

⁵⁷⁶ *State v. Bennett*, 672 P.2d 772 (Wash. 1983).

⁵⁷⁷ See, e.g., 18 U.S.C. § 2241 (2004); *MCM*, *supra* note 32, Pt. IV, ¶ 45(d).

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position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense."⁵⁷⁸

Oregon allows the mistake of age defense for rape in the first or second-degree but not in the third-degree. The Oregon rationale is that the accused can avoid the higher punishments associated with the first or second-degree offenses but should not avoid liability altogether.⁵⁷⁹

The majority of states do not allow mistake of fact as a defense to carnal knowledge.⁵⁸⁰ Carnal knowledge is a strict-liability crime, and the mental intent of the defendant is irrelevant in jurisdictions that do not recognize the mistake of fact defense.⁵⁸¹ Prior to 1996, courts-martial applied the rule that it is "no defense that the accused is ignorant or misinformed as to the true age of the female."⁵⁸² In 1996, Congress amended the UCMJ and created a reasonable mistake of age affirmative defense to make this UCMJ provision more consistent with 18 U.S.C. § 2243 (2004).⁵⁸³ The accused may raise the affirmative defense if he or she reasonably believed the victim was at least sixteen-years-old.⁵⁸⁴ Congress made this amendment to Article 120, to conform military law to federal civilian law.⁵⁸⁵

(a) Option 5

⁵⁷⁸ See *infra* MINN. STAT. ANN. § 609.342 (West 2004), *infra* at page 629; see also, e.g., MONT. CODE ANN. § 45-5-511 (2004) (mistake of age not authorized for intercourse with children under the age of fourteen but authorized if the victim is fourteen or fifteen).

⁵⁷⁹ *State v. Jalo*, 696 P.2d 14 (Or. Ct. App. 1985).

⁵⁸⁰ Colin Campbell, *Annotation, Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499, 508 (1997).

⁵⁸¹ *Id.*

⁵⁸² *United States v. Schuler*, 47 M.J. 561, 562 (N.M.Ct.Crim.App. 1997).

⁵⁸³ See *id.* at 562 n.3.

⁵⁸⁴ *Id.* at 562-63.

⁵⁸⁵ *Id.*

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Option 5 lists six offenses that provide protection to children and minors from sexual abuse subsections 920(b), 920(d), 920(f), 920(g), 920(i), and 920(k):

“(b) Any person subject to this chapter who engages in a sexual act with a child who has not attained the age of 12 years, or engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years but has not attained the age of 16 years is guilty of **rape of a child** and shall be punished as a court-martial may direct.”⁵⁸⁶

“(d) Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years, but has not yet attained the age of 16 years is guilty of **aggravated sexual assault on a child** and shall be punished as a court-martial may direct.”⁵⁸⁷

“(f) Any person subject to this chapter who engages in a lewd act with a child is guilty of **aggravated sexual abuse of a child** and shall be punished as a court-martial may direct.”⁵⁸⁸

“(g) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate— subsection 920(b) of this chapter had the sexual contact been a sexual act is guilty of **aggravated sexual contact with a child** and shall be punished as a court-martial may direct.”⁵⁸⁹

“(i) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate—

⁵⁸⁶ See *infra* Option 5, subsection 920(b) at page 294. For an explanation of the rationale for subsection 920(b) see page 256.

⁵⁸⁷ See *infra* Option 5, subsection 920(d) at page 295. For an explanation of the rationale for subsection 920(d) see page 257.

⁵⁸⁸ Aggravated sexual abuse of a child § 920(f) is at page 295. 18 U.S.C. §§ 2241-2244 does not include aggravated sexual abuse of a child in this format. Subsection 920(f) protects children from lewd acts, which is defined by § 920(u)(10), at page 298. “Lewd act” includes the sexual act from 18 U.S.C. § 2246(2)(D), which is § 920(u)(10)(A). It also includes sexual conduct not specifically prohibited in 18 U.S.C. § 2246(2). The explanation for § 920(f) is at page 258 and for § 920(u)(10) is at page 277.

⁵⁸⁹ See *infra* Option 5, subsection 920(g) at page 295. For an explanation of the rationale for subsection 920(g) see page 258.

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subsection 920(d) of this chapter had the sexual contact been a sexual act is guilty of **abusive sexual contact with a child** and shall be punished as a court-martial may direct.”⁵⁹⁰

“(k) Any person subject to this chapter who engages in indecent conduct or liberty, in the presence of a child with the intent to arouse, appeal to, or gratify the sexual desire of any person; or with the intent to abuse, humiliate, or degrade any person is guilty of **indecent liberty with a child** and shall be punished as a court-martial may direct.”⁵⁹¹

Option 5 retains the mistake of fact defense for cases involving victims who are minors from the age of twelve to fifteen years. The defense is not available for children under twelve years of age, to provide the maximum protection to the youngest and most vulnerable victims. While at the same time the accused is allowed to assert a reasonable mistake of fact defense when the victim is older. Option 5, subsection 920(q) provides as follows:

“(q) **Age of child** —

(1) In a prosecution under sections 920(b), 920(g) and 920(k), it need not be proven that the accused knew that the other person engaging in the sexual act, contact or liberty had not attained the age of twelve years. It is not an affirmative defense that the accused reasonably believed that the minor had attained the age of twelve years.

(2) In a prosecution under sections 920(d), 920(i) and 920(k), it need not be proven that the accused knew that the other person engaging in the sexual act, contact or liberty had not attained the age of sixteen years.” It is an affirmative defense that the accused reasonably believed that the minor had attained the age of sixteen years.”⁵⁹²

(b) Option 6.

Option 6 has seven sections that explicitly protect children, and three other sections that could be used to prosecute sexual offenses involving

⁵⁹⁰ See *infra* Option 5, subsection 920(i) at page 295. For an explanation of the rationale for subsection 920(i) see page 259.

⁵⁹¹ See *infra* Option 5, subsection 920(k) at page 296. For an explanation of the rationale for subsection 920(k) see page 260.

⁵⁹² See *infra* Option 5, subsection 920(q) at page 296. For an explanation of the rationale for subsection 920(q) see page 264.

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children. Article 120(a), UCMJ begins at page 335. Options 5, 6, and 18 U.S.C. § 2241 (2004) create strict liability for those who engage in sexual activity with children under the age of 12. There is no issue of consent or mistake of fact as to age. The difference between Options 5 and 6 is one of structure or format. The following offenses in Option 6 pertain to children and minors:

- (1) Article 120(a)(1)(B) and (C), rape;
- (2) Article 120(a)(3), carnal knowledge;
- (3) Article 120(a)(4)(B) and (C), aggravated forcible sodomy;
- (4) Article 120(a)(6), sodomy;
- (5) Article 120(a)(8)(B) and (C), aggravated indecent assault;
- (6) Article 120(a)(10), indecent acts with a child; and
- (7) Article 120(a)(11), indecent liberties with a child.

The first offense, rape, which is similar in format to aggravated forcible sodomy and aggravated indecent assault states:

- (1) commits an act of sexual intercourse,
 - (A) by forcible compulsion, physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
 - (B) **with a person who is less than 12 years of age;**⁵⁹³ **or**
 - (C) **with a person who is at least 12 years of age but less than 16 years of age and is:**⁵⁹⁴

⁵⁹³ Many jurisdictions have created a “*per se*” rule of “rape” for individuals engaging in sexual intercourse with children below a specified age. *See* Georgia Annotated Code § 16-6-1(a)(2)(defining rape as sexual intercourse with an individual under ten years of age) [*see infra* at page 558]; KY. REV. STAT. ANN. §510.040(1)(b)(2) (Michie 2004) (defining rape as sexual intercourse with an individual under 12 years of age), *see infra* at page 595; MICH. COMP. LAWS § 750.520b(1)(a) (2004), *see infra* at page 621 (defining criminal sexual conduct as sexual penetration with an individual under 13 years of age); and New York State Consolidated Laws § 130.35(3)(defining rape as sexual intercourse with an individual under 11 years of age) [*see infra* at page 677]. *See* also Model Penal Code, § 213.1(1)(d)(defining rape as sexual intercourse with an individual under ten years of age) [*see infra* at page 326]. Option 6 recommends continuing the current “*per se*” prohibition against sexual activity with children who are “less than twelve years of age.” This *per se* rule like that under Title 18 prevents an accused from raising a mistake of fact defense for engaging in sexual intercourse with a child who is less than twelve years of age. *See MCM*, Pt. IV, ¶ 45 [*see infra* at page 369].

⁵⁹⁴ Many jurisdictions prohibit, as “rape,” a person from engaging in sexual intercourse with a child below a specified age when the child is a member of individual’s household, related to the individual, or subjected to the accused’s

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- (i) a member of the accused’s household; or**
- (ii) a relative, within the fourth degree, of the accused; or**
- (iii) subjected to the accused’s authority and coerced into engaging in sexual intercourse by the accused; or**

(D) with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability, or mental incapacity, of understanding the nature of the sexual act; or

(E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct. (emphasis added).⁵⁹⁵

The next provision, Article 120(a)(2), UCMJ, overlaps with Article 120(a)(1), in that sexual intercourse with a child of the age of 11 or younger might also be prosecuted as aggravated sexual intercourse, if it results from a lesser level of threat or coercion.

(2) under circumstances not amounting to rape, commits an act of sexual intercourse by threat or coercion⁵⁹⁶ of sufficient consequence reasonably calculated to cause submission without consent⁵⁹⁷ is guilty

authority. *See* ARK. CODE ANN. § 5-14-103(a)(1)(D) (Michie 2004), *see infra* at page 496; DEL. CODE. ANN. tit. 11, § 773(a)(6) (2004), *see infra* at page 538; 720 ILL. COMP. STAT. 5/12-13(a)(4) (2004), *see infra* at page 573; MICH. COMP. LAWS § 750.520b(1)(b) (2004), *see infra* at page 621; and New Jersey Statutes § 2C:14-2(a)(2) [*see infra* at page 661]. Our provision is similar to MICH. COMP. LAWS § 750.520b(1)(b) (2004), *see infra* at page 621.

⁵⁹⁵ *See infra* Option 6, App. G, at page 335.

⁵⁹⁶ “Coercion” recognizes the possibility that an accused could use threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping to “compel” sexual intercourse. Under this proposal, engaging under such conduct would constitute a less aggravated version of “rape.”

⁵⁹⁷ The phrase “of sufficient consequence reasonably calculated to cause submission without consent” is based on COLO. REV. STAT. § 18-3-402(1)(a) (2004), *see infra* at page 523, and recognizes that not all threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping will be sufficient to turn an act of sexual intercourse into “aggravated sexual intercourse,” an act of sodomy into “forcible sodomy,” or sexual contact into an “indecent assault. A threat or coercion is of sufficient consequence if the person complies with the accused’s demands out of a reasonable fear that non-compliance would result in the accused or another harming or injuring the person, the person’s property, or person or property of another. Whether a threat or coercion is of sufficient consequence depends upon

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of aggravated sexual intercourse⁵⁹⁸ and shall be punished as a court-martial may direct; or

This pattern follows between Article 120(a)(4), UCMJ, and Article 120(a)(5) and between Article 120(a)(8), UCMJ, and Article 120(a)(9). The reason the carnal knowledge offense is necessary is because Option 6 is based on the theory for example, that it is worse to engage in sexual intercourse with a fifteen year old who is a member of the accused's household, or a relative within the fourth degree.

(3) under circumstances not amounting to rape or aggravated sexual intercourse, commits an act of sexual intercourse with a person who is not his or her spouse and who has not attained the age of 16 years, is guilty of carnal knowledge and shall be punished as a court-martial may direct. However, it shall be an affirmative defense to carnal knowledge that the person with whom the accused committed the act of sexual intercourse had, at the time of the sexual intercourse, attained the age of twelve years and the accused reasonably believed that the person had, at the time of the sexual intercourse, attained the age of sixteen years. The accused has the burden of proving this defense by a preponderance of the evidence.

With regard to Option 6's Article 120(a)(6), the term, "child" is not specifically defined in the definition sections, but it is in this section a person under the age of 16. It may be more appropriate to refer to this offense as sodomy with a minor and to limit the application to minors 12 to 15 years of age. Option 6's Article 120(a)(6) states:

(6) engages in sodomy with a child under the age of 16, who is not his or her spouse, is guilty of sodomy with a child⁵⁹⁹ and shall be punished as a court-martial may direct; or

the circumstances of each case. It may include a threat or coercion to cause physical injury to some person; cause destruction or damage to property; accuse some person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of position, rank, or authority, adversely affect some person. Proof that the accused actually intended to engage in the above conduct is not required.

⁵⁹⁸ "Aggravated sexual intercourse" is a term of art used to denote a less aggravated version of rape; it is akin to the term "second degree rape" used in some jurisdictions.

⁵⁹⁹ See *infra* Option 6, App. G, at page 339. The analysis and rationale of this offense follows the analysis and rationale of the proposed "carnal knowledge" article...the only differences being the nature of the sexual act, i.e. sodomy as

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7. Parental Sexual Abuse

Option 5 does not specifically prohibit sexual activity between a military person and their family members because a majority of the subcommittee concluded it was unnecessary. Option 5 already prohibits sexual activity between military personnel and children under the age of 16 years. The majority reasoned that sexual activity between military personnel and a family member over the age of 15 years was so rare as to not require a specific prohibition. If Congress determined a such a provision was desirable the next section contains a good provision.

“The sexual abuse of children by a parent or an individual standing in *loco parentis* is not, unfortunately, a rare occurrence.”⁶⁰⁰ Currently, Article 120 does not specifically address the issue of sexual activity between parents and their children. The military courts analyze cases involving sexual activity between a parent and child to determine if the “moral, psychological, or intellectual force a parent exercises over a child” rises to the level of constructive force.⁶⁰¹ If the parental coercion rises to the level of constructive force, then the child is not required to resist and the act of intercourse alone satisfies the element of by force and without consent. There is no *per se* rule that sex between a parent and their child always constitutes rape⁶⁰² or any crime whatsoever, if their child is sixteen or older.

Several states explicitly protect children by criminalizing sexual relationships between parents or guardians and children.⁶⁰³ For example, North Carolina prohibits intercourse between an accused “who has assumed the position of parent in the home” and a minor residing in the home.⁶⁰⁴ Consent is not a defense to the North

opposed to sexual intercourse, and the lack of an affirmative defense for sodomy with a child.

⁶⁰⁰ *United States v. Torres*, 27 M.J. 867, 869 (A.F.C.M.R. 1989).

⁶⁰¹ *Palmer*, 33 M.J. at 8.

⁶⁰² *Dunning*, 40 M.J. at 646.

⁶⁰³ See, e.g., ALASKA STAT. § 11.41.434 (Michie 2004) (sexual abuse of a minor in the first-degree), see *infra* at page 487; COLO. REV. STAT. § 18-3-405.3 (2004) (sexual assault on a child by one in a position of trust), see *infra* at page 525; MICH. COMP. LAWS § 750.520b (2004), see *infra* at page 621 (criminal sexual conduct in first-degree); N.C. GEN. STAT. § 14-27.7 (2004) (intercourse and sexual offenses with certain victims; consent no defense), see *infra* at page 683; OHIO REV. CODE ANN. § 2907.03 (Anderson 2004), see *infra* at page 691 (sexual battery).

⁶⁰⁴ N.C. GEN. STAT. § 14-27.7 (2004), see *infra* at page 683.

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Carolina statute. Ohio's sexual battery statute prohibits sexual conduct between a minor child and his or her natural or adoptive parent, stepparent, guardian or custodian.⁶⁰⁵

Alaska provides an example statutory scheme:

Sec. 11.41.434. Sexual abuse of a minor in the first degree

(a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

Sec. 11.41.436. Sexual abuse of a minor in the second degree

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual

⁶⁰⁵ OHIO REV. CODE ANN. § 2907.03 (Anderson 2004), *see infra* at page 691.

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contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) -- (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

Sec. 11.41.438. Sexual abuse of a minor in the third degree

(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree

(a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

Sec. 11.41.450. Incest

(a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

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(3) an uncle, aunt, nephew, or niece by blood.

Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults.⁶⁰⁶ The parent wields authority over the child as an assailant might wield a weapon against his victim.⁶⁰⁷ If a parent engages in intercourse with his or her child, the parent commits a gross breach of his or her duty as a parent. Because of the unique relationship between a parent and a child it is impossible to imagine a factual scenario when intercourse between parent and child is legally acceptable.

The current requirement to analyze each case of sexual activity between a parent and his or her child to determine if constructive force exists could be replaced because it is never acceptable for a parent to engage in intercourse with his or her child.

Option 6 on the other hand eliminates the requirement to analyze sexual activity between a parent and his or her child in terms of constructive force. Instead, consent to sexual activity with his or her parent would no longer be an affirmative defense, and such conduct would be strictly prohibited.

(a) Option 5

A provision, that could be included in Article 120, prohibiting sexual abuse involving family members provides:

- “(c) Any person subject to this chapter who —
- (1) causes another person to engage in a sexual act by—
 - (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
 - (B) causing bodily harm; or
 - (2) **engages in a sexual act with another person if that other person is a family member**
 - (3) engages in a sexual act with another person if that other person is substantially incapacitated or substantially incapable of —
 - (A) appraising the nature of the sexual act;
 - (B) physically declining participation in the sexual act; or

⁶⁰⁶ *Palmer*, 33 M.J. at 9; *United States v. Sargeant*, 33 M.J. 815, 817 (A.C.M.R. 1991); *United States v. Thompson*, 29 M.J. 541, 545 (A.F.C.M.R. 1989).

⁶⁰⁷ *Howell v. State*, 636 So .2d 1260, 1261 (Ala. 1993); *State v. Etheridge*, 352 S.E.2d 673 (N.C. 1987).

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(C) physically communicating unwillingness to engage in the sexual act is guilty of **aggravated sexual assault** and shall be punished as a court-martial may direct.” (emphasis added)⁶⁰⁸

It would be necessary to specifically define family member.

(24) ‘family member’ means a parent, grandparent, or child, whether by whole blood, half-blood or adoption and includes a step-grandparent, step-parent or step-child. ‘Family member’ also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child for at least one year.

The version of Option 5 in this report does not include the provision protecting family members. For the reasons stated in the previous section and because a majority of the subcommittee believed it was unnecessary if the other provisions in Option 5 were adopted, the above definition for family member and the bold provisions were **NOT** included in Option 5.

The subcommittee added the sentence, “‘Family member’ also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child for at least one year.” to prohibit those situations where a non-family member by blood, marriage or adoption stays with the military family for an extended period of time. The subcommittee recognized the ambiguity of the “one year” provision—does it have to be continuous? When does the year start or end? Does the offense have to occur during the one year?

Another alternative that could be used is ALASKA STAT. § 11.41.440(a)(2) (Michie 2004), to prohibit “the offender engage[ing] in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.” ALASKA STAT. § 11.41.470(5) (Michie 2004) defines “position of authority” to mean:

an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor.

(b) Option 6

⁶⁰⁸ Option 5, *infra* at page 294, does not include the family abuse provision.

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Option 6 classifies parental rape as sexual misconduct in the first-degree because of the culpability of the parent and the potential for life long adverse consequences for the victim. Option 6 states:

The first offense, rape, which is similar in format to aggravated forcible sodomy and aggravated indecent assault states:

- (1) commits an act of sexual intercourse,
 - (A) by forcible compulsion, physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
 - (B) with a person who is less than 12 years of age; or
 - (C) **with a person who is at least 12 years of age but less than 16 years of age and is:**⁶⁰⁹
 - (i) **a member of the accused’s household;**
 - (ii) **a relative, within the fourth degree, of the accused; or**
 - (iii) **subjected to the accused’s authority and coerced into engaging in sexual intercourse by the accused; or**
 - (D) with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability, or mental incapacity, of understanding the nature of the sexual act; or
 - (E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct. (emphasis added).⁶¹⁰

Option 6 does not define the following terms:

(1) “a member of the accused’s household.” Two example illustrate why the term should be defined: (a) If a foreign exchange student stays with the accused’s family for a semester, would the exchange student be a member of the accused’s household? and (b) The accused has a child outside marriage. The aunt of the baby, who is 15 years of age lives in the accused’s household over the summer to babysit,

⁶⁰⁹ Many jurisdictions prohibit, as “rape,” a person from engaging in sexual intercourse with a child below a specified age when the child is a member of individual’s household, related to the individual, or subjected to the accused’s authority. See ARK. CODE ANN. § 5-14-103 (Michie 2004), *see infra* at page 496; DEL. CODE. ANN. tit. 11, § 773(a)(6) (2004), *see infra* at page 538; 720 ILL. COMP. STAT. 5/12-13(a)(4) (2004), *see infra* at page 573; MICH. COMP. LAWS § 750.520b (2004), *see infra* at page 621; and New Jersey Statutes § 2C:14-2(a)(2) [*see infra* at page 661]. Option 6’s provision is similar to MICH. COMP. LAWS § 750.520b(1)(b) (2004), *see infra* at page 621.

⁶¹⁰ *See infra* Option 6, App. G, at page 335.

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and the accused has sexual intercourse with the baby's aunt. Is the baby's aunt a "member of the accused's household"?

Option 6 does not define, "a relative, within the fourth degree, of the accused."⁶¹¹

8. Abuse of authority

A parent abuses a position of authority when he or she engages in sexual activity with his or her child. Many American jurisdictions prohibit the exploitation of other positions of authority for sexual purposes.⁶¹² These sexual exploitation statutes protect persons vulnerable to exploitation by those who exercise control or authority over them. For example, some jurisdictions criminalize sexual relationships between teachers and students,⁶¹³ doctors or therapists and their patients,⁶¹⁴ and prison guards and inmates.⁶¹⁵ A few jurisdictions define positions of authority to include certain professionals,⁶¹⁶ and religious leaders.⁶¹⁷

⁶¹¹ MICH. COMP. LAWS § 750.520b(1)(b)(ii) and 750.520b(1)(h)(i) (2004), *see infra* at page 621, and § 750.520c(1)(b)(ii) and 750.520c(1)(h)(ii), *see infra* at page 622. The term fourth degree is not defined in MICH. COMP. LAWS § 750.520a (2004), *see infra* at page 620.

⁶¹² *See, e.g.*, ARK. CODE ANN. §§ 5-14-124 to 5-14-127 (Michie 2004), *see infra* at pages 498 to 500; DEL. CODE ANN. tit. 11, §§ 770 - 773 (2004), *see infra* at pages 535 and 538; MISS. CODE ANN. § 97-3-95 (2004), *see infra* at page 638; N.H. REV. STAT. ANN. § 632-A:3, *infra* at page 657; N.J. STAT. ANN. § 2C:14-2 (2004), *see infra* at page 661; N.M. STAT. ANN. § 30-9-11 (Michie 2004), *see infra* at page 668; TENN. CODE ANN. § 39-13-527 (2004), *see infra* at pages 721.

⁶¹³ *See, e.g.*, ALASKA STAT. § 11.41.434 (Michie 2004) (sexual abuse of a minor in the first-degree), *see infra* at page 487; CONN. GEN. STAT. § 53a-71 (2003), *see infra* at page 530; DEL. CODE ANN. tit. 11, §§ 761, 770 - 773 (2004), *see infra* at pages 540, 535 and 538; KAN. STAT. ANN. § 21-3520 (2003-Lexis does not have update), *see infra* at page 591; ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; N.C. GEN. STAT. § 14-27.1 to 14-27.5 (2004), *see infra* at pages 681 to 682; OKLA. STAT. ANN. tit. 21, §§ 1111 and 1114 (West 2004), *see infra* at pages 695 and 696.

⁶¹⁴ *See, e.g.*, CONN. GEN. STAT. § 53a-71 (2003), *see infra* at page 530; COLO. REV. STAT. § 18-3-405.3 (2004) (sexual assault on a child by one in a position of trust), *see infra* at page 525; FLA. STAT. ANN. § 491.0112 (West 2004), *see infra* at page 557; GA. CODE ANN. § 16-6-5.1 (2004), *see infra* at page 562; IOWA CODE ANN. § 709.15 (2002); ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; MINN. STAT. ANN. §§ 609.341, .344 - .345, .347 (West 2004), *infra* at page 626; N.M. STAT. ANN. § 30-9-10 to 30-9-12 (Michie 2004), *see infra* at pages 667 to 669; N.D. CENT. CODE § 12.1-20-06.1 (2002); S.D. CODIFIED LAW §§ 22-22-27 to -29 (2002); TEX.

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By its very nature the military requires positions of great authority of military superiors over their military subordinates. The senior-subordinate relationship is critical to the accomplishment of the military mission.⁶¹⁸ Military superiors must be in a position of control. If a subordinate violates the lawful orders of or shows disrespect to a superior, the subordinate commits a criminal offense.⁶¹⁹ The dominance and control over individuals is most evident in the drill sergeant and trainee relationship. The Air Force Court of Criminal Appeals described the relationship between a basic trainee and her male military instructor this way:

PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724; WIS. STAT. ANN. § 940.22 (2002).

⁶¹⁵ *See, e.g.*, ALASKA STAT. § 11.41.425 (Michie 2004), *see infra* at page 486; ARIZ. REV. STAT. § 13-1419 (2004), *see infra* at page 494; D.C. CODE § 22-3015 (2004), *see infra* at page 548; IDAHO CODE § 18-6110 (Michie 2004), *see infra* at page 570; 720 ILL. COMP. STAT. ANN. 5/11-9.2 (West 2004), *see infra* at page 571; IOWA CODE ANN. § 709.16 (2004), *see infra* at page 587; KAN. STAT. ANN. § 21-3502 (2003-Lexis does not have update), *see infra* at page 588; ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; MINN. STAT. ANN. § 609.344 (West 2004), *infra* at page 629; MONT. CODE ANN. § 45-5-502 to 503 (2004), *see infra* at pages 645 to 646; NEB. REV. STAT. ANN. § 28-319 to 320 (Michie 2004), *see infra* at page 649; N.C. GEN. STAT. § 14-27.1 to 14-27.5 (2004), *see infra* at pages 681 to 682; N.D. CENT. CODE § 12.1-20-06 (2004), *see infra* at page 686; OKLA. STAT. ANN. tit. 21, §§ 1111 and 1114 (West 2004), *see infra* at pages 695 and 696; 18 PA. CONS. STAT. § 3124.2 3101 (2004), *see infra* at page 706; S.D. CODIFIED LAWS § 22-22-7.6 (Michie 2004), *see infra* at page 717; UTAH CODE ANN. § 76-5-412 (2004), *see infra* at page 737; VA. CODE ANN. § 18.2-64.2 (2004), *see infra* at page 746; WASH. REV. CODE ANN. §§ 9A.44.160 to 9A.44.170 (West 2004), *see infra* at pages 757 to 757; W. VA. CODE ANN. § 61-8B-10 (Michie 2004), *see infra* at page 763.

⁶¹⁶ *See, e.g.*, D.C. CODE § 22-3015 (2004), *see infra* at page 548; N.J. STAT. ANN. § 2C:14-2 (2004), *see infra* at page 661; TENN. CODE ANN. § 39-13-527 (2004), *see infra* at page 721.

⁶¹⁷ *See, e.g.*, OHIO REV. CODE ANN. § 2907.03 (Anderson 2004), *see infra* at page 691; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724; UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735.

⁶¹⁸ Major Timothy Grammel, *Military Justice Symposium – Volume I: Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001 at pages 63-64.

⁶¹⁹ *MCM*, *supra* note 32, Pt. IV, ¶¶ 13 - 14.

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This case is about sexual activity between a female basic trainee and her male military training instructor — a person cloaked by regulation, custom, and practice with authority over practically every aspect of her daily existence. More specifically, he held the awesome (to a basic trainee) power of “recycling” — of requiring the trainee to repeat basic training. To anyone who has been through this or a similar regimen, the terror inspired by the threat of having to go through it again is very real.⁶²⁰

The prevention of sexual abuse against recruits, trainees, advanced individual training students, junior enlisted personnel, students attending service academies, rated personnel by their raters, and other potentially vulnerable victims is crucial to the maintenance of good order and military discipline. The *MCM* provides to officers, NCOs, drill sergeants, recruiters, cadre and others the right and obligation to exercise control over those they supervise. Unfortunately, some military members use their positions of authority to obtain sexual gratification or to act as sexual predators.⁶²¹

In the absence of force, or violence by the accused most cases involving sexual activity between recruiter and recruit, drill sergeant and trainee, and supervisor and subordinate are dealt with through punitive regulations.⁶²² The most egregious cases are prosecuted as rape involving constructive force based on a totality of circumstances approach.⁶²³ Intercourse between a drill sergeant and a

⁶²⁰ *United States v. McCreary*, No. ACM 30753, 1995 CCA LEXIS 84 (A.F. Ct. Crim. App. Feb. 15, 1995).

⁶²¹ Grammel *see supra* note 618 (citing *United States v. Johnson*, 54 M.J. 67, 72 (C.A.A.F. 2000) (Sullivan, J., dissenting)).

⁶²² *See, e.g.*, U.S. DEPT. OF ARMY REG. 600-20, ARMY COMMAND POLICY ¶¶ 4-14 to – 15 (2002); UNITED STATES ARMY RECRUITING COMMAND, REG. 600-25 (prohibiting improper relationship between recruiters and recruits).

⁶²³ *See generally Clark*, 35 M.J. at 432 (citing “the unique situation of dominance and control presented by appellant’s superior rank and position” as sufficient for constructive force); *Bradley*, 28 M.J. at 200 (“We hold . . . that this military relationship . . . created a unique situation of dominance and control where explicit threats and display of force by the military superior were not necessary.”); *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); *McFarlin*, 19 M.J. at 794 (lack of consent found in the “passive acquiescence prompted by appellant’s superior rank and position”).

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trainee,⁶²⁴ between a drill sergeant and a trainee's girlfriend or wife,⁶²⁵ or between a military superior and subordinate⁶²⁶ have been prosecuted as rape, if force and lack of consent can be proven.

Military leaders are required to train, lead and guide their subordinates. According to a minority of subcommittee members, the abuse of a leadership position, which is a position of trust, for sexual purposes is a grave breach and merits Congressional classification as a criminal offense in the military justice system. Indeed, sexual abuse by a drill sergeant of a trainee or by a recruiter of an applicant for military service is much more likely than sexual abuse by a guard at a confinement facility—and sexual abuse by a guard of a prisoner is prohibited by 18 U.S.C. § 2243 (2004) and 18 U.S.C. § 2244 (2004).

Jurisdictions with statutes prohibiting the abuse of a position of authority classify the offense differently. Some jurisdictions include the abuse of a position of authority in their rape or sexual assault statutes.⁶²⁷ Other jurisdictions list abuse

⁶²⁴ *Simpson*, 55 M.J. at 674 (“we reject the notion that every act of intercourse between a trainee and a drill sergeant is inherently nonconsensual”).

⁶²⁵ *See supra* notes 102 - 124 and accompanying text.

⁶²⁶ *Clark*, 35 M.J. at 436 (stating, “Superior rank and position of the male does not translate automatically into lack of consent of the female.”) (Wiss J., concurring).

⁶²⁷ *See, e.g.*, 720 ILL. COMP. STAT. 5/12-13 (2004), *see infra* at page 573 (intercourse between an adult holding a position of trust, authority or supervision over a child who is at least thirteen and not older than seventeen is criminal sexual assault); IOWA CODE ANN. § 709.4 (West 2004), *see infra* at page 586 (sexual abuse in the third-degree); N.M. STAT. ANN. § 30-9-11 (Michie 2004), *see infra* at page 668 (an adult who uses a position of authority over a child who is at least thirteen and not older than seventeen to obtain sexual penetration commits the offense of criminal sexual penetration); OHIO REV. CODE ANN. § 2907.03 (Anderson 2004), *see infra* at page 691 (sexual battery occurs when a teacher, coach, scout troop leader, health care provider or mental health professional engages in sexual conduct with another they exercise supervisory or disciplinary authority over); OKLA. STAT. ANN. tit. 21, § 1111 (West 2004), *see infra* at page 695 (Oklahoma classifies intercourse between teachers and students and certain state employees and those under the supervision of the state employees as rape); TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724 (prohibits mental health providers, clergy and public servants from using their position to coerce another into submitting to sexual penetration); UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735 (prohibits health professionals or religious counselors from engaging in intercourse with their clients).

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of authority offenses as separate criminal sexual misconduct statutes.⁶²⁸ For example, Kansas has a statute that specifically prohibits sex between certain state employees and the people they are responsible for guarding, supervising, protecting or teaching.⁶²⁹

Other jurisdictions treat the abuse of a position of authority as an aggravating factor justifying classification as a higher degree of rape or sexual assault⁶³⁰ or an enhanced punishment.⁶³¹ Some jurisdictions distinguish between different level offenses based on the type of authority abused. For example, Alaska treats cases of sexual penetration between a health care worker and a patient during the course of

⁶²⁸ See, e.g., COLO. REV. STAT. § 18-3-405.3 (2004) (sexual assault on a child by one in a position of trust), see *infra* at page 525; GA. CODE ANN. § 16-6-5.1 (2004), see *infra* at page 562; MD. CODE ANN. CRIMINAL LAW § 3-314 (2002); MISS. CODE ANN. § 97-3-104 (2004), see *infra* at page 639; N.D. CENT. Code § 12.1-20-06 (2002); 18 PA. CONS. STAT. §§ 3101 and 3124.2 (2004), see *infra* at page 706; S.D. CODIFIED LAW §§ 22-22-27 to -29 (2002); WASH. REV. CODE 9A.44.093 (2004), see *infra* at page 755.

⁶²⁹ KAN. STAT. ANN. § 21-3502 (2003-Lexis does not have update), see *infra* at page 588.

⁶³⁰ ARK. CODE ANN. § 5-14-124 (Michie 2004), see *infra* at page 498 (intercourse between inmates and corrections personnel, professionals in a position of trust and their clients, guardians, caretakers and teachers and those in their care is sexual assault in the first-degree); DEL. CODE. ANN. tit. 11, § 773 (2004), see *infra* at page 538 (if a child under sixteen has intercourse with a person in a position of trust, authority or supervision then it is rape in the first-degree); MICH. COMP. LAWS § 750.520b (2004), see *infra* at page 621 (sexual penetration with a victim who is at least thirteen and not older than fifteen by a person in a position of authority over the victim is criminal sexual conduct in the first-degree); MINN. STAT. ANN. § 609.342 (West 2004), *infra* at page 629 (sexual penetration with a victim who is at least thirteen and not older than fifteen by a person in a position of authority over the victim is criminal sexual conduct in the first-degree); N.H. REV. STAT. ANN. § 632-A:2 (2004), *infra* at page 656 (medical personnel and people in a position of authority who use their position to obtain intercourse commit the offense of aggravated felonious sexual assault); R.I. GEN. LAWS § 11-37-2 (2004), see *infra* at page 711 (sexual penetration achieved through a medical procedures is first-degree sexual assault).

⁶³¹ D.C. CODE § 22-3020 (2004), see *infra* at page 549 (if the victim is under the age of eighteen and the accused had a significant relationship with the victim then the accused may receive a maximum punishment of one and one-half times the maximum punishment authorized for the particular offense).

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treatment as a first-degree offense.⁶³² Sexual penetration between a correction officer and a prisoner is a third-degree offense.⁶³³

A majority of the subcommittee recommended that Option 5 **not** include a specific prohibition against sexual penetrations and sexual contacts between: (1) a drill sergeants and trainees; (2) service academy cadets, Reserve Officer Training Corps cadets or other officer candidates in officer accession programs and their military cadre and instructors; (3) rated persons and their raters; and (4) recruiters and persons being recruited into the military, including persons in the Delayed Entry Program. The majority's rationale was that existing regulations already prohibit this misconduct. Should such conduct warrant a statutory prohibition, a proposal supported by some subcommittee members is discussed at page 161, along with a discussion about the merits of such a statutory prohibition. One rationale for a statutory prohibition against abuse of a position is that it would provide better protection of vulnerable persons from coercive sexual relationships. Both a regulatory prohibition and a statutory prohibition eliminates consent as a defense by creating strict liability for those in positions of authority for sexual activity with individuals who are subject to their authority. In addition to protecting potential victims, the strict prohibition of sexual activity between those in positions of authority and those they supervise provides clear standards and protects the integrity of relationships between individuals with authority and individuals subject to the authority. The advantage of a statutory prohibition is a statute has greater visibility than a regulation and a statute can include a higher maximum confinement. The proposed statutory prohibition permits the President, Secretary of Defense and Service Secretary to further refine the prohibition to meet the needs of the service.

(a) Option 5

Whereas violation of a regulation under Article 92, UCMJ, is punishable by a maximum confinement of two years. The proposal that a majority of the subcommittee recommended against enactment was for a new subsection with a maximum punishment of seven years confinement for sexual abuse of a trainee, recruit, ratee, or officer candidate attending a service academy, or persons attending Reserve Officer Training Program or Officer Candidate School, and five years confinement for sexual contact with persons attending those same programs.

The prohibition against sexual activity involving military superiors and subordinates in specific positions of authority protects against abuses of power involving these relationships because they have the greatest potential for coercion and abuse. The possible subsection is:

⁶³² ALASKA STAT. § 11.41.410 (Michie 2004), *see infra* at page 485.

⁶³³ *Id.* § 11.41.425 (Michie 2004).

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Subsection 920(i) might provide:

Any person subject to this chapter who is:

- (1) a commissioned, warrant, noncommissioned, or petty officer;
- (2) in a position of authority over a service member; and
- (3) engages in a sexual act or lewd act with another person who is:
 - (i) in initial active duty for training;
 - (ii) an applicant for military service who has started the process for:
 - (I) appointment as a commissioned or warrant officer in the Active or Reserve components;
 - (II) enlistment in the Armed Forces, including the Reserve components, or in federally recognized units or organizations of the National Guard;
 - (III) reenlistment in Regular and Reserve components and in federally recognized units or organizations of the National Guard when after a period of more than 30 days have elapsed since discharge;
 - (IV) application for Scholarship or Advanced Course Reserve Officers Training Corps (ROTC), and all other Armed Forces' special officer personal procurement programs; or
 - (iii) persons who have enlisted under the Delayed Entry Program authorized by 10 U.S.C. § 513;
 - (iv) a student, midshipmen, new cadet, or cadet, assigned to or with duty at an academy preparatory school, ROTC, Officer Candidate School, service academy or similar initial officer qualification program; or
 - (v) a rated service member by their rater or senior rater is guilty of **sexual abuse involving a person in a position of special trust** and shall be punished as a court-martial may direct.”⁶³⁴

The corresponding provision pertaining to sexual contacts is subsection 920(l):

Any person subject to this chapter who engages in sexual contact with another person, if so to do would violate—subsection 920(i) of this chapter had the sexual contact been a sexual act is guilty of **sexual**

⁶³⁴ The offense, “sexual abuse involving a person in a position of special trust,” is a new offense not specifically prohibited in the UCMJ or *MCM*. “Sexual act” is defined at subsection 920(u)(1) at page 297. The maximum punishment includes confinement for seven years and would be listed under subsection 920(u)(5). Various service regulations prohibit the same conduct.

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contact involving a person in a position of special trust and shall be punished as a court-martial may direct.”⁶³⁵

The term, “initial active duty for training” could be defined as follows:

“the basic military training and technical skill training required for all accessions. The President, Secretary of Defense or Service Secretary concerned may by regulation further define the term “initial active duty for training for all other enlistees and inductees.”

This definition specifically permits the President, Secretary of Defense or Service Secretary concerned to further define this term “for all other enlistees and inductees” by regulation. Under 10 U.S.C. § 836 the *MCM* is a regulation. This delegation provides future flexibility to the chain of command.

The term “position of authority is defined is this proposal as follows:

“‘position of authority’ for purposes of subsections 920(i) and 920(l) is limited to cadre members, drill sergeants, recruiters, raters over personnel they rate, and their supervisors. The President, Secretary of Defense or the Secretary concerned may, by regulation, further expand, or limit, the application of this subsection by defining the terms, ‘cadre members,’ ‘drill sergeants,’ ‘recruiters,’ ‘raters’ and ‘their supervisors.’”

Subsection 920(u)(10) is explicitly limited to two offenses to avoid confusion with subsections 920(j) (at page 295) and subsection 920(l) (at page 296) as well as subsection 920(u)(7) (at page 298). Many state sexual abuse statutes recognize that persons in particular positions of authority or responsibility have a more significant opportunity to sexually abuse others because of the vulnerability of those they supervise. For example, ALASKA STAT. § 11.41.470(5) (Michie 2004) defines “position of authority” to mean:

an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor.

⁶³⁵ The offense, “sexual contact involving a person in a position of special trust,” is a new offense. “Sexual contact” is defined at subsection 920(u)(2) at page 297. The suggested maximum confinement for this offense is five years and would be listed under subsection 920(u)(6).

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Other states strictly prohibit sexual activity between employees of correctional facilities and inmates, parolees or persons on probation. *See, e.g.*, N.M. STAT. ANN. § 30-9-11 (2004), VIRGINIA Stat. § 18.2-64.2 (2004). COLO. REV. STAT. § 18-3-402(f) (2004), “sexual assault,” provides for example that when: “The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search.”

Marriage should be included as an affirmative defense. Thus, subsection 920(s) at page 264 would need to list and include these two subsections.

The definition of lewd act in subsection 920(u)(10) should also list these two sections. *See* page 298, *infra*.

DRAFT MCM IMPLEMENTING PROVISIONS.

MCM ELEMENTS OF OFFENSES.

(9) *Sexual abuse involving a person in a position of special trust with a--*
(a) *trainee.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual act with another service member; and

(iv) That the other service member is in initial active duty for training.

(b) *recruit for military service.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual act with another person; and

(iv) That the other person is an applicant for military service and has started the process for:

(I) appointment as a commissioned or warrant officer in the Active or Reserve components;

(II) enlistment in the Armed Forces, including the Reserve components and in federally recognized units or organizations of the National Guard;

(III) reenlistment in Regular and Reserve components or in federally recognized units or organizations of the National Guard when after a period of more than 30 days have elapsed since discharge;

(IV) application for Scholarship or Advanced Course

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Reserve Officers Training Corps (ROTC), and all other Armed Forces' special officer personal procurement programs; or

(v) That the other person has enlisted under the Delayed Entry Program authorized by 10 U.S.C. § 513;

(c) *person in an officer accession or initial officer qualification training program.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual act with another service member; and

(iv) That the other person is a student, new cadet, or cadet, assigned to or with duty at an academy preparatory school, Reserve Officer Training Corps, Officer Candidate School, service academy or similar initial officer qualification program.

(d) *ratee with their rater.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused rates another service member and is in a position of authority over that ratee-service member; and

(iii) That the accused engaged in a sexual act with that ratee-service member.

(12) *Sexual contact involving a person in a position of special trust with a--*

(a) *trainee.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual contact or lewd act with another service member; and

(iv) That the other service member is in initial active duty for training.

(b) *recruit for military service.*

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual contact or lewd with another person; and

(iv) That the other person is an applicant for military service and has started the process for:

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(I) appointment as a commissioned or warrant officer in the Active or Reserve components;

(II) enlistment in the Armed Forces, including the Reserve components and in federally recognized units or organizations of the National Guard;

(III) reenlistment in Regular and Reserve components or in federally recognized units or organizations of the National Guard when after a period of more than 30 days have elapsed since discharge;

(IV) application for Scholarship or Advanced Course Reserve Officers Training Corps (ROTC), and all other Armed Forces' special officer personal procurement programs; or

(v) That the other person has enlisted under the Delayed Entry Program authorized by 10 U.S.C. § 513;

(c) person in an officer accession or initial officer qualification training program.

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused is in a position of authority over another service member;

(iii) That the accused engaged in a sexual contact or lewd act with another service member; and

(iv) That the other person is a student, new cadet, or cadet, assigned to or with duty at an academy preparatory school, Reserve Officer Training Corps, Officer Candidate School, service academy or similar initial officer qualification program.

(d) ratee with their rater.

(i) That the accused is a commissioned, warrant, noncommissioned or petty officer;

(ii) That the accused rates another service member and is in a position of authority over that ratee-service member; and

(iii) That the accused engaged in a sexual contact or lewd act with that ratee-service member.

MCM LESSER INCLUDED OFFENSES.

(9) Sexual abuse involving a person in a position of special trust.

(a) Article 120—sexual contact involving a person in a position of special trust, indecent act; wrongful sexual contact

(b) Article 93—maltreatment of person subject to orders

(c) Article 128—assault, assault consummated by a battery

(d) Article 80—attempts

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- (10) *Sexual abuse of a detainee or prisoner.*
- (a) Article 120—sexual contact with a prisoner, indecent act; wrongful sexual contact
 - (b) Article 93—maltreatment of person subject to orders
 - (c) Article 128—assault, assault consummated by a battery
 - (d) Article 80—attempts
- (11) *Indecent liberty with a child.*
- (a) Article 120—indecent act; wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts
- (12) *Sexual contact involving a person in a position of special trust.*
- (a) Article 120—indecent act; wrongful sexual contact
 - (b) Article 93—maltreatment of person subject to orders
 - (c) Article 128—assault, assault consummated by a battery
 - (d) Article 80—attempts

MCM SAMPLE SPECIFICATIONS

(9) *Sexual abuse involving a person in a position of special trust with a--*

(a) *Person in initial active duty for training.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ____, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ____, a service member in initial active duty for training.

(b) *Recruit.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ____, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ____, a person who is joining the armed services, including anyone in the delayed entry program.

(c) *Person in an officer accession or initial officer qualification training program.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ____, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ____, a person who is a student, new cadet, or cadet, assigned to or with duty at an academy preparatory school, Reserve Officer Training Corps, Officer Candidate School, service academy or similar initial officer qualification program.

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(10) *Sexual abuse of a detainee or prisoner.*

(a) *Prisoner*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a sexual act, to wit: ___ with ___, a person who is in (custody) (confinement) and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

(b) *Detainee*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a sexual act, to wit: ___ with ___, a person who is a detainee and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

(11) *Indecent liberties with a child.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, take indecent liberties with ___, a (female) (male) under 16 years of age, by (communicating the words: to wit: ___) (exposing one's private parts, to wit: ___) (___), with intent to [(arouse) (appeal to) (gratify) the (sexual desire) of the ___ (or ___)] [(abuse)(humiliate)(degrade) ___].

(12) *Sexual contact involving a person in a position of special trust with a--*

(a) *Person in initial active duty for training.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ___, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a sexual contact, to wit: ___ with ___, a service member in initial active duty for training.

(b) *Recruit.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ___, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a sexual contact, to wit: ___ with ___, a person who is joining the armed services, including anyone in the delayed entry program.

(c) *Person in an officer accession or initial officer qualification training program.*

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, who is in a position of authority over ___, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a sexual contact, to wit: ___ with ___, a person who is a student, new cadet, or cadet, assigned to or with duty at an academy preparatory school, Reserve Officer Training Corps, Officer Candidate School, service academy or similar initial officer qualification program.

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(b) Option 6

Option 6 has three sections that individually prohibit sexual intercourse, sodomy and sexual contact with a person who is “subjected to the accused’s authority and coerced into engaging in the [sexual activity] by the accused.” The following offenses in Option 6 pertain to children and minors:

- (1) Article 120(a)(1)(C)(iii), rape;
- (2) Article 120(a)(4)(C)(iii), aggravated forcible sodomy; and,
- (3) Article 120(a)(8)(C)(iii), aggravated indecent assault.

Rape, which is similar in format to aggravated forcible sodomy and aggravated indecent assault states:

- (1) commits an act of sexual intercourse,
 - (A) by forcible compulsion, physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
 - (B) with a person who is less than 12 years of age; or
 - (C) with a person who is at least 12 years of age but less than 16 years of age and is:
 - (i) a member of the accused’s household; or
 - (ii) a relative, within the fourth degree, of the accused; or
 - (iii) subjected to the accused’s authority and coerced into engaging in sexual intercourse by the accused; or**
 - (D) with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability, or mental incapacity, of understanding the nature of the sexual act; or
 - (E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct. (emphasis added).⁶³⁶

The problem with Option 6’s approach is it does not define the terms, “coerced” or “position of authority.” For example, a major tells a captain that he is good friends with her commanding officer (CO), and whatever he says about her to her CO, good or bad, is dependent on whether the captain engages in sexual intercourse with the major. This scenario could be rape because a major has authority over a captain, and the threat to communicate with her CO could be coercion. The “position of authority” in this scenario is much less coercive than the parent-child relationship, and the coercion is much less than a threat of death or grievous bodily harm.

⁶³⁶ See *infra* Option 6, App. G, at page 335.

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9. Mentally or Physically Incapacitated Victim

Many jurisdictions expressly prohibit the sexual exploitation of the mentally or physically incapacitated. Jurisdictions use different standards to determine if a mentally or physically incapacitated person can consent to sexual activity. The most prevalent standard is the nature of the conduct standard.⁶³⁷ The nature of the conduct standard requires that the mentally incapacitated person understand the sexual nature of the conduct and be able to voluntarily participate.⁶³⁸ Georgia and Minnesota apply a test that refers to whether the victim can exercise judgment regarding consent to sexual activity.⁶³⁹ Several other states do not have a standard or test. Instead, the fact finder evaluates evidence of mental disability as a means of determining the victim's capacity to consent.⁶⁴⁰

The *MCM*'s standard pertaining to mental disability, states, "if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or

⁶³⁷ See, e.g., ALASKA STAT. § 11.41.470 (Michie 2004), *see infra* at page 489; ARIZ. REV. STAT. § 13-1401 (2004), *see infra* at page 491; ARK. CODE ANN. § 5-14-101 (Michie 2004), *see infra* at page 501; DEL. CODE ANN. tit. 11, § 772 (2004), *see infra* at page 536; FLA. STAT. ANN. § 794.011 (West 2004), *see infra* at page 554; IOWA CODE ANN. § 709.15 (2002); LA. REV. STAT. ANN § 43 (West 2004), *see infra* at page 600; ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; NEB. REV. STAT. ANN. § 28-319 (Michie 2004), *see infra* at page 649; NEV. REV. STAT. ANN. § 200.366 (Michie 2004), *see infra* at page 653; N.C. GEN. STAT. § 14-27.1 (2004), *see infra* at page 681; N.D. CENT. CODE § 12.1-20-03 (2004), *see infra* at page 685; OR. REV. STAT. § 163.305 (2004), *see infra* at page 698; R.I. GEN. LAWS § 11-37-1 (2004), *see infra* at page 710; S.C. CODE ANN. § 16-3-651 (Law Co-op. 2004), *see infra* at page 713; TEX. PENAL CODE ANN. § 22.011 (Vernon 2004), *see infra* at page 724; UTAH CODE ANN. § 76-5-406 (2004), *see infra* at page 735.

⁶³⁸ *Id.*

⁶³⁹ GA. CODE ANN. § 16-6-5.1 (2004), *see infra* at page 562; MINN. STAT. ANN. § 609.341 (West 2004), *infra* at page 629.

⁶⁴⁰ See, e.g., CAL. PENAL CODE § 261 (Deering 2004), *see infra* at page 503; CONN. GEN. STAT. § 53a-71 (2003), *see infra* at page 530; IND. CODE ANN. §35-42-4-1 (Michie 2004), *see infra* at page 580; KY. REV. STAT. ANN. § 510.020 (Michie 2004), *see infra* at page 595; MONT. CODE ANN. § 45-5-501 (2004), *see infra* at page 645; OKLA. STAT. ANN. tit. 21, § 1111 (West 2004), *see infra* at page 695; 18 PA. CONS. STAT. § 3124.2 3101(2004), *see infra* at page 706; S.D. CODIFIED LAWS § 22-22-1 (Michie 2004), *see infra* at page 716; VT. STAT. ANN. tit. 13, § 3254 (2004); W.VA. CODE ANN. § 61-8B-2 (Michie 2004), *see infra* at page 760.

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her incapable of giving consent, the act is rape.”⁶⁴¹ The Judge’s BENCHBOOK instruction states that a victim cannot consent who “lacks the mental capacity to understand the nature of the act.”⁶⁴²

Military case law has a different test stating that a handicapped person is capable of consenting to intercourse unless his or her mental infirmity renders him or her incapable of understanding the act, its motive, and its possible consequences.⁶⁴³ If the accused knew or had reasonable cause to know that the victim was incapable of giving consent, the act of sexual intercourse was done by force and without consent.⁶⁴⁴

American jurisdictions classify sexual assaults with mentally incapacitated persons as sexual assaults in the first,⁶⁴⁵ second⁶⁴⁶ or third degree.⁶⁴⁷

⁶⁴¹ *MCM*, Pt. IV, ¶ 45c(1)(b).

⁶⁴² Military Judges’ BENCHBOOK, para. 3-45-1, Note 10 states, “When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.” The complete BENCHBOOK instruction concerning “victim’s lack of capacity of giving consent—due to mental infirmity” is at page 436.

⁶⁴³ *Henderson*, 4 U.S.C.M.A. at 274-75, 15 C.M.R. at 274-75; *United States v. Lyons*, 33 M.J. 543, 548-49 (A.C.M.R. 1991).

⁶⁴⁴ *Id.*

⁶⁴⁵ *See, e.g.*, ARK. CODE ANN. § 5-14-103 (Michie 2004), *see infra* at page 496; ME. REV. STAT. tit. 17a § 253 (West 2004), *infra* at page 603; MICH. COMP. LAWS § 750.520b (2004), *see infra* at page 621; NEB. REV. STAT. ANN. § 28-319 to 320 (Michie 2004), *see infra* at page 649; N.J. STAT. ANN. § 2C:14-2 (2004), *see infra* at page 661; N.D. CENT. CODE § 12.1-20-03 (2004), *see infra* at page 685; OKLA. STAT. ANN. tit. 21, § 1114 (West 2004), *see infra* at page 696; OR. REV. STAT. § 163.375 (2004), *see infra* at page 699; 18 PA. CONS. STAT. § 3101 3101(2004), *see infra* at page 702; TENN. CODE ANN. §39-13-502 (2004), *see infra* at page 719; WIS. STAT. ANN. § 940.225 (2004), *see infra* at page 764; WYO. STAT. ANN. § 6-2-302 (Michie 2004), *see infra* at page 772.

⁶⁴⁶ *See, e.g.*, 18 U.S.C. § 2242 (2004); ALA. CODE § 13A-6-61 to 13A-6-67 (2004), *see infra* at pages 482 - 483; CONN. GEN. STAT. §§ 53a-70a to 53a-73a (2003), *see infra* at pages 530 to 532; 11 DEL. C. § 772 (2001); D.C. CODE § 22-3003 (2004), *see infra* at page 545; HAW. REV. STAT. ANN. § 707-731 (Michie 2004), *see infra* at pages 565; 720 ILL. COMP. STAT. 5/12-13 to 5/12-16 (2004), *see infra* at pages 573 to 576; MD. CODE ANN. CRIMINAL LAW § 3-304 (2004), *see infra* at page 612; N.Y. PENAL § 130.35 (2004), *see infra* at page 677; N.C. GEN. STAT. § 14-27.2 to 14-27.3

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(a) Option 5

Option 5 is similar to the federal statute in prohibiting sexual activity with an incapacitated victim. The classification as a first or second-degree offense depends on the accused's culpability and the danger to the victim. Option 5, which defines the offense as rape, is very similar to 18 U.S.C. § 2241 (2004), as follows:

“(a) Any person subject to this chapter who causes another person to engage in a sexual act by—

(1) using force against that other person;
(2) causing grievous bodily harm to any person;
(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;

(4) rendering another person unconscious; or

(5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control

conduct is guilty of rape and shall be punished as a court-martial may direct.”⁶⁴⁸

(Emphasis added).

Subsection 920(c) of Option 5 is very similar to 18 U.S.C. § 2242 (2004), except that the word, “substantially” is added in subsection 920(c)(2) because

(2004), *see infra* at pages 681 to 682; R.I. GEN. LAWS § 11-37-4 (2004), *see infra* at page 711; S.D. CODIFIED LAWS § 22-22-1 (Michie 2004), *see infra* at page 716; TEX. PENAL CODE ANN. § 22.011 to 22.021 (Vernon 2004), *see infra* at pages 724 to 727; WASH. REV. CODE 9A.44.050 (2004), *see infra* at page 754; WIS. STAT. ANN. § 940.225(1)(b) (2004), *see infra* at page 764.

⁶⁴⁷ ALASKA STAT. § 11.41.425 (Michie 2004); IOWA CODE ANN. § 709.4 (West 2004), *see infra* at page 586; KY. REV. STAT. ANN. § 510.060 (Michie 2004), *see infra* at page 595; MINN. STAT. ANN. § 609.344 (West 2004), *infra* at page 629; W.VA. CODE ANN. § 61-8B-3 to 61-8B-9 (Michie 2004), *see infra* at pages 760 to 762.

⁶⁴⁸ *See infra* Option 5, subsection 920(a) at page 294. *See also infra* at page 253 for an explanation for differences between 18 U.S.C. § 2241 (2004) and subsection 920(a) at page 294.

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arguably 18 U.S.C. § 2242 (2004) sets an absolute standard, which is too high for a prosecutor to meet.⁶⁴⁹ Option 5 defines the offense of sexual abuse, as follows:

“(c) Any person subject to this chapter who —
 (1) causes another person to engage in a sexual act by—
 (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
 (B) causing bodily harm; or
 (2) engages in a sexual act with another person if that other person is **substantially incapacitated or substantially incapable of** —
 (A) **appraising the nature of the sexual act;**
 (B) **declining participation in the sexual act; or**
 (C) **communicating unwillingness to engage in the sexual act**
is guilty of **aggravated sexual assault** and shall be punished as a court-martial may direct.”⁶⁵⁰

18 U.S.C. § 2246 (2004) does not define the term, “appraise or control conduct” nor does it explain how substantial impairment relates to consent. Option 5, however, defines apprise or control conduct as a person who is unable to understand the act, its motive, or its possible consequences. Option 5 defines, “consent,” subsection 920(u)(21), at page 300, as follows:

“(21) ‘consent’ means words or overt acts indicating a freely given agreement to the sexual conduct in question by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual activity at issue shall not constitute consent. **A person cannot consent to sexual activity if:**
 (A) under sixteen years of age;
 (B) **substantially incapable of:**
 (1) **appraising the nature of the sexual act or sexual contact due to:**
 (i) **mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or**

⁶⁴⁹ In regard to subsections 920(a) and 920(c), a list of the other differences between these two subsections and 18 U.S.C. § 2241 (2004) and 18 U.S.C. § 2242 (2004) is at page 253 and 256 *infra*.

⁶⁵⁰ See *infra* Option 5, subsection 920(c) at page 294. See also *infra* at page 256 for an explanation for differences between 18 U.S.C. § 2242 (2004) and subsection 920(c) at page 294.

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- (ii) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;**
- (2) declining participation in the sexual conduct at issue;**
- (3) communicating unwillingness to engage in the sexual conduct at issue.**⁶⁵¹

(Emphasis added).

(b) Option 6

Option 6 has three subsections that individually prohibit sexual intercourse, sodomy and sexual contact with a person who is “subjected to the accused’s authority and coerced into engaging in the [sexual activity] by the accused.” The following offenses in Option 6 address lack of capacity to consent:

- (1) Article 120(a)(1)(D) & (E), rape;
- (2) Article 120(a)(4)(D) & (E), aggravated forcible sodomy; and,
- (3) Article 120(a)(8)(D) & (E), aggravated indecent assault.

Rape, which is similar in format to aggravated forcible sodomy and aggravated indecent assault provides:

- (a) Any person, subject to this chapter who—
 - (1) commits an act of sexual intercourse with another person,
 - (A) by forcible compulsion, physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
 - (B) with a person who is less than 12 years of age; or
 - (C) with a person who is at least 12 years of age but less than 16 years of age and is:
 - (i) a member of the accused’s household; or
 - a relative, within the fourth degree, of the accused; or
 - (ii) subjected to the accused’s authority and coerced into engaging in sexual intercourse by the accused; or
 - (D) **with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability, or mental incapacity, of understanding the nature of the sexual act**⁶⁵²; or

⁶⁵¹ Military law states that “a person is capable of consenting to an act of sexual intercourse unless her mental ability is so severe that she is incapable of understanding the act, its motive, and its possible consequences.” *See* BENCHBOOK, ¶ 3-45-1d n.10.

⁶⁵² *See infra* Option 6, App. G, at page 335. Many jurisdictions prohibit, as “rape,” anyone from engaging in sexual intercourse with a person he knows is incapable, by reason of a mental disability or mental incapacity, of understanding the nature

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(E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act⁶⁵³ (emphasis added).

Option 6's definition of lack of consent also addresses incapacity as follows:

(3) *Lack of Consent.*⁶⁵⁴ The term "consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A person is deemed incapable of giving consent when he or she is less than 16 years of age; lacks, because of a mental disability or mental incapacity, the mental ability to understand the nature of the act; or, lacks, because of a physical incapacity, the physical ability to consent to the act. Thus, consent of the victim is not an issue in alleged violations of subdivisions (1)(B-E), (3), (4)(B-E), (6), (7), (8)(B-E), (10), and (11) of this article.

D. DIFFERENCES BETWEEN OPTION 5 AND OPTION 6

sexual act. *See* ALASKA STAT. §11.41.410(a)(3) (Michie 2004), *see infra* at page 485; COLO. REV. STAT. § 18-3-402(1)(b) (2004), *see infra* at page 523; 720 ILL. COMP. STAT. 5/12-13(a)(2) (2004), *see infra* at page 573; Maine Revised Statutes § 253(2)(C) [*see infra* at page 603]; MICH. COMP. LAWS § 750.520b(1)(g) (2004), *see infra* at page 621; and New Jersey Statutes § 2C:14-2(a)(7) [*see infra* at page 661]. Option 6 is similar to New Jersey Statutes § 2C:14-2(a)(7) in that it establishes a standard that the accused knew or reasonably should have known the "victim" was mentally incapable of understanding the nature of the sexual act.

⁶⁵³ *See infra* Option 6 at page 335. Many jurisdictions prohibit, as "rape," a person from engaging in sexual intercourse with someone that he knows is physically incapable of consenting to the sexual act. *See* ALA. CODE § 13A-6-61(a)(2) (2004), *see infra* at pages 482; ALASKA STAT. §11.41.410(a)(3) (Michie 2004), *see infra* at page 485; ARK. CODE ANN. § 5-14-103(a)(1)(B) (Michie 2004), *see infra* at page 496; COLO. REV. STAT. § 18-3-402(1)(h) (2004), *see infra* at page 523; KAN. STAT. ANN. § 21-3502(a)(1)(B) (2003-Lexis does not have update), *see infra* at page 588; KY. REV. STAT. ANN. § 510.040(1)(b)(1) (Michie 2004), *see infra* at page 595; Maine Revised Statutes § 253(2)(D) [*see infra* at page 603]; MICH. COMP. LAWS § 750.520b(1)(g), *see infra* at page 620; and New Jersey Statutes § 2C:14-2(a)(7) [*see infra* at page 661]. Our provision is similar to New Jersey Statutes § 2C:14-2(a)(7) in that it establishes a standard that the accused knew or reasonably should have known the "victim" was physically incapable of consenting to the sexual act.

⁶⁵⁴ *See infra* Option 6 at page 344.

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In Option 6's subsection 920(a)(1) at page 338, the accused is liable for "use of a dangerous weapon." "Use" is not defined. Is possession or display of a dangerous weapon to obtain sex the same as use? To use a gun may be limited by appellate courts to shooting it. Similarly, use of a knife might be limited to cutting someone with it. That is why Option 5 has multiple applications for weapons in the definition of force. Similarly, the term, "dangerous weapon" is not defined.

The offenses of rape, in Option 6's subsection 920(a)(1) at page 338 and aggravated forcible sodomy in Option 6's subsection 920(a)(4)(A) at page 338 are the same, except rape involves sexual intercourse and sodomy involves unnatural carnal copulation. These two offenses could be combined as in subsection 920(u)(1) of Option 5 (*see* page 297) and 18 U.S.C. § 2246(2) (*see* page 429) by defining intercourse and carnal copulation as a sex act, or by some other term.

Option 6's subsection 920(a)(8) at page 339 describes an "aggravated indecent assault" and states "under circumstances not amounting to rape or aggravated sexual intercourse, engages in sexual contact with another person (A) by forcible compulsion, etc. The words "under circumstances not amounting to rape or aggravated sexual intercourse," should probably be deleted because they create confusion. Perhaps the reason it does not amount to rape or aggravated sexual intercourse is because it is a "sexual contact," rather than vaginal-penile penetration. In regard to aggravated forcible sodomy—it is unclear whether the two exclusions are limited to intercourse. If the reason it does not amount to rape or aggravated sexual intercourse is because the force is less, than it is confusing because the terms like forcible compulsion are the same. For example, assuming that a sexual contact by forcible compulsion with a 10-year old child is a aggravated indecent assault, a sexual contact, by definition, includes sexual intercourse and human to human sodomy.

In defining the term, "physical force" in the *MCM*'s implementation, at para. c(4) (at page 345), the qualifier "active" in front of resistance is unnecessary.

Option 6 uses the word, "victim" in definitions. It may be preferable to not use words that imply the accused's guilt. Trial judges should be able to read statutory definitions to the jury without substituting words. Another possibility is using the term "alleged victim," but a better choice is to use "by another" or "person" as in 18 U.S.C. §§ 2241-2244, 2246.

The term fourth degree is used, but not defined in subsections 920(a)(1)(C)(ii), 920(a)(4)(C)(ii) and 920(a)(8)(C)(ii) at pages 336, 338 and 339, respectively, in the phrase, "a relative, within the fourth degree, of the accused."

The term, "serious bodily injury" is used in forcible compulsion in the *MCM*'s implementation, at para. c(1) (at page 343), and it is not defined. Option 6 would be improved if grievous bodily harm were used in lieu of "serious bodily injury."

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The term, “grievous bodily harm,” is already used in 10 U.S.C. § 928(b)(1), aggravated assault, and is defined in the *MCM*, Part IV, ¶ 54(c)(4)(iii). Grievous bodily harm is a lesser degree of injury than “serious bodily injury,” as defined in 18 U.S.C. § 2246(4) at page 430. Grievous bodily harm is used in lieu of serious bodily injury in Option 5’s subsection 920(u)(3) at page 297.

Option 6 does not address the accused’s use of intoxicants versus the victim’s consensual use of intoxicants to facilitate a nonconsensual sexual act. Option 6’s definition of “lack of consent,”⁶⁵⁵ includes the sentence, “A person is deemed incapable of giving consent when he or she . . . lacks because of mental disability or mental incapacity, the mental ability to understand the nature of the act; or lacks because of a physical incapacity, the physical ability to consent to the act.”⁶⁵⁶

Unlike Option 5, and Title 18, Option 6 does not address an accused’s use of intoxicants to facilitate a nonconsensual sexual act as an aggravating factor. It is no more serious an offense for an accused to slip a knock-out drug to an unsuspecting victim, or to strike her head with an object, knocking her unconscious and then to have sexual intercourse with her than it is to have sexual intercourse with someone who has consensually consumed too much alcohol and is physically incapable of consenting to the sexual act. Option 6 defines lack of capacity differently than Option 5. Option 6 should also include a more precise definition of family member, *see* discussion in this Report at pages 153 to 156 *infra*.

With respect Option 6’s *MCM* implementation, para. c(9) defines “threat of sufficient consequence” at page 345, to include “the use or abuse of position, rank, or authority, adversely affect some person.” Option 6 does not define the terms, “coerced” or “position of authority.” “By threat or coercion of sufficient consequence reasonably calculated to cause submission without consent” is an element of aggravated sexual intercourse, subsection 920(a)(2) at page 337. For example, a major, who is not in the same unit with a captain, tells a captain that he is good friends with her commanding officer (CO), and whatever he says to her CO, good or bad, about her, depends on whether the captain engages in sexual intercourse with the major. This scenario could be aggravated sexual intercourse under Option 6’s subsection 920(a)(2) because a major has authority over a captain, and the threat to communicate with her CO could be coercion. The rank relationship between the major and the captain is not a coercive factor because the major has no special ability based on his rank to affect the career of the captain. Adding into

⁶⁵⁵ Option 6’s subsection 920(a)(2) at page 337, includes a provision, “by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent.” Consent should be listed as an affirmative defense and refer to R.C.M. 916. *See e.g.*, *MCM*, Pt. IV, ¶ 50c(4).

⁶⁵⁶ *See infra* Option 6 at page 344.

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para. c(9) the sentence, “Whether a threat or coercion is of sufficient consequence depends upon the circumstances of each case,” reintroduces the vague, totality of the circumstances test in contravention of the goal of making sexual offenses and defenses reasonably specific and precise. While a trial judge is likely to tell a jury to consider all the facts and circumstances presented at trial, this sentence should probably not be included in the definition itself.

As indicated in the discussion starting at page 66, the Court of Appeals for the Armed Forces does not consider the *MCM* interpretation of substantive offenses to be binding. Therefore, the explanation in *MCM*, para. c should be moved into the statutory section of Option 6’s section 920.

E. LABELING SEXUAL CRIMES AS “FIRST DEGREE RAPE,” “AGGRAVATED SEXUAL ABUSE,” OR OTHERWISE

Article 120, UCMJ, and Options 5 and 6 label forcible sexual intercourse as “rape.” Under military law and Option 6, forcible sodomy is separately defined and punished. Because Option 6 divides sexual offenses by degree of culpability, this further division into intercourse and other sexual penetrations results in a doubling of the sections that are required.

Some states define all sexual penetrations as rape.⁶⁵⁷ Option 5’s subsection 920(u)(1) and 18 U.S.C. § 2246(2) (2004) define sexual penetrations similarly. For a detailed description of the differences between these two definitions of sexual acts,

⁶⁵⁷ For example, Delaware defines all sexual penetrations as sexual intercourse. *See infra* § 761(e) at page 540, stating:

- (a) “Cunnilingus” means any oral contact with the female genitalia.
- (b) “Fellatio” means any oral contact with the male genitalia.
- * * *
- (d) “Sexual offense” means any offense defined by §§ 761-773 and §§ 1108-1112A of this title.
- (e) “Sexual intercourse” means:
 - (1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required. This offense encompasses the crimes commonly known as rape and sodomy; or
 - (2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.

Ohio takes a similar approach defining all sexual penetrations as sexual conduct. *See infra* at § 2907.02 at page 689.

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see starting at page 270. 18 U.S.C. § 2241 (2004) assigns the most serious sexual crime as “aggravated sexual abuse,” but like some states combine terms, defining sexual intercourse and sodomy into a comprehensive term called, “sexual act.” Subsections 920(u)(1) defines “sexual act” as:

(A) contact between the penis and the vulva or genital opening or the penis and the anus, and for purposes of subsections 920(u)(1)(A) and 920(u)(1)(B) contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.⁶⁵⁸

Professor David Bryden discusses whether changing the label from rape to a type of sexual assault, sexual abuse or sexual battery is beneficial and concludes in the long term that changing the name of the offense will have little effect.⁶⁵⁹ Professor Bryden indicates there are four primary reasons for eliminating rape. First, rape is primarily a crime of force and violence, rather than a crime of lust or sexual gratification. One way to transfer the orientation from the sex to aspects of force, power and violence, is to label the offense differently, such as by changing it from rape to sexual assault, sexual abuse or sexual battery. Second, while consent is a defense to both rape and assault consummated by battery, there is no resistance requirement or element for assault and battery. Arguably by changing to an assault-type label, fact finders would be less likely to infer the existence of a resistance element. Third, some assert there is less stigma and embarrassment to being an assault victim as opposed to being a rape victim.⁶⁶⁰

Professor Bryden finds four counter arguments for keeping the name, rape, to be more persuasive. First, a rape conviction carries a heavy stigma that is significantly greater than that of a conviction for sexual abuse. Second, nationwide penalties for rape are greater than penalties for assault consummated by battery or aggravated assault. Changing to assault will likely cause penalties for rape-type assaults to be decreased. Third, eventually the same stereotypes and baggage will

⁶⁵⁸ *See infra* Option 5 at subsection 920(u)(1) at page 297. *See also* the explanation for subsection 920(u)(1) at page 270. 18 U.S.C. § 2246(2) is at page 429.

⁶⁵⁹ DAVID P. BRYDEN, *FORUM ON THE LAW OF RAPE: REDEFINING RAPE*, 3 BUFFALO CRIM. L. R. 317, 427-434 (2000).

⁶⁶⁰ *Id.*

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accrue to sexual assault offenses that currently apply to rape, such as an inference that resistance is required, and the embarrassment and stigma of being a sexual-assault victim will become equal to that currently suffered by rape victims.⁶⁶¹ Fourth, rape as a crime is unique because consensual sexual intercourse is generally legal in society. Sexual intercourse by force and without consent is an atrocious crime. Any attempt to reduce the consent defense by changing the name of the offense is placing “an enormous faith in the power of words” and is “naïve.”⁶⁶²

Twenty-six states, the Model Penal Code and the UCMJ label their most sexual offense as rape, aggravated rape or rape in the first degree. The following jurisdictions and entities label their most serious sexual offense as a type of sexual:

- a. **assault** by sixteen states;
- b. **conduct** by three states;
- c. **abuse** by two states and under Title 18;
- d. **battery** by one state;
- e. **imposition** by one state; and,
- f. **penetration** by one state.

A table at pages 472 to 479 lists the primary and secondary names chosen by each jurisdiction for forcible sexual penetrations.

The Federal Government, under Title 18, Chapter 109A—Sexual Abuse, the sections are labeled as follows:

- (1) 18 U.S.C. § 2241 (2004) **aggravated sexual abuse (a) by force or threat**
- (2) 18 U.S.C. § 2241 (2004) **aggravated sexual abuse (b) by other means**
- (3) 18 U.S.C. § 2241 (2004) **aggravated sexual abuse (c) with children**
- (4) 18 U.S.C. § 2242 (2004) **sexual abuse (1) by threatening or placing that other person in fear**
- (5) 18 U.S.C. § 2242 (2004) **sexual abuse of (2) an incapable person**
- (6) 18 U.S.C. § 2243 (2004) **sexual abuse of (a) a minor**
- (7) 18 U.S.C. § 2243 (2004) **sexual abuse of (b) a ward**

⁶⁶¹*Id.*

⁶⁶²*Id.* at 429.

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- (8) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(1) under 18 U.S.C. § 2241 (2004) by force or threat
- (9) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(1) under 18 U.S.C. § 2241 (2004) **by other means**
- (10) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(1) under 18 U.S.C. § 2241 (2004) **with children**
- (11) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(2) under 18 U.S.C. § 2242 (2004) **by threatening or placing that other person in fear**
- (12) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(2) under 18 U.S.C. § 2242 (2004) **of an incapable person**
- (13) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(3) under 18 U.S.C. § 2243 (2004) **of a minor**
- (14) 18 U.S.C. § 2244 (2004) **abusive sexual contact** (a)(4) under 18 U.S.C. § 2243 (2004) **of a ward**
- (15) 28 U.S.C. § 2245 **sexual abuse resulting in death**

In the current *MCM* and UCMJ, the sexual crimes at issue in this report are labeled:

- (1) **rape** (Article 120, UCMJ);
- (2) **carnal knowledge** (Article 120, UCMJ);
- (3) **sodomy** (Article 125, UCMJ);
- (4) **indecent assault** (Article 134, UCMJ);
- (5) **indecent acts or liberties with a child** (Article 134, UCMJ);
- (6) **indecent acts with another** (Article 134, UCMJ);
- (7) **indecent exposure** (Article 134, UCMJ); and,
- (8) **pandering by compelling** (Article 134, UCMJ).

Essentially, the first five *MCM* and UCMJ offenses are divided in Title 18 into the first fourteen offenses.

Option 5 recommends the Congress prohibit:

1. **Rape** § 920(a) at page 294 is from 18 U.S.C. § 2241 (2004), rape combines aggravated sexual abuse by force or threat and aggravated sexual abuse by other means. For an explanation for differences between § 920(a) the title 18 offense *see* page 253.
2. **Rape of a child** § 920(b) at page 294 is from 18 U.S.C. § 2241 (2004), aggravated sexual abuse of a child. For an explanation for differences between the title 18 offense and § 920(b) *see* page 256.
3. **Aggravated sexual assault** § 920(c) at page 294 is from 18 U.S.C. § 18 U.S.C. § 2242 (2004), sexual abuse. For an explanation for differences between the title 18 offense and § 920(c) *see* page 256.
4. **Aggravated sexual assault on a child** § 920(d) at page 295 is from 18 U.S.C. § 2243 (2004), sexual abuse of a minor. For an explanation for differences between the title 18 offense and § 920(d) *see* page 257.

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5. **Aggravated sexual contact** § 920(e) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact by force or threat and abusive sexual contact by other means. For an explanation for differences between the title 18 offense and § 920(e) *see* page 258.
6. **Aggravated sexual abuse of a child** § 920(f) is at page 295. 18 U.S.C. §§ 2241-2244 does not include aggravated sexual abuse of a child in this format. Subsection 920(f) protects children from lewd acts, which is defined by § 920(u)(10), at page 298. “Lewd act” includes the sexual act from 18 U.S.C. § 2246(2)(D), which is § 920(u)(10)(A). It also includes sexual conduct not specifically prohibited in 18 U.S.C. § 2246(2). The explanation for § 920(f) is at page 258 and for § 920(u)(10) is at page 277.
7. **Aggravated sexual contact with a child** § 920(g) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact on a child. For an explanation for differences between the title 18 offense and § 920(g) *see* page 258.
8. **Abusive sexual contact** § 920(h) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact. For an explanation for differences between the title 18 offense and § 920(h) *see* page 259.
9. **Abusive sexual contact with a child** § 920(i) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact. For an explanation for differences between the title 18 offense and § 920(i) *see* page 259.
10. **Sexual abuse of a detainee or a prisoner** § 920(j) at page 295 is adapted from 18 U.S.C. § 2243 (2004), sexual abuse of a ward—however it is changed to include protection of overseas detainees from sexual abuse. For an explanation for differences between the title 18 offense *see* page 259.
11. **Indecent liberty with a child** § 920(k) at page 296. For an explanation of this offense *see* page 260.
12. **Sexual contact with a detainee or prisoner** § 920(l) at page 296 is adapted from 18 U.S.C. § 2244 (2004), abusive sexual contact with a ward—however it is changed to include protection of overseas detainees from sexual abuse. For an explanation for differences between the title 18 offense *see* page 260.
13. **Indecent act** § 920(m) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 261.
14. **Forcible pandering** § 920(n) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 261.
15. **Wrongful sexual contact** § 920(o) at page 296 is derived from 18 U.S.C. § 2244 (2004). For an explanation for differences between the title 18 offense *see* page 261.
16. **Indecent exposure** § 920(p) at page 296 is derived from an offense under Article 134, UCMJ. For an explanation of this offense *see* page 262.

Most of the offenses listed in Option 5, are the same as under Title 18. However, sexual abuse as listed above combines 18 U.S.C. § 2242 (2004) sexual abuse (1) by threatening or placing that other person in fear and 18 U.S.C. § 2242 (2004) sexual abuse of (2) an incapable person. Abusive sexual contact combines 18 U.S.C. § 2244 (2004) abusive sexual contact (a)(2) under 18 U.S.C. § 2242 (2004) (1) by threatening or placing that other person in fear and 18 U.S.C. § 2244 (2004)

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abusive sexual contact (a)(2) under 18 U.S.C. § 2242 (2004) of an incapable person.

Also, indecent liberty with a child or minor, indecent act, and indecent exposure are added from Article 134, UCMJ. The first degree sexual abuse of a position of special trust, sexual abuse of a prisoner, and second degree sexual abuse of a position of special trust are new, but could potentially be charged as maltreatment of a subordinate under Article 93, UCMJ.

In conclusion, the subcommittee agreed with Professor Bryden, 26 of the states, the Model Penal Code and the current UCMJ, that “rape” should be retained as the most serious UCMJ sexual offense. Retention of rape is less confusing to practitioners; and it allows for better statistical comparisons within the military as to “rapes” before and after enactment of Option 5. “Rape” best encapsulates the atrocious nature of this offense. As one commentator has indicated:

The more accurate labeling of the offense is of enormous importance. First, a rape conviction establishes that the wrong being punished is not a simple assault. Instead, the crime being punished is one of the most humiliating, degrading and life-altering experiences than any victim can endure. . . the criminal behavior is not excused or downgraded as an assault, but is instead recognized as one of the most traumatic invasions a victim can experience. . . The statute, then, reflects a studied understanding of how rape occurs and does not force the rape victim to suffer the further indignity of having the perpetrator’s behavior trivialized.”⁶⁶³

F. AMENDMENT OF MILITARY RULE OF EVIDENCE 412 TO BE CONSISTENT WITH FEDERAL RULE OF EVIDENCE 412⁶⁶⁴

⁶⁶³ DAPHNE EDWARDS, ACQUAINTANCE RAPE AND THE FORCE ELEMENT: WHEN “NO” IS NOT ENOUGH, 26 GOLDEN GATE U.L. REV. 241, 292 (1996). “To highlight the outrage involved, many women victims prefer to see their assailants convicted of third degree rape rather than first or second degree assault, even though the penalty for the rape offense is much lower.” *Id.* at n.275 (citation omitted).

⁶⁶⁴ The majority of this section is from the discussion of admissibility of evidence about the victim’s pre-offense sexual relationship with the accused in *United States v. Andreozzi*, ARMY 9800870, (Army Ct. Crim. App. Nov. 4, 2004). In *Andreozzi*, the accused, a staff sergeant, was convicted of the rape and forcible sodomy of his estranged wife. Staff Sergeant Andreozzi’s sentence included confinement for 27 years. The *Andreozzi* trial judge confused the balancing tests in Mil. R. Evid. 403 and Mil. R. Evid. 412(c)(3). The trial judge used the Mil. R. Evid. 412(c)(3) balancing test to exclude the evidence, when it is actually supposed to be used to admit otherwise inadmissible evidence. Chief Judge Carey recommended changing the *MCM* so that Mil. R. Evid. 412 and FED. R. EVID. 412 explicitly apply to all

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Analysis of admissibility under Mil. R. Evid. 412 is exceptionally complicated and confusing. Military Rule of Evidence 412 is intended to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping.”⁶⁶⁵ “[T]he rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”⁶⁶⁶ “[E]vidence of a victim’s past sexual behavior with persons other than the accused is not admissible unless [C]onstitutionally required to be admitted.”⁶⁶⁷ On the other hand, “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent” under Mil. R. Evid. 412(b)(1)(B) “is admissible, if otherwise admissible under these rules.”⁶⁶⁸ The rights of the accused to a fair trial are adequately protected and the purpose of Mil. R. Evid. 412 is frustrated by an unnecessary internal balancing test.

Under Mil. R. Evid. 412, “the military judge applies a two-part process of review to determine if the evidence is admissible.”⁶⁶⁹ First, the military judge determines if the evidence is relevant under Mil. R. Evid. 401. *Id.* Second, if relevant, the military judge applies the Military Rule of Evidence 412(c)(3)

sexual offenses. For clarity, further attribution to the *Andreozzi* decision is not included in this report.

⁶⁶⁵*United States v. Lauture*, 46 M.J. 794, 797 (Army Ct. Crim. App. 1997) (quoting FEDERAL RULE OF EVIDENCE 412, Advisory Committee Notes [hereinafter FED. R. EVID.] 412, Advisory Notes); see *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991). For non-consensual offenses, Mil. R. Evid. 412 is “somewhat broadened” as compared to FED. R. EVID. 412, and both rules have the same purpose. See *Banker*, 60 M.J. at 221; Mil. R. Evid. 412 analysis, at A22-35. In 1994, FED. R. EVID. 412 was amended making its protections equally applicable to both consensual and nonconsensual sexual offenses. See *Banker*, 60 M.J. at 219-20 (interpreting Mil. R. Evid. 412 to be applicable to all prosecutions involving alleged sexual misconduct).

⁶⁶⁶*United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (quoting FED. R. EVID. 412, Advisory Notes); see also *United States v. Hurst*, 29 M.J. 477, 480 (C.M.A. 1990).

⁶⁶⁷*Carter*, 47 M.J. at 396 (citing Mil. R. Evid. 412(b)(1)).

⁶⁶⁸*Id.* See also *Banker*, 60 M.J. at 221; Howard J. Alperin, Annotation, *Propriety of Cross-Examining Witness as to Illicit Relations with Defendant in Criminal Case*, 25 A.L.R.3d 537, § 6 (update Mar. 2003).

⁶⁶⁹*Banker*, 60 M.J. at 222.

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balancing test. *Id.* Even if admissible under Mil. R. Evid. 412, the evidence may still be excluded under the Mil. R. Evid. 403 balancing test.⁶⁷⁰ Ultimately, the Constitution may require admissibility of the evidence. *Id.* at 222.

Military Rules of Evidence 401 and 402 provide that evidence having “‘any tendency to make the existence of any fact . . . more or less probable than it would be without the evidence’ is legally relevant and admissible.”⁶⁷¹ Relevance of prior sexual activity between an accused and an alleged victim is increased by the degree of its similarity to the charged conduct, and whether the sexual activity is distinctive and unusual.⁶⁷² If the evidence is more dissimilar than similar, then the evidence has minimal relevance and low probative value to the issue of consent.⁶⁷³ The Mil. R. Evid. 412(c)(3) balancing test does not require admission of this evidence unless the probative value of such evidence outweighs the danger of unfair prejudice to the accused.⁶⁷⁴

Even if admissible under Mil. R. Evid. 412, the evidence may still be excluded under Mil. R. Evid. 403. “[U]nder Mil. R. Evid. 403, evidence which is both legally and logically relevant ‘may be excluded if its probative value is substantially outweighed by the danger of undue prejudice.’”⁶⁷⁵ “[Military Rule of

⁶⁷⁰ *Id.* at 223 n.3. If the balancing test in Mil. R. Evid. 412(c)(3) is met, the evidence “shall be admissible,” whereas if the balancing test in Mil. R. Evid. 403 is met, relevant evidence may be excluded. The proponent’s burden and the presumption of admissibility under each rule “lean in different directions: i.e., toward inclusion in the case of [Mil. R. Evid.] 403 and toward exclusion in the case of [Mil. R. Evid.] 412(c)(3).” *Id.*

⁶⁷¹ *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996) (citation omitted).

⁶⁷² *See United States v. Velez*, 48 M.J. 220, 226-27 (C.A.A.F. 1998) (“[C]oncurrence of underlying details in both stories, i.e., drinking, wanting to play pool, being with a Marine who was not her husband, and some sexual act[,] are not so ‘unique’ as to suggest contrivance or falsehood on the alleged victim’s part.”).

⁶⁷³ *Cf. United States v. Bear Stops*, 997 F.2d 451, 453-58 (8th Cir. 1993) (reversing conviction for sexual abuse); *United States v. Powers*, 59 F.3d 1460, 1470 (4th Cir. 1995) (finding evidence of victim’s subsequent sexual activity irrelevant to accused’s guilt).

⁶⁷⁴ *See Banker*, 60 M.J. at 222 (stating Mil. R. Evid. 412(c)(3) balancing test applies “to all three of the enumerated exceptions”).

⁶⁷⁵ *Sanchez*, 44 M.J. at 178 (citation omitted) (applying Mil. R. Evid. 403 to Mil. R. Evid. 412 evidence); *see also Banker*, 60 M.J. at 223; *Lauture*, 46 M.J. at 798-99.

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Evidence] 412 does not wholly supplant [Mil. R. Evid.] 403 since the military judge may exclude evidence on [Mil. R. Evid.] 403 grounds even if that evidence would otherwise be admissible under [Mil. R. Evid.] 412.”⁶⁷⁶ “[T]he policy of Mil. R. Evid. 412, to guard against unwarranted intrusion into the victim’s private life, may be taken into account in determining the amount of unfair prejudice under Rule 403.”⁶⁷⁷

Military Rule of Evidence 412(c)(3) does not require admissibility because the “probative value of [the] evidence [is] outweigh[ed] by the danger of unfair prejudice.” The evidence is inadmissible because under Mil. R. Evid. 403, whatever

⁶⁷⁶ *Banker*, 60 M.J. at 223 n.3; *United States v. Williams*, 37 M.J. 352, 360 n.7 (C.M.A. 1993) (discussing relationship between Mil. R. Evid. 403 and 412). In 1994, FED. R. EVID. 412 was amended, eliminating the balancing test for criminal cases that was retained in Mil. R. Evid. 412(b)(3). Compare P.L. 100-690, Title VII, Subtitle B, § 7046(a), 102 Stat. 4400 (Nov. 18, 1988) with P.L. 103-322, Title IV, Subtitle A, ch 4, § 40141(b), 109 Stat. 1919 (Sept. 13, 1994). We recommend elimination of the Mil. R. Evid. 412(c)(3) balancing test. As noted in the Commentary to FED. R. EVID. 412:

[I]f a specific act is offered for one of the two limited purposes provided, the act is admissible so long as it also satisfied Rule 403. See, e.g., *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (evidence that fits one of the Rule 412 exceptions can nonetheless be excluded [under Rule 403] if the probative value is substantially outweighed by the prejudicial effect). That is, there is no heightened exclusionary balancing test applied. This makes sense, since if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test.

FED. R. EVID. 412 cmt. (2004). Currently, federal civilian appellate courts apply the FED. R. EVID. 403 balancing test to exclude that which is otherwise admissible under FED. R. EVID. 412. WEINSTEIN’S FEDERAL EVIDENCE § 412.03[1] (2003) (“The Advisory Committee Note to the 1994 Amendment [to FED. R. EVID. 412] states that evidence ‘offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403.’” (citation omitted)).

⁶⁷⁷ Marjorie A. Shields, Annotation, *Admissibility in Sex Offense Case, Under Rule 412 of Federal Rules of Evidence, of Evidence of Victim’s Past Sexual Behavior*, 166 A.L.R. FED. 639, § 3b (update May 2003) (citing *One Feather*, 702 F.2d 736).

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limited probative value this evidence did have was “substantially outweighed by the danger of unfair prejudice [and] confusion of the issues.”⁶⁷⁸

Even though the evidence is inadmissible under the military rules of evidence, courts are still required to determine whether the restriction on cross-examination meets Constitutional standards—keeping in mind that “‘trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’”⁶⁷⁹ “Relevance is the key to determining when the evidence is [C]onstitutionally required to be admitted,” and this determination must be made on a “case-by-case basis.”⁶⁸⁰ Constitutional relevance is shown, for example, by “‘testimony proving the existence of a sexual relationship that would have provided *significant* evidence on an issue of *major importance* to the case.’”⁶⁸¹ Recently, the United States Court of Appeals for the Armed Forces has explained that, “[w]hile the term ‘favorable’ may not lend itself to a specific definition, we believe that based on Supreme Court precedent and our own Court’s rulings in this area, the term is synonymous with ‘vital.’” *Banker*, 60 M.J. at 222 (citations omitted).

In 1994, the FED. R. EVID. 412, the “Rape Shield” evidentiary rule used in U.S. District Courts was revised, eliminating an internal balancing test, which is confusing and unnecessary. The amended FED. R. EVID. 412 expanded its

⁶⁷⁸ Mil. R. Evid. 403; *see Ramone*, 218 F.3d at 1237-38; *United States v. Galloway*, 937 F.2d 542, 548 (10th Cir. 1991) (stating court has discretion to exclude evidence of past sexual behavior in certain cases where FED. R. EVID. 412 inapplicable), *vacated en banc on other grounds*, 56 F.3d 1239 (10th Cir. 1995); *United States v. Blue Horse*, 856 F.2d 1037, 1040-41 (8th Cir. 1988) (finding no error where medical records indicating past sexual activity excluded).

⁶⁷⁹ *United States v. Byrne*, 171 F.3d 1231, 1234 (10th Cir. 1999) (quoting *Van Arsdall*, 475 U.S. at 679). There is a three-part test to determine whether evidence is Constitutionally required to be admitted: the evidence must be relevant, material, and favorable to the defense. *See United States v. Williams*, 37 M.J. 352, 359 (C.M.A. 1993).

⁶⁸⁰ *Carter*, 47 M.J. at 396 (internal quotation marks omitted) (quoting *Jensen*, 25 M.J. at 286, and *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996), respectively).

⁶⁸¹ *Id.* (emphasis added) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)); *United States v. Pagel*, 45 M.J. 64, 70 (C.A.A.F. 1996) (“Evidence is also [C]onstitutionally required to be admitted when the evidence is ‘so particularly unusual and distinctive as to verify the defendant’s version.’” (quoting *Sanchez*, 44 M.J. at 179-80)).

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protections to include protecting the privacy of the victim whether the charged sexual act is consensual or nonconsensual.

FED. R. EVID. 412 currently states:

Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must--

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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Military Rule of Evidence (Mil. R. Evid.) 412 currently states:

Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution;

and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision

(b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial;

and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the

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accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term “sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

In 2004, 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.⁶⁸² 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 title to Mil. R. Evid. 412 currently is, “**Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition.**” The title should be changed to mirror that of Fed. R. Evid. 412 to state, “**Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition.**” The change to include all sexual conduct in Mil. R. Evid. 412 makes section (e) unnecessary. Military Rule of Evidence 412(e) states:

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

As previously indicated, when admissibility of the victim’s sexual conduct is at issue, two balancing tests are used, Mil. R. Evid. 403 and 412(c)(3). FED. R. EVID. 412 no longer contains the 412(c)(3) balancing test for use in criminal trials. This balancing test is used to admit evidence about the victim’s sexual background, even if otherwise contrary to Rule 412. The exception in paragraph (b)(1)(C) for Constitutionally required evidence is sufficient to prevent injustice. So the following language should be deleted from Mil. R. Evid. 412(c)(3):

⁶⁸² *United States v. Banker*, 60 M.J. 216, 220 (C.A.A.F. 2004).

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(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

G. MOVING SEXUAL OFFENSES FROM ARTICLE 134 TO ARTICLE 120

Options 5 and 6 propose moving four sexual offenses from Article 134, UCMJ to the new Article 120, UCMJ. Option 5 also changes them to make them clearer and more specific. The new offenses would retain the same names as under Article 134: (1) indecent liberties with a child; indecent acts; indecent exposure and forcible pandering. These offenses are currently depicted in Article 134, UCMJ, as implemented in *MCM*, Part IV, as follows: paragraphs 87 (indecent acts or liberties with a child),⁶⁸³ 90 (indecent acts with another),⁶⁸⁴ 88 (indecent exposure),⁶⁸⁵ and 97 (pandering and prostitution—part of pandering and all of prostitution would be retained under Article 134).⁶⁸⁶

Currently, under Article 134, UCMJ, the government is required to prove as an element, that the conduct was prejudicial to good order and discipline or discredits the service. Moving these offenses to Article 134, UCMJ, eliminates the necessity of proving this element. These offenses can be improved by describing sexual conduct that is specifically prohibited in most of the states.

1. Indecent liberty with a child

Option 5 proposes modifying and clarifying an existing *MCM* offense, “indecent acts or liberties with a child,” which includes conduct that is already covered by two subsections: (1) **aggravated sexual contact with a child** subsection 920(g) at page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact on a child (for an explanation for differences between the title 18 offense and subsection 920(g) *see* page 258); (2) **abusive sexual contact with a child** subsection 920(i) at

⁶⁸³ *See infra MCM*, Pt. IV, ¶ 87 at page 386.

⁶⁸⁴ *See infra MCM*, Pt. IV, ¶ 90 at page 391.

⁶⁸⁵ *See infra MCM*, Pt. IV, ¶ 88 at page 388.

⁶⁸⁶ *See infra MCM*, Pt. IV, ¶ 97 at page 392.

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page 295 is from 18 U.S.C. § 2244 (2004), abusive sexual contact (for an explanation for differences between the title 18 offense and subsection 920(i) *see* page 259).

Option 5's subsections 920(g), 920(h) and the new subsection 920(k) **indecent liberty with a child** at page 296 (for an explanation of this offense *see* page 260), are superior to *MCM*, Pt. IV, ¶ 87 because they provide three degrees or variations based on the culpability of the accused. For example, a servicemember who has sexual contact with a child violates "aggravated sexual contact with a child," subsection 920(g), if the child is under 12 years of age (maximum confinement of 20 years), and "abusive sexual contact with a child," subsection 920(i), if the child is 12 to 15 years of age (maximum confinement of 7 years). If an accused suggests sexual activity to a child or exposes his genitals to a child, then he would violate subsection 920(k), which prohibits indecent liberty with a child. Subsection 920(k) includes sexual offenses in the physical presence of a child, that do not involve the adult servicemember touching the child.

MCM, Pt. IV, ¶ 87, prohibits indecent acts or liberties with a child, and includes an indecent touching,⁶⁸⁷ indecent exposure, and indecent language involving children, any of which are punishable by a maximum of 7 years confinement. The specific intent in *MCM*, Pt. IV, ¶ 87 is "that the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both."⁶⁸⁸ As stated previously, indecent acts with a child are prohibited by subsections 920(g) and 920(h). Indecent liberties with a child are *per se* criminal. Accordingly the element of prejudice to good order and discipline or service discredit is unnecessary.

"(k) Any person subject to this chapter who engages in indecent conduct or liberty, in the presence of a child with the intent to arouse, appeal to, or gratify the sexual desire of any person; or with the intent to abuse, humiliate, or degrade any

⁶⁸⁷ The elements of indecent acts with a child where physical contact is involved are: (1) that the accused committed a certain act upon or with the body of a certain person; (2) that the person was under 16 years of age and not the spouse of the accused; (3) that the act of the accused was indecent; (4) that the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of the nature to bring discredit upon the armed forces. *See United States v. Baker*, 57 M.J. 330, 340 (C.A.A.F. 2002) (citing *MCM*, Pt. IV, ¶ 87 at page 386).

⁶⁸⁸ *See* note 687 *supra*, *MCM*, Pt. IV, ¶ 87b(1)(d) element (4).

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person is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.”⁶⁸⁹

Subsection 920(u)(12) defines “indecent liberty” as follows:

“(12) ‘indecent liberty’ means indecent conduct in the physical presence of the child, but physical contact is not required. It includes one who with the requisite intent exposes one’s genitalia, anus, buttocks or female areola or nipple, to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct the conduct is indecent; the child’s consent is not relevant.”⁶⁹⁰

A proposal not adopted by a majority of the subcommittee was that subsection 920(u)(13) define “indecent” as follows:

“(13) ‘indecent’ means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”⁶⁹¹ Indecent conduct includes but is not limited to:

⁶⁸⁹ Indecent liberty with a child, subsection 920(k) is at page 296. For an explanation of this offense *see* page 260 *infra*.

⁶⁹⁰ “Indecent liberty” is defined the same as in *MCM*, Pt. IV, ¶ 87c(2), except instead of “private parts,” the words, “genitalia, anus, or female areola or nipple,” are used. These terms for private parts are from ARIZ. REV. STAT. § 13-1402 (2004), *see infra* at page 491 and is also the same list of private parts used in Option 5’s indecent exposure. Because some commercially available swimming attire exposes part of the buttocks, or exposure of other intimate body parts can be inadvertent, it is important that the intent be indecent. The sentence, “If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct the conduct is indecent and the child’s consent is not relevant.” is added to statutorily overrule *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002), which held the factual consent of the child is relevant to whether the conduct is indecent. This definition is consistent with subsection 920(t) at page 297, which explicitly states that consent is not a defense to “indecent liberty with a child.” Subsection 920(u)(12) is at page 298. Option 5’s explanation for subsection 920(u)(12) is at page 277.

⁶⁹¹ *MCM*, Pt. IV, ¶ 90c, defines “indecent” as “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.” The language is changed slightly, and “lust” is replaced with “sexual

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engaging in a sexual act or contact with another person:
(1) knowing that a third person is present in the same room;⁶⁹² or

desire” which is consistent with the definitions of sexual act and sexual contact in subsections 920(u)(1)(D) and 920(u)(2).

⁶⁹² Subsection 920(u)(13)(A) at page 299 provides notice and specifically informs servicemembers that public sexual conduct is criminal. The first sentence in this definition is verbatim from *MCM*, Pt. IV, ¶ 90c. This provision is consistent with current military law. In *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999) the court held that the evidence was legally sufficient to support a conviction of committing an indecent act, where the accused had sexual intercourse with a woman in his barracks room while his two roommates were in the room, even though he blocked their view by hanging up a sheet “that substantially blocked his roommates’ view of his side of the room.” In that same case, however, the court also held that the evidence was legally insufficient to prove an indecent act where the accused had sexual intercourse in a shared barracks room, with the door closed but unlocked and with no one else present in the room. *See also United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002) (sexual contact in public area); *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000) (sexual intercourse in presence of third party); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983) (sexual intercourse in presence of third party); ARIZ. REV. STAT. § 13-1403 (2004), *see infra* at page 492, for example, provides:

§ 13-1403. **Public sexual indecency; public sexual indecency to a minor; classifications**

A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:

1. An act of sexual contact.
2. An act of oral sexual contact.
3. An act of sexual intercourse.
4. An act involving contact between the person’s mouth, vulva or genitals and the anus or genitals of an animal.

B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present.

See also IND. CODE ANN. §35-42-4-1(b) (Michie 2004), *see infra* at page 580, Public indecency—Indecent exposure at page 198 and GA. CODE ANN. § 16-6-8 (2004), *see infra* at page 560.

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(2) in a public place;⁶⁹³

(C) observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material without his or her consent and contrary to his or her reasonable expectation of privacy of:⁶⁹⁴

⁶⁹³ The term “public place” is defined in subsection 920(u)(14) at page 299, and the explanation for subsection 920(u)(14) is at page 279. Subsection 920(u)(14) is taken from the GA. CODE CODE ANN. § 16-6-3(15) (2004), which states, “Public place” means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household. *See infra* at page 559.

⁶⁹⁴ COLO. REV. STAT. § 18-3-404(1.7) (2004), *see infra* at page 524, for example, states:

(1.7) Any person who knowingly observes or takes a photograph of another person’s intimate parts without that person’s consent, in a situation where the person observed has a reasonable expectation of privacy, for the purpose of the observer’s own sexual gratification, commits unlawful sexual contact. For purposes of this subsection (1.7), “photograph” includes any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material.

An example, that does not include “for the purpose of the observer’s own sexual gratification,” is N.J. STAT. § 2C: 14-9 (2004), “**Invasion of privacy, degree of crime; defenses, privileges**” which states:

a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person’s consent and under circumstances in which a reasonable person would not expect to be observed.

b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person’s consent and under circumstances in which a reasonable person would not expect to be observed.

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(1) another person's genitalia, anus, buttocks or a female's areola or nipple; or

(2) another person who is engaged in a sexual act, or sexual contact;⁶⁹⁵

(D) engaging in contact between the person's mouth, vulva or genitals and the anus or genitals of an animal or a corpse.⁶⁹⁶

⁶⁹⁵ Several appellate cases have been affirmed involving servicemembers who surreptitiously view, videotape, or photograph others engaged in sexual activity, urinating, defecating or showering. *See, e.g., United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994) (affirming indecent acts with another for secretly videotaping victims); *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993) (affirming indecent acts with another for voyeurism); *but see United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978) (holding accused's act of voyeurism by secreting himself in a women's restroom and peering into toilet stalls was service discrediting, but not an indecent act *with another*).

⁶⁹⁶ Under the *MCM* to find a servicemember guilty of indecent acts with another, requires the fact finder to determine under the totality of circumstances that the conduct at issue is indecent, and prejudicial to good order and discipline or service discrediting. The trial judge is not permitted to provide examples of conduct found to meet these standards. At the appellate level, however, military law recognizes that some sexual acts are "indecent conduct *per se*." *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000) (holding sexual activity between twelve-year-old daughter and her natural father was indecent *per se*); *see also United States v. Gaskin*, 12 U.S.C.M.A. 419, 420-21, 31 C.M.R. 5, 6-7 (1961) (holding appellant's act of placing his penis between the legs of a male child was an indecent act that "fairly shouts its criminal nature"); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34 (1960) (holding anal sodomy of a chicken is indecent act with another); *United States v. Mabie*, 24 M.J. 711, 713 (A.C.M.R. 1987) (sexual acts with corpse are indecent).

Most state statutes are specific about the indecent conduct that is criminal. N.Y. PENAL § 130.20 (2004), *see infra* at page 676 is an example of such a state statute providing, "§130.20.3. **Sexual misconduct** A person is guilty of sexual misconduct when: . . . He or she engages in sexual conduct with an animal or a dead human body. Sexual misconduct is a class A misdemeanor."

Another example is Delaware's § 777. "**Bestiality**," which states, "A person is guilty of bestiality when the person intentionally engages in any sexual act involving sexual contact, penetration or intercourse with the genitalia of an animal or intentionally causes another person to engage in any such sexual act with an animal for purposes of sexual gratification." While these offenses are rare, like the states, and Article 125, UCMJ, it is appropriate to continue their prohibition in subsection 920(n), indecent act. Another example statute prohibiting similar

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A majority of the subcommittee concluded that “engaging in a sexual act or contact with another person: (1) knowing that a third person is present in the same room; or (2) in a public place” should also include the element of prejudice to good order and discipline or service discrediting conduct. Accordingly, Option 5 includes this conduct in its proposed *MCM* provision at page 291. There was also a concern about a family sharing a bedroom with a child and permitting the child to be present during the sexual activity under the belief that the child would not witness or understand what was occurring. Including the element of prejudice to good order and discipline or service discrediting conduct would filter out some activity that should not be criminal.

Option 5 is the same as *MCM*, Pt. IV, ¶ 87, The offense, “indecent liberties with a child” is similar to the prohibition in *MCM*, Pt. IV, ¶ 87, except for five changes: First, the government would no longer have to prove that the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. Second, a broader specific intent has been added, “with an intent to abuse, humiliate, or degrade,” which is the same as from 18 U.S.C. § 2246 (2004) and § 2246(3), except “harass” is excepted to avoid confusion. Third, the parts of *MCM*, Pt. IV, ¶ 87 that relate to indecent physical contact with a child are not included because that conduct is prohibited by subsection 920(f), “aggravated sexual contact with a child,” if the child is under 12 years of age (maximum confinement of 15 years), and subsection 920(i) at page 295, “abusive sexual contact with a child,” if the child is 12 to 15 years of age (maximum confinement of 7 years). Fourth, the government would no longer have to prove that the victim and the accused were not married to each other because this would become an affirmative defense under subsection 920(t). Fifth, consent is explicitly not a defense under subsection 920(u), whereas under case law the members must determine under the totality of the circumstances whether consent of the child to the sexual touching negates the

indecent conduct is TEX. PENAL CODE ANN. 21.07, **Public Lewdness** (2004), which states:

- (a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:
- (1) act of sexual intercourse;
 - (2) act of deviate sexual intercourse;
 - (3) act of sexual contact; or
 - (4) act involving contact between the person’s mouth or genitals and the anus or genitals of an animal or fowl.
- (b) An offense under this section is a Class A misdemeanor.

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element of indecency. *See United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002) (holding factual consent of the child is relevant to the issue of indecency). The maximum punishment for this offense includes confinement for seven years.

A similar statute is IND. CODE ANN § 35-45-4-1(b) (Michie 2004), Public indecency—Indecent exposure states:

- (a) A person who knowingly or intentionally, in a public place:
 - (1) engages in sexual intercourse;
 - (2) engages in deviate sexual conduct;
 - (3) appears in a state of nudity with the intent to arouse the sexual desires of the person or another person; or
 - (4) fondles the person’s genitals or the genitals of another person; commits public indecency, a Class A misdemeanor.

- (b) A person at least eighteen (18) years of age who knowingly or intentionally, in a public place, appears in a state of nudity with the intent to be seen by a child less than sixteen (16) years of age commits public indecency, a Class A misdemeanor.

In the next section are similar provisions from Arizona and Georgia.

2. Indecent act

“Indecent acts with another” was prohibited under the general article since the 1951 *MCM* and by each subsequent *MCM*. It has been used to punish a wide variety of sexual offenses. “Indecent acts with another” is punishable under Article 134, UCMJ, and is described in *MCM*, Pt. IV, ¶ 90, as follows:

- (1) That the accused committed a certain wrongful act with a certain person;
- (2) That the act was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. “Indecent” signifies 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 the morals with respect to sexual relations.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay

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and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did (at/on board—location) (subject matter jurisdiction, if required), on or about _____ 20__, wrongfully commit an indecent act with _____ by _____.

As with some other sexual offenses, military personnel reviewing *MCM*, Pt. IV, ¶ 90, would be unable to discern what conduct constituted “indecent” conduct without researching the caselaw. Some examples illustrate what conduct has been upheld as an indecent act:

(a) An accused’s instruction to female recruits to disrobe, and then change positions, and bounce up and down while he videotaping them without their knowledge.⁶⁹⁷

(b) Spanking young boys on the bare buttocks.⁶⁹⁸

(c) Consensual sexual intercourse in the presence of others.⁶⁹⁹

(d) Sexual acts with a chicken, a corpse or a child.⁷⁰⁰

Other examples illustrate conduct appellate courts have determined not to be indecent:

⁶⁹⁷ See *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994).

⁶⁹⁸ See *United States v. Proctor*, (A.F.C.M.R. 1992).

⁶⁹⁹ See *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983).

⁷⁰⁰ While the fact finder still must determine whether the conduct at issue is indecent, and prejudicial to good order and discipline or service discrediting, military law also recognizes that some sexual acts at the appellate level are “indecent conduct *per se*.” *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000) (holding sexual activity between twelve-year-old daughter and her natural father was indecent *per se*); see also *United States v. Gaskin*, 12 U.S.C.M.A. 419, 420-21, 31 C.M.R. 5, 6-7 (1961) (holding appellant’s act of placing his penis between the legs of a male child was an indecent act that “fairly shouts its criminal nature”); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34 (1960) (anal sodomy of a chicken is indecent *per se*); *United States v. Mabie*, 24 M.J. 711, 713 (A.C.M.R. 1987) (sexual acts with corpse are indecent).

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(a) Sexual intercourse between unmarried, consenting adults, which is not a crime under military law.⁷⁰¹

(b) Sexual intercourse in a barracks room, with the door closed and no other persons in the room.⁷⁰²

(c) A male sergeant fondling a female soldier's breasts in the accused's bedroom during a party. The coats of people attending the party were in the accused's bedroom, as well as the hard alcohol. The door was closed, but not locked. Despite the reasonable probability that others would enter the bedroom unannounced and view the sexual activity, the conviction was reversed.⁷⁰³

(d) Intercourse on closed, public beach at midnight was not open and notorious.⁷⁰⁴

The most commonly charged indecent act with another is sexual intercourse when someone in addition to the sexual partner is present. This particular form of indecent act with another should be specifically prohibited under subsection 920(m) by applying the definition of "indecent" from subsection 920(u)(13) at page 299. Subsection 920(m) states:

"(m) Any person subject to this chapter who engages in indecent conduct with another is guilty of **indecent act** and shall be punished as a court-martial may direct."⁷⁰⁵

⁷⁰¹ *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952); *United States v. Blake*, 33 M.J. 923 (A.C.M.R. 1991).

⁷⁰² *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999).

⁷⁰³ *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002). In *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999) the court held that the evidence was legally sufficient to support a conviction of committing an indecent act, where the accused had sexual intercourse with a woman in his barracks room while his two roommates were in the room, even though he blocked their view by hanging up a sheet "that substantially blocked his roommates' view of his side of the room." In the same case, however, the court also held that the evidence was legally insufficient to prove an indecent act where the accused had sexual intercourse in a shared barracks room, with the door closed but unlocked and no one else present in the room.

⁷⁰⁴ *United States v. Allison*, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).

⁷⁰⁵ Subsection 920(m), "indecent act" is at page 296. Subsection 920(m) is similar to the prohibition in *MCM*, Pt. IV, ¶ 87. The term, "indecent" is defined more clearly

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The critical definition in subsection 920(m) is of the term, “indecent,” subsection 920(u)(13) at page 299. The source for the term, “indecent” is discussed starting at page 193 and notes 691 to 694 *supra*.

Arizona Revised Statute § 13-1403 (2004) Public sexual indecency; public sexual indecency to a minor; classifications, states:

A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:

1. An act of sexual contact.
2. An act of oral sexual contact.
3. An act of sexual intercourse.
4. An act involving contact between the person’s mouth, vulva or genitals and the anus or genitals of an animal.

B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present.

Official Code of Georgia Annotated § 16-6-8 (2004). Public indecency, states

(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:

- (1) An act of sexual intercourse;
- (2) A lewd exposure of the sexual organs;
- (3) A lewd appearance in a state of partial or complete nudity; or
- (4) A lewd caress or indecent fondling of the body of another person.

(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.

and specifically than in the *MCM* to improve notice. The term, “indecent” defines the same conduct that has been held to be indecent by military appellate courts to include, for example, sexual acts and contacts when a third party is present. *See* subsection 920(u)(13) at page 299 for the definition of “indecent” *infra*. This same specificity is in numerous state statutes. The maximum punishment for indecent act includes confinement for five years. *See infra* subsection 920(w)(6) at page 301.

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(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(d) For the purposes of this Code section only, “public place” shall include jails and penal and correctional institutions of the state and its political subdivisions.

(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

Official Code of Georgia Annotated § 16-1-3 (15) (2004), states, “Public place” means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.

Indiana Code Ann. § 35-45-4-1(a). Public indecency -- Indecent exposure states:

- (a) A person who knowingly or intentionally, in a public place:
- (1) engages in sexual intercourse;
 - (2) engages in deviate sexual conduct;
 - (3) appears in a state of nudity with the intent to arouse the sexual desires of the person or another person; or
 - (4) fondles the person’s genitals or the genitals of another person; commits public indecency, a Class A misdemeanor.

3. Forcible pandering

The offense, “forcible pandering” prohibited by Article 134, UCMJ as implemented in *MCM*, Pt. IV, ¶ 97b(2). Subsection 920(n) is at page 296. Forcible pandering involved the accused compelling “a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused.” *Id.* at ¶ 97b(2)(a). It was limited to sexual intercourse, whereas this offense prohibits compelling sexual acts and sexual contacts. The offense does not require the government to prove the conduct was prejudicial to good order and discipline or service discrediting conduct. The maximum punishment for this offense includes confinement for five years. Subsection 920(n) is at 296 *infra*, and the explanation for subsection 920(n) is at page 261 *infra*.

Option 5’s subsection 920(n) states:

“(n) Any person subject to this chapter who compels another person to

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engage in an act of prostitution with another person to be directed to said person is guilty of **forcible pandering** and shall be punished as a court-martial may direct.”

4. Indecent exposure

The offense of indecent exposure could easily be merged into indecent acts by making a minor modification of the definition of “indecent.” It is separately retained because of the lesser maximum confinement for this offense. The offense, “indecent exposure” is defined in *MCM*, Pt. IV, ¶ 88, which states:

88. Article 134—(Indecent exposure)

a. *Text.* See paragraph 60.

b. *Elements.*

- (1) That the accused exposed a certain part of the accused body to public view in an indecent manner;
- (2) That the exposure was willful and wrongful; and
- (3) That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* “Willful” means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning “indecent.”

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about 20__ , while at a barracks window) (____) willfully and wrongfully expose in an indecent manner to public view his or her _____.

MCM, paragraph 90c, states, “*Explanation.* “Indecent” signifies 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 the morals with respect to sexual relations.”

It is apparent that this definition has the same issue with notice as rape under the current Article 120, UCMJ. The terms are not defined, and the specific conduct prohibited is unclear. This proposed change provides notice of the conduct that

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is prohibited.⁷⁰⁶ Additionally, the government should not have to prove that exposure of sexual organs to the public is prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Notice is improved by listing the specific body parts that cannot be intentionally and indecently exposed, and more clearly defining “exposure to public view.”

In *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002), the court considered a case where Corporal Graham invited a 15-year old babysitter into his bedroom and then dropped his towel, exposing his penis to her. First, the *Graham* Court noted that Corporal Graham’s conduct met the elements, as established by case law for indecent liberties, which is a much more serious offense, and distinguished a 1969 decision by the Court of Military Appeals that determined that similar conduct was not indecent exposure. The *Graham* Court held that Corporal Graham’s bedroom was a “public place,” explaining, “the purpose of criminalizing public indecency ‘is to protect the public from shocking and embarrassing displays of sexual activities. A person need not be in a public place to be a member of the public.’”⁷⁰⁷ Because the term, “public” was not defined, the court applied an Arizona statute which more generically defined indecent exposure. ARIZ. REV. STAT. § 13-1402 (2004) defines indecent exposure as follows:

A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

Alaska like Article 134, UCMJ, makes it more aggravating if the indecent exposure is to a child under the age of 16.

Alaska Sec. 11.41.458, indecent exposure in the first degree, states:

(a) An offender commits the crime of indecent exposure in the first degree if

(1) the offender violates AS 11.41.460(a);

(2) while committing the act constituting the offense, the offender

⁷⁰⁶ See Major Steven Cullen, “PROSECUTING INDECENT CONDUCT IN THE MILITARY: HONEY, SHOULD WE GET A LEGAL REVIEW FIRST?” 179 MILITARY LAW REVIEW 128 (2004) (discussing value of notice of specific conduct prohibited in regard to prosecutions of indecent acts).

⁷⁰⁷ *Id.* (citing *States v. Whitaker*, 164 Ariz. 359, 793 P.2d 116, 120 (Ariz. App. 1990) and *People v. Legel*, 24 Ill. App. 3d 554, 321 N.E.2d 164, 168 (Ill. App. 1974)).

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knowingly masturbates; and

(3) the offense occurs within the observation of a person under 16 years of age.

ALASKA STAT. 11.41.460 (Michie 2004), indecent exposure in the second degree, at page 489 states:

(a) An offender commits the crime of indecent exposure in the second degree if the offender knowingly exposes the offender's genitals in the presence of another person with reckless disregard for the offensive, insulting, or frightening effect the act may have.

KAN. STAT. ANN. § 21-3508 (2003), lewd and lascivious behavior at page 590 states:

(a) Lewd and lascivious behavior is:

(1) Publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others; or

(2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.

(b) (1) Lewd and lascivious behavior if committed in the presence of a person 16 or more years of age is a class B nonperson misdemeanor.

(2) Lewd and lascivious behavior if committed in the presence of a person under 16 years of age is a severity level 9, person felony.

N.Y. PENAL § 245.00 (Consol 2004), at page 799 states:

§ 245.00. Public lewdness

A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed.

The Model Penal Code has two provision that pertain to the military offense of indecent exposure. § 213.5, Indecent Exposure, at page 328 provides:

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse,

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he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

§ 251.1, Open Lewdness, at page 331 states:

A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.

The Model Penal Code explains the basis for these two provisions as follows:

Article 251 collects four offenses under the rubric of public indecency. The common goal of these provisions is to protect against the open flouting of community standards regarding sexual or related matters. The Model Penal Code does not attempt to enforce private morality. Thus, none of the provisions contained in Article 251 purports to regulate sexual behavior generally. Instead, each is limited to the affront to public sensibilities occasioned by public or commercial sexual misconduct.

Section 251.1 defines the petty misdemeanor of open lewdness. Liability is expressly limited to lewd conduct that the actor knows “is likely to be observed by others who would be affronted or alarmed.” Although this formulation partially duplicates the offense of obscenity under Section 251.4, a separate provision against open lewdness is needed to reach offensive eroticism engaged in for the actor’s own purposes rather than as a performer for an audience or a provider of titillating materials. Section 251.1 also overlaps the misdemeanor of indecent exposure under Section 213.5. Whereas the latter offense requires a purpose to arouse or gratify sexual desire, the instant provision covers as a lesser offense lewd conduct that is not related to sexual gratification but that is intended only to shock or annoy.

Indecent exposure is prohibited by subsection 920(p), at page 296, and below as follows:

“(p) Any person subject to this chapter who willfully exposes the genitalia, buttocks, groin, or female nipples in a public place in an indecent manner is guilty of **indecent exposure** and shall be punished as a court-martial may direct.”⁷⁰⁸

⁷⁰⁸ The list of private parts, “genitalia, anus, or female areola or nipple,” is from ARIZ. REV. STAT. § 13-1402 (2004). See *infra* at page 491.

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Definitions for three terms are necessary: (1) indecent, (2) public place and (3) willful. Subsection 920(u)(13) at page 299 defines “indecent” and is changed to provide specific notice of some examples of conduct that is criminal in various states and has been found to be indecent as a matter of law in military appellate decisions.⁷⁰⁹ Subsection 920(u)(13) defines “indecent” as follows:

“(13) ‘indecent’ means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes but is not limited to:

(A) observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material without his or her consent and contrary to his or her reasonable expectation of privacy of:

(1) another person’s genitalia, anus, buttocks or a female’s areola or nipple; or

(2) another person who is engaged in a sexual act, or sexual contact;

(B) engaging in contact between the person’s mouth, vulva or genitals and the anus or genitals of an animal or a corpse.

Subsection 920(u)(14) at page 299 defines “public place” as follows:

“(14) ‘Public place’ means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household;⁷¹⁰

Subsection 920(u)(15) at page 299 defines “willful” as follows:

“(15) ‘willful’ in indecent exposure means an intentional exposure in a public place.”⁷¹¹

IX. CONCLUSION

⁷⁰⁹ See page 193 *supra* and notes 691 to 696.

⁷¹⁰ The term “public place” is defined in subsection 920(u)(14) at page 299 and is taken from the GA. CODE ANN. § 16-1-3(15)(2004) at page 784, which states, “Public place” means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.

⁷¹¹ This definition is verbatim from *MCM*, Pt. IV, ¶ 88c.

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The current UCMJ, *MCM*, regulations and orders allow military prosecutors to charge any sexual offense necessary to uphold the needs of the services for good order and discipline. As such, no statutory, *MCM*, or regulatory change is likely to significantly increase the number of sexual offenses prosecuted. Nor is change necessary to stop or prevent a particular type of sexual behavior that is injurious to good order and discipline.

If a new type of sexual misconduct becomes a problem, the military can issue appropriate general orders and regulations, making the conduct punishable under Article 92, UCMJ (violation of Article 92, UCMJ, is punishable by forfeiture of all pay and allowances, dishonorable discharge, and two years of confinement). 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.

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. A majority of the subcommittee members concluded that if higher authorities directed a change to the UCMJ, then Option 5 is the alternative that best takes into account unique military requirements, and at the same time comes closest to conforming military law to 18 U.S.C. §§ 2241-2244, 2246, because it promotes good order and discipline, enhances the military justice system for service members by creating clear prohibitions, and distinguishes between different degrees of criminal sexual misconduct, providing greater clarity to the law of sexual assaults.

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**APPENDIX A
OPTION 2
NO CHANGE TO UCMJ
AMEND MCM**

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) 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.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person was under 16 years of age.

c. *Explanation.*

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(1) Rape.

(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense. Depending on the presence of certain aggravating factors, rape may have varying degrees of punishment.

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. In essence, the crime of rape occurs when the force applied to the victim overcomes the victim's will, thus the force element captures the lack of consent requirement for this 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, need not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, where the victim is unable to resist because of the lack of mental or physical faculties, or when, depending on the particular acts of the case including any senior/subordinate relationship between the accused and victim, the victim believes that they cannot resist. In cases where no actual force is applied to the victim, the doctrine of constructive force (or the force involved in penetration) would be the force necessary to substantiate the offense of rape.

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 based upon the particular facts and circumstances. 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.

(d) *Affirmative defense.* In a prosecution under subsection (a)(rape), if the defense of mistake of fact as to the victim's consent or that the victim actually consented is raised by the evidence, the prosecution has the burden of proving beyond a reasonable doubt that the defense did not exist.

(e) *Sexual intercourse with a person in official detention or confinement:* The nature of the offense between a person in official detention or confinement and person who exercises custodial, supervisory, or disciplinary authority over the other party is the way the relative difference in authority impacts the ability of the person

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in official detention or confinement to resist or manifest their lack of consent due to fear of actual or implied threats or repercussions.

(2) *Carnal knowledge*. “Carnal knowledge” is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused’s spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

(3) Forms of rape. There are variations of rape under Article 120 which recognize variations in the level of force or coercion applied to overcome the victim’s will or the age of the victim. These circumstances are not essential elements of a violation of Article 120. The following are types of rapes:

- (a) Caused another person to engage in the act of sexual intercourse by threatening or placing that other person in fear that any person will be subjected to some bodily injury⁷¹² (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping).
- (b) Engaged in sexual intercourse with another person if that other person is—
 - (A) Incapable of appraising the nature of the conduct; or
 - (B) Physically incapable of declining participation in, or communicating unwillingness to engage in that sexual intercourse.
- (c) Engaged in non-consensual sexual intercourse with another person who is known to be—
 - (A) In official detention or confinement; and
 - (B) Under the custodial, supervisory, or disciplinary authority of the person so engaging.
- (d) Caused another person subject to the accused’s authority to engage in the act of sexual intercourse by—
 - (A) The accused’s use of an actual threat; or
 - (B) The accused’s use of an implied threat.

⁷¹² This addition would remove threat against pecuniary interest, ratings, graduation, etc., from this category.

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(e) Caused another person to engage in the act of sexual intercourse by using force⁷¹³ against that other person.⁷¹⁴

⁷¹³ The force required here involves the situation where the victim is able to manifest lack of consent but the subject uses physical power to cause the victim to engage in sexual intercourse.

⁷¹⁴ The sexual abuse statute requires a lesser degree of threat or fear than the aggravated sexual abuse statute, thereby limiting sentencing to less than 20 years. 18 U.S.C. § 2242 (2004). The requisite fear prohibited by the statute is a fear of harm to self or others, excluding fear of death, serious bodily injury or kidnapping. *United States v. Gavin*, 959 F.2d 788, 791 (9th Cir. 1992). The statute recognizes that a broad range of definitional possibilities exist for both “fear” and “harm.” *Id.* However, there are some harms, such as embarrassment that will not suffice. *Id.*

The legislative history makes it clear that Congress intended to prohibit express or implied threats that would cause another person to engage in a sexual act by enacting 18 U.S.C. § 2242 (2004). *United States v. Cherry*, 938 F.2d 748, 754 (7th Cir. 1991), citing H.R. Rep. No. 594, at 16 (1986), reprinted in 1986 U.S.C.C.A.N. 6186, 6196. Implicit threats of harm arise in the adult parent and child relationship. When an adult attempts to sexually abuse a child, “there is always a substantial risk that physical force will be used to ensure the child’s compliance.” *United States v. Castillo*, 140 F.3d 874, 885 (10th Cir. 1998). A rational inference, from the nature of the circumstances, is that a parent who attempts or does engage in a sexual act with his child places them in fear of bodily harm. *Id.* In *Cherry*, a child, victim who was afraid of the accused adult was found to be in fear of some bodily harm because she did not know what he would do to her and was frightened. *Cherry* at 755. Also, the court in *Johns* found sufficient evidence of fear based on the circumstances that consisted of the accused’s assumed role as the victim’s father and spiritual teacher, his control over the victim’s activities inside and outside of the house, and him telling the victim that this sexual abuse was ordained by the spirits and that harm would come to her or her loved ones if she did not comply. *United States v. Johns*, 15 F.3d 740, 742-43 (8th Cir. 1994).

Fear can also be inferred from the disparity in power between the accused and victim in other circumstances where an accused controls a victim’s everyday life. *Lucas* 1002-03. In *Lucas*, the accused had a high level of control over the victim’s life since he oversaw the victim’s jail, controlled the inmates’ ability to move inside the jail and receive visits from the outside, determined the type of work assigned to inmates, and had the power to punish inmates. *Lucas* at 1003. Therefore, the Court found that the accused’s control over the victim was sufficient to imply fear as a result of the disparity in power between them. *Id.* The *Denjen* court additionally found implied fear when a lieutenant of a detention center told an inmate she would receive sanctions, such as time in disciplinary segregation, if she did not comply

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(f) Caused another person to engage in the act of sexual intercourse by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.⁷¹⁵

(g) Rendered another person unconscious and thereby engaged in sexual intercourse with that other person.

(h) The act of sexual intercourse was with a person who had not attained the age of twelve years regardless of whether the person knew that the other person engaging in the sexual intercourse had not attained the age of twelve years.

(i) Administered to another person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance and which substantially impaired the ability of that other person to appraise or control conduct and thereby engaged in sexual intercourse with that other person.

d. *Lesser included offenses.*

(1) **Rape.**

with his sexual advances. *United States v. Denjen*, 258 F. Supp. 2d 194, 195 (E.D.N.Y. 2003).

The aforementioned cases indicate that fear may be inferred from the circumstances. A victim is not required to prove that she was verbally threatened or coerced. She may prove fear based upon the disparity in power between the victim and the accused and the accused's control over her and her surroundings.

⁷¹⁵ The force requirement of 18 U.S.C. § 2241(a)(1) (2004) is satisfied when sexual contact results from the restraint upon the victim and the victim could not escape the sexual contact. *United States v. Lauck*, 905 F.2d 15, 18 (2d Cir. 1990). The requisite "force does not have to be part of the sexual contact itself, but must be used only in order to make the contact." *Id.* In *Lauck*, the accused forcibly held the victim so that she could not escape and then sexually abused her. *Lauck* at 18. The *Lauck* Court found that the requisite force was met since the accused restrained the victim in order to make sexual contact with her. *Id.* The Court additionally pointed out that the statute does not require "significantly violent action or threats," therefore, the accused's argument that "he did not use a weapon, threaten or harm [the victim] or injure or inflict pain on her" was immaterial. *Id.* Such evidence was irrelevant because Congress' intent is to provide greater protection to the victim by reducing the need to demonstrate the use of excessive force. *Id.*

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- (a) Article 128--assault; assault consummated by a battery
- (b) Article 134--assault with intent to commit **rape**
- (c) Article 134--indecent assault
- (d) Article 80--attempts
- (e) Article 120(b)--carnal knowledge

(2) *Carnal knowledge.*

- (a) Article 134--indecent acts or liberties with a person under 16
- (b) Article 80--attempts

e. *Maximum punishment.*

(1) **Rape.**

- (a) Rape under aggravating factors (e) through (i). Death or such other punishment as a court-martial may direct.
- (b) Rape under aggravating factors (a) through (d). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.
- (c) Other rapes. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specifications.*

(1) **Rape.**

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, **rape** ___, (a person who had not attained the age of 16 years).

(2) *Carnal knowledge.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit the offense of carnal knowledge with ___.

51. Article 125--Sodomy

a. *Text.*

“(a) Any person subject to this chapter who engages in unnatural carnal copulation

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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.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add one or more of the following elements, if applicable for **forcible sodomy**)

(1) The act of sodomy was with a person who had attained the age of twelve years but had not attained the age of sixteen years; ⁷¹⁶or

(2) Caused another person to engage in the act of sodomy by threatening or placing that other person in fear that any person will be subjected to some bodily injury (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

(3) Engaged in sodomy with another person if that other person is—
(A) Incapable of appraising the nature of the conduct; or
(B) Physically incapable of declining participation in, or communicating unwillingness to engage in the act of sodomy; or

(4) Engaged in non-consensual sodomy with another person who is known to be—
(A) In official detention or confinement; and
(B) Under the custodial, supervisory, or disciplinary authority of the person so engaging; or

(5) Caused another person subject to the accused’s authority to engage in the act of sodomy by the accused’s use of an actual or implied threat.

(Note: Add one or more of the following elements, if applicable for **aggravated forcible sodomy**)

(1) Caused another person to engage in the act of sodomy by using force against that other person; or

⁷¹⁶ Note that the exact same punishment is permitted for adding this sodomy equivalent to carnal knowledge as is permitted by carnal knowledge. The rationale is that a person not yet 16 cannot legally truly consent.

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(2) Caused another person to engage in the act of sodomy by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; or

(3) Rendered another person unconscious and thereby engaged in sodomy with that other person; or

(4) The act of sodomy was with a person who had not attained the age of twelve years regardless of whether the person knew that the other person engaging in the act of sodomy had not attained the age of twelve years; or

(5) Administered to another person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance which substantially impaired the ability of that other person to appraise or control conduct and thereby engaged in sodomy with that other person.

c. Explanation. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's 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 with an animal. The force necessary to sustain a conviction for aggravated sodomy and forced sodomy is the same force as described in paragraph 45(c)(1)(b) of Part IV. The principles announced in paragraph 45(c) of Part IV (rape explanation and affirmative defenses) equally apply to the sodomy offenses.

d. Lesser included offenses.

(1) *Aggravated Forcible Sodomy.*

- (a) Art. 125—Forcible Sodomy
- (b) Art. 125—sodomy
- (c) Art. 80—Attempts
- (d) Art. 134—Assault with Intent to commit Sodomy
- (e) Art. 134—Indecent Assault

(2) *Forcible Sodomy.*

- (a) Art. 80—Attempts
- (b) Art. 125—Sodomy
- (c) Art. 134—Indecent Assault
- (d) Art. 134—Assault with intent to commit sodomy

(3) *Sodomy.*

- (a) Art. 80--Attempts
- (b) Art. 134—Indecent Assault
- (c) Art. 134—Indecent Acts with Another

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e. Maximum punishment.

(1) *Aggravated Forcible Sodomy*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(2) *Forcible Sodomy*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Sodomy*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

(1) *Aggravated Forcible Sodomy* .

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit sodomy with ___ by (add aggravated forcible sodomy force elements as applicable).

(2) *Forcible Sodomy*.

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit sodomy with ___ by (add forcible sodomy force elements as applicable).

(3) *Sodomy*.

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit sodomy [with/by] ___.

63. Article 134--(Assault--indecent)

a. *Text*. See paragraph 60.

b. *Elements*.

(1) *Aggravated Indecent Assault*.

(a) That the accused engaged in a sexual act not amounting to sexual intercourse or sodomy with a certain person;

(b) That the accused either:

(1) Caused the other person to engage in the sexual act by using force against that other person; or

(2) Caused the other person to engage in the sexual act by threatening or

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placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; or

(3) Rendered the other person unconscious and thereby engaged in the sexual act with that other person; or

(4) Engaged in a sexual act with a person who had not attained the age of twelve years regardless of whether the person knew that the other person engaging in the sexual act had not attained the age of twelve years; or

(5) Administered to the other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance which substantially impaired the ability of that other person to appraise or control conduct and thereby engaged in the sexual act with that other person;

(c) That the acts were done with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of the accused; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Indecent Assault.*

(a) That the accused engaged in a sexual act not amounting to sexual intercourse or sodomy with a certain person;

(b) That the accused either:

(1) Engaged in a sexual act with a person who had attained the age of twelve years but had not attained the age of sixteen years; or

(2) Caused the other person to engage in the sexual act by threatening or placing that other person in fear that any person will be subjected to some bodily injury⁷¹⁷ (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

(3) Engaged in a sexual act with another person if that other person is—
(A) Incapable of appraising the nature of the conduct; or

⁷¹⁷ This addition would remove threat against pecuniary interest, ratings, graduation, etc., from this category.

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(B) Physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act; or

- (4) Engaged in a non-consensual sexual act with another person who is known to be—
- (A) In official detention or confinement; and
 - (B) Under the custodial, supervisory, or disciplinary authority of the person so engaging; or
- (5) Caused another person subject to the accused's authority to engage in a sexual act by—the accused's use of an actual or implied threat.

(c) That the acts were done with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of the accused; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of “indecent”, see paragraph 90 c. Sexual act includes all sexual acts that are not sexual intercourse or sodomy. These include the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. These acts includes the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. The force necessary to sustain a conviction for aggravated sodomy and non-aggravated sodomy is the same force as described in paragraph 45(b) of Part IV. The principles annunciated in paragraph 45(b) through (e) of Part IV (rape explanation) equally apply to the indecent assault offenses.

d. Lesser included offenses.

(1) Aggravated Indecent Assault

- (a) Art. 134—Indecent Assault
- (b) Article 128--assault consummated by a battery; assault
- (c) Article 134--indecent acts
- (d) Article 80—attempts

(2) Indecent Assault

- (a) Article 128--assault consummated by a battery; assault
- (b) Article 134--indecent acts
- (c) Article 80—attempts

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e. Maximum punishment.

(1) *Aggravated Indecent Assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) *Indecent Assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

(1) *Aggravated Indecent Assault.*

In that ___ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit an aggravated indecent assault upon ___ by ___, with intent to gratify his/her (lust) (sexual desires).

(2) *Indecent Assault.*

In that ___ (personal jurisdiction data), did (at/on board--location), (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit an indecent assault upon ___ by ___, with intent to gratify his/her (lust) (sexual desires).

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**APPENDIX B
OPTION 3
H.R. 4709**

H. R. 4123; 108 H.R. 4123 was introduced in the House of Representatives in the 108th CONGRESS, 2ND SESSION on 1 April 2004.

On 23 June 2004, the Department of Defense received a revised version of H.R. 4123—H.R. 4709.

SPONSOR(S):

Sponsor and Cosponsors as of 04/12/2004

SANCHEZ, LORETTA (D-CA) - Sponsor

A BILL H.R. 4709

To amend the Uniform Code of Military Justice to bring sexual assault crimes under military law into parallel with sexual assault crimes under Federal law, and for other purposes.

1 *Be it enacted by the Senate and House of Representatives of*
2 *the United States of America in Congress assembled,*

3

4 **SECTION 1. SHORT TITLE.**

5 This Act may be cited as the “MILITARY SEXUAL ASSAULT

6 CRIMES REVISION ACT OF 2004”.

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1

2 **SEC. 2. MILITARY SEXUAL ABUSE.**

3 (a) **SEXUAL ABUSE.** Section 920 of title 10, United
4 States Code (article 120 of the Uniform Code of Military
5 Justice), is amended to read as follows:

6

7 **“§ 920. ART. 120. MILITARY SEXUAL ABUSE**

8 “(a) Any person subject to this chapter who
9 knowingly—

10 “(1) causes another person to engage in a sex-
11 ual act by using force against that other person; or

12 “(2) causes another person to engage in a sexual act
13 by threatening or placing that other person in fear that
14 any person will be subjected to death, grievous bodily
15 harm, or kidnapping;

16 “(3) renders another person unconscious and
17 thereby engages in a sexual act with that other per-
18 son; or

19 “(4) administers to another person by force or
20 threat of force, or without the knowledge or permis-
21 sion of that other person, a drug, intoxicant, or

22 other similar substance and thereby—

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1 “(A) substantially impairs the ability of
2 that other person to appraise or control con-
3 duct; and

4 “(B) engages in a sexual act with that
5 other person;

6 is guilty of aggravated sexual abuse and shall be
7 punished as a court-martial may direct.

8 “(b) Any person subject to this chapter who know-
9 ingly engages in a sexual act with another person who
10 has not attained the age of twelve years is guilty of
11 aggravated sexual abuse of a child and shall be punished
12 as a court-martial may direct. In a prosecution under this
13 subsection, it need not be proven that the accused knew
14 that the other person engaging in the sexual act had not
15 attained the age of twelve years.

16 “(c) Any person subject to this chapter who
17 knowingly—

18 “(1) causes another person to engage in a sex-
19 ual act by threatening or placing that other person
20 in fear (other than by threatening or placing that
21 other person in fear that any person will be sub-
22 jected to death, grievous bodily harm, or kidnap-

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1 ping); or

2 “(2) engages in a sexual act with another per-
3 son if that other person is—

4 “(A) incapable of appraising the nature of
5 the conduct; or

6 “(B) physically incapable of declining par-
7 ticipation in, or communicating unwillingness to
8 engage in, that sexual act;

9 is guilty of sexual abuse and shall be punished as a
10 court-martial may direct.

11 “(d)(1) Any person subject to this chapter who know-
12 ingly engages in a sexual act with another person who—

13 “(A) has attained the age of twelve years but
14 has not attained the age of sixteen years; and

15 “(B) is not that person’s spouse;

16 is guilty of sexual abuse of a minor and shall be punished as
17 a court-martial may direct.

18 “(2) In a prosecution under this subsection, it need
19 not be proven that the accused knew the age of the other
20 person engaging in the sexual act.

21 “(3) In a prosecution under this subsection, it is an
22 affirmative defense that the accused reasonably believed

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1 that the other person had attained the age of sixteen
2 years. The accused has the burden of proving a defense
3 under this paragraph by a preponderance of the evidence.

4 “(e) Any person subject to this chapter who know-
5 ingly engages in a sexual act with another person who
6 is—

7 “(1) in official detention or confinement;

8 “(2) under the custodial, supervisory, or dis-
9 ciplinary authority of the person so engaging; and

10 “(3) is not that person’s spouse;
11 is guilty of sexual abuse of a prisoner and shall be pun-
12 ished as a court-martial may direct.

13 “(f) In this section, the term ‘sexual act’ means—

14 “(1) contact between the penis and the vulva or
15 the penis and the anus, and for purposes of this sub-
16 paragraph contact involving the penis occurs upon
17 penetration, however slight;

18 “(2) contact between the mouth and the penis,
19 the mouth and the vulva, or the mouth and the
20 anus;

21 “(3) the penetration, however slight, of the anal

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1 or genital opening of another by a hand or finger or
2 by any object, with an intent to abuse, humiliate,
3 harass, degrade, or arouse or gratify the sexual de-
4 sire of any person; or

5 “(4) the intentional touching, not through the
6 clothing, of the genitalia of another person who has
7 not attained the age of sixteen years with an intent
8 to abuse, humiliate, harass, degrade, or arouse or
9 gratify the sexual desire of any person.”

10
11 (b) CONFORMING AMENDMENTS.—(1) Paragraph
12 (4) of section 918 of title 10, United States Code (article 118
13 of the Uniform Code of Military Justice), is amended by
14 striking “rape,” and inserting “aggravated sexual
15 abuse, aggravated sexual abuse of a child,”.

16 (2) Subsection (b)(2)(B)(i) of section 843 of
17 title 10, United States Code (article 43 of the Uniform
18 Code of Military Justice), is amended by striking “Rape
19 or carnal knowledge” and inserting “Aggravated sexual
20 abuse of a child or sexual abuse of a minor”.

21 (c) CLERICAL AMENDMENT.—The table of
22 sections at the beginning of chapter 47 of title 10, United
23 States Code, is amended by striking the item relating to

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1 section 920 and inserting the following new item:

2 “920. Art. 120. Sexual abuse.”.

3 (d) EFFECTIVE DATE.—The amendments made by
4 this section shall take effect 6 months after the date of
5 the enactment of this Act and apply with respect to of-
6 fenses committed after such effective date.

7 (e) INTERIM MAXIMUM PUNISHMENTS.—Until
8 the President otherwise provides pursuant to section 856
9 of title 10, United States Code (article 56 of the Uniform
10 Code of Military Justice), the punishment which a court-
11 martial may direct for an offense under section 920 of
12 such title (article 120 of the Uniform Code of Military
13 Justice), as amended by this section, may not exceed the
14 following limits:

15 (1) For aggravated sexual abuse or aggravated
16 sexual abuse of a child, such punishment may not
17 exceed dishonorable discharge, forfeiture of all pay
18 and allowances, and confinement for life without eli-
19 gibility for parole.

20 (2) For sexual abuse or sexual abuse of a
21 minor, such punishment may not exceed dishonor-

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1 able discharge, forfeiture of all pay and allowances,
2 and confinement for twenty years.

3 (3) For sexual abuse of a prisoner, such pun-
4 ishment may not exceed bad-conduct discharge, for-
5 feiture of all pay and allowances, and confinement
6 for one year.

7 (f) NO PREEMPTION.—The prosecution or punish-
8 ment of an accused for an offense under section 920 of
9 title 10, United States Code (article 120 of the Uniform
10 Code of Military Justice), as amended by this section, does
11 not preclude the prosecution or punishment of that ac-
12 cused for any other offense.

13

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**APPENDIX C
OPTION 4
H.R. 4709 MODIFIED
Committee Proposed Bill**

SECTION 1. SHORT TITLE.

This Act may be cited as the “MILITARY SEXUAL ASSAULT
CRIMES REVISION ACT OF 2004”.

SEC. 2. MILITARY SEXUAL ABUSE.

(a) **ILLCIT SEXUAL CONDUCT.**⁷¹⁸ Section 920 of title 10,
United States Code (article 120 of the Uniform Code of Military
Justice), is amended to read as follows:

“§ 920. ART. 120. ILLCIT SEXUAL CONDUCT.

“(a) Any person subject to this chapter who [] —
“(1) causes another person to engage in a sex-
ual act by using force against that other person; or

⁷¹⁸ An alternative to “illicit sexual conduct,” which is taken from H.R. 5422, Section 105(f) could be “sexual abuse” as under Chapter 109A of Title 18. Illicit sexual conduct was chosen over sexual abuse because sexual abuse is used for a specific sexual offense within this section. Illicit sexual conduct includes all sex acts, as defined in 18 U.S.C. Section 2246. It avoids confusion from having two similar terms, “sexual abuse” for the main title, and “sexual abuse” in Section 120(c)(2)(B). These terms will also be used at various places in the *MCM*.

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1 “(2) causes another person to engage in a sexual act
2 by threatening or placing that other person in fear that
3 any person will be subjected to death, grievous bodily
4 harm, or kidnapping;

5 “(3) renders another person unconscious and
6 thereby engages in a sexual act with that other per-
7 son; or

8 “(4) administers to another person by force or
9 threat of force, or without the knowledge or permis-
10 sion of that other person, a drug, intoxicant, or
11 other similar substance and thereby—

12 “(A) substantially impairs the ability of
13 that other person to appraise or control con-
14 duct; and

15 “(B) engages in a sexual act with that
16 other person;

17 is guilty of aggravated sexual abuse and shall be
18 punished

19 as a court-martial may direct.

20 “(b) Any person subject to this chapter who []
21 engages in a sexual act with another person who has not
22 attained the age of twelve years is guilty of aggravated

23 sexual abuse of a child and shall be punished as a court-martial

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1 may direct. In a prosecution under this subsection, it
2 need not be proven that the accused knew that the other
3 person engaging in the sexual act had not attained the
4 age of twelve years.

5 “(c) Any person subject to this chapter who [] —

6 “(1) causes another person to engage in a sex-
7 ual act by threatening or placing that other person
8 in fear (other than by threatening or placing that
9 other person in fear that any person will be sub-
10 jected to death, grievous bodily harm, or kidnap-
11 ping); or

12 “(2) engages in a sexual act with another per-
13 son if that other person is—

14 “(A) incapable of appraising the nature of
15 the conduct; or

16 “(B) physically incapable of declining par-
17 ticipation in, or communicating unwillingness to
18 engage in, that sexual act;

19 is guilty of sexual abuse and shall be punished as a
20 court-martial may direct.

21 “(d)(1) Any person subject to this chapter who []
22 engages in a sexual act with another person who—

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1 “(A) has attained the age of twelve years but
2 has not attained the age of sixteen years; and

3 “(B) is not that person’s spouse;
4 is guilty of sexual abuse of a minor and shall be
5 punished as a court-martial may direct.

6 “(2) In a prosecution under this subsection, it need
7 not be proven that the accused knew the age of the other
8 person engaging in the sexual act.

9 “(3) In a prosecution under this subsection, it is an
10 affirmative defense that the accused reasonably believed
11 that the other person had attained the age of sixteen
12 years. The accused has the burden of proving a defense
13 under this paragraph by a preponderance of the evidence.

14 “(e) Any person subject to this chapter who -- engages in sexual
15 contact with another person without that other person’s
16 permission;

17 is guilty of abusive sexual contact and shall be punished as a
18 court-martial may direct.”⁷¹⁹

19 “(f) Any person subject to this chapter who [] engages
20 in a sexual act with another person who is—

21 “(1) in official detention or confinement;

22 “(2) under the custodial, supervisory, or dis-

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1 disciplinary authority of the person so engaging; and

2 “(3) is not that person’s spouse;

3 is guilty of sexual abuse of a prisoner and shall be
4 punished as a court-martial may direct.

5 “(g) In this section, the term ‘sexual act’ means—

6 “(1) contact between the penis and the vulva or
7 genital opening or the penis and the anus, and for
8 purposes of this sub-paragraph contact involving the
9 penis occurs upon penetration, however slight;

10 “(2) contact between the mouth and the penis,
11 the mouth and the vulva, or the mouth and the
12 anus;

13 “(3) the penetration, however slight, of the anal
14 or genital opening of another by a hand or finger or
15 by any object, with an intent to abuse, humiliate,
16 harass, degrade, or arouse or gratify the sexual de-
17 sire of any person; or

18 “(4) the intentional touching, not through the
19 clothing, of the genitalia of another person who has
20 not attained the age of sixteen years with an intent
21 to abuse, humiliate, harass, degrade, or arouse or

⁷¹⁹ This provision is taken verbatim from 18 U.S.C. § 2244 (2004).

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1 gratify the sexual desire of any person.’’

2 “(h) in this section the term ‘sexual contact’ means the
3 intentional touching, either directly or through the clothing, of
4 the genitalia, anus, groin, breast, inner thigh, or buttocks of
5 another person with an intent to abuse, humiliate, harass,
6 degrade, or arouse or gratify the sexual desire of any
7 person.’’⁷²⁰

8 “(i) in this section, the term ‘grievous bodily harm’ means
9 serious bodily injury. It does not include minor injuries, such
10 as a black eye or a bloody nose, but does include fractured or
11 dislocated bones, deep cuts, torn members of the body, serious
12 damage to internal organs, and other serious bodily
13 injuries.’’⁷²¹

14 (b) CONFORMING AMENDMENTS.—(1) Paragraph
15 (4) of section 918 of title 10, United States Code (article
16 118 of the Uniform Code of Military Justice), is
17 amended by striking “rape,” and inserting “aggravated
18 sexual abuse, aggravated sexual abuse of a child,”.

19 (2) Subsection (b)(2)(B)(i) of section 843 of title 10,

⁷²⁰ This provision is taken verbatim from 18 U.S.C. § 2246(3).

⁷²¹ This provision is taken verbatim from *MCM*, Pt. IV, ¶ 54c(4)(a)(iii). “Grievous bodily harm” is used in lieu of the term, “serious bodily injury” because military practioners are familiar with its usage in the context of serious assaults. Aggravated sexual abuse uses the term “serious bodily injury,” as prohibited by 18 U.S.C. § 2241(a)(2) (2004) and defined in 18 U.S.C. § 2246(4).

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1 United States Code (article 43 of the Uniform Code of
2 Military Justice), is amended by striking “Rape or carnal
3 knowledge” and inserting “Aggravated sexual abuse of
4 a child or sexual abuse of a minor”. Section
5 843(b)(2)(B)(iii) is repealed. Section 843(b)(2)(B)(iv) is
6 redesignated Section 843(b)(2)(B)(iii). Section
7 843(b)(2)(v) is redesignated Section 843(b)(2)(iv).⁷²²

8 (3) Section 925 of title 10 United States Code
9 (article 125 of the Uniform Code of Military Justice) is
10 repealed.⁷²³

11 (c) CLERICAL AMENDMENT.—The table of
12 sections at the beginning of chapter 47 of title 10, United
13 States Code, is amended by striking the items relating to
14 sections 920 and 925 and inserting the following new
15 item at section 920: “920. Art. 120. Illicit sexual
16 conduct.”

17 (d) EFFECTIVE DATE.—The amendments made by
18 this section shall take effect 12⁷²⁴ months after the date
19 of the enactment of this Act and apply with respect to of-

⁷²² This addition is based on H.R. 5422. Article 43, UCMJ, in the *MCM*, 2002, does not include the changed statute of limitations.

⁷²³ Section 920 will prohibit all nonconsensual sexual contact that was previous prohibited by Article 125, UCMJ. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring Texas statute prohibiting private, consensual sodomy to be unconstitutional).

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1 fenses committed after such effective date.

2 (e) INTERIM MAXIMUM PUNISHMENTS.—Until
3 the President otherwise provides pursuant to section 856
4 of title 10, United States Code (article 56 of the Uniform
5 Code of Military Justice), the punishment which a court-
6 martial may direct for an offense under section 920 of
7 such title (article 120 of the Uniform Code of Military
8 Justice), as amended by this section, may not exceed the
9 following limits:

10 (1) For aggravated sexual abuse or aggravated
11 sexual abuse of a child, such punishment may not
12 exceed dishonorable discharge, forfeiture of all pay
13 and allowances, and confinement for life without eli-
14 gibility for parole.

15 (2) For sexual abuse or sexual abuse of a
16 minor, such punishment may not exceed dishonor-
17 able discharge, forfeiture of all pay and allowances,
18 and confinement for twenty years.

19 (3) For abusive sexual contact, such punishment
20 may not exceed dishonorable discharge, forfeiture of

⁷²⁴ Eighteen months will be required to properly staff the Executive Order amending the *MCM*.

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1 all pay and allowances, and confinement for five
2 years.⁷²⁵

3 (3) For sexual abuse of a prisoner, such pun-
4 ishment may not exceed bad-conduct discharge, for-
5 feiture of all pay and allowances, and confinement
6 for three years.⁷²⁶

7 (f) NO PREEMPTION.—The enactment of section
8 920 of title 10, United States Code (article 120 of the
9 Uniform Code of Military Justice), does not preclude the
10 prosecution or punishment of an accused for any other
11 offense under sections 890, 891, 892, 893, 905, 928, 929,
12 930, 933, or 934 of title 10, United States Code (articles
13 90, 91, 92, 93, 105, 128, 129, 130, 133, or 134⁷²⁷ of the
14 Uniform Code of Military Justice).

⁷²⁵ Abusive sexual contact is equivalent to indecent assault under Article 134, UCMJ. Indecent assault has a maximum sentence of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *See* MCM, Pt. IV, ¶ 63e. The maximum sentence for abusive sexual contact under 18 U.S.C. § 2244 (2004) includes a fine and imprisonment for not more than six months.

⁷²⁶ All confinement facilities in the United States prohibit fraternization with prisoners and confines by punitive regulations. The maximum punishment for violating a punitive regulation includes two years of confinement. The maximum sentence for sexual abuse of a confine under 18 U.S.C. § 2243 (2004) for a sexual act includes a fine and imprisonment for not more than one year, and for a sexual contact includes a fine and imprisonment for not more than six months.

⁷²⁷ It is desirable for “illicit sexual conduct” not to preempt prosecution or to create confusion about whether preemption applies of these other UCMJ articles.

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SUBTITLE B--UNIFORM CODE OF MILITARY JUSTICE

SEC. 1011. MILITARY SEXUAL ASSAULT.

1 (a) Sexual Assault- Section 920 of title 10, United States Code (article 120 of
2 the Uniform Code of Military Justice), is amended to read as follows:

`SEC. 920. ART. 120. SEXUAL ASSAULT

3 `(a) Any person subject to this chapter who knowingly causes another person
4 to engage in a sexual act--

5 `(1) by displaying, threatening to use, or using a dangerous weapon, or
6 any object fashioned or utilized in such a manner as to lead a victim
7 under the circumstances to reasonably believe the object to be a
8 dangerous weapon;

9 `(2) by force or threat of force against that other person;

10 `(3) by threatening or placing that other person in fear that any person
11 will be subjected to death, grievous bodily harm, or kidnapping;

12 `(4) by rendering that other person unconscious and thereby engaging
13 in a sexual act with that other person;

14 `(5)(A) by administering to that other person by injection, inhalation,
15 ingestion, transfusion, possession or any other means, without his or
16 her knowledge or by threat or deception, a drug, intoxicant, or other
17 similar substance; or

18 `(B) with the knowledge that another person so administered such drug,
19 intoxicant, or other similar substance;

20 `(6) during the course of or commission of or attempted commission of
21 any other criminal act;

22 `(7) if the sexual act is nonconsensual and the other person has attained
23 the age of 60 years;

24 `(8) if the sexual act is nonconsensual and the other person is a
25 physically or mentally challenged person;

26 `(9) if the sexual act is nonconsensual and the accused is joined or
27 assisted by another person (other than the accused or the other person)
28 in the sexual act or in physically restraining, assaulting, or sexually
29 assaulting the other person;

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1 `(10) if the sexual act is nonconsensual and the other person is also
2 caused by any person to engage in another nonconsensual sexual act as
3 part of the same occurrence; or

4 `(11) if the sexual act is nonconsensual and the accused has previously
5 been convicted of another offense (whether under this chapter or under
6 any other Federal or State law) that would constitute sexual assault or
7 aggravated sexual assault;

8 is guilty of aggravated sexual assault and shall be punished as a court-martial
9 may direct.

10 `(b) Any person subject to this chapter who knowingly--

11 `(1) causes another person to engage in a sexual act by threatening or
12 placing that other person in fear (other than by threatening or placing
13 that other person in fear that any person will be subjected to death,
14 grievous bodily harm, or kidnapping);

15 `(2) engages in a sexual act with another person without the consent,
16 knowledge, or permission of that other person; or

17 `(3) engages in a sexual act with another person if that other person is--

18 `(A) incapable of consent;

19 `(B) incapable of appraising the nature of the conduct; or

20 `(C) physically incapable of declining participation in, or
21 communicating unwillingness to engage in, that sexual act;

22 is guilty of sexual assault and shall be punished as a court-martial may direct.

23 `(c)(1) Any person subject to this chapter who knowingly engages in a sexual
24 act with another person who--

25 `(A) has attained the age of twelve years but has not attained the age of
26 sixteen years; or

27 `(B) is under the custodial, supervisory, or disciplinary authority of the
28 person so engaging;

29 is guilty of sexual assault of a minor and shall be punished as a court-martial
30 may direct.

31 `(2) In a prosecution under this subsection, it need not be proven that the

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1 accused knew the age of the other person engaging in the sexual act.

2 `(3) In a prosecution under this subsection, it is a defense, that must be
3 established by a preponderance of the evidence, that the accused reasonably
4 believed that the other person had attained the age of sixteen years.

5 `(4) In a prosecution under this section, it is a defense, which the accused
6 must establish by a preponderance of the evidence, that the persons engaging
7 in the sexual act were at that time married to each other. The fact that the
8 accuser and the other person engaging in the sexual act were at any other time
9 married to each other is not a defense.

10 `(d) Any person subject to this chapter who knowingly engages in a sexual act
11 with another person who is--

12 `(1) in official detention or confinement; or

13 `(2) under the custodial, supervisory, or disciplinary authority of the
14 person so engaging;

15 is guilty of sexual assault of a prisoner and shall be punished as a court-
16 martial may direct.

17 `(e) In this section, the term `sexual act' means--

18 `(1) contact between the penis and the vulva or the penis and the anus,
19 and for purposes of this subparagraph contact involving the penis,
20 however slight;

21 `(2) contact between the mouth and the penis, the mouth and the vulva,
22 or the mouth and the anus;

23 `(3) penetration, however slight, of the anal or genital opening of
24 another by a hand or finger or by any object, with an intent to abuse,
25 humiliate, harass, degrade, or arouse or gratify the sexual desire of any
26 person;

27 `(4) the intentional touching of the external genitalia, perineum, anus,
28 or pubes of another person or the breast of a female person with an
29 intent to abuse, humiliate, harass, degrade, or arouse or gratify the
30 sexual desire of any person; or

31 `(5) the intentional touching of the clothing covering the immediate
32 area of another person's genitalia, perineum, anus, or pubes of another
33 person or the breast of a female person with an intent to abuse,
34 humiliate, harass, degrade, or arouse or gratify the sexual desire of any

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1 person.'.

2 (b) Conforming Amendment- Paragraph (4) of section 918 of title 10, United
3 States Code (article 118 of the Uniform Code of Military Justice), is amended
4 by striking `rape,' and inserting `aggravated sexual assault, sexual assault of a
5 minor,'.

6 (c) Clerical Amendment- The item relating to section 920 (article 120) in the
7 table of sections at the beginning of subchapter X of chapter 47 of title 10,
8 United States Code, is amended to read as follows:

9 `920. 120. Sexual assault.'.

10 (d) Effective Date- The amendments made by this section shall apply with
11 respect to offenses committed after the date of the enactment of this Act.

12 (e) Interim Maximum Punishments- Until the President otherwise provides
13 pursuant to section 856 of title 10, United States Code (article 56 of the
14 Uniform Code of Military Justice), the punishment which a court-martial may
15 direct for an offense under section 920 of such title (article 920 of the
16 Uniform Code of Military Justice) may not exceed the following limits:

17 (1) For aggravated sexual assault, such punishment may not exceed
18 dishonorable discharge, forfeiture of pay and allowances, and
19 confinement for life without eligibility for parole.

20 (2) For sexual assault of a minor, such punishment may not exceed
21 dishonorable discharge, forfeiture of all pay and allowances, and
22 confinement for 30 years.

23 (3) For sexual assault, such punishment may not exceed dishonorable
24 discharge, forfeiture of all pay and allowances, and confinement for 20
25 years.

26 (4) For sexual assault of a prisoner, such punishment may not exceed
27 bad-conduct discharge, forfeiture of all pay and allowances, and
28 confinement for 15 years.

29 (f) No Preemption- The prosecution or punishment of an accused for an
30 offense under section 920 of title 10, United States Code (article 120 of the
31 Uniform Code of Military Justice), does not preclude the prosecution or
32 punishment of that accused for any other offense.

SEC. 1012. STALKING.

33 (a) Stalking- Subchapter X of chapter 47 of title 10, United States Code, is
34 amended by inserting after section 928 (article 128 of the Uniform Code of

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1 Military Justice) the following:

SEC. 928A. ART. 128A. STALKING

2 (a) Any person subject to this chapter who knowingly--

3 (1) travels with the intent to kill, injure, harass, or intimidate another
4 person, and in the course of, or as a result of, such travel places that
5 other person in reasonable fear of the death of, or serious bodily injury
6 to, that other person, a member of the immediate family of that other
7 person, or the spouse or intimate partner of that other person; or

8 (2) with the intent to kill or injure a person or to place a person in
9 reasonable fear of the death of, or serious bodily injury to, that other
10 person, a member of the immediate family of that other person, or a
11 spouse or intimate partner of that other person, uses mail, telephone or
12 cellular telephone, electronic communication, or any facility of
13 interstate or foreign commerce to engage in a course of conduct that
14 places that person in reasonable fear of such a death or serious bodily
15 injury,

16 is guilty of stalking and shall be punished as a court-martial may direct.'

17 (b) Clerical Amendment- The table of sections at the beginning of subchapter
18 X of chapter 47 of title 10, United States Code, is amended by inserting after
19 the item relating to section 928 (article 128 of the Uniform Code of Military
20 Justice) the following new item:

21 '928a. 128a. Stalking.'

22 (c) Effective Date- The amendments made by this section shall apply with
23 respect to offenses committed after the date of the enactment of this Act.

24 (d) Interim Maximum Punishments- Until the President otherwise provides
25 pursuant to section 856 of title 10, United States Code (article 56 of the
26 Uniform Code of Military Justice), the punishment which a court-martial may
27 direct for an offense under section 928a of such title (article 128a of the
28 Uniform Code of Military Justice) may not exceed the following limits:

29 (1) For a stalking if the death of the victim results, such punishment
30 may not exceed dishonorable discharge, forfeiture of pay and
31 allowances, and confinement for life without eligibility for parole.

32 (2) For a stalking if permanent disfigurement or life threatening bodily
33 injury to the victim results, such punishment may be twice that as
34 provided including dishonorable discharge, forfeiture of pay and

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1 allowances, and confinement for 30 years.

2 (3) For a stalking if serious bodily injury to the victim results or if the
3 accused uses a dangerous weapon, such punishment may not exceed
4 dishonorable discharge, forfeiture of all pay and allowances and
5 confinement for 20 years.

6 (4) For a stalking that involves an assault involving domestic violence
7 or family violence under section 928 of title 10, United States Code
8 (article 128 of the Uniform Code of Military Justice), such punishment
9 may not exceed dishonorable discharge, forfeiture of all pay and
10 allowances and confinement for 10 years.

11 (e) No Preemption- The prosecution or punishment of an accused for an
12 offense under section 928a of title 10, United States Code (article 128 of the
13 Uniform Code of Military Justice), does not preclude the prosecution or
14 punishment of that accused for any other offense.

SEC. 1013. DOMESTIC VIOLENCE AND FAMILY VIOLENCE.

15 (a) Assault- Section 928(b) of title 10, United States Code (article 128(b) of
16 the Uniform Code of Military Justice), is amended--

17 (1) by striking `or' at the end of paragraph (1);

18 (2) by inserting `or' at the end of paragraph (2); and

19 (3) by inserting after paragraph (2) the following new paragraph:

20 `(3) commits an assault involving domestic violence or family
21 violence;'

22 (b) Assault Involving Domestic Violence or Family Violence Defined- Such
23 section is further amended by adding at the end the following new subsection:

24 `(c) In this section, the term `assault involving domestic violence or family
25 violence' means--

26 `(1) an assault--

27 `(A) with the intent to kill, injure, harass, or intimidate a spouse,
28 intimate partner, or family member, or any other person related
29 by consanguinity or affinity;

30 `(B) in which the accused intentionally inflicts bodily harm with
31 or without a weapon upon a spouse, former spouse, intimate
32 partner, or family member, or any other person related by

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- 1 consanguinity or affinity; or
- 2 (C) in which the accused places a person in reasonable fear of
3 imminent bodily injury to that person or to another person;
- 4 (2) a sexual assault; or
- 5 (3) any conduct in which the accused--
- 6 (A) places a person in reasonable fear of imminent bodily injury
7 to that person or to another;
- 8 (B) harasses or intimidates a spouse, intimate partner, or family
9 member or person related by consanguinity or affinity, in the
10 course of or as a result of which the accused commits a crime of
11 violence against the spouse, intimate partner, or family member
12 or person related by consanguinity or affinity; or
- 13 (C) uses force, coercion, duress, or fraud to facilitate, commit,
14 or attempt to commit a crime of violence against a spouse,
15 former spouse, intimate partner, or family member.'.

16 (c) Effective Date- The amendments made by this section shall apply with
17 respect to offenses committed after the date of the enactment of this Act.

18
19 (d) Interim Maximum Punishments- Until the President otherwise provides
20 pursuant to section 856 of title 10, United States Code (article 56 of the
21 Uniform Code of Military Justice), the punishment which a court-martial may
22 direct for an offense under subsection (b)(3) of section 928 of such title
23 (article 128 of the Uniform Code of Military Justice) may not exceed the
24 following limits:

25
26 (1) For an assault involving domestic violence or family violence if the
27 death of the victim results, such punishment may not exceed
28 dishonorable discharge, forfeiture of pay and allowances, and
29 confinement for life without eligibility for parole.

30 (2) For an assault involving domestic violence or family violence if
31 permanent disfigurement or life threatening bodily injury to the victim
32 results, such punishment may be twice that as provided including
33 dishonorable discharge, forfeiture of pay and allowances, and
34 confinement for 30 years.

35
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APPENDIX E

**OPTION 5: PROPOSED UCMJ & MCM CHANGES WITH DISCUSSION
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OPTION 5

SECTION BY SECTION DISCUSSION

A. INTRODUCTION

Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, § 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 proposal includes all of Chapter 109A—Sexual Abuse, 18 U.S.C. §§ 2241-2244, 2246, in a new Article 120, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 920, with minor changes made to conform with other UCMJ articles and to be consistent with military practice. Section 920 replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct. It includes a series of graded offenses with a precise description of the conduct prohibited—the same rationale for enactment of 18 U.S.C. §§ 2241-2246 in 1986.

If Congress enacts 18 U.S.C. §§ 2241-2244, 2246 as 10 U.S.C. § 920 without change, it would result in gaps that do not exist under Title 18. For example, military law, unlike Title 18 has no separate statute prohibiting use of a firearm in relation to a crime of violence. *See* 18 U.S.C. §§ 113(a)(3), 924(c)(1); *United States v. Bousley*, 523 U.S. 614 (1998). Subsection 920(u)(5) fills this statutory gap by defining “force” to mean “action to compel submission of another or to overcome or prevent another’s resistance by—(A) the use or display of a dangerous weapon or object; or (B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object.” *Compare* subsection 920(a)(1) *with* 18 U.S.C. 2241(a)(1). *See also* the definition of dangerous weapon or object at subsection 920(u)(4) at page 297 *infra*.

Enactment of 18 U.S.C. §§ 2241-2244, 2246 in lieu of 10 U.S.C. § 920 without change, would result in confusing overlap with other currently existing UCMJ offenses. For example, military law unlike Title 18 has a separate statute already prohibiting inchoate crimes such as an attempt. *See* 10 U.S.C. § 880. Thus, the words, “or attempts to do so” in 18 U.S.C. §§ 2241-2244 are unnecessary and confusing in the new section 920.

The new section 920 lists the offenses in order with the most serious offense first (subsection 920(a), rape at page 294; and subsection 920(b), rape of a child at page 294) to the least serious (subsection 920(p), indecent exposure at page 296). A mix of terms from common law and Title 18 was chosen for names of the new sexual offenses. “Rape” which is still used by 26 states and under current military law was retained for the two most serious offenses. Other terms, however, were derived from state laws and title 18, such as “aggravated sexual assault,” subsection 920(c) at page

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294, (which is used by some states), and “abusive sexual contact,” subsection 920(h) at page 295, (which is used in 18 U.S.C. § 2244).

Subsections 920(j) at page 295, and 920(l) at page 296, are designed to protect military prisoners, and detainees such as at overseas facilities in Iraq and Cuba from sexual abuse by guards and other custodians. These two new offenses do not permit the affirmative defenses of consent or mistake of fact. *See* subsection 920(t) at page 297. Under 18 U.S.C. §§ 2246(1) or 2246(2), causing a prisoner to masturbate does not constitute a “sexual act” or a “sexual contact” because the prisoner was touching himself and not “the accused.” Subsection 920(l) incorporates the term “lewd act,” which is defined at subsection 920(u)(10) at page 298 to prohibit the circumstance, for example, where a guard might force a prisoner to masturbate for the guard’s amusement or to abuse and humiliate the prisoner, as well as to prohibit other forms of sexual abuse. *See also discussion of United States v. Sagg*, 125 F.3d 1294, 1295-96 (9th Cir. 1997) at page 270 *infra*.

Five sexual offenses are moved from Article 134, UCMJ into the new section 920 because they are *per se* criminal, and the Government should not be required to prove the element required by Article 134, UCMJ: that the conduct is prejudicial to good order and discipline or service discrediting. Some of these UCMJ art. 134 offenses also overlap with offenses from 18 U.S.C. §§ 2241-2244 that are adopted into the new section 920. For example, 18 U.S.C. § 2244(a)(2) includes several types of indecent assault and 18 U.S.C. § 2244(a)(3) includes several types of indecent acts with a child, which are both currently prohibited by the *MCM*’s implementation of Article 134, UCMJ.

Definitions for terms such as force, consent, mistake of fact, and the like are derived from military and federal caselaw, as well as from state statutes and incorporated into the new subsection 920(u), which begins at page 297. The element of lack of consent, in Article 120, UCMJ, which focuses attention on the victim’s conduct is eliminated except in subsection 920(o), “wrongful sexual contact,” at page 296. *See* 18 U.S.C. § 2244(b), knowingly engaging in sexual contact with another person without that other person’s permission. The subcommittee recommended that subsection 920(o) not be included because this conduct is prohibited by other UCMJ provisions. Nevertheless, subsection 920(o) was included in Option 5 to comply with Public Law 108-375’s mandate. *See discussion at page 261 infra*.

Subsection 920(s) at page 297, and subsection 920(t) at page 297, define when marriage, consent, and mistake of fact are affirmative defenses that the accused has the burden of establishing by a preponderance of evidence. *See page 264 infra* for the rationale for subsections 920(s) and 920(t).

Article 56, UCMJ authorizes the President to set the maximum punishments for UCMJ offenses. However, *interim* maximum punishments are included in subsection 920(v) at page 301 in the event that an amendment to the *MCM* has not been signed by

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the time the new subsection 920 becomes effective. *See* starting at page 282 *infra* for an explanation for the interim maximum punishments.

A new *MCM* provision, Pt. IV, ¶ 62, prohibits prejudicial relationships involving sexual activity. *MCM*, Pt. IV, ¶ 62 prohibits sexual acts, sexual contacts and lewd acts that are prejudicial to good order and discipline or service discrediting conduct. *MCM*, Pt. IV, ¶ 62 continue a prohibition against traditional military sexual offenses such as pandering, consensual sodomy, indecent acts with another, and adultery. The new *MCM* prohibition against prejudicial sexual relationships clarifies military law, meets the concerns of the appellate courts, and is broader than the current military prohibitions which do not specifically prohibit, for example, sexual contacts for compensation. *See infra* starting at page 318.

In regard to the requirement in Public Law 108-375, § 571 to also review and where possible conform the *MCM* “more closely to other Federal laws and regulations that address such issues,” this Option proposes changing Military Rule of Evidence 412, to make it as protective of victims of sexual crimes as FEDERAL RULE OF EVIDENCE 412. *See infra* at page 324. It does not address general procedural changes not specifically directed toward sexual offenses, such as amending Article 45, UCMJ, to conform with FED. R. CRIM. P. 11 and Article 59, UCMJ, to conform with FED. R. CRIM. P. 52. Conforming Articles 45 and 59, UCMJ will be considered as part of the annual review of the UCMJ.

Other conforming or procedural changes may be required—for example, Article 43, UCMJ, contains “sodomy” as an offense. Under section 920, “sodomy” is redefined in terms such as “rape” subsection 920(a) at page 294, “rape of a child” subsection 920(b) at page 294, “aggravated sexual assault” subsection 920(c) at page 294, “aggravated sexual assault on a child” subsection 920(d) at page 295, “aggravated sexual abuse of a child” subsection 920(f) at page 295, “sexual abuse of a detainee or prisoner” under subsection 920(j) at page 295 and under Article 134, UCMJ, *MCM*, Pt. IV, ¶ 62 as a prejudicial sexual act. Other changes of terms will be required in the *MCM* should this proposal of section 920 be enacted.

B. SOURCE AND RATIONALE FOR EACH SUBSECTION.

Subsection 920(a) is derived from 18 U.S.C. §§ 2241(a) and 2241(b). The term, “sexual act” is defined similarly in both 18 U.S.C. § 2246(2) and subsection 920(u)(1). The interim maximum punishment for subsection 920(a), rape includes confinement for life without the possibility of parole or death. *See infra* for maximum punishments, subsection 920(v)(1) at page 301. Subsection 920(a) has ten changes from § 2241(a) and (b):

(1) “Aggravated sexual abuse by force or threat” and “aggravated sexual abuse by other means” were combined into subsection 920(a), and the offense was labeled, “rape.” The common law term “rape” was chosen over “aggravated sexual abuse” because 26 states, the Model Penal Code, and the UCMJ use the term, “rape.” Sixteen

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states include the term, “assault” and only two states use the term “abuse” in their most serious sexual offenses. The term “rape” is more derogatory and is a more fitting description of this very aggravated sexual misconduct. The meaning of rape is universally understood, whereas many will not understand what “aggravated sexual abuse” connotes. 18 U.S.C. § 2241(a) and (b) were combined into subsection 920(a) because only one type of rape was desirable as opposed to “rape in the first degree” and “rape in the second degree,” as they are labeled in many states.

(2) The term, “grievous bodily harm” is substituted for “serious bodily harm” in 18 U.S.C. § 2241(a) to conform with military practice. Grievous bodily harm is a lesser degree of injury than “serious bodily injury,” as defined in 18 U.S.C. § 2246(4).

“Grievous bodily harm,” is defined in subsection 920(u)(3) at page 297. The term, “grievous bodily harm” is used in 10 U.S.C. § 928(b)(1), aggravated assault, and is defined in the *MCM*, Pt. IV, ¶ 54(c)(4)(iii) as, “serious bodily injury. It does not include minor injuries, such as a black eye or bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.”

In contrast, the term, “serious bodily injury” is defined in 18 U.S.C. § 2246(4), and describes a more serious degree of injury. According to subsection 2246(4), “‘Serious bodily injury’ means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” The explanation for subsection 920(u)(3) is at page 272.

(3) The phrase, “or attempts to do so,” is deleted as unnecessary because “[a]n act, done with specific intent to commit an offenses under [the UCMJ]” violates Article 80, UCMJ, 10 U.S.C. § 980. Title 18 does not have a section prohibiting attempts to do other crimes.

(4) The word, “knowingly,” which is in each section of 18 U.S.C. §§ 2241-2244 is not included in subsections 920(a)-920(p) because “knowingly” is unnecessary. Under military practice, none of the other offenses in the UCMJ include the word, “knowingly.” A very few offenses explicitly include a knowledge requirement. *See e.g.*, 10 U.S.C. § 923a, making, drawing, or uttering check, draft, or order without sufficient funds. Knowledge is relevant in many offenses. For example, knowledge of superior rank and officer status in disrespect to commissioned officer offense; knowledge of order for failure to obey order; knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine); or knowledge of superior right of ownership in larceny. *See MCM*, Pt. IV., ¶¶ 13c(1)(2), 16c(2)(b), 37c(5), 46c(1)(c), *see also United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988). The definition of mistake of fact as to consent in subsection 920(u)(22) clarifies the important issue of when knowledge is relevant, and how it applies. *See* definition of

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mistake of fact *infra* at page 300, and when mistake of fact as to consent is an affirmative defense under subsection 920(t). *See infra* at page 297.

(5) In subsection 920(a)(2) the phrase, “by causing grievous bodily harm” is added because 18 U.S.C. § 2241 does not expressly include any prohibition addressing injury to the victim—possibly because such injury is part of the threat or force provision. In any event, it is clearer to expressly include this provision.

(6) The words “of any age” are added after the words “another person” in both subsections 920(a) and 920(c). The Government should have the choice of charging someone who sexually penetrates a child with any of four possible offenses: “rape,” “rape of a child,” “aggravated sexual assault,” or “aggravated sexual assault on a child.” But subsections 920(b) and 920(d), as currently written, might be misread to mean that any offense against a child must be charged as “rape of a child” or “aggravated sexual assault on child.” A general rule of statutory construction is that when two statutory provisions each address a subject, the more specific statute controls. Usually, the Government will want to charge the more specific child-related offense because the proof is easier; but the Government might want to charge the general offense in some instances because of the greater punishment available. For example, suppose that the accused assaults a child and is convicted of aggravated sexual assault and sentenced to confinement for 30 years. On appeal, the accused might argue that he should have been charged with aggravated sexual assault on child because § 920(d) says that is the offense applicable to acts against children. As a result, the accused would argue that his maximum confinement is only 20 years.

(7) The term “force” is defined at subsection 920(u)(5). *See infra* at page 298.

(8) The term, “sexual act” is defined in subsection 920(u)(1) at page 297. The term, “sexual act” is modified in subsection 920(u)(1) from the definition in 18 U.S.C. § 2246(2). The differences between subsection 920(u)(1) and 18 U.S.C. § 2246(2) are discussed at page 270 *infra*.

(9) Subsection 920(t) at page 297 provides for “consent” and “mistake of fact as to consent” as affirmative defenses for a prosecution under subsection 920(a). The explanation for subsection 920(t) is at page 265.

(10) The maximum punishment for rape under Article 120, UCMJ, includes confinement for life without parole or death. The maximum confinement under 18 U.S.C. § 2241(a) or § 2241(b) is confinement for life. The interim maximum punishment for rape includes confinement for life without the possibility of parole or death. *See infra* subsection 920(v)(1) at page 301 for subsection 920(a)’s interim maximum punishment. Rule for Courts-Martial 1004 significantly restricts the circumstances for when a death sentence may be adjudged. The last military execution occurred in 1965.

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Subsection 920(b) at page 294 is similar to 18 U.S.C. § 2241(c). The term, “sexual act” is modified in subsection 920(u)(1) at page 297, from the definition in 18 U.S.C. § 2246(2). The differences between 920(u)(1) and 18 U.S.C. § 2246(2) are discussed at page 270 *infra*. The term, “child” is defined in subsection 920(u)(9) at page 298 to be a person under the age of 16 years, which is different than in 18 U.S.C. § 2241(c) for the reasons stated at page 276 *infra*. The words, “or attempts to do so” and “knowingly” are deleted as unnecessary for the reasons stated at page 254 *supra*.

The words, “substantially incapacitated or” are added because in some states “substantially incapable” might be limited to those situations where a victim lacks some innate capacity, or has a mental disease or defect. The objective is to also prohibit the sexual abuse of anyone who is temporarily incapacitated through abuse of alcohol and/or drugs. MICH. COMP. LAWS §§ 750.520a(g), (h) and (k)(2004) for example have the following definitions:

“(g) ‘Mentally incapable’ means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(h) ‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

* * *

(k) ‘Physically helpless’ means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.”

The interim maximum punishment for subsection 920(b), rape of a child includes confinement for life without the possibility of parole or death. *See infra* subsection 920(v)(1) at page 301 for interim maximum punishments.

Subsection 920(c) “aggravated sexual assault” is similar to 18 U.S.C. § 2242, except for five changes: First, the term, “grievous bodily harm” is substituted for “serious bodily harm” in 18 U.S.C. § 2242(1). *See* page 254 *supra*, which explains why “grievous bodily harm” is better and other differences between 18 U.S.C. § 2241 and subsection 920(a). Second, the words, “knowingly” and “or attempts to do so,” are deleted as unnecessary. *See id.* Third, the term, “sexual act” is modified in subsection 920(u)(1) at page 297, from the definition in 18 U.S.C. § 2246(2). The differences between 920(u)(1) and 18 U.S.C. § 2246(2) are discussed at page 270 *infra*. Fourth, subsection 920(c)(1)(B) states, “any person subject to this chapter who — (1) causes another person of any age to engage in a sexual act by—(B)

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causing bodily harm.” The term, “bodily harm” is defined in subsection 920(u)(8) at page 298. The explanation for the term, “bodily harm” is at page 276. Fifth, instead of the word, “incapable” the term “substantially incapable” has been added in subsection 920(c)(2). This is more consistent with subsection 920(a)(5) which uses “substantially impairs” for the victim’s mental state after being drugged by an assailant. The use of the qualifying word, “substantial” is clearer. It avoids the possibility that a fact finder might require the victim’s complete or total incapacity, or alternatively the fact finder might conclude that any incapability whatsoever is sufficient. Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(c)(2) at page 295. Subsection 920(t) at page 297 provides for “consent” and “mistake of fact as to consent” as affirmative defenses for a prosecution under subsection 920(c). The explanation for subsection 920(t) is at page 265. The interim maximum punishment for aggravated sexual assault includes confinement for thirty years. *See infra* subsection 920(v)(2) at page 301 for interim maximum punishments.

Subsection 920(d) “aggravated sexual assault on a child” at page 295 is similar to 18 U.S.C. § 2243(a), except, the words, “knowingly” and “or attempts to do so,” are deleted as unnecessary. *See* page 254 *supra*, which explains why these words are unnecessary as well as other differences between 18 U.S.C. § 2241 and subsection 920(a). The term “child” is used in lieu of “minor.” The term, “minor” is defined in 18 U.S.C. § 2243(a)(1). The term, “child” is defined in subsection 920(u)(9) at page 298 to be a person under 16 years of age. The word, “child” is defined differently than in 18 U.S.C. § 2241(c) for the reasons stated at page 276 *infra*. Aggravated sexual assault on a child protects children age 12 years of age to 15 years of age. The exception in 18 U.S.C. § 2243(a)(2), if the child is at least 12 years of age, but has not attained 16 years of age, and the accused is within four years of age of the child is not included in subsection 920(d). The 4-year age exception in 18 U.S.C. § 2243(a)(2) would permit an 18-year old service member to engage in sexual intercourse or sodomy with a 14-year old child (Typically, a 14-year old child attends the 8th grade). If the child was a dependent of another service member, this sexual activity could cause significant problems to good order and discipline. If the child was a dependent of a civilian, then this could cause significant problems to military-civilian relations, especially in some foreign countries, and be service discrediting conduct. The term, “sexual act” is modified in subsection 920(u)(1) at page 297, from the definition in 18 U.S.C. § 2246(2). The differences between 920(u) (1) and 18 U.S.C. § 2246(2) are discussed at page 270 *infra*. Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(d) at page 295. The interim maximum punishment for aggravated sexual assault on a child includes confinement for twenty years. *See infra* subsection 920(v)(3) at page 301 for interim maximum punishments.

Subsection 920(e) “aggravated sexual contact” at page 295, prohibits sexual contacts that violate subsection 920(a). As such, it is similar to 18 U.S.C. § 2244(a)(1), which refers back to 18 U.S.C. § 2241(a) and (b). *See* page 254 *supra*, which explains the ten differences between 18 U.S.C. § 2241 and subsection 920(a). The phrase, “if so to do” in 18 U.S.C. § 2244(a) is changed to “if to do so” for clarity.

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Subsection 920(t) at page 297 provides for “consent” and “mistake of fact as to consent” as affirmative defenses for a prosecution under subsection 920(e). The explanation for subsection 920(t) is at page 265. The interim maximum punishment for aggravated sexual contact includes confinement for twenty years. *See infra* subsection 920(v)(3) at page 301 for interim maximum punishments.

Subsection 920(f) “aggravated sexual abuse of a child” is at page 295. This subsection states, “Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.”

18 U.S.C. §§ 2241-2244 does not include aggravated sexual abuse of a child in this format. 18 U.S.C. §§ 2241, 2241(c), 2242, and 2243(a) all prohibit sexual acts involving children. 18 U.S.C. § 2246(2)(D) includes as a sexual act, “the intentional touching, not through the clothing, of the genitalia of another person, who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2)(D) is defined as a type of “lewd act” in subsection 920(u)(10)(A) at page 298. The explanation for moving 18 U.S.C. § 2246(2)(D) to subsection 920(u)(10)(A) is at page 277.

The words, “knowingly” and “or attempts to do so,” are not included in subsection 920(f). *See* page 254 *supra*, which explains why these words are unnecessary as well as other differences between 18 U.S.C. § 2241 and subsection 920(a). Subsection 920(f) protects children from lewd acts, which is defined by subsection 920(u)(10), at page 298. Subsection 920(u)(10)(B) is not in 18 U.S.C. § 2246(2). Subsection 920(u)(10) states, “‘lewd act’ under subsections 920(f) and 920(l) means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person.”

Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(f) at page 295. The maximum punishment for violation of 18 U.S.C. § 2243(a), sexual abuse of a minor includes confinement for 15 years. The interim maximum punishment for aggravated sexual abuse of a child includes confinement for fifteen years. *See infra* subsection 920(v)(4) at page 301 for interim maximum punishments.

Subsection 920(g) “aggravated sexual contact with a child” at page 295, prohibits sexual contacts that violate subsection 920(b). As such, it is similar to 18 U.S.C. § 2244(a)(1), which refers back to 18 U.S.C. § 2241(c). The phrase, “if so to do” in 18 U.S.C. § 2244(a) is changed to “if to do so” for clarity as was done in subsection 920(e). The exception in 18 U.S.C. § 2243(a)(2) if the child is at least 12 years of age but has not attained 16 years of age, and the accused is within four years

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of age of the child is not included. *See* explanation in subsection 920(d) at page 257 *supra* for not including the 4-year age exception. “Child” is defined in subsection 920(u)(9) at page 298 to be a person under the age of 16 years. The word “child” is defined differently than in 18 U.S.C. § 2241(c) for the reasons stated at page 276 *infra*. The interim maximum punishment for aggravated sexual contact with a child includes confinement for fifteen years. *See infra* subsection 920(v)(4) at page 301 for interim maximum punishments.

Subsection 920(h) “abusive sexual contact” at page 295, prohibits sexual contacts that violate subsection 920(c). As such, it is similar to 18 U.S.C. § 2244(a)(2), which refers back to 18 U.S.C. § 2242. *See* explanation for subsection 920(c) at page 256 *supra*. The phrase, “if so to do” in 18 U.S.C. § 2244(a) is changed to “if to do so” for clarity as was done in subsection 920(e). Subsection 920(t) at page 297 provides for “consent” and “mistake of fact as to consent” as affirmative defenses for a prosecution under subsection 920(h). The explanation for subsection 920(t) is at page 265. The interim maximum punishment for abusive sexual contact includes confinement for seven years. *See infra* subsection 920(v)(5) at page 301 for interim maximum punishments.

Subsection 920(i) “abusive sexual contact with a child” at page 295, prohibits sexual contacts that violate subsection 920(d). As such, it is similar to 18 U.S.C. § 2244(a)(3), which refers back to 18 U.S.C. § 2243(a), except, for four differences. First, the term, “child” is defined in subsection 920(u)(9) at page 298 to be a person under the age of 16 years, whereas under 18 U.S.C. § 2243(a) a minor is a person who has attained the age of 12 years, but who has not attained the age of 16 years. Second, the defense in 18 U.S.C. § 2243(a)(2), that the victim is within four years of age of the accused is eliminated. *See* explanation for subsection 920(d) at page 257 *supra* for the rationale for not including the defense in 18 U.S.C. § 2243(a)(2). Third, the words, “or attempts to do so,” and “knowingly” are deleted as unnecessary. *See* page 254 *supra*, which explains why these words are unnecessary as well as other differences between 18 U.S.C. § 2241 and subsection 920(a). Fourth, the phrase, “if so to do” in 18 U.S.C. § 2244(a) is changed to “if to do so” for clarity as was done in subsection 920(e). Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(i) at page 295. The interim maximum punishment for abusive sexual contact with a child includes confinement for seven years. *See infra* subsection 920(v)(5) at page 301 for interim maximum punishments.

Subsection 920(j) “sexual abuse of a detainee or prisoner” at page 295 is similar to 18 U.S.C. § 2243(b). The words, “knowingly” and “or attempts to do so,” are deleted as unnecessary. *See* page 254 *supra*, which explains why these words are unnecessary as well as other differences between 18 U.S.C. § 2241 and subsection 920(a). Subsection 920(j) also protects detainees confined as a result of military operations overseas, such as in Iraq and in Cuba from sexual abuse. The term, “sexual act” is modified in subsection 920(u)(1) at page 297, from the definition in 18 U.S.C. § 2246(2). The differences between 920(u)(1) and 18 U.S.C. § 2246(2) are discussed at page 270 *infra*. Subsection 920(u)(16) at page 299, defines “detainee”; subsection

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920(u)(17) at page 299, defines “custody”; subsection 920(u)(18) at page 299, defines “confinement”; and subsection 920(u)(19) at page 299 defines “correctional custody.” Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(j) at page 295. The maximum punishment for violation of 18 U.S.C. § 2243(b) includes confinement for one year. The interim maximum punishment under subsection 920(j) includes confinement for seven years. *See infra* subsection 920(v)(5) at page 301 for interim maximum punishments.

Subsection 920(k) “indecent liberty with a child” at page 296 is similar to the prohibition in *MCM*, Pt. IV, ¶ 87, except for five changes: First, the Government would no longer have to prove that the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. Second, a broader specific intent than in the *MCM* has been added: “with an intent to abuse, humiliate, or degrade,” which is the same as from 18 U.S.C. §§ 2246(2)(C) and 2246(3), except “harass” is excepted to avoid confusion. Third, the parts of *MCM*, Pt. IV, ¶ 87 that relate to indecent physical contact with a child are not included because that conduct is prohibited by subsection 920(g), “aggravated sexual contact with a child.” *See infra* at page 295. Fourth, the Government would no longer have to prove that the victim and the accused were not married to each other because this would become an affirmative defense under subsection 920(s). *See infra* at page 297. Fifth, consent is explicitly not a defense under subsection 920(t), *see infra* at page 297, whereas under case law the members must determine under the totality of the circumstances whether consent of the child to the sexual touching negates the element of indecency. *See United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002) (reversing conviction because the military judge did not instruct the members that factual consent of the child is relevant to the issue of indecency). *See infra* at subsection 920(u)(9) at page 298 for the definition of child, subsection 920(u)(12), at page 298 for the definition of “indecent liberty;” and subsection 920(u)(13), at page 299 for the definition of “indecent.” Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(k) at page 296.

For “aggravated sexual contact with a child,” subsection 920(g), at page 295, if the child is under 12 years of age, the interim maximum confinement is 15 years. *See infra* subsection 920(v)(4) at page 301 for interim maximum punishment for subsection 920(g). For “abusive sexual contact with a child,” subsection 920(i) at page 295, if the child is 12 to 15 years of age and for “indecent liberties with a child,” subsection 920(k) at page 296, the interim maximum confinement for both offenses is seven years. *See infra* subsection 920(v)(5) at page 301 for interim maximum punishments for violating subsections 920(i) and 920(k).

Subsection 920(l) “sexual contact with a detainee or prisoner” at page 296 has the same objective as 18 U.S.C. § 2244(a)(3). Subsection 920(l) prohibits sexual contacts and lewd acts that violate subsection 920(j). Like subsection 920(j), subsection 920(l) is designed to protect prisoners, and detainees such as those at overseas facilities in Iraq and Cuba from sexual abuse by guards and other military custodians. *See supra* subsection 920(j) at page 259 for more information and

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definitions pertaining to sexual abuse of a detainee or prisoner. Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(l) at page 296. The interim maximum punishment for subsection 920(l), “sexual contact with a detainee or prisoner” includes confinement for five years. *See infra* subsection 920(v)(6) at page 301 for interim maximum punishments.

Subsection 920(m) “indecent act” at page 296 is similar to the prohibition in *MCM*, Pt. IV, ¶ 87, except for the same changes discussed in subsection 920(k) at page 260 *supra*. The term, “indecent” is defined more clearly and specifically than in the *MCM* to improve notice. The term, “indecent” defines the same conduct that has been held to be indecent by military appellate courts. *See infra* subsection 920(u)(13) at page 299 for the definition of “indecent” and at page 277 for how “indecent” was derived. This same specificity in subsections 920(m) and 920(u)(13) is in numerous state statutes. The interim maximum punishment for indecent act includes confinement for five years. *See infra* subsection 920(v)(6) at page 301 for interim maximum punishments.

Subsection 920(n) “forcible pandering” at page 296 is prohibited by *MCM*, Pt. IV, ¶ 97b(2), implementing Article 134, UCMJ. Forcible pandering involves the accused compelling “a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused.” *Id.* at ¶ 97b(2)(a). In the *MCM*, forcible pandering is limited to sexual intercourse, whereas subsection 920(n) prohibits compelling sexual acts and sexual contacts. Subsection 920(n) does not require the Government to prove the conduct is prejudicial to good order and discipline or service discrediting. The term, “act of prostitution” is defined in § 920(u)(20) at page 300. The interim maximum punishment for subsection 920(n), “forcible pandering” is the same as in the *MCM*, and includes confinement for five years. *See infra* subsection 920(v)(6) at page 301 for interim maximum punishments.

Subsection 920(o) “wrongful sexual contact” at page 296 is verbatim from 18 U.S.C. § 2244(b), except “wrongful” has been added. Wrongful is defined in subsection 920(u)(11) at page 298. The subcommittee recommended not including subsection 920(o) because the same conduct is already prohibited by one UCMJ provisions, assault consummated by a battery under Article 128, UCMJ.

Additionally, subsection 920(h) at page 295 prohibits a sexual contact under the circumstances of subsection 920(c)(1)(B), which states, “Any person subject to this chapter who — (1) causes another person of any age to engage in a sexual act — by (B) causing bodily harm.” “Bodily harm” is defined at subsection 920(u)(8), page 298 as means any offensive touching of another, however slight,” the same level of bodily harm as under Article 128, UCMJ for assault consummated by a battery.

“Wrongful sexual contact” is included as subsection 920(o) to achieve consistency with Title 18, but with some skepticism concerning its utility. Only four reported cases mention 18 U.S.C. § 2244(b): (1) An airline passenger’s forcible sexual contact with an airline stewardess on two occasions during a flight violated 18 U.S.C.

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§§ 2244(b) and 2244(a)(1) (§ 2244(a)(1) prohibits knowingly engaging in or causing sexual contact with or by another person by force or threats). *See United States v. Jenny*, 7 F.3d 953 (10th Cir. 1993); (2) A deputy U.S. Marshal was convicted of 5 counts of sexual abuse under 18 U.S.C. § 2244(b) and two counts under § 2244(a)(2) (§ 2244(a)(2) prohibits knowingly engaging in or causing sexual contact with or by another person by “threatening or placing that other person in fear”). *See United States v. Urrabazo*, 234 F.3d 904 (5th Cir. 2000); (3) A federal employee fondled the breasts of another federal employee in violation of 18 U.S.C. § 2244(b). *See United States v. Bell*, 1991 U.S. App. LEXIS 19739 (6th Cir. 1991); and (4) A male airline passenger touched another passenger’s genitals while she was asleep. The defendant pleaded guilty to violating 18 U.S.C. § 2244(b), a misdemeanor. But it is clear his conduct actually violated 18 U.S.C. § 2244(a)(2), a felony. *See Wallace v. Korean Air*, 1999 U.S. Dist. LEXIS 4312 (S.D.N.Y. 1999).

The data provided by the Administrative Office of U.S. Courts, for 1999-2003, which lists the top four sexual abuse type-counts indicates only one person was prosecuted in U.S. District Court under 18 U.S.C. § 2244(b) during those four years. The person was found guilty of violating section 18 U.S.C. § 2244(b) and given probation. There were probably other prosecutions in Magistrate Courts for sexually offensive touchings under 18 U.S.C. § 2244(b) and/or 18 U.S.C. § 113(a)(5) (prohibits simple assault).

Including the offense of “wrongful sexual contact” with its element of “without that other person’s permission” may also cause some confusion. One benefit of subsection 920(a) over Article 120, UCMJ was the elimination of the element of “without consent.” This offense re-introduces the same concept by bringing back “without permission” as an element. Including “wrongful sexual contact” may also cause confusion with the definition of consent in subsection 920(u)(21) at page 300. Under the current *MCM*, a sexual touching “without permission” would be prosecuted as: (1) maltreatment under Article 93, UCMJ; (2) an assault consummated by a battery under Article 128, UCMJ; or (3) indecent assault under Article 134, UCMJ. *See MCM*, Pt. IV, ¶¶ 17 (maltreatment), 54(b)(2) (assault consummated by a battery) and 63 (indecent assault). *See also United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (finding a conviction of assault consummated by a battery legally insufficient because the victim’s failure to clearly manifest her lack of consent to backrubs in an office setting did not place the appellant on notice that she did not in fact consent); *see also R.C.M.* 916(j). In any event, the same conduct that is prohibited in subsection 920(o) is also prohibited by the new offense of prejudicial relationship involving sexual activity, *see infra* at page 318. Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(o) at page 296. The interim maximum punishment for subsection 920(o), “wrongful sexual contact” includes confinement for one year. *See infra* subsection 920(v)(6) at page 301 for interim maximum punishments.

Subsection 920(p) “indecent exposure” at page 296 is similar to the indecent exposure prohibition in *MCM*, Pt. IV, ¶ 88, except for three changes. First, the

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Government would no longer have to prove that the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. Second, subsection 920(p) lists the specific body parts that cannot be intentionally and indecently exposed. Third, “public view” is replaced with “public place.” In *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002), the court considered a case where Corporal Graham invited a 15-year old babysitter into his bedroom and then dropped his towel, exposing his penis to her. The *Graham* Court noted that Corporal Graham’s conduct met the elements, as established by case law for indecent liberties, which is a more serious offense than indecent exposure, and then distinguished a 1969 decision by the Court of Military Appeals that determined that similar conduct was not indecent exposure. The *Graham* Court held that Corporal Graham’s bedroom was a “public place,” explaining, “the purpose of criminalizing public indecency ‘is to protect the public from shocking and embarrassing displays of sexual activities. A person need not be in a public place to be a member of the public.’” *Id.* (citations omitted). The *Graham* Court cited the expansive view of “public place” in Arizona caselaw.

Subsection 920(p)’s indecent exposure is derived from ARIZ. REV. STAT. § 13-1402 (2004), which defines indecent exposure as follows:

A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

The term “public place” is defined in subsection 920(u)(14) at page 299 and is derived from the GA. CODE ANN. § 16-6-3(15) (2004), which states, “‘Public place’ means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.” Subsection 920(u)(14) at page 299 defines “public place” more broadly than “public view” under Article 134, UCMJ, and statutorily clarifies that *Graham*’s conduct is indecent exposure.

The term, “buttocks” is used in lieu of “anus” because due to the physical location of the “anus” it would very rarely be exposed. “Anus” is the “opening at the lower end of the alimentary canal.” THE AMERICAN HERITAGE STEDMAN’S MEDICAL DICTIONARY 56 (1995). Because some commercially available swimming attire exposes part of the buttocks, or exposure of other intimate body parts can be inadvertent, it is important that the indecent exposure subsection require specific, “indecent manner.” See subsection 920(p). DEL. CODE ANN. § 764 (2004), “Indecent exposure in the second degree,” provides a good listing of body parts that should remain unexposed to view stating:

(a) A male is guilty of indecent exposure in the second degree if he exposes his genitals or buttocks under circumstances in which he knows his conduct is likely to cause affront or alarm to another person.

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(b) A female is guilty of indecent exposure in the second degree if she exposes her genitals, breast or buttocks under circumstances in which she knows her conduct is likely to cause affront or alarm to another person.

See subsection 920(u)(13) at page 299 for the definition of “indecent” *infra*; and subsection 920(u)(15) at page 299 for the definition of “willful.” Subsection 920(s) at page 297, provides that marriage is an affirmative defense to violation of subsection 920(p) at page 296. The interim maximum punishment for subsection 920(p), “indecent exposure” includes confinement for one year. *See infra* subsection 920(v)(6) at page 301 for interim maximum punishments.

C. AFFIRMATIVE DEFENSES

Subsection 920(q) at page 296 explains when the age of the child is an affirmative defense. Subsection 920(q)(1) at page 296 is consistent with current military practice, and 18 U.S.C. § 2241(d), but it is best to provide statutory notice. 18 U.S.C. § 2241(d) states, “State of mind proof requirement.—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act has not attained the age of 12 years.” It is also clearer to specifically rule out mistake of age as an affirmative defense. “Affirmative defense” is defined at subsection 920(u)(23) at page 300.

Subsection 920(q)(2) at page 296 is consistent with current military practice, but it is better to provide statutory notice than to rely on existing caselaw for notice. 18 U.S.C. § 2243(d) states, “State of mind proof requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—(1) the age of the other person engaging in the sexual act.”

Subsection 920(r) at page 296 eliminates a potential defense to use of a dangerous weapon or object, stating, “Dangerous weapon or object. In a prosecution under subsections 920(a)(1) and 920(e), proof that the accused actually intended to engage in the threatened conduct or to use the dangerous weapon or object is not required.” Subsection 920(u)(5) at page 298, defines “force,” which is a term used in subsections 920(a) and 920(e). The explanation for how the term force was derived is at page 274. Subsection 920(u)(4) at page 297, defines “dangerous weapon or object,” Subsection 920(u)(4) is specifically limited to subsections 920(a)(1), 920(e) and 920(u)(5) (which defines “force”). A description of the derivation of “dangerous weapon or object” is at page 273.

Subsection 920(s) at page 297, as noted in the preceding paragraphs, establishes marriage as an affirmative defense to a prosecution for violating subsections 920(c)(2), 920(d), 920(i), 920(j), 920(k), 920(l), 920(m), 920(o), and 920(p). Subsection 920(u)(23) at page 300 defines “affirmative defense.” 18 U.S.C. § 2243(c)(2) establishes marriage as an affirmative defense to sexual activity with a ward or a minor. “Indecent assault” under Article 134, UCMJ, *MCM*, Pt. IV, ¶ 63b(1) includes as an element that the accused is not married to the other person. “Indecent acts or

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liberties with a child,” under Article 134, UCMJ, *MCM*, Pt. IV, ¶¶ 87b(1)(b) and 87b(2)(d) includes as an element that the accused is not married to the other person. Article 120(b)(1), UCMJ, explicitly lists lack of marriage as an element the prosecutor must prove for carnal knowledge. Under military law marriage is not a defense when the accused inflicts grievous bodily harm. *See United States v. Arab*, 55 M.J. 508, 516-519 (Army Ct. Crim. App. 2001) (discussing when consent is a defense to assault consummated by a battery resulting in injury). The *MCM* does not list marriage as an element for the crimes of indecent acts with another and indecent exposure under Article 134, UCMJ, or sodomy under Article 125, UCMJ.

The affirmative defense of marriage, however, should not exist if the accused is acting in bad faith. The language describing intent at the time of the sexual conduct to “abuse, humiliate, or degrade any person” is from 18 U.S.C. §§ 2246(2)(D) and 2246(3), and also appears in the definitions of “sexual act” and “sexual contact.” *See infra* subsections 920(u)(1) and 920(u)(2) at page 297. Marriage as an affirmative defense is superior to requiring the Government to prove lack of the marital relationship. “A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction” is verbatim from *MCM*, Pt. IV, ¶ 62c(3). The source for the sentence, “A marriage is a relationship between the accused and the other person as spouses, which is recognized by the laws of a competent state or foreign jurisdiction,” is the definition of the term “marriage” in N.Y. PENAL § 130.00 (Consol 2004), which provides, “§ 130.00.4. For the purposes of this article ‘married’ means the existence of the relationship between the actor and the victim as spouses which is recognized by law at the time the actor commits an offense proscribed by this article against the victim.”

Subsection 920(t) at page 297 explains when consent and mistake of fact as to consent are affirmative defenses. “Consent” is defined in subsection 920(u)(21) at page 300. “Mistake of fact as to consent” is defined in subsection 920(u)(22) at page 300. “Affirmative defense” is defined at subsection 920(u)(23) at page 300.

Defining when “consent” and “mistake of fact as to consent” are affirmative defenses is modeled primarily from MICH. COMP. LAWS § 750.225(4)(2004):

(4) CONSENT.

“Consent”, as used in this section means words or over actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subparagraphs (2)(c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent, but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2).

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

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(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

In regard to the situations where “consent is not an issue,” MICH. COMP. LAWS § 750.225(2) (2004) provides, “Whoever does any of the following is guilty of a Class C felony:

(c) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.

(cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicate to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(g) Is an employee of a facility or program under § 940.295(2)(b), (c), (h) or (k) and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program.

(h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(i) Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision, if the actor is a probation, parole, or extended supervision agent who supervises the individual either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or who has influenced or attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

D.C. CODE ANN. 22-3007 (2004) “defense to sexual abuse [Formerly § 22-4107]” provides:

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Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.

D.C. CODE ANN. § 22-3001(4) (2004) defines consent as follows:

(4) "Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.

D.C. CODE ANN. § 22-3011 (2004) defines "defenses to child sexual abuse [Formerly § 22-4111]" as follows:

(a) Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.

See Russell v. United States, 698 A.2d 1007, 1009 (D.C. App. 1997).

Subsection 920(t), like MICH. COMP. LAWS § 750.225(4)(2004) and D.C. CODE ANN. § 22-3011 (2004), states when "consent" and "mistake of fact as to consent" are not an issue.

Much of the sexual conduct prohibited by section 920 is *per se* criminal, and there is no affirmative defense of consent or mistake of fact as to consent. Consistent with current military law, subsections 920(b), at page 294; 920(d), at page 295; 920(f) at page 295; 920(g), at page 295; 920(i), at page 295; and 920(k), at page 296; do not include these two defenses because the sexual offenses involve child-victims.

As to new subsections 920(j), at page 295; and 920(l), at page 296; consent and mistake of fact as to consent are not affirmative defenses because of the status or position of the victim as in MICH. COMP. LAWS § 750.225(2)(g), (2)(h) and (2)(i)(2004).

Consistent with current military law, for subsections 920(m) (indecent act—at page 296), and 920(p) (indecent exposure—at page 296), consent and mistake of fact as to consent are not affirmative defenses because the conduct involved is "indecent." For example, if the accused exposes himself in a public area, this conduct constitutes indecent exposure, regardless of consent of the other party who views the exposure. Lack of "permission" is an element in 18 U.S.C. § 2244(b) and in "wrongful sexual contact" subsection 920(o) at page 296, which mirrors 18 U.S.C. § 2244(b). *See* discussion for subsection 920(o), at page 261 *supra*.

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Subsection 920(t) at page 297 provides that lack of permission is an element for subsection 920(o). Subsection 920(t) provides that “consent” and “mistake of fact as to consent” are affirmative defenses for sexual conduct in issue in a prosecution under subsections 920(a), 920(c), 920(e), and 920(h). Describing when these two affirmative defenses apply is based on D.C. CODE ANN. 22-3007 (2004) “defense to sexual abuse [Formerly § 22-4107]” provides:

Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.

D.C. CODE ANN. § 22-3001(4) (2004) defines consent as follows:

(4) ”Consent” means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.

See Russell v. United States, 698 A.2d 1007, 1009 (D.C. App. 1997).

D.C. CODE ANN. § 22-3002 (2004), “first degree sexual abuse” provides:

(a) . . . if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

- (1) By using force against that other person;
- (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;
- (3) After rendering that other person unconscious; or
- (4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

D.C. CODE ANN. § 22-3003 (2004), “second degree sexual abuse” provides:

. . . if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

- (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or
- (2) Where the person knows or has reason to know that the other person is:
 - (A) Incapable of appraising the nature of the conduct;
 - (B) Incapable of declining participation in that sexual act; or

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(C) Incapable of communicating unwillingness to engage in that sexual act.

D.C. CODE ANN. § 22-3004 (2004), “third degree sexual abuse” provides:

. . . if that person engages in or causes sexual contact with or by another person in the following manner:

- (1) By using force against that other person;
- (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;
- (3) After rendering that person unconscious; or
- (4) After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

D.C. CODE ANN. § 22-3005 (2004), “fourth degree sexual abuse” provides:

. . . if that person engages in or causes sexual contact with or by another person in the following manner:

- (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or
- (2) Where the person knows or has reason to know that the other person is:
 - (A) Incapable of appraising the nature of the conduct;
 - (B) Incapable of declining participation in that sexual contact; or
 - (C) Incapable of communicating unwillingness to engage in that sexual contact.

D.C. CODE ANN. § 22-3006 (2004), “misdemeanor sexual abuse” provides:

Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person’s permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not to exceed \$ 1,000.

See Michigan v. Stull, 127 Mich. App. 14, 20-21, 338 N.W.2d 403, 406-07 (1983) (stating that under MICH. COMP. LAWS § 750.520b(1)(d)(ii)(2004) consent is an affirmative defense to forcible sexual penetrations, even though not statutorily required); *People v. Thompson*, 117 Mich. App. 522, 528, 324 N.W.2d 22 (1982); *Nebraska v. Koperski*, 254 Neb. 624, 634, 578 N.W.2d 837, 844 (1998) (citations omitted) (stating that even if lack of consent is not a statutory element, “consent may operate as a failure of proof in regard to the essential element of the use of force, or in regard the essential element that the victim must be overcome”).

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Once these two affirmative defenses are established by a preponderance of the evidence, the Government is required to prove beyond reasonable doubt that the victim did not consent, and/or that the accused was not reasonably mistaken as to consent. *See Hicks v. United States*, 707 A.2d 1301 (D.C. App. 1998); *Russell*, 698 A.2d at 1017 (reversed because trial judge failed to give consent instruction in prosecution similar to subsections 920(a)(1), and 920(a)(3)).

Typically a defendant will not attempt a “consent” or “mistake of fact as to consent” defense without also contesting the underlying element(s). When this occurs, the fact finder will be required to resolve conflicts in testimony and evidence. For example, the victim testifies that the accused threatened to inflict grievous bodily harm unless she engages in sexual intercourse. This threat caused her to comply with the accused’s sexual demand. The accused testifies that no such threats were made and the intercourse was voluntary and consensual. The accused’s testimony is sufficient to raise the consent defense, and the military judge, like a judge in U.S. District Court on similar facts, would instruct the fact finder about consent. *See e.g., United States v. Grassrope*, 342 F.3d 866 (8th Cir. 2003) (noting issue was narrowed in prosecution under 18 U.S.C. § 2241 to consent of 17-year old babysitter to defendant’s sexual penetration); *United States v. Chipps*, 299 F.3d 962 (8th Cir. 2002) (discussing consent defense in prosecution under 18 U.S.C. § 2241 to sexual penetration of 16-year); *United States v. Ramone*, 218 F.3d 1229 (10th Cir. 2000) (defendant presented consent defense to sexual penetrations); *United States v. Platero*, 72 F.3d 806 (10th Cir. 1995); *United States v. Norquay*, 987 F.2d. 475 (8th Cir. 1993) (holding that the matter of a reasonable mistake [as to consent] is an affirmative defense that requires the defendant to introduce some evidence, direct or circumstantial, of a reasonable basis for having made a mistake.”); *United States v. Tollinchi*, 54 M.J. 80, 82-83 (C.A.A.F. 2000) (holding successful resistance by intoxicated 17-year old victim to oral sodomy, followed by lack of resistance to intercourse, rendered rape conviction legally insufficient); *United States v. Bonano-Torres*, 31 M.J. 175, 178 (stating “*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 [in rape.]*”) (alteration in original)(citation omitted), *see also United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003) (discussing when mistake of fact as to consent instruction is required). The judge instructs the fact finder that the Government has to prove that the threat to commit grievous bodily harm was made (an element), and that victim did not consent (affirmative defense) beyond a reasonable doubt. *See* the definition of consent in subsection 920(u)(21) at page 300.

D. DEFINITIONS UNDER SUBSECTION 920(u).

Subsection 920(u)(1) at page 297 defines “sexual acts” and is similar to 18 U.S.C. § 2246(2)(A)-(C). In subsection 920(u)(1)(A), the words and figures, “subsection 920(u)(1)(A)” are substituted for “this subparagraph” because it is more specific.

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Military practitioners are familiar with the terms, “sexual act” and “sexual contact” as defined in 18 U.S.C. §§ 2246(2) and 2246(3). In the current *MCM*, these two terms are repeated verbatim in Military Rule of Evidence 413(e), Evidence of similar crimes sexual assault cases and in Military Rule of Evidence 414(e), Evidence of similar crimes in child molestation cases.

18 U.S.C. § 2246(2)(D) is moved to subsection 920(u)(10)(A) at page 298 because this conduct, “the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person,” is inconsistent with traditional concepts of “rape” and “rape of a child,” (generally understood to require a penetration of the genitals) which is the label of the offenses in subsections 920(a) at page 294, and subsection 920(b) at page 294. If the Congress chooses to use the terminology, for the two most serious offenses in 18 U.S.C. § 2241 of “aggravated sexual abuse” and “aggravated sexual abuse of a child,” in lieu of “rape,” and “rape of a child” then subsection 920(u)(10), at page 298 should be moved into subsection 920(u)(1), which will cause it to more closely conform with 18 U.S.C. § 2246(2), and subsection 920(f) should be deleted.

In *United States v. Sagg*, 125 F.3d 1294, 1295-96 (9th Cir. 1997), the defendant put a sleeping child’s hand on his penis. She did not wake up. Sagg argued that he could not be convicted because the statute did not specify that the accused’s intent was required, and there was no evidence of the child’s intent. The Ninth Circuit determined the touching must be based on the defendant’s, rather than the victim’s conscious motive. Subsection 920(u)(10)(B) specifically prohibits “intentionally causing another person to touch, not through the clothing, the genitalia of any person” in order to prohibit situations as in *Sagg* where the accused causes the child-victim to touch the accused’s genitalia.

Additionally, it is important to include those situations where a person is forced to masturbate. As such, subsection 920(u)(10)(A) includes as a lewd act those cases where the touching involves victims who is especially vulnerable to abuse, such as children (subsection 18 U.S.C. § 2246(2)(D) includes a separate provision applicable to victims under the age of 16 years), prisoners, and detainees. It covers those situations, for example, where a guard forces a prisoner or detainee or a step parent forces a child to masturbate for their amusement or to abuse and humiliate the prisoner or trainee. Under 18 U.S.C. § 2246(2) or 2246(3), causing a prisoner or child to masturbate might not constitute a “sexual act” or a “sexual contact” because the defendant and the victim were not touching each other.

Subsection 920(u)(10)(B), at page 298 is not in 18 U.S.C. § 2246(2). Subsection 920(u)(10)(B) is limited to subsections 920(f) or 920(l). Subsection 920(u)(10)(B) states, “(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person.”

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The word, “harass” is deleted from subsections 920(v)(1)(B) and 920(u)(10) because it is a synonym for the words humiliate and abuse. Harass is often used in the context of sexual harassment, and its use here could cause confusion. The Department of Defense is in the process of defining “sexual harassment” to clarify the scope of the Equal Opportunity program, and sexual harassment is already used in the *MCM* explanation of maltreatment under Article 93, UCMJ.

Subsection 920(u)(2) at page 297 defines “sexual contact” as in 18 U.S.C. § 2246(3), except “or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person,” is added. This additional phrase is added to subsection 920(u)(2) for the same reason this phrase was added to 920(u)(10)(B) was added. *See supra* page 270.

Subsection 920(u)(3) at page 297 defines the term, “grievous bodily harm” which is used in subsection 920(a)(2) at page 294 in lieu of “serious bodily harm” in 18 U.S.C. § 2241(a). Grievous bodily harm is a familiar term to military practitioners, and is a lesser degree of injury than “serious bodily injury,” as defined in 18 U.S.C. § 2246(4). The term, “grievous bodily harm” is used in 10 U.S.C. § 928(b)(1) and (b)(2), aggravated assault, and is defined in the *MCM*, Pt. IV, ¶ 54(c)(4)(iii) as follows:

“Grievous bodily harm” means serious bodily injury. It does not include minor injuries, such as a black eye or bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

Subsection 920(u)(3) defines this terms as follows:

“Grievous bodily harm” means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in 10 U.S.C. § 928(b), and a lesser degree of injury than in 18 U.S.C. § 2246(4).

In contrast, 18 U.S.C. § 2246(4) defines the term, “serious bodily injury” as “bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

In subsection 920(u)(3)’s definition of “grievous bodily harm,” the words “serious bodily injury” in subsection 920(u)(3) are the same as in 18 U.S.C. § 2246(4). As a result, courts interpreting subsection 920(u)(3) might think that they are to follow the definition in 18 U.S.C. § 2246(4). Thus, subsection 920(u)(3) concludes with a clarifying sentence. “Grievous bodily harm” in subsection 920(u)(3) starts with what this term includes before stating what it does not include.

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MCM, Pt. IV, ¶ 54(c)(4)(iii) should be amended to more precisely conform with subsection 920(u)(3).

Subsection 920(u)(4) at page 297 defines the term, “dangerous weapon or object.” Subsection 920(u)(4) is specifically limited to subsections 920(a)(1), 920(e) and 920(u)(5) (which defines “force”) to avoid confusion with *MCM*, Pt. IV, ¶ 54c(4)(a)(I). The current *MCM* definition in *MCM*, Pt. IV, ¶ 54c(4)(a)(I) of a dangerous weapon is inadequate because it requires the use of the weapon in a manner likely to produce death or grievous bodily harm. The *MCM* definition does not prohibit the displaying of a weapon. A perpetrator displaying a weapon or object to a victim can be extremely coercive. The *MCM* definition of a dangerous weapon also fails to consider cases in which the accused claims to have a weapon and through his actions displays an item that the victim believes is a weapon.

The best definition of a “dangerous weapon or object” for use in the military is a combination of the Illinois and the Hawaii definitions. Hawaii’s definition is comprehensive and specifically tailored to prohibit the use of deadly weapons in cases involving sexual assaults. The definition specifically prohibits the use of firearms and generally prohibits the use of other weapons. The “dangerous weapon or object” definition includes the accused’s actual use of the weapon and the weapon’s intended use. By including both the actual use and intended use of the dangerous weapon or object, the definition more accurately defines the criminal use of weapons in a sexual assault. The HAW. REV. STAT. § 707-700 (2002) defines force-dangerous instrument in its sexual assault statutes as any “firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”

The Illinois definition includes the concept of the reasonable belief of the victim, as opposed to viewing the situation from the standpoint of the accused. The Illinois definition of force-dangerous weapon is:

the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon

See 720 ILL. COM. STAT. 5/12-14(a)(1) (2004). Another approach is to make a list of dangerous weapons. Iowa defines dangerous weapons as including, “any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.” IOWA CODE § 702.7 (2002). The Iowa definition specifically listing types of weapons is inadequate because the items that can be used as weapons are almost limitless. An attempt to list them all is nearly impossible. For this reason, the Iowa statutory scheme was not selected.

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Subsection 920(u)(5) at page 298 defines “force.” It includes use of a dangerous weapon or object, which is defined at subsection 920(u)(4). Subsection 920(u)(5) is from a variety of sources. In *United States v. Jones*, 104 F.3d 193, 197 (8th Cir. 1997), a commissary employee was sexually assaulted by another commissary employee in a storeroom. The Eighth Circuit noted that force is not defined in 18 U.S.C. § 2246, but stated, “the amount of force required under the statute need be only ‘restraint . . . sufficient that the other person could not escape the sexual conduct.’” *Id.* (citing *United States v. Fire Thunder*, 908 F.2d 272, 274 (8th Cir. 1990)). In *United States v. Lauck*, 905 F.2d 15, 17 (2d Cir. 1990) (affirming defendant’s conviction under 18 U.S.C. § 2241(a)(1) because he put his arms around the victim and held her in a corner and then fondled her in a sexual manner), stating:

The statute does not define “force” or specify the amount of force necessary for a violation of section 2244(a)(1). The legislative history of the statute, the Sexual Abuse Act of 1986, Pub. L. No. 99-654, 100 Stat. 3660, however, states that “the requirement of force may be satisfied by a showing of . . . the use of such physical force as is sufficient to overcome, restrain, or injure a person. . . .” H.R. REP. NO. 594, 99th Cong., 2d Sess. 14 n. 54a, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6186, 6194 n. 54a.

See also *United States v. Weekley*, 130 F.3d 747, 754 (6th Cir. 1997) (stating, “A force sufficient to sustain a conviction under 18 U.S.C. § 2241(a) includes ‘the use of such physical force as is sufficient to overcome, restrain or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.’”). NEB. REV. STAT. ANN. § 28-318(9) (Michie 2004) provides an example of a state definition of force:

(9) Force or threat of force means (a) the use of physical force which overcomes the victim’s resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

R.I. GEN. LAWS § 11-37-1(2) (2004) is another example of a state definition of force:

(2) “Force or coercion” means when the accused does any of the following:

(i) Uses or threatens to use a weapon, or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(ii) Overcomes the victim through the application of physical force or physical violence.

(iii) Coerces the victim to submit by threatening to use force or violence on the victim and the victim reasonably believes that the accused has the present ability to execute these threats.

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(iv) Coerces the victim to submit by threatening to at some time in the future murder, inflict serious bodily injury upon or kidnap the victim or any other person and the victim reasonably believes that the accused has the ability to execute this threat.

Subsection 920(u)(6) at page 298 defines threats under subsections 920(a)(3) at page 294, and subsection 920(e) at page 295 to be “a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping.” An objective standard is used. Subsection 920(u)(6) provides contrast with the 920(u)(7) by differentiating between levels of threats.

Subsection 920(u)(7) at page 298 elaborates on degrees of threats that are lesser than death, grievous bodily harm, or kidnapping. Subsection 920(u)(7) recognizes that other threats or coercion will also be sufficient to turn a sexual act into “aggravated sexual assault” under subsection 920(c)(1)(A) or an “abusive sexual contact” under subsection 920(h). Whether a threat or coercion is of sufficient consequence depends upon the circumstances of each case. Subsection 920(u)(7) prohibits causing someone from engaging in a sexual act in the following example scenarios: (1) an accused obtains a videotape of sexual activity involving a person, and then threatens to provide the videotape to the person’s spouse or family members or place the videotape on the internet, unless someone engages in sexual acts; (2) an accused-officer promises a career enhancing assignment, evaluation or award in exchange for sexual acts; (3) an accused noncommissioned officer threatens to remove someone from a course, initiate discharge proceedings or prefer charges unless someone engages in sexual acts; and (4) an accused threatens to inform others that a person is infected with HIV. Requiring the fear to be reasonable makes the test objective rather than subjective. It is important that this provision not be drafted too narrowly or too broadly. An example of coercion is TEX. PENAL CODE § 1.07(a)(9) (2004), which states:

“Coercion” means a threat, however communicated:

- (A) to commit an offense;
- (B) to inflict bodily injury in the future on the person threatened or another;
- (C) to accuse a person of any offense;
- (D) to expose a person to hatred, contempt, or ridicule;
- (E) to harm the credit or business repute of any person; or
- (F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

Another example, the MODEL PENAL CODE § 212.5, Criminal Coercion, is defined as follows:

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another’s freedom of action to his detriment, he threatens to:

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- (a) commit any criminal offense; or
- (b) accuse anyone of a criminal offense; or
- (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
- (d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

Another example is DEL. CODE. ANN. tit. 11, § 776 (2004), which states:

Sexual extortion; class E felony

A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will:

- (1) Cause physical injury to anyone;
- (2) Cause damage to property;
- (3) Engage in other conduct constituting a crime;
- (4) Accuse anyone of a crime or cause criminal charges to be instituted against anyone;
- (5) Expose a secret or publicize an asserted fact, whether true or false, intending to subject anyone to hatred, contempt or ridicule;
- (6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (7) Perform any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

Subsection 920(u)(8) at page 298 defines the term "bodily harm" as any offensive touching of another, however slight. This definition pertains to assault consummated by a battery and is from *MCM*, Pt. IV, ¶ 54c(1)(a).

Subsection 920(u)(9) at page 298 defines "child," eliminating potential confusion between minors and children. 18 U.S.C. § 2241(b) defines a child as a person under the age of 12. Under traditional military law, a child is a person under the age of 16 years. *See e.g.*, Article 43(b)(2)(B), UCMJ (as amended Nov. 24, 2003

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changing statute of limitations for offenses involving children) and *MCM*, Pt. IV, ¶ 87c(2) (explaining indecent liberties with a child under the age of 16).

Subsection 920(u)(10) at page 298, states, “(10) ‘lewd act’ under subsections 920(f) and 920(l) means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person.” The rationale for subsection 920(u)(10) is included in the explanation for subsection 920(u)(1), sexual act, at page 270.

Subsection 920(u)(11) at page 298 defines “wrongful” the same as in *MCM*, Pt. IV, ¶ 37c(5).

Subsection 920(u)(12)’s definition at page 298 of “indecent liberty” is from *MCM*, Pt. IV, ¶ 87c(2), except instead of “private parts,” the words, “genitalia, anus, or female areola or nipple,” are used. Because some commercially available swimming attire exposes part of the buttocks, or exposure of other intimate body parts can be inadvertent, it is important that the statute require specific, indecent intent. These terms for private parts are from ARIZ. REV. STAT. § 13-1402 (2004), and is also the same list of private parts used in Option 5’s indecent exposure. The sentence, “If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct the conduct is indecent and the child’s consent is not relevant.” is added to statutorily overrule *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002), which held the factual consent of the child is relevant to whether the conduct is indecent. This definition is consistent with subsection 920(t) at page 297, which explicitly states that consent is not a defense to “indecent liberty with a child,” subsection 920(k) at page 296.

Subsection 920(u)(13) at page 299, defines “indecent” the same as *MCM*, Pt. IV, ¶ 90c, as “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.” The language is changed slightly, and “lust” is replaced with “sexual desire” which is consistent with the definitions of sexual act and sexual contact in subsections 920(u)(10) and 920(u)(2).

Subsection 920(u)(13)(A) provides notice and specifically informs service members that public sexual conduct is criminal. The first sentence in this definition is verbatim from *MCM*, Pt. IV, ¶ 90c.

COLO. REV. STAT. § 18-3-404 (1.7) (2004) states, for example:

(1.7) Any person who knowingly observes or takes a photograph of another person’s intimate parts without that person’s consent, in a

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situation where the person observed has a reasonable expectation of privacy, for the purpose of the observer's own sexual gratification, commits unlawful sexual contact. For purposes of this subsection (1.7), "photograph" includes any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material.

An example, that does not include "for the purpose of the observer's own sexual gratification," is N.J. STAT. § 2C: 14-9 (2004), "Invasion of privacy, degree of crime; defenses, privileges" which states:

a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

Subsection 920(u)(13)(C) at page 299 specifically criminalizes surreptitious viewing, videotaping, or photographing others engaged in sexual activity, urinating, defecating or showering. *See, e.g., United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994) (affirming indecent acts with another for secretly videotaping victims); *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993) (affirming indecent acts with another for voyeurism); *but see United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978) (holding accused's act of voyeurism by secreting himself in a women's restroom and peering into toilet stalls was service discrediting, but not an indecent act *with another*).

Under the *MCM*, to find a service member guilty of indecent acts with another, requires the fact finder to determine under the totality of circumstances that the conduct at issue is indecent, and prejudicial to good order and discipline or service discrediting. The trial judge is not permitted to provide examples of conduct found to meet these standards. At the appellate level, however, military law recognizes that some sexual acts are "indecent conduct *per se*." *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000) (holding sexual activity between twelve-year-old daughter and her natural father was indecent *per se*); *see also United States v. Gaskin*, 12 U.S.C.M.A. 419, 420-21, 31 C.M.R. 5, 6-7 (1961) (holding appellant's act of placing his penis between the legs of a male child was an indecent act that "fairly shouts its criminal nature"); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34

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(1960) (holding anal sodomy of a chicken is indecent act with another); *United States v. Mabie*, 24 M.J. 711, 713 (A.C.M.R. 1987) (sexual acts with corpse are indecent).

Most state statutes are specific about the indecent conduct that is criminal. N.Y. PENAL § 130.20 (Consol 2004) is an example of such a state statute providing, “§ 130.20.3. Sexual misconduct. A person is guilty of sexual misconduct when: . . . He or she engages in sexual conduct with an animal or a dead human body. Sexual misconduct is a class A misdemeanor.”

Another example is DEL. CODE. ANN. tit. 11, § 777 (2004), “bestiality,” which states, “A person is guilty of bestiality when the person intentionally engages in any sexual act involving sexual contact, penetration or intercourse with the genitalia of an animal or intentionally causes another person to engage in any such sexual act with an animal for purposes of sexual gratification.” While these offenses are rare, like the states, and Article 125, UCMJ, it is appropriate to continue their prohibition in subsection 920(m), indecent act. Another example statute prohibiting similar indecent conduct is TEX. PENAL CODE ANN. 21.07, Public Lewdness (2004), which states:

- (a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:
 - (1) act of sexual intercourse;
 - (2) act of deviate sexual intercourse;
 - (3) act of sexual contact; or
 - (4) act involving contact between the person’s mouth or genitals and the anus or genitals of an animal or fowl.
- (b) An offense under this section is a Class A misdemeanor.

Subsection 920(u)(14) defines the term, “public place” and is derived from GA. CODE ANN. § 16-1-3 (15) (2004), which states, “‘Public place’ means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.”

Subsection 920(u)(15) at page 308 defines the term, “willful” and is verbatim from *MCM*, Pt. IV, ¶ 88c.

Subsection 920(u)(16) at page 299 defines “detainee” for purposes of subsections 920(j)(1) and 920(l), at page 295, based on terms provided by the Army Office of The Judge Advocate General (International Law) (OTJAG). OTJAG’s source is a draft regulation pertaining to detainee operations overseas.

Subsections 920(u)(17), 920(u)(18), and 920(u)(19), at pages 299 to 299 define, “custody,” “confinement,” and “correctional custody” imposed under 10 U.S.C. § 815. “Custody” is derived from *MCM*, Pt. IV, ¶19c(4)(a). “Confinement” applies to protect confinees whether in pretrial or post-trial confinement. All three definitions pertain to

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subsections 920(j) and 920(l), at pages 295 and 296, respectively, which protect detainees and prisoners from sexual abuse by guards and other custodians.

Subsection 920(u)(20) at page 300 defines “act of prostitution” and is from *MCM*, Pt. IV, ¶ 97b(2)(a), except the *MCM* limits an act of prostitution to sexual intercourse, and this provision like many states prohibits all sexual acts, sexual contacts and lewd acts for the purpose of receiving money or other compensation. Subsections 920(u)(1) and 920(u)(2) at pages 297 and 297, respectively, define sexual acts and contacts. “Act of prostitution” is used in subsection 920(n), “forcible pandering,” at page 296.

Subsection 920(u)(21), defines “consent” at page 300.

The following language in subsection 920(u)(21) is from the definition of consent as an affirmative defense is ILL. COMP. STAT.5/12-17 (2004):

“Consent” means words or overt acts indicating a freely given agreement to the sexual act or sexual contact in question by a competent person. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. The manner of dress of the person involved with the accused in the sexual activity at issue shall not constitute consent.

Subsection 920(u)(21) uses language from CAL. PENAL CODE § 261.1 (Deering 2004), which states, under certain subsections, “‘consent’ shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue . . .”

The sentence in subsection 920(u)(21), “An expression of lack of consent through words or conduct means there is no consent” is known as a “no means no” provision, and is from UTAH CODE ANN. § 76-5-406(1) (2004). *See also United States v. Ayers*, 54 M.J. 85, 97 (C.A.A.F. 2000) (Crawford, C.J., dissenting) (urging the majority not to set aside indecent assault conviction of NCO-instructor because the trainee-victim told him to stop poking her with his penis, and he nevertheless continued to do so. The majority stated that her previous behavior established her consent as a matter of law).

Military law states that “a person is capable of consenting to an act of sexual intercourse unless her mental ability is so severe that she is incapable of understanding the act, its motive, and its possible consequences.” *See* Department of the Army Pamphlet 27-9, MILITARY JUDGE’S BENCHBOOK, Change 1 (15 September 2002) [hereinafter BENCHBOOK], ¶ 3-45-1d n.10. The BENCHBOOK is the most frequently updated source of military criminal law on crimes and defenses and is available at

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Army Court of Criminal Appeals Library link at <https://www.jagcnet.army.mil/ACCA>. See also D.C. CODE § 22-3001(4) (2004); DEL. CODE. ANN. tit. 11, § 761(h) (2004); FLA. STAT. ANN. § 794.011 (1)(a) (West 2004); N.Y. PENAL § 130.05 (Consol 2004); WIS. STAT. ANN. § 940.225(4) (2004), other sources for this definition of consent.

Subsection 920(u)(21) at page 300 ensures there is no consent defense in situations where the victim is physically or mentally unable to consent regardless of the sexual offense charged. While subsection 920(a)(4) at page 294, subsection 920(a)(5) at page 294, and subsection 920(c)(2) at page 295 specifically criminalize sexual acts with a victim who is unconscious, or physically unable to consent, an accused might be charged with a sexual offense under a subsection other than 920(a)(4), 920(a)(5), and 920(c)(2) where consent could be in issue.

Subsection 920(t) at page 297 explains when “consent” is an affirmative defense.

Subsection 920(u)(22) at page 300 adds transparency and notice to the UCMJ by defining mistake of fact as to consent. It does not change existing military law. R.C.M. 916(j)(1) generally defines mistake of fact. Caselaw explains that mistake of fact as to consent in general intent crimes, such as rape, must be reasonable, and not negligent. Voluntary intoxication is irrelevant to determining negligence. See *United States v. Binegar*, 55 M.J. 1 (C.A.A.F. 2001); *United States v. True*, 41 M.J. 424 (C.A.A.F. 1995); *United States v. Jackson*, 50 M.J. 868 (Army Ct. Crim. App. 1999). BENCHBOOK, ¶ 5-11-2. Under military law, mistake of fact as to consent is an affirmative defense that can be raised by “some evidence.” In *United States v. Brown*, 43 M.J. 187, 190 n.3 (C.A.A.F. 2003), the court stated that trial judges should, “INSTRUCT ON REASONABLE AND HONEST MISTAKE IN ALL RAPE CASES INVOLVING CONSENT UNLESS THE DEFENSE COUNSEL AGREES THAT THE DEFENSE IS NOT RAISED.” (emphasis in original), but see *United States v. Hibbard*, 58 M.J. 71, 76-77 (C.A.A.F. 2003) (holding that mistake of fact was not raised by the evidence where defense argued sexual activity never occurred). Requiring the defense to be raised by a preponderance of the evidence clarifies that more is required than “some evidence” to raise a defense. See subsection 920(u)(23) (describing standard for raising affirmative defenses). A thorough outline on military crimes and defenses is available at Army Court of Criminal Appeals Library link at <https://www.jagcnet.army.mil/ACCA>.

Subsection 920(u)(23) at page 300 defines “affirmative defense” and is consistent with R.C.M. 916(a) and (b). “Affirmative defense” means “any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The enumeration in section 920 of some affirmative defenses shall not be construed as excluding the existence of others.” The sentence, “The enumeration in section 920 of some affirmative defenses shall not be construed as excluding the

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existence of others.” is from the definition of affirmative defenses in GA. CODE ANN. § 16-1-3 (1) (2004).

E. EXPLANATION FOR INTERIM MAXIMUM PUNISHMENTS. Any change to UCMJ substantive offenses should include interim maximum punishments. Assuming section 920 rescinds and replaces the current 10 U.S.C. Sections 920, and/or 925, their replacements should specify and include the new interim maximum punishments. Otherwise offenses which occur after the enactment of section 920, but before the President signs an executive order under 10 U.S.C. § 856 providing for new punishments could result in offenses that cannot be prosecuted under either the old or new Section 920.

The maximum confinement for offenses under Title 18 is not equivalent to maximum confinement under the UCMJ because military prisoners are eligible for parole and clemency. Parole is very unusual unless an inmate has served at least a year of their sentence to confinement, and at least one third of their sentence to confinement, whichever is greater. *See* Department of Defense Instruction Number 1325.7, “Administration of Military Correctional Facilities and Clemency and Parole Authority,” (updated June 10, 2003), paragraph 6.16 (discusses parole eligibility considerations). Available at <http://www.dtic.mil/whs/directives/corres/pdf2/i13257p.pdf>. Congress abolished parole under Title 18 offenses effective November 1, 1987, with enactment of the Sentencing Reform Act of 1984, when it repealed and replaced the The Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219 (codified as amended at 18 U.S.C. §§ 4201-4218 (1982) (repealed 1984, effective 1987)). *See* Pub. L. No. 98-473, §§ 212, 218, 98 Stat. 1987, 2027 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86, 28 U.S.C. §§ 991-98 (1988)); *Bledsoe v. United States*, 384 F.3d 1232, 1233 (10th Cir. 2004). Most military prisoners who are confined more than three years are eventually paroled, however, most serve well over one-third of their sentences to confinement before being paroled. Thus, higher maximum sentences to confinement are warranted under subsection 920 than for equivalent offenses under Title 18.

INTERIM MAXIMUM PUNISHMENTS UNDER SUBSECTION 920(v)

Subsection 920(v)(1) at page 301 sets an interim maximum punishments for “rape,” subsection 920(a) at page 294 and for “rape of a child,” subsection 920(b) at page 294. Article 120, UCMJ, sets death as the maximum punishment, but R.C.M. 1004 further limits the application of the death penalty. The maximum punishment for violation of 18 U.S.C. § 2241(a)-(c) includes confinement for life, but it does not include the death penalty. The maximum penalty for forcible sodomy under Article 125, UCMJ, includes confinement for life without eligibility for parole. *See MCM*, Pt. IV, ¶¶ 45e (rape) and 51e (sodomy).

Subsection 920(v)(2) at page 301 sets an interim maximum confinement of thirty years for “aggravated sexual assault,” subsection 920(c) at page 294. The maximum confinement for violation of 18 U.S.C. § 2242 is twenty years. “Aggravated sexual

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assault” is a type of rape or forcible sodomy in the current *MCM*. The current *MCM* maximum confinement for attempted rape or attempted forcible sodomy is 20 years confinement.

Subsection 920(v)(3) at page 301 sets an interim maximum confinement of twenty years for “aggravated sexual assault on a child who has attained the age of 12 years, but has not yet attained the age of 16 years,” subsection 920(d) at page 295. The maximum confinement is fifteen years for violation of 18 U.S.C. § 2243(a). This offense in the current *MCM* is defined as carnal knowledge, which is sexual intercourse with a person age twelve years to fifteen years. Carnal knowledge has a maximum confinement of twenty years. *See MCM*, Pt. IV, ¶ 45e(2). Currently sodomy with a person under age sixteen in the *MCM* has a maximum confinement of twenty years. *See MCM*, Pt. IV, ¶ 51e(2).

Subsection 920(v)(3) at page 301 sets an interim maximum confinement of twenty years for “aggravated sexual contact,” subsection 920(e) at page 295. The maximum confinement for attempted violation of 18 U.S.C. § 2241 is confinement for life and for violation of 18 U.S.C. § 2244(a)(1) is confinement for ten years. The maximum confinement for attempted rape and attempted forcible sodomy under Article 80, UCMJ, is twenty years. *See MCM*, Pt. IV, ¶ 4e. The maximum confinement for assault with intent to commit rape is twenty years, assault with intent to commit sodomy is ten years, indecent acts with a child is seven years, and for indecent assault is five years, under Article 134, UCMJ. *See MCM*, Pt. IV, ¶¶ 64e(1)(assault with intent to commit rape), 64e(2) (assault with intent to commit sodomy), 87e (indecent acts with a child), and 63e (indecent assault).

Subsection 920(v)(4) at page 301 sets an interim maximum confinement of fifteen years for “aggravated sexual abuse of a child,” subsection 920(f), at page 295, “aggravated sexual contact with a child who is under the age of 12 years,” subsection 920(g) at page 295. The maximum confinement is three years for violation of 18 U.S.C. § 2244(a)(2). The maximum confinement is seven years for indecent act or liberty with a child, under Article 134, UCMJ. *See MCM*, Pt. IV, ¶ 87e (indecent act or liberty with a child—includes children up to 16 years of age).

Subsection 920(v)(5) at page 301 sets an interim maximum confinement of seven years for “abusive sexual contact” and “abusive sexual contact with a child who has attained the age of 12 years, but has not yet attained the age of 16 years” under subsection 920(h) at page 295 and subsection 920(i) at page 295, respectively. The maximum confinement is fifteen years for an attempted sexual act with a minor under 18 U.S.C. § 2243(a)(2), and two years for sexual contact with a minor under 18 U.S.C. § 2244(a)(3). The maximum confinement is twenty years for attempted carnal knowledge, and seven years for indecent acts with a child under Articles 80 and 134, UCMJ, respectively. *See MCM*, Pt. IV, ¶¶ 4e (attempted carnal knowledge) and 87e (indecent acts with a child).

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Subsection 920(v)(5) at page 301 sets an interim maximum confinement of seven years for “sexual abuse of a detainee or prisoner,” subsection 920(j) at page 295. Title 18 of the United States Code does not prohibit sexual acts with a detainee overseas in military custody or detention. The maximum confinement is one year for a consensual, sexual act with a prisoner under 18 U.S.C. § 2243(b). Currently consensual sexual intercourse with a detainee or prisoner is punished either as maltreatment under Article 93, UCMJ, with a maximum confinement of one year, or as violation of a regulation, under Article 92, UCMJ, with a maximum confinement of two years. *See MCM*, Pt. IV, ¶¶ 16e(1) (violation of regulation) and 17e(1) (maltreatment). Currently consensual sodomy with anyone has a maximum confinement of five years under Article 125, UCMJ. *See MCM*, Pt. IV, ¶ 51e(4).

Subsection 920(v)(5) at page 301 sets an interim maximum confinement of seven years for “indecent liberty with a child,” subsection 920(k) at page 296. Title 18 U.S.C. does not specifically prohibit an indecent liberty with a child (does not involve a physical touching), except as an attempt to violate subsections 2241(c) or 2243(a). The maximum confinement in the *MCM* is seven years for indecent liberties with a child. *See MCM*, Pt. IV, ¶ 87e (indecent liberty with a child).

Subsection 920(v)(6) at page 301 sets an interim maximum confinement of five years “sexual contact with a detainee or prisoner,” subsection 920(l) at page 296. Title 18 of the United States Code does not prohibit consensual, sexual contacts with a detainee overseas in military custody or detention. The maximum confinement is one year for an attempted sexual act with a prisoner under 18 U.S.C. § 2243(b), and is six months for a sexual contact with a prisoner under 18 U.S.C. § 2244(a)(4). Currently consensual sexual contact with a detainee or prisoner is punished either as maltreatment under Article 93, UCMJ, with a maximum confinement of one year, or as violation of a regulation, under Article 92, UCMJ, with a maximum confinement of two years. *See MCM*, Pt. IV, ¶ 16e(1) (regulation) and 17e(1) (maltreatment).

Subsection 920(v)(6) at page 301 sets an interim maximum confinement of five years for “indecent act,” subsection 920(m), at page 296; and for “forcible pandering,” subsection 920(n), at page 296. The maximum confinement is five years for indecent acts with another. *See MCM*, Pt. IV, ¶ 90e. The maximum confinement in the *MCM* for pandering is five years. *See MCM*, Pt. IV, ¶ 97e(2).

Subsection 920(v)(7) at page 301 sets an interim maximum confinement of one year for “wrongful sexual contact,” subsection 920(o) at page 296, and for “indecent exposure,” subsection 920(m) at page 296. The maximum confinement is six months for sexual contact in 18 U.S.C. § 2244(b). The maximum confinement in the *MCM* for indecent assault is five years and for indecent exposure is six months. *See MCM*, Pt. IV, ¶¶ 63e (indecent assault) and 88e (indecent exposure).

F. EFFECTIVE DATE

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Subsection 920(w) at page 301 sets an effective date twelve months after enactment. This time will be sufficient to complete necessary training of judge advocates and investigators. If Congress does not enact the interim maximum punishments, or if Presidential implementation is otherwise required, than two years after enactment should be authorized to permit full study and staffing of the required *MCM* change.

G. CONFORMING UCMJ CHANGES

Conforming UCMJ changes are required for the following sections of Title 10: (1) subchapter X, which is the table of contents for the punitive articles; (2) section 843; (3) subsection 918(4); (4) section 920; and (5) section 925 (articles 43, 118, 120, and 125). The specific offenses, “carnal knowledge” under section 920, and “sodomy under section 925 are changed in the proposed section 920. The conforming change for section 843 is at page 302, and for section 918 at page 302. Sections 920 and 925 are replaced with the new section 920.

Subsection 843(a) at page 302 as amended, ensures that the offenses which have a potential sentence of death, are included. As examples, murder, rape, and rape of a child are included in subsection 843(a). The Supreme Court in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) prohibited the death penalty for rape of an adult woman. Notwithstanding, the *Coker* prohibition against the death penalty for rape, the military statute of limitations for rape of an adult female should continue to be unlimited. *See Willinbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998). Adding “rape and rape of a child” to subsection 843(a) clarifies that the holding of the *Willinbring* decision is still good law and that there is an unlimited statute of limitations for all offenses that list death as a statutorily potential sentence—even if death is not a Constitutionally permitted punishment.

Subsection 843(b)(2)(A) at page 302 as amended, provides for the life of the victim or five years, whichever is greater, as the statute of limitations for child abuse offenses with a maximum punishment of one year or more of confinement. No UCMJ or *MCM* offense that specifies a child-victim has a punishment of less than one year of confinement. This change is consistent with the amendment of 18 U.S.C. § 3283 on April 30, 2003, by Public Law 108-21, Title II, 117 Stat. 660, which removed the application of the statute of limitations when the child reached the age of 25 years. Prior to the 2003 amendment, 18 U.S.C. § 3283 stated, “No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.” 18 U.S.C. § 3283 now states, “No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child.” Subsection 843(b)(2)(A) currently mirrors the pre-2003 version of 18 U.S.C. § 3283. Amendment of subsection 843(b)(2)(A) makes the same change as the amendment of 18 U.S.C. § 3283, increasing the period of the statute of limitations to the life of the child.

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Amendment of 10 U.S.C. § 843(b)(2)(A) solves a problem created in the event of the child-victim's death within five years of the offense. In 2003 Congress changed the military's statute of limitations for certain child abuse offenses from five years to when the child-victim attained the age of 25. It was Congress' intent to increase the statute of limitations to allow for prosecution of certain child abuse offenses beyond the period for which it was previously authorized. However, if a child-victim dies within the five year period after the abuse, the 2003 statute of limitations decreases the period of time in which a prosecution is authorized. By way of illustration, in *United States v. Wellington*, 58 M.J. 420 (C.A.A.F. 2004), Sergeant Wellington sexually abused his 16-year old stepdaughter while she was dying of cancer. She died within a year of the sexual abuse, but four months after Sergeant Wellington's trial. Under 10 U.S.C. § 843(b)(2)(A), as amended in 2003, had she died before the summary court-martial convening authority received the charges, Wellington's prosecution would have been barred. This amendment increases the statute of limitations to the greater of the life of the child/victim or within 5 years from the date of the offense.

Subsection 843(b)(2)(B) at page 302 as amended, takes into consideration the myriad of potential sexual offenses involving children. It is better to base the statute of limitations on two criteria: (1) a child being the victim as an element of the offense; and (2) the maximum confinement being equal to or greater than one year. Explicitly listing all the potential offenses involving child victims is problematic. For example, in *United States v. Thompson*, 59 M.J. 432 (C.A.A.F. 2004), Sergeant First Class Thompson was charged with the rape of his stepdaughter on divers occasions when she was between 5 and 15 years of age. She was 20 years of age at the time of trial. Sergeant Thompson was convicted of the lesser included offense of indecent acts with a child, an offense at that time with a 5-year statute of limitations. Because the military judge failed to instruct on the statute of limitations as a defense to the lesser-included offense (there was no defense request for the instruction), the Court of Appeals for the Armed Forces reversed Sergeant Thompson's conviction even though some of the conduct fell within the statute of limitations. It is important to note that under 10 U.S.C. § 59(a), the military has a plain error standard that reduces the defense requirement to request instructions, as compared to FEDERAL RULE OF CRIMINAL PROCEDURE 52(b). See *United States v. Baker*, 57 M.J. 330, 337, 342 (C.A.A.F. 2002) (Crawford, C.J., dissenting) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) and quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) stating, "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.").

While two offenses generally are not alleged in the same specification, it is possible to do so. For example, a 10-year old child allows a service member to engage in a sexual contact with her because he tells her that he will kill her mother unless she lets him do so. The offense is charged 8 years later. Under Option 5, the accused could be charged under subsection 920(e), aggravated sexual contact, because the accused caused the victim to engage in a sexual act by using a threat to kill and under subsection 920(g), aggravated sexual contact with a child, because the child was under

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12 years of age when the offense occurred. The proposed list of lesser included offenses at *MCM*, Pt. IV, ¶45d(5) and 45d(7) (which are non-exclusive guides) is as follows:

- (5) *Aggravated sexual contact.*
 - (a) Article 120—abusive sexual contact; indecent act; wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts

- (7) *Aggravated sexual contact with a child.*
 - (a) Article 120—abusive sexual contact; indecent liberty with a child, indecent act, wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts

There are other offenses involving child-victims, including conspiracy, solicitation, kidnapping, manslaughter, and different levels of assault (aggravated assault, assault with a means likely to cause grievous bodily harm, assault consummated by a battery, etc.). Any list of enumerated offenses would inevitably be incomplete because it is almost impossible to predict all the possible offense or charging permutations. Further, potentially the *MCM* could be amended, changing an offense involving a child-victim under Article 134. The *MCM* change would then require a change in subsection 843(b)(2)(B).

Subsection 843(b)(2)(C) at page 302 as amended clarifies that for federal offenses prosecuted under clause 3 of Article 134, the term child includes any victims under the age of 18 at the time of the offense.

Section 918 at page 302 amends the UCMJ’s felony murder provision to add to “burglary, rape, robbery, or aggravated arson” the most serious sexual offenses under the new subsection 920 in lieu of “sodomy.” The added offenses are: rape of a child, subsection 920(b) at page 294; aggravated sexual assault, subsection 920(c) at page 294; aggravated sexual assault on a child, subsection 920(d) at page 295; aggravated sexual contact, subsection 920(e) at page 295; aggravated sexual abuse of a child, subsection 920(f) at page 295; and aggravated sexual contact with a child, subsection 920(g) at page 295.

Sections 920, Rape and carnal knowledge, and 925, sodomy, of title 10, United States Code (articles 120 and 125), are amended—by deleting the entire section and substituting therefore section 920.

COMMENTS PERTAINING TO *MCM* ELEMENTS. All of citations are to *MCM*, Pt. IV.

Paragraph 45b(1) at page 303 provides elements for rape, subsection 920(a) at page 294.

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Paragraph 45b(2) at page 303 provides elements for rape of a child, subsection 920(b) at page 294.

Paragraph 45b(3) at page 304 provides elements for aggravated sexual assault, subsection 920(c) at page 294.

Paragraph 45b(4) at page 305 provides elements for aggravated sexual assault on a child, subsection 920(d) at page 295.

Paragraph 45b(5) at page 305 provides elements for aggravated sexual contact, subsection 920(e) at page 295.

Paragraph 45b(6) at page 53 provides elements for aggravated sexual abuse of a child, subsection 920(f) at page 43.

Paragraph 45b(7) at page 306 provides elements for aggravated sexual contact with a child, subsection 920(g) at page 295.

Paragraph 45b(8) at page 307 provides elements for abusive sexual contact, subsection 920(h), at page 295.

Paragraph 45b(9) at page 307 provides elements for abusive sexual contact with a child, subsection 920(i), at page 295.

Paragraph 45b(10) at page 307 provides elements for sexual abuse of a detainee or a prisoner, subsection 920(j) at page 295.

Paragraph 45b(11) at page 308 provides elements for indecent liberty with a child, subsection 920(k) at page 296.

Paragraph 45b(12) at page 308 provides elements for sexual contact with a detainee or prisoner, subsection 920(l) at page 296.

Paragraph 45b(13) at page 308 provides elements for indecent act. The elements for indecent act, which is prohibited by subsection 920(m) at page 296, are based on *MCM*, Pt. IV, ¶ 90b.

Paragraph 45b(14) at page 308 provides elements for forcible pandering, subsection 920(n) at page 296.

Paragraph 45b(15) at page 308 provides elements for wrongful sexual contact, subsection 920(o) at page 296.

Paragraph 45b(16) at page 308 provides elements for indecent exposure, subsection 920(p) at page 296.

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Paragraph 45(c)(1), “definitions” at page 309 refers to the statutory definitions in subsection 920(u) starting at page 297.

Paragraph 45(c)(2), “character of victim” at page 309 states, “*See* Military Rule of Evidence 412 concerning rules of evidence relating to an alleged rape victim’s character.” This provision is from *MCM*, Pt. IV, ¶ 45c(c).

H. PREJUDICIAL RELATIONSHIPS INVOLVING SEXUAL ACTIVITY: EXPLANATION OF OFFENSES

Paragraph 62, “prejudicial sexual relationships” at page 318 is a catchall for any “sexual act” or “sexual contact” that is also prejudicial to good order and discipline or service discrediting conduct. “Sexual act” is defined in subsection 920(u)(1) at page 297 and “sexual contact” is defined in subsection 920(u)(2) at page 297. The definition of sexual act includes both sodomy and intercourse. *MCM*, Pt. IV, ¶ 51c defines sodomy as follows:

It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s 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 with an animal.

The definition of sodomy as a type of “sexual act” in subsection 920(u)(1) at page 297 is different from the current definition of sodomy in the *MCM* because it does not include sexual activity with an animal. Sexual activity with animals is specifically prohibited as an indecent act under subsection 920(m), at page 296. *See* definition of “indecent,” subsection 920(u)(12)(B) at page 299. Sexual activity with animals has also been prosecuted as an indecent act under the *MCM*. *See* discussion of subsection 920(u)(12) at page 277; *United States v. Sanchez*, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34 (1960).

Prostitution is one of five enumerated prejudicial sexual relationships. *See MCM*, Pt. IV, ¶ 62b(2) at page 318. This offense is similar to the existing “prostitution” *MCM* offense. *See MCM*, Pt. IV, ¶ 97.

The Joint Service Committee recently recommended adopting “patronizing a prostitute” as a new offense under Article 134, UCMJ. *See MCM*, Pt. IV, ¶ 62b(3) at page 319.

The new pandering offense is similar to the *MCM*’s existing “pandering” offense, *see MCM*, Pt. IV, ¶ 97, except it now prohibits sexual acts and contacts, rather than being limited to sexual intercourse. *See* pandering, *MCM*, Pt. IV, ¶ 62b(4) at page 319.

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The new adultery offense is verbatim with the existing *MCM*'s "adultery" offense, except the words, "sexual act" are substituted for "sexual intercourse." See *MCM*, Pt. IV, ¶ 62b(5) at page 319. "Sexual act" includes all sexual penetrations, and thus includes more sexual conduct that was precluded under the previous adultery provision. "Sexual act" is defined in subsection 920(u)(1) at page 294. Private, extramarital, heterosexual intercourse between consenting adults is not intrinsically indecent. See *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994); *United States v. Hickson*, 22 M.J. 146, 148-50 (C.M.A. 1986) (discussing history of military adultery and fornication prosecutions and stating private sexual intercourse between unmarried persons is not punishable), *overruled in part on other grounds by United States v. Hill*, 48 M.J. 352 (C.A.A.F. 1997) (summary disposition); *United States v. Snyder*, 1 U.S.C.M.A. 423, 427, 4 C.M.R. 15, 18 (1952) (holding Article 134, UCMJ, not intended to set standard for private conduct), see also *United States v. Izquierdo*, 51 M.J. 421, 422-23 (C.A.A.F. 1999) (stating "fornication, when committed 'openly and notoriously,' is an 'aggravating circumstance[] sufficient to state an offense under Article 134,'" (citations omitted), and holding sexual intercourse behind the closed door of a barracks room with no third party present is insufficient to establish an indecent act).

The Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) reversed a consensual sodomy conviction, declared the Texas statute prohibiting such conduct to be unconstitutional because the right to privacy protected private, adult, noncommercial, consensual sexual activity. The United States Court of Appeals for the Armed Forces in *United States v. Marcum*, 60 M.J. 190 (C.A.A.F. 2004) and *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) stated that *Lawrence* did not require reversal because the participants in the military consensual sodomy convictions had a senior-subordinate relationship with each other. Citing *Marcum* and *Stirewalt*, the Army Court of Criminal Appeals reversed two heterosexual, consensual sodomy convictions because of the absence of demonstrable prejudice to good order and discipline in *United States v. Barber*, Army 20000413 (Army Ct. Crim. App. 2004) (unpub.) and *United States v. Bullock*, Army 20030534 (Army Ct. Crim. App. 2004) (unpub.). Copies of the *Barber* and *Bullock* unpublished opinions are available at <https://www.jagcnet.army.mil/ACCA>. Unpublished opinions may be persuasive, but are not binding precedent.

Nature of the offenses is verbatim from *MCM*, Pt. IV, ¶ 62c(1) at page 320, except the words, "these offenses" are substituted for "adultery" because all offenses in this section must meet the prejudicial to good order and discipline or service discrediting standard. *MCM*, Pt. IV, ¶¶ 62c(2)(j) and 62c(2)(k) at page 321 are added because in many instances these two factors aggravate or mitigate the impact on good order and discipline.

The explanation for conduct prejudicial to good order and discipline or service discrediting conduct is verbatim with the explanation under the existing "adultery" provision in the *MCM*, except the word, "adultery" is replaced with the words, "these offenses." See *MCM*, Pt. IV, ¶ 62c(2).

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While marriage is an affirmative defense under subsection 920(s), at page 297, for adultery, one or parties in the sexual activity must be married, but not to each other. This marital status is an element of adultery. This is consistent with current military practice.

MCM, Pt. IV, ¶ 62b(6) at page 319, engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room, provides notice that sexual conduct in the presence of a third party is criminal. This conduct has been punishable for more than two decades under military law, but has not been explicitly prohibited. *See United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002) (sexual contact in public area); *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000) (sexual intercourse in presence of third party); *United States v. Brundidge*, 17 M.J. 586 (A.C.M.R. 1983) (sexual intercourse in presence of third party); *see also* Major Steven Cullen, “PROSECUTING INDECENT CONDUCT IN THE MILITARY: HONEY, SHOULD WE GET A LEGAL REVIEW FIRST?” 179 MILITARY LAW REVIEW 128 (2004) (discussing value of notice of specific conduct prohibited in regard to prosecutions of indecent acts).

ARIZ. REV. STAT. § 13-1403 (2004) Public sexual indecency for example, provides:

§ 13-1403. Public sexual indecency; public sexual indecency to a minor; classifications

A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:

1. An act of sexual contact.
2. An act of oral sexual contact.
3. An act of sexual intercourse.
4. An act involving contact between the person’s mouth, vulva or genitals and the anus or genitals of an animal.

B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present.

MCM, Pt. IV, ¶ 62b(7) at page 319, prohibits engaging in a sexual act, sexual contact, or lewd act with another person in a public place. Public place is defined in subsection 920(u)(14) at page 299. *See also United States v. Shaffer*, 46 M.J. 94 (C.A.A.F. 1997) (affirming indecent exposure to public view conviction because accused was standing nude in open garage during daylight hours). GA. CODE ANN. § 16-6-3 (15) (2004), states, “Public place” means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.

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MCM, Pt. IV, ¶ 62e(1) at page 321, provides that the maximum punishment for prejudicial sexual acts, includes confinement for two years. This offense is most closely analogous to adultery, maltreatment by sexual harassment, and consensual sodomy. For adultery the maximum confinement is for one year. *See MCM*, Pt. IV, ¶ 62. The maximum confinement for maltreatment by sexual harassment is confinement for one year. *See MCM*, Pt. IV, ¶ 17e. The maximum confinement for consensual sodomy is confinement for five years. *See MCM*, Pt. IV, ¶ 51e(4).

MCM, Pt. IV, ¶ 62e(1) at page 321 provides that the maximum punishment for prejudicial sexual contacts and prejudicial lewd acts includes confinement for one year. This offense is most closely analogous to adultery. The maximum punishment is the same as the current maximum punishment for adultery in *MCM*, Pt. IV, ¶ 62e.

MCM, Pt. IV, ¶ 62e(2)(a) at page 321 provides that the maximum punishment for patronizing a prostitute includes confinement for one year, which is the same as the current maximum punishment for prostitution in *MCM*, Pt. IV, ¶ 97e(1).

MCM, Pt. IV, ¶ 62e(2)(b) at page 321 provides that the maximum punishment for pandering includes confinement for five years, which is the same as the current maximum punishment for pandering in *MCM*, Pt. IV, ¶ 97e(2).

MCM, Pt. IV, ¶ 62e(3) at page 322 provides that the maximum punishment for adultery includes confinement for one year, which is the same as the current maximum punishment for adultery in *MCM*, Pt. IV, ¶ 62e.

MCM, Pt. IV, ¶ 62e(4) at page 322 provides for the maximum punishment for engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room includes confinement for one year. This offense currently is punishable under the UCMJ as an indecent act with a maximum punishment including 5 years of confinement.

MCM, Pt. IV, ¶ 62e(5) at page 322 provides for the maximum punishment for engaging in a sexual act, sexual contact, or lewd act with another person in a public place includes confinement for one year. This offense currently is punishable under the UCMJ as an indecent act with a maximum punishment including 5 years of confinement.

COMMENTS PERTAINING TO *MCM* SAMPLE SPECIFICATIONS

The new adultery and prostitution sample specifications are modeled from the sample specifications for adultery and prostitution currently in *MCM*, Pt. IV, ¶¶ 62f and 97f(1), except the words, “sexual act” and “sexual contact” are used in lieu of “sexual intercourse” and “a person not his/her spouse” is deleted from the *MCM*’s

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prostitution sample specification because marriage is changed from an element to an affirmative defense.

**I. AMENDMENT OF MILITARY RULE OF EVIDENCE 412 TO BE CONSISTENT WITH
FEDERAL RULE OF EVIDENCE 412**

Military Rule of Evidence (Mil. R. Evid) 412 is intended to safeguard victims of sexual crimes against invasion of privacy, potential embarrassment and sexual stereotyping. *See United States v. Andreozzi*, 60 M.J. 727, 738 (Army Ct. Crim. App. 2004) (most of the discussion in this section is from the *Andreozzi* decision—citations and quotation marks are omitted throughout this section for brevity). Mil. R. Evid 412 also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders. *Id.* at 738.

1. Elimination of the balancing test.

In *Andreozzi*, Chief Judge Carey recommended changing the *MCM* so that Mil. R. Evid. 412 conforms with FED. R. EVID. 412—eliminating the Rule 412(c)(3) balancing test. *Id.* at 740 n.32. Mil. R. Evid. 412 should also be changed to be consistent with FEDERAL RULE OF EVIDENCE (FED. R. EVID.) 412. Staff Sergeant (SSG) Andreozzi was convicted of the rape and forcible sodomy of his estranged wife and sentenced to confinement for 27 years among other punishments. The trial judge denied the defense request to cross-examine Mrs. Andreozzi about her sexual activity with her husband. The military judge cited the Mil. R. Evid. 412(c)(3) balancing test as the basis for denying this request. The *Andreozzi* trial judge apparently confused the balancing tests in Mil. R. Evid. 403 and Mil. R. Evid. 412(c)(3). The Mil. R. Evid. 412(c)(3) balancing test is supposed to be applied to admit rather than to exclude evidence of the victim’s sexual conduct.

The Mil. R. Evid. 412(c)(3) balancing test does not require admission of evidence unless the probative value of such evidence outweighs the danger of unfair prejudice to the accused. *See United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (stating Mil. R. Evid. 412(c)(3) balancing test applies “to all three of the enumerated exceptions” in Rule 412).

Analysis of admissibility under Mil. R. Evid. 412 is exceptionally complicated and confusing because of the Rule 412(c)(3) balancing test. Under Mil. R. Evid. 412, “the military judge applies a two-part process of review to determine if the evidence is admissible.” *Banker*, 60 M.J. at 222. First, the military judge determines if the evidence is relevant under Mil. R. Evid. 401. *Id.* Second, if relevant, the military judge applies the Mil. R. Evid. 412(c)(3) balancing test. *Id.* Even if admissible under Mil. R. Evid. 412, the evidence may still be excluded under the Mil. R. Evid. 403 balancing test. *Id.* at 223 n.3. If the balancing test in Mil. R. Evid. 412(c)(3) is met, the evidence “shall be admissible,” whereas if the balancing test in Mil. R. Evid. 403 is met, relevant evidence may be excluded. The proponent’s burden and the presumption of admissibility under each rule “lean in different directions: i.e., toward inclusion in the case of [Mil. R.

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Evid.] 403 and toward exclusion in the case of [Mil. R. Evid.] 412(c)(3).” *Id.* Ultimately, the Constitution may require admissibility of the evidence. *Id.* at 222.

In 1994, FED. R. EVID. 412 was amended, eliminating the internal balancing test for criminal cases. *Compare* P.L. 100-690, Title VII, Subtitle B, § 7046(a), 102 Stat. 4400 (Nov. 18, 1988) *with* P.L. 103-322, Title IV, Subtitle A, ch 4, § 40141(b), 109 Stat. 1919 (Sept. 13, 1994). Currently, federal civilian appellate courts apply the FED. R. EVID. 403 balancing test to exclude that which is otherwise admissible under FED. R. EVID. 412. *Andreozzi*, 60 M.J. at 740 n.32. Elimination of the Mil. R. Evid. 412(b)(3) balancing test will conform military law to federal civilian law.

2. Protecting all victims of sexual misconduct. In addition to the extraneous balancing test, Mil. R. Evid. 412, does not indicate it applies to protect victims’ privacy when they are involved in consensual sexual activity. In 1994, FED. R. EVID. 412 was amended making its protections equally applicable to both consensual and nonconsensual sexual offenses. *See Banker*, 60 M.J. at 220 (interpreting Mil. R. Evid. 412 to be applicable to all prosecutions involving alleged sexual misconduct). The military should conform Mil. R. Evid. 412 to the *Banker* decision and FED. R. EVID. 412 in regard to protecting all victims of sexual abuse.

II. CHANGES TO UCMJ ARTICLES

45. Article 120—Rape, sexual assault, and other sexual misconduct

“(a) Any person subject to this chapter who causes another person of any age to engage in a sexual act by—

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct is guilty of **rape** and shall be punished as a court-martial may direct.”

“(b) Any person subject to this chapter who engages in a sexual act with a child who has not attained the age of 12 years, or engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years but has not attained the age of 16 years is guilty of **rape of a child** and shall be punished as a court-martial may direct.”

“(c) Any person subject to this chapter who —

- (1) causes another person of any age to engage in a sexual act by—

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(A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or

(B) causing bodily harm; or

(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of —

(A) appraising the nature of the sexual act;

(B) declining participation in the sexual act; or

(C) communicating unwillingness to engage in the sexual act

is guilty of **aggravated sexual assault** and shall be punished as a court-martial may direct.”

“(d) Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years, but has not yet attained the age of 16 years is guilty of **aggravated sexual assault on a child** and shall be punished as a court-martial may direct.

“(e) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate—subsection 920(a) of this chapter had the sexual contact been a sexual act is guilty of **aggravated sexual contact** and shall be punished as a court-martial may direct.”

“(f) Any person subject to this chapter who engages in a lewd act with a child is guilty of **aggravated sexual abuse of a child** and shall be punished as a court-martial may direct.”

“(g) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate—subsection 920(b) of this chapter had the sexual contact been a sexual act is guilty of **aggravated sexual contact with a child** and shall be punished as a court-martial may direct.”

“(h) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate—subsection 920(c) of this chapter had the sexual contact been a sexual act is guilty of **abusive sexual contact** and shall be punished as a court-martial may direct.”

“(i) Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate—subsection 920(d) of this chapter had the sexual contact been a sexual act is guilty of **abusive sexual contact with a child** and shall be punished as a court-martial may direct.”

“(j) Any person subject to this chapter who engages in a sexual act with another person who is—

(1) in custody, or confinement; or a detainee; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

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is guilty of **sexual abuse of a detainee or prisoner** and shall be punished as a court-martial may direct.”

“(k) Any person subject to this chapter who engages in indecent conduct or liberty, in the presence of a child with the intent to arouse, appeal to, or gratify the sexual desire of any person; or with the intent to abuse, humiliate, or degrade any person is guilty of **indecent liberty with a child** and shall by punished as a court-martial may direct.”

“(l) Any person subject to this chapter who engages in sexual contact or a lewd act with another person, if to do so would violate—subsection 920(j) of this chapter had the sexual contact been a sexual act is guilty of **sexual contact with a detainee or prisoner** and shall be punished as a court-martial may direct.”

“(m) Any person subject to this chapter who engages in indecent conduct is guilty of an **indecent act** and shall be punished as a court-martial may direct.”

“(n) Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of **forcible pandering** and shall by punished as a court-martial may direct.”

“(o) Any person subject to this chapter who wrongfully engages in sexual contact with another person without that other person’s permission is guilty of **wrongful sexual contact** and shall be punished as a court-martial may direct.”

“(p) Any person subject to this chapter who willfully exposes the genitalia, anus, buttocks or female areola or nipple in a public place in an indecent manner is guilty of **indecent exposure** and shall by punished as a court-martial may direct.”

“(q) **Age of child** —

(1) In a prosecution under subsections 920(b), 920(g), and 920(k), it need not be proven that the accused knew that the other person engaging in the sexual act, contact or liberty had not attained the age of twelve years. It is not an affirmative defense that the accused reasonably believed that the minor had attained the age of twelve years.

(2) In a prosecution under subsections 920(d), 920(f), 920(i), and 920(k), it need not be proven that the accused knew that the other person engaging in the sexual act, contact or liberty had not attained the age of sixteen years. It is an affirmative defense that the accused reasonably believed that the minor had attained the age of sixteen years.”

“(r) **Dangerous weapon or object.** In a prosecution under subsections 920(a)(1) and 920(e), proof that the accused actually intended to engage in the threatened conduct or to use the dangerous weapon or object is not required.”

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“(s) **Marriage.** In a prosecution under subsections 920(c)(2), 920(d), 920(i), 920(j), 920(f), 920(k), 920(l), 920(o), and 920(p), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct are married to each other. A marriage is a relationship between the accused and the other person as spouses, which is recognized by the laws of a competent state or foreign jurisdiction. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. The affirmative defense of marriage shall not exist if the accused’s intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person, or if the child is under the age of 15 years.”

“(t) **Consent and mistake of fact as to consent.** Lack of permission is an element of the offense in subsection 920(o). Consent and mistake of fact as to consent are not an issue, or an affirmative defense in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsections 920(a), 920(c), 920(e), and 920(h).”

“(u) **Definitions.** In this section, the terms are defined as follows:

“(1) ‘sexual act’ means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of subsection 920(u)(1)(A) contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis; the mouth and the vulva; or the mouth and the anus; or

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

“(2) ‘sexual contact’ means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person; or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, degrade, arouse or gratify the sexual desire of any person.”

“(3) ‘grievous bodily harm’ means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in 10 U.S.C. § 928(b), and a lesser degree of injury than in 18 U.S.C. § 2246(4).”

“(4) ‘dangerous weapon or object’ under subsections 920(a)(1), 920(e) and 920(u)(5) means any firearm, loaded or not, and whether operable or not; or other weapon, device, instrument, material or substance, whether animate or inanimate,

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which in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.”

“(5) ‘force’ means action to compel submission of another or to overcome or prevent another’s resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another, sufficient that the other person could not avoid or escape the sexual conduct.”

“(6) ‘threatening or placing that other person in fear’ under subsections 920(a)(3) and 920(e) means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping.”

“(7) ‘threatening or placing that other person in fear’ under subsections 920(c)(1)(A) and 920(h) means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person, or another person’s property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required.”

“(8) ‘bodily harm’ means any offensive touching of another, however slight.”

“(9) ‘child’ means any person who has not attained the age of sixteen years.”

“(10) ‘lewd act’ under subsections 920(f) and 920(l) means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person.”

“(11) ‘wrongful’ means without legal justification or lawful authorization.”

“(12) ‘indecent liberty’ means indecent conduct in the physical presence of the child, but physical contact is not required. It includes one who with the requisite intent

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exposes one's genitalia, anus, buttocks or female areola or nipple, to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct the conduct is indecent; the child's consent is not relevant."

"(13) 'indecent' means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes but is not limited to:

(A) observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material without his or her consent and contrary to his or her reasonable expectation of privacy of:

(1) another person's genitalia, anus, buttocks or a female's areola or nipple; or

(2) another person who is engaged in a sexual act, or sexual contact;

(B) engaging in contact between the person's mouth, vulva or genitals and the anus or genitals of an animal or a corpse.

"(14) 'public place' means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household."

"(15) 'willful' in indecent exposure means an intentional exposure in a public place."

"(16) 'detainee' for purposes of subsections 920(j) and 920(l) means any person captured or otherwise detained by an armed force. Detainees include all persons categorized as enemy prisoners of war, civilian internees, retained personnel, other detainees, persons under control, and all other persons captured or otherwise detained by an armed force.

"(17) 'custody' for purposes of subsections 920(j) and 920(l) means restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released."

"(18) 'confinement' for purposes of subsections 920(j) and 920(l) means physical restraint imposed under 10 U.S.C. §§ 810, 815 and 858."

"(19) 'correctional custody' for purposes of subsections 920(j) and 920(l) means physical restraint imposed under 10 U.S.C. § 815."

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“(20) ‘act of prostitution’ means a sexual act, sexual contact or lewd act for the purpose of receiving money or other compensation.”

“(21) ‘consent’ means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if:

(A) under sixteen years of age; or

(B) substantially incapable of:

(1) appraising the nature of the sexual conduct at issue due to:

(i) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(ii) mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue;

(2) physically declining participation in the sexual conduct at issue; or

(3) physically communicating unwillingness to engage in the sexual conduct at issue.

“(22) ‘mistake of fact as to consent’ means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused’s state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

“(23) ‘Affirmative defense’ means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The enumeration in section 920 of some affirmative defenses shall not be construed as excluding the existence of others.”

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“(v) **INTERIM MAXIMUM PUNISHMENTS.**—Until the President otherwise provides pursuant to section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), the punishment which a court-martial may direct for an offense under section 920 of such title (article 120 of the Uniform Code of Military Justice), as amended by this section, may not exceed the following limits:

(1) *Rape, and rape of a child.* Death or such other punishments as a court-martial may direct.

(2) *Aggravated sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual assault on a child who has attained the age of 12 years, but has not yet attained the age of 16 years, and aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Aggravated sexual contact with a child who is under the age of 12 years, and aggravated sexual abuse of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) *Abusive sexual contact; abusive sexual contact with a child who has attained the age of 12 years, but has not yet attained the age of 16 years; sexual abuse of a detainee or prisoner; and indecent liberty with a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) *Sexual contact with a detainee prisoner, indecent act, and forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) *Wrongful sexual contact, and indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

“(w) **EFFECTIVE DATE.**—The amendments made by this section shall take effect 12 months after the date of the enactment of this Act and apply with respect to offenses committed after such effective date.”

F. CONFORMING UCMJ CHANGES.

SUBCHAPTER X. PUNITIVE ARTICLES.

Subchapter X. Punitive Articles, is amended—by deleting “Rape and carnal knowledge” and replacing it with “Rape, sexual assault, and other sexual misconduct.” and delete, “Sodomy” and replace it with “Repealed.”

§ 843. ARTICLE 43, UCMJ.

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Subsection (a) of section 843 of title 10, United States Code (article 43), is amended—

(1) by adding the words “murder, rape, rape of a child” after the words “in time of war”.

Subsection (b) of section 843 of title 10, United States Code (article 43), is amended—

(1) by deleting from subsection (2)(A), and replacing subsection (2)(A) with “(2)(A) Except as otherwise provided in this section (article), a person charged with having committed a child abuse offense, is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the victim or within five years from the date of the offense, whichever is greater, by an officer exercising summary court-martial jurisdiction with respect to that person.”;

(2) by deleting subsections (2)(B) and (2)(B)(i) to (2)(B)(v), and replacing subsection (2)(B) and (2)(B)(i) to (2)(B)(v) with subsection (2)(B) stating, “(2)(B) In subsection (A) the term, ‘child abuse offense’ means an act that involves abuse of a person who has not attained the age of 16 years. A child abuse offense includes, but is not limited to offenses with word, ‘child’ in the name of the offense. A child abuse offense is an offense with a maximum punishment that includes one year or more of confinement.”;

(3) by adding subsection (2)(C), which will read:

“(C) In subsection (A), the term “child abuse offense” includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapters 110 or 117 or section 1591 of title 18, United States Code.”

§ 918. ARTICLE 118, UCMJ.

Subsection (4) of section 918 of title 10, United States Code (article 118), is amended—by deleting from subsection (4) “sodomy” and substituting therefore “rape of a child; aggravated sexual assault; aggravated sexual assault on a child; aggravated sexual contact; aggravated sexual abuse of a child; and aggravated sexual contact with a child”.

§ 920 AND 925. ARTICLES 120 AND 125, UCMJ.

Sections 920, Rape and carnal knowledge, and 925, sodomy, of title 10, United States Code (articles 120 and 125), are amended—by deleting the entirety of sections 920 and 925 and substituting therefore section 920.

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III. MCM Provisions implementing Article 120, UCMJ are Preliminary: *MCM* changes are accomplished by Executive Order, and must be consistent with any statutory changes that occur—*MCM* provisions herein are consistent with this proposed section 920, but have not undergone staffing in DoD or the public hearing process.

a. *Text.* See Article 120, UCMJ.

b. *Elements.*

(1) *Rape.*

(a) *By using force or by causing grievous bodily harm.*

(i) That the accused engaged in a sexual act; and
(ii) That the accused caused another person, who is of any age, to engage in that sexual act by using force against that other person or by causing grievous bodily harm to any person.

(b) *By using threats or placing in fear.*

(i) That the accused engaged in a sexual act; and
(ii) That the accused caused another person, who is of any age, to engage in that sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(c) *By rendering another unconscious.*

(i) That the accused rendered another person unconscious; and
(ii) That the accused thereby engaged in a sexual act with that other person, who is any age.

(d) *By administration of drug, intoxicant or other similar substance.*

(i) That the accused administered to another person a drug, intoxicant, or other similar substance;
(ii) That the accused administered the substance by force or threat of force, or without the knowledge or permission of that other person;
(iii) That as a result, that other person's ability to appraise or control conduct was substantially impaired; and
(iv) That the accused then engaged in a sexual act with that other person, who is of any age.

(2) *Rape of a child who has:*

(a) *not attained the age of 12 years.*

(i) That the accused engaged in a sexual act with a child; and
(ii) That at the time of the sexual act the child who engaged in the sexual act with the accused has not attained the age of twelve years.

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(b) *attained the age of 12 years but has not attained the age of 16 years by using force or by causing grievous bodily harm.*

(i) That the accused engaged in a sexual act with a child; and

(ii) That at the time of the sexual act the child who engaged in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years;

(iii) That the accused caused the child to engage in that sexual act by using force against that child or by causing grievous bodily harm to any person.

(c) *attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child who engaged in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years; and

(iii) That the accused caused the child to engaged in that sexual act by threatening or placing that child in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *attained the age of 12 years but has not attained the age of 16 years by rendering another unconscious.*

(i) That the accused rendered a child unconscious;

(ii) That at the time of the sexual act the child who engaged in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years; and

(iii) That the accused thereby engaged in a sexual act with that other child.

(e) *attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant or other similar substance.*

(i) That the accused administered to a child a drug, intoxicant, or other similar substance;

(ii) That at the time of the sexual act the child who engage in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years;

(iii) That the accused administered the substance by force or threat of force, or without the knowledge or permission of that child;

(iv) That as a result, that child's ability to appraise or control conduct was substantially impaired; and

(v) That the accused then engaged in a sexual act with that child.

(3) *Aggravated sexual assault.*

(a) *By using threats, by placing in fear, or by causing bodily harm.*

(i) That the accused caused another person to engage in a sexual act; and

(ii) That the accused caused another person to engage in that sexual act by threatening that any person would be subjected to bodily harm or other harm (other

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than death, grievous bodily injury, or kidnapping), by placing that other person in fear, or by causing bodily harm.

(b) *Upon a mentally incapacitated person.*

- (i) That the accused engaged in a sexual act with another person; and
- (ii) That the other person who engaged in a sexual act with the accused was substantially incapable of appraising the nature of the sexual act.

(c) *Upon a person substantially incapacitated, substantially incapable of declining participation, or substantially incapable of communicating unwillingness.*

- (i) That the accused engaged in a sexual act with another person; and
- (ii) That the other person who engaged in a sexual act with the accused was substantially incapacitated; substantially incapable of declining participation in the sexual act; or substantially incapable of communicating unwillingness to engage in the sexual act.

(4) *Aggravated sexual assault on a child.*

- (a) That the accused engaged in a sexual act with a child; and
- (b) That at the time of the sexual act the child who engaged in the sexual act with the accused has attained the age of twelve years but has not attained the age of sixteen years.

(5) *Aggravated sexual contact.*

- (a) *By using force or by causing grievous bodily harm.*
 - (i) That the accused engaged in sexual contact; and
 - (ii) That the accused caused another person to engage in sexual contact by using force against that other person or by causing grievous bodily harm to any person.

(b) *By using threats or placing in fear.*

- (i) That the accused engaged in sexual contact; and
- (ii) That the accused caused another person to engage in sexual contact by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(c) *By rendering another unconscious.*

- (i) That the accused rendered another person unconscious; and
- (ii) That the accused thereby engaged in sexual contact with that other person.

(d) *By administration of drug, intoxicant or other substance.*

- (i) That the accused administered to another person a drug, intoxicant, or other similar substance;
- (ii) That the accused administered the substance by force or threat of force, or without the knowledge or permission of that other person;
- (iii) That as a result, that other person's ability to appraise or control conduct was substantially impaired; and

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(iv) That the accused then engaged in sexual contact with that other person.

(6) *Aggravated sexual abuse of a child.*

- (a) That the accused committed a certain act with a child; and
- (b) That the act amounted to a lewd act.

(7) *Aggravated sexual contact with a child who has:*

- (a) *not attained the age of 12 years.*
 - (i) That the accused engaged in a sexual contact with a child; and
 - (ii) That at the time of the sexual contact the child who engaged in the sexual act with the accused has not attained the age of twelve years.

(b) *attained the age of 12 years but has not attained the age of 16 years by using force or by causing grievous bodily harm.*

- (i) That the accused engaged in a sexual contact with a child; and
- (ii) That at the time of the sexual contact the child who engaged in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years;
- (iii) That the accused caused the child to engage in that sexual contact by using force against that child or by causing grievous bodily harm to any person.

(c) *attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

- (i) That the accused engaged in a sexual contact with a child;
- (ii) That at the time of the sexual contact the child who engaged in the sexual contact with the accused has attained the age of 12 years but has not attained the age of 16 years; and
- (iii) That the accused caused a child to engaged in that sexual contact by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *attained the age of 12 years but has not attained the age of 16 years by rendering another unconscious.*

- (i) That the accused rendered a child unconscious;
- (ii) That at the time of the sexual contact the child who engaged in the sexual contact with the accused has attained the age of 12 years but has not attained the age of 16 years; and
- (iii) That the accused thereby engaged in a sexual contact with that child.

(e) *attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant or other similar substance.*

- (i) That the accused administered to a child a drug, intoxicant, or other similar substance;
- (ii) That at the time of the sexual contact the child who engaged in the sexual act with the accused has attained the age of 12 years but has not attained the age of 16 years;

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(iii) That the accused administered the substance by force or threat of force, or without the knowledge or permission of that child;

(iv) That as a result, that child's ability to appraise or control conduct was substantially impaired; and

(v) That the accused then engaged in a sexual contact with that child.

(8) *Abusive sexual contact.*

(a) *By using threats, by placing in fear, or by causing bodily harm.*

(i) That the accused caused another person to engage in a sexual contact; and

(ii) That the accused caused another person to engage in that sexual contact by threatening that any person would be subjected to bodily harm or other harm (other than death, grievous bodily injury, or kidnapping), by placing that other person in fear, or by causing bodily harm.

(b) *Upon a mentally incapacitated person.*

(i) That the accused engaged in a sexual contact with another person; and

(ii) That the other person who engaged in a sexual contact with the accused was substantially incapable of appraising the nature of the sexual act.

(c) *Upon a person substantially incapacitated, substantially incapable of declining participation, or substantially incapable of communicating unwillingness.*

(i) That the accused engaged in a sexual contact with another person; and

(ii) That the other person who engaged in a sexual contact with the accused was substantially incapacitated; substantially incapable of declining participation in the sexual contact; or substantially incapable of communicating unwillingness to engage in the sexual contact.

(9) *Abusive sexual contact with a child.*

(a) That the accused engaged in a sexual contact with a child; and

(b) That at the time of the sexual act the child who engaged in the sexual contact with the accused has attained the age of twelve years but has not attained the age of sixteen years.

(10) *Sexual abuse of a detainee or prisoner.*

(a) prisoner

(i) That the accused engaged in a sexual act with another person;

(ii) That the other person was in custody, or confinement; and

(iii) That the other person was under the custodial, supervisory or disciplinary authority of the accused.

(b) detainee

(i) That the accused engaged in a sexual act with another person;

(ii) That the other person was a detainee; and

(iii) That the detainee was under the custodial, supervisory or disciplinary authority of the accused.

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(11) *Indecent liberty with a child.*

- (a) That the accused committed a certain act;
- (b) That the act amounted to the taking of indecent conduct or liberty;
- (c) That the accused committed the act in the presence of a certain child;
- (d) That the child was under 16 years of age; and
- (e) That the accused committed the act with the intent to arouse, appeal to, or gratify the sexual desires of any person; or with the intent to abuse, humiliate, or degrade any person.

(12) *Sexual contact or lewd act with a detainee or prisoner.*

- (a) prisoner
 - (i) That the accused engaged in a sexual contact or lewd act with another person;
 - (ii) That the other person was in custody, or confinement; and
 - (iii) That the other person was under the custodial, supervisory or disciplinary authority of the accused.
- (b) detainee
 - (i) That the accused engaged in a sexual contact or lewd act with another person;
 - (ii) That the other person was a detainee; and
 - (iii) That the detainee was under the custodial, supervisory or disciplinary authority of the accused.

(13) *Indecent act.*

- (a) That the accused committed a certain act with a certain person; and
- (b) That the act was indecent.

(14) *Forcible pandering.*

- (a) That the accused compelled a certain person to engage in an act of prostitution;
- (b) That the accused directed persons to another person, who then engaged in an act of prostitution.

(15) *Wrongful sexual contact.*

- (a) That the accused had sexual contact with another person;
- (b) That the accused had the sexual contact with that other person without that other person's permission.

(16) *Indecent exposure.*

- (a) That the accused exposed a certain part of the accused's body in a public place in an indecent manner; and
- (b) That the exposure was willful and wrongful.

c. *Explanation.*

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(1) *Definitions.* The terms are defined in ¶ 45a(u), *supra*.

(2) *Character of victim.* See Military Rule of Evidence 412 concerning rules of evidence relating to an alleged rape victim's character.

d. *Lesser included offenses.*

(1) *Rape.*

- (a) Article 120—sexual abuse; aggravated sexual contact by force or threat; abusive sexual contact; indecent act; wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(2) *Rape of a child.*

- (a) Article 120—sexual abuse; aggravated sexual abuse of a child, aggravated sexual contact with a child; abusive sexual contact; indecent act; wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(3) *Aggravated sexual assault.*

- (a) Article 120—abusive sexual contact; indecent act; wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(4) *Aggravated sexual assault on a child.*

- (a) Article 120—aggravated sexual abuse of a child, abusive sexual contact; sexual contact with a minor, indecent liberty with a child or minor, indecent act; wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(5) *Aggravated sexual contact.*

- (a) Article 120—abusive sexual contact; indecent act; wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(6) *Aggravated sexual abuse of a child.*

- (a) Article 120—abusive sexual contact; indecent liberty with a child, indecent act, wrongful sexual contact
- (b) Article 128—assault, assault consummated by a battery
- (c) Article 80—attempts

(7) *Aggravated sexual contact with a child.*

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- (a) Article 120—abusive sexual contact; indecent liberty with a child, indecent act, wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts
- (8) *Abusive sexual contact.*
- (a) Article 120—indecent act, wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts
- (9) *Abusive sexual contact with a child.*
- (a) Article 120—indecent act, wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts
- (10) *Sexual abuse of a detainee or prisoner.*
- (a) Article 120—sexual contact with a prisoner, indecent act; wrongful sexual contact
 - (b) Article 93—maltreatment of person subject to orders
 - (c) Article 128—assault, assault consummated by a battery
 - (d) Article 80—attempts
- (11) *Indecent liberty with a child.*
- (a) Article 120—indecent act; wrongful sexual contact
 - (b) Article 128—assault, assault consummated by a battery
 - (c) Article 80—attempts
- (12) *Sexual contact with a detainee or prisoner.*
- (a) Article 120—indecent act; wrongful sexual contact
 - (b) Article 93—maltreatment of person subject to orders
 - (c) Article 128—assault, assault consummated by a battery
 - (d) Article 80—attempts
- (13) *Indecent act.*
- (a) Article 80—attempts
- (14) *Forcible pandering.*
- (a) Article 80—attempts
- (15) *Wrongful sexual contact.*
- (a) Article 80—attempts
- (16) *Indecent exposure.*
- (a) Article 80—attempts

e. *Maximum punishment.* The maximum punishment for each offense is listed in Article 120(v), UCMJ.

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f. *Sample specifications.*

(1) *Rape.*

(a) *Rape by using force.*

(i) *Rape by use, display, or suggestion of possession of dangerous weapon or object.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___ , by (using a dangerous weapon or object, to wit: ___) (displaying a dangerous weapon or object, to wit: ___) (the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause ___ to believe it is a dangerous weapon or object).

(ii) *Rape by using physical violence, strength, power, or restraint to any person.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___ , by using (physical violence) (strength) (power) (restraint applied to ___), sufficient that ___ could not avoid or escape the sexual conduct.

(b) *Rape by causing grievous bodily harm to any person.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___ , by causing grievous bodily harm to ___.

(c) *Rape by using threats or placing in fear.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___ , by (threatening that ___ will be subjected to death, grievous bodily harm, or kidnapping) (placing ___ in fear of ___ being subjected to death, grievous bodily harm, or kidnapping).

(d) *Rape by rendering another unconscious.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___ , by rendering ___ unconscious.

(e) *Rape by administering a drug or intoxicant.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage with ___ in a sexual act, to wit: ___ , by (administering to ___) (by force) (by threat of force) (without the knowledge or permission of ___), (a drug) (an intoxicant) (other similar substance), the

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said ___ thereby substantially impaired the ability of ___ to (appraise) (control) (his) (her) conduct.

(2) Rape of a child.

(a) Rape of a child who has not attained the age of 12 years.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with a child ___ , who has not attained the age of 12 years.

(b) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.

(i) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by use, display, or suggestion of possession of dangerous weapon or object.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual act, to wit: ___ , by (using a dangerous weapon or object, to wit: ___) (displaying a dangerous weapon or object, to wit: ___) (the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause ___ to believe it is a dangerous weapon or object).

(ii) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual act, to wit: ___ , by using (physical violence) (strength) (power) (restraint applied to ___ sufficient that ___ could not avoid or escape the sexual act).

(b) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual act, to wit: ___ , by causing grievous bodily harm to ___.

(c) Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual act, to wit: ___ , by (threatening that ___ will be subjected to death, grievous

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bodily harm, or kidnapping) (placing ___ in fear of ___ being subjected to death, grievous bodily harm, or kidnapping).

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering another unconscious.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___, a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual act, to wit: ___, by rendering ___ unconscious.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administering a drug or intoxicant.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage with ___, a child who has attained the age of 12 years, but has not attained the age of 16 years, in a sexual act, to wit: ___, by (administering to ___) (by force) (by threat of force) (without the knowledge or permission of ___), (a drug) (an intoxicant) (other similar substance), the said ___ thereby substantially impaired the ability of ___ to (appraise) (control) (his) (her) conduct.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by threatening or placing that other person in fear.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual act, to wit: ___, by (threatening bodily harm) (threatening other harm) (placing ___ in fear) (causing bodily harm).

(b) *Aggravated sexual assault by engaging in a sexual act with a mentally incapacitated person.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___, with ___ who was substantially incapable of appraising the nature of the sexual act.

(c) *Aggravated sexual assault by engaging in a sexual act with a person substantially incapacitated, substantially incapable of declining participation, or substantially incapable of communicating unwillingness.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ___, who was (substantially incapacitated) (substantially incapable of) (declining participation in the sexual act) (communicating unwillingness to engage in the sexual act).

(4) *Aggravated sexual assault on a child.*

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In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ___ , who has attained the age of 12 years, but has not attained the age of 16 years.

(5) Aggravated sexual contact.

(a) Aggravated sexual contact by using force.

(i) Aggravated sexual contact by use, display, or suggestion of possession of dangerous weapon or object.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ , by (using a dangerous weapon or object, to wit: ___) (displaying a dangerous weapon or object, to wit: ___) (the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause ___ to believe it is a dangerous weapon or object).

(ii) Aggravated sexual contact by using physical violence, strength, power, or restraint to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ , by using (physical violence) (strength) (power) (restraint applied to ___), sufficient that ___ could not avoid or escape the sexual contact.

(b) Aggravated sexual contact by causing grievous bodily harm to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ , by causing grievous bodily harm to ___.

(c) Aggravated sexual contact by using threats or placing in fear.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ , by (threatening that ___ would be subjected to death, grievous bodily harm, or kidnapping) (placing ___ in fear of ___ being subjected to death, grievous bodily harm, or kidnapping).

(d) Aggravated sexual contact by rendering another unconscious.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ , by rendering ___ unconscious.

(e) Aggravated sexual contact by administering a drug or intoxicant.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage with ___ in a sexual contact, to wit: ___ , by (administering to ___) (by force) (by threat of force) (without

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the knowledge or permission of ___), (a drug) (an intoxicant) (other similar substance), the said ___ thereby substantially impaired the ability of ___ to (appraise) (control) (his) (her) conduct.

(6) Aggravated sexual abuse of a child.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a lewd act, to wit: ___ with a child ___ , who has not attained the age of 16 years.

(7) Aggravated sexual contact with a child.

(a) Aggravated sexual contact with a child who has not attained the age of 12 years.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with a child ___ , who has not attained the age of 12 years.

(b) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.

(i) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by use, display, or suggestion of possession of dangerous weapon or object.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual contact, to wit: ___ , by (using a dangerous weapon or object, to wit: ___) (displaying a dangerous weapon or object, to wit: ___) (the suggestion of possession of a dangerous weapon or an object that is used in a manner to cause ___ to believe it is a dangerous weapon or object).

(ii) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual contact, to wit: ___ , by using (physical violence) (strength) (power) (restraint applied to ___ sufficient that ___ could not avoid or escape the sexual contact).

(b) Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years. by causing grievous bodily harm to any person.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual contact, to wit: ___ , by causing grievous bodily harm to ___.

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(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual contact, to wit: ___ , by (threatening that ___ will be subjected to death, grievous bodily harm, or kidnapping) (placing ___ in fear of ___ being subjected to death, grievous bodily harm, or kidnapping).

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering another unconscious.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, to engage in a sexual contact, to wit: ___ , by rendering ___ unconscious.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administering a drug or intoxicant.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage with ___ , a child who has attained the age of 12 years, but has not attained the age of 16 years, in a sexual contact, to wit: ___ , by (administering to ___) (by force) (by threat of force) (without the knowledge or permission of ___), (a drug) (an intoxicant) (other similar substance), the said ___ thereby substantially impaired the ability of ___ to (appraise) (control) (his) (her) conduct.

(8) *Abusive sexual contact.*

(a) *Abusive sexual contact by threatening or placing that other person in fear.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, cause ___ to engage in a sexual contact, to wit: ___ by (threatening bodily harm) (threatening other harm) (placing ___ in fear) (causing bodily harm).

(b) *Abusive sexual contact by engaging in a sexual act with a mentally incapacitated person.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with ___ , who was substantially incapable of appraising the nature of the sexual contact.

(c) *Abusive sexual contact by engaging in a sexual act with a person substantially incapacitated, substantially incapable of declining participation, or substantially incapable of communicating unwillingness..*

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In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with ___ , who was (substantially incapacitated) (substantially incapable of) (declining participation in the sexual act) (communicating unwillingness to engage in the sexual act).

(9) Abusive sexual contact with a child.

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with ___ , who has attained the age of 12 years, but has not attained the age of 16 years.

(10) Sexual abuse of a detainee or prisoner.

(a) Prisoner

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ___ , a person who is in (custody) (confinement) and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

(b) Detainee

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual act, to wit: ___ with ___ , a person who is a detainee and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

(11) Indecent liberties with a child.

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, (take indecent liberties) (engage in indecent conduct) with ___ , a (female) (male) under 16 years of age, by (communicating the words: to wit:___) (exposing one's private parts, to wit: ___) (___), with intent to [(arouse) (appeal to) (gratify) the (sexual desire) of the ___ (or ___)] [(abuse)(humiliate)(degrade) ___].

(12) Sexual contact with a detainee or prisoner.

(a) Prisoner

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with ___ , a person who is in (custody) (confinement) and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

(b) Detainee

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, engage in a sexual contact, to wit: ___ with ___ , a person who is a detainee and ___ is under the (custodial) (supervisory) (disciplinary) authority of the said ___.

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(13) *Indecent act.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, wrongfully commit an indecent act with ___ by ____.

(14) *Forcible pandering.*

In that ___ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ___ 20___, compel ____ to engage in a (sexual act, to wit: ___) (sexual contact, to wit: ___) (lewd act, to wit: ___) for the purpose of receiving money or other compensation with ___ (a) person(s) to be directed to ___ by the said ____.

(15) *Wrongful sexual contact.*

In that ___ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a wrongful sexual contact, to wit: ___ with ___ , and such sexual contact was without the permission of ____ .

(16) *Indecent exposure.*

In that ___ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ___ 20___, while (at the barracks window) (_____) willfully and wrongfully expose in an indecent manner in a public place (his) (her) ____.

I. CHANGES TO MCM, PART IV, TO CREATE COMPREHENSIVE ARTICLE 134 OFFENSE FOR OFFENSES THAT ARE MANIFESTED THROUGH CONSENSUAL SEXUAL ACTIVITY.

62. Article 134—Prejudicial Sexual Relationships

a. *Text* See paragraph 60.

b. *Elements.*

(1) *Prejudicial sexual act (includes sodomy), sexual contact, or lewd act.*

(a) That the accused engaged in a sexual act (includes sodomy), sexual contact or lewd act with a certain person; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(2) *Prostitution.*

(a) That the accused wrongfully engaged in a sexual act, sexual contact, or lewd act with another person;

(b) That the accused did so for the purpose of receiving money or other compensation; and

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(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(3) *Patronizing a prostitute.*

(a) That the accused engaged in a sexual act, sexual contact, or lewd act with another person not the accused's spouse;

(b) That the accused induced, enticed, or procured such person to engage in a sexual act or a sexual contact in exchange for money or other compensation;

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(4) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging a sexual act, sexual contact or lewd act.*

(a) That the accused induced, enticed, procured, arranged, or received consideration for arranging with another person to engage in the act of sexual act, sexual contact or lewd act for hire and reward; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(5) *Adultery.*

(a) That the accused wrongfully engaged in a sexual act with a certain person;

(b) That, at the time of the sexual act, the accused or the other person was married to someone else; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(6) *Engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room.*

(a) That the accused wrongfully engaged in a sexual act, sexual contact or a lewd act with a certain person;

(b) That, at the time of the sexual act, sexual contact, or lewd act, the accused knew a third person was present in the same room; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(7) *Engaging in a sexual act, sexual contact, or lewd act with another person in a public place.*

(a) That the accused wrongfully engaged in a sexual act, sexual contact or a lewd act with a certain person;

(b) That, at the time of the sexual act, sexual contact, or lewd act, the accused knew a third person was present in the same room; and

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(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *Nature of the offenses.* These offenses are clearly unacceptable conduct, and it reflects adversely on the service record of the military member.

(2) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, these offenses must either be directly prejudicial to good order and discipline or service discrediting. Conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member. These offenses may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While conduct that is private and discreet in nature, may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, or position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the co-actor's spouse, or their relationship to the armed forces;
- (d) The impact, if any, of the consensual sexual act on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the consensual sexual act;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the conduct was accompanied by other violations of the UCMJ;
- (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) Whether the accused or co-actor was legally separated;
- (i) Whether the misconduct involves an ongoing or recent relationship or is remote in time;

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- (j) The location where the conduct occurred; and
- (k) The nature, if any, of the official and personal relationship between the accused and co-actor.

In a prosecution under paragraph 62, it is an affirmative defense that the accused and the other person engaged in the sexual act, sexual contact or lewd act are married to each other. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. The accused has the burden of proving an affirmative defense under paragraph 62 by a preponderance of the evidence.

(3) *Definitions.*

(a) *Sexual act (includes sodomy), sexual contact, and lewd act.* These terms are defined in UCMJ subsections 920(u)(1), 920(u)(2), and 920(u)(10) respectively. Sexual act includes sexual intercourse and sodomy. An ejaculation is not required.

(b) *Sodomy.* Sodomy is a type of sexual act under subsection 920(u)(1).

d. *Lesser included offenses.*

(1) *Sexual act (includes sodomy), sexual contact, and lewd act.*—Article 80—attempts

(2) *Prostitution.*—Article 80—attempts

(3) *Patronizing a prostitute.*—Article 80—attempts

(4) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse.*—Article 80—attempts

(5) *Adultery.*—Article 80—attempts

(6) *Engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room.*—Article 80—attempts

(7) *Engaging in a sexual act, sexual contact, or lewd act with another person in a public place.*—Article 80—attempts

e. *Maximum punishment.*

(1) *Sexual act (includes sodomy), sexual contact, and lewd act.*

(a) *Sexual act (includes sodomy).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

(b) *Sexual contact and lewd act.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(2) *Prostitution.*

(a) *Patronizing a prostitute and prostitution.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(b) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging a sexual act or sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

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(3) *Adultery*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(4) *Engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room*. Dishonorable discharge, forfeiture of all pay and allowances and confinement for one year.

(5) *Engaging in a sexual act, sexual contact, or lewd act with another person in a public place*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(6) *Engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.

Engaging in a sexual act, sexual contact, or lewd act with another person in a public place. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.

f. *Sample specifications.*

(1) *Prejudicial sexual act (includes sodomy), sexual contact, or lewd act.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) with _____.

(2) *Prostitution.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) with _____, for the purpose of receiving (money) (_____).

(3) *Patronizing a prostitute.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully induced, enticed, or procured _____, a person not (his) (her) spouse, to engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) in exchange for (money) (_____).

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(4) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging a sexual act, sexual conduct or lewd act.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (induce) (entice) (procure) _____ to engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) for hire and reward.

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for) _____ to engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) with _____.

(5) *Adultery.*

In that _____ (personal jurisdiction data), (a married man) (a married woman), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in a (sexual act) to wit: (sexual intercourse) (sodomy) (other) with _____, a (married) (woman/man) not (his wife) (her husband).

(6) *Engaging in a sexual act, sexual contact, or lewd act with another person knowing that a third person is present in the same room.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) with _____, a (woman) (man) with a third person(s) present in the same room.

(7) *Engaging in a sexual act, sexual contact, or lewd act with another person in a public place.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in a (sexual act) (sexual contact) (lewd act) to wit: (sexual intercourse) (sodomy) (other) with _____, a (woman) (man) in a public place.

J. MCM PARAGRAPHS TO BE REMOVED, REPLACED OR SIGNIFICANTLY MODIFIED

(1) *MCM*, Pt. IV, ¶ 45, “Article 120—Rape and Carnal Knowledge” will be replaced with *MCM*, Pt. IV, ¶ 45, “Article 120—Rape, sexual assault, and other sexual misconduct.”

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(2) *MCM*, Pt. IV, ¶ 51, “Article 125—Sodomy” will be separated into two types of sodomy—part prohibited in *MCM*, Pt. IV, ¶ 45, and part prohibited in *MCM*, Pt. IV, ¶ 62, “Article 134—(Prejudicial Sexual Relationships).”

(3) *MCM*, Pt. IV, ¶ 62, “Article 134—(Adultery)” will be prohibited in *MCM*, Pt. IV, ¶ 62, “Article 134—(Prejudicial Sexual Relationships).”

(4) *MCM*, Pt. IV, ¶ 63, “Article 134—(Assault—indecent)” will be replaced with *MCM*, Pt. IV, ¶ 45, “Article 120—Rape, sexual assault, and other sexual misconduct.” There are five offenses that replicate indecent assault, depending on the culpability of the accused. *See* subsections 920(e) (aggravated sexual contact), 920(h) (abusive sexual contact), 920(l) (sexual contact with a detainee or prisoner), and 920(o) (wrongful sexual contact).

(5) *MCM*, Pt. IV, ¶ 64, “Article 134—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)” will be eliminated because under military caselaw these offenses are attempts to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking.

(6) *MCM*, Pt. IV, ¶ 87, “Article 134—(Indecent acts or liberties with a child)” will be replaced with *MCM*, Pt. IV, ¶ 45, “Article 120—Rape, sexual assault, and other sexual misconduct.” There are three subsections that replicate indecent acts or liberties with a child. *See* subsections 920(g) (aggravated sexual contact with a child), 920(i) (abusive sexual contact with a child), and 920(k) (indecent liberty with a child).

(7) *MCM*, Pt. IV, ¶ 88, “Article 134—(Indecent exposure)” will be replaced with *MCM*, Pt. IV, ¶ 45, “Article 120—Rape, sexual assault, and other sexual misconduct.” *See* subsection 920(p) (indecent exposure).

(8) *MCM*, Pt. IV, ¶ 90, “Article 134—(Indecent acts with another)” will be replaced with *MCM*, Pt. IV, ¶ 45, “Article 120—Rape, sexual assault, and other sexual misconduct.” *See* subsection 920(m) (indecent act).

(9) *MCM*, Pt. IV, ¶ 97, “Article 134—(Pandering and prostitution)” will be amended—part will be prohibited in *MCM*, Pt. IV, ¶ 45, and part prohibited in *MCM*, Pt. IV, ¶ 62, “Article 134—(Prejudicial Sexual Relationships).”

K. CHANGES TO MILITARY RULE OF EVIDENCE 412.

The title of the section should be changed from:

“Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition” to “Rule 412. Sexual offenses; relevance of victim’s behavior or sexual predisposition.”

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The following language should be deleted from Mil. R. Evid. 412(c)(3):

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

The following language should be deleted from Mil. R. Evid. 412(e):

(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

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**Appendix F
MODEL PENAL CODE**

§ 213.0. Definitions.

In this Article, unless a different meaning plainly is required:

- (1) the definitions given in [Section 210.0](#) apply;
- (2) “Sexual intercourse” includes intercourse per os or per anum, with some penetration however slight; emission is not required;
- (3) “Deviate sexual intercourse” means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

§ 213.1. Rape and Related Offenses.

(1) **Rape.** A male who has sexual intercourse with a female not his wife is guilty of rape if:

- (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
- (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
- (c) the female is unconscious; or
- (d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) **Gross Sexual Imposition.** A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

- (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or
- (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or
- (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

§ 213.2. Deviate Sexual Intercourse by Force or Imposition.

(1) **By Force or Its Equivalent.** A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

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(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

(2) **By Other Imposition.** A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

§ 213.3. Corruption of Minors and Seduction.

(1) **Offense Defined.** A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) **Grading.** An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

§ 213.4. Sexual Assault.

A person who has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person; or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

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(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

§ 213.5. Indecent Exposure.

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

§ 213.6. Provisions Generally Applicable to Article 213.

(1) **Mistake as to Age.** Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

(2) **Spouse Relationships.** Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) **Sexually Promiscuous Complainants.** It is a defense to prosecution under [Section 213.3](#) and [paragraphs \(6\), \(7\) and \(8\) of Section 213.4](#) for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

(4) **Prompt Complaint.** No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) **Testimony of Complainants.** No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

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§ 230.2. Incest.

A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]. "Cohabit" means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

Part II. Definition of Specific Crimes

Offenses Involving Danger to the Person

EXPLANATORY NOTE FOR SECTIONS 211.1-211.3

The offenses in this article deal with bodily injury short of homicide and with certain other situations where such injury is attempted, threatened, or risked. The offenses are graded on a scale of seriousness ranging from a petty misdemeanor to a felony of the second degree.

Section 211.1 effects a consolidation of the common law crimes of mayhem, battery, and assault and also consolidates into a single offense what the antecedent statutes in this country normally treated as a series of aggravated assaults or batteries. Crimes such as assault with intent to rape or assault with intent to murder are discontinued on the ground that they really amount to no more than an attempt to commit the object offense. Under Section 5.05(1) of the Model Code, an attempt to commit a first degree felony is graded as a second degree felony, and any other attempt is graded at the same level as the completed offense. The result is that all attempts have been graded more seriously under the Model Code than under prevailing law at the time the Code was drafted and the object of such "assault-with-intent-to" offenses has already been accomplished by that means.

It is nevertheless necessary for the Model Code to deal separately with conduct ranging from the simple assault to the infliction of serious, permanent injury. Section 211.1 accomplishes this result by treating as a second degree felon one who attempts to cause serious bodily injury or one who causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. One who attempts to cause or who purposely or knowingly causes bodily injury to another with a deadly weapon is punished as a third degree felon. Assault is treated as a misdemeanor in three circumstances: where the actor attempts to cause or purposely, knowingly, or recklessly causes bodily injury; where he negligently causes bodily injury with a deadly weapon; and where he attempts by physical menace to put another in fear of imminent serious bodily harm. The third of these circumstances incorporates the civil notion of assault into the criminal law, as had been done in a majority of jurisdictions at the time the Model Code was drafted. Finally, assault is treated as a petty misdemeanor in the case of a fight or a scuffle entered into by mutual consent.

The remaining two offenses in Article 211 generalize principles found in antecedent statutes addressed only to ad hoc situations, such as reckless driving of a motor vehicle or reckless use of firearms. Section 211.2 deals with reckless endangerment by any means, i.e., situations where the actor's conduct recklessly places or may place another person in danger of death or serious bodily injury. Section 211.3 deals with terroristic threats, i.e., situations where the actor threatens to commit a crime of violence with purpose to terrorize another person or a group of persons.

§ 211.1. Assault.

(1) **Simple Assault.** A person is guilty of assault if he:

- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a deadly weapon; or
- (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

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Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) **Aggravated Assault.** A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Part II. Definition of Specific Crimes

§ 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

§ 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

§ 212.5. Criminal Coercion.

(1) **Offense Defined.** A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) **Grading.** Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious, in which cases the offense is a felony of the third degree.

EXPLANATORY NOTE FOR SECTIONS 251.1-251.4

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Article 251 collects four offenses under the rubric of public indecency. The common goal of these provisions is to protect against the open flouting of community standards regarding sexual or related matters. The Model Penal Code does not attempt to enforce private morality. Thus, none of the provisions contained in Article 251 purports to regulate sexual behavior generally. Instead, each is limited to the affront to public sensibilities occasioned by public or commercial sexual misconduct.

Section 251.1 defines the petty misdemeanor of open lewdness. Liability is expressly limited to lewd conduct that the actor knows “is likely to be observed by others who would be affronted or alarmed.” Although this formulation partially duplicates the offense of obscenity under Section 251.4, a separate provision against open lewdness is needed to reach offensive eroticism engaged in for the actor’s own purposes rather than as a performer for an audience or a provider of titillating materials. Section 251.1 also overlaps the misdemeanor of indecent exposure under Section 213.5. Whereas the latter offense requires a purpose to arouse or gratify sexual desire, the instant provision covers as a lesser offense lewd conduct that is not related to sexual gratification but that is intended only to shock or annoy.

Section 251.2 defines a series of offenses relating to prostitution. The governing rationale of this provision, both in assigning criminal liability and in determining the grade of the offense, is the suppression of commercialized sex. Thus, the section does not cover every isolated instance of sex for reward or profit. Instead, it requires that the actor be an inmate of a house of prostitution, engage in sexual activity as a business, or loiter in a public place for the purpose of being hired to engage in sexual activity. Similarly, grading under Section 251.2 varies according to the actor’s place in the business organization of commercialized sex. Thus, the prostitute is guilty of a petty misdemeanor. The customer is guilty only of a violation, while managerial and supervisory personnel are liable to misdemeanor and in some instances to felony sanctions. The bases for these distinctions are explained in detail in the Comment to Section 251.2.

Section 251.3 covers one who loiters in a public place for the purpose of soliciting deviate sexual relations. Again, this offense is not directed against private homosexual behavior but against the public nuisance created by the conduct proscribed. The offense is a petty misdemeanor.

Finally, Section 251.4 is the Model Code provision on obscenity. As the Comment to this section explains in detail, the law of obscenity has been substantially revised by constitutional adjudication subsequent to the drafting of this provision. It is worth noting, however, that Section 251.4 is consistent with the general policy against legislating private morality in that it does not proscribe simple possession of obscene materials. Possession is criminal only if maintained for the purpose of sale or other commercial dissemination.

§ 251.1. Open Lewdness.

A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.

§ 251.2. Prostitution and Related Offenses.

(1) **Prostitution.** A person is guilty of prostitution, a petty misdemeanor, if he or she:

- (a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
- (b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

“Sexual activity” includes homosexual and other deviate sexual relations. A “house of prostitution” is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another. An “inmate” is a person who engages in prostitution in or through the agency of a house of prostitution. “Public place” means any place to which the public or any substantial group thereof has access.

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(2) **Promoting Prostitution.** A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in Subsection (3). The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

(a) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or

(c) encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or

(d) soliciting a person to patronize a prostitute; or

(e) procuring a prostitute for a patron; or

(f) transporting a person into or within this state with purpose to promote that person's engaging in prostitution, or procuring or paying for transportation with that purpose; or

(g) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or

(h) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.

(3) **Grading of Offenses Under Subsection (2).** An offense under Subsection (2) constitutes a felony of the third degree if:

(a) the offense falls within paragraph (a), (b) or (c) of Subsection (2); or

(b) the actor compels another to engage in or promote prostitution; or

(c) the actor promotes prostitution of a child under 16, whether or not he is aware of the child's age; or

(d) the actor promotes prostitution of his wife, child, ward or any person for whose care, protection or support he is responsible.

Otherwise the offense is a misdemeanor.

(4) **Presumption from Living off Prostitutes.** A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is supported in whole or substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution in violation of

Subsection (2).

(5) **Patronizing Prostitutes.** A person commits a violation if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(6) **Evidence.** On the issue whether a place is a house of prostitution the following shall be admissible evidence: its general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits by non-residents. Testimony of a person against his spouse shall be admissible to prove offenses under this Section.

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§ 251.3. Loitering to Solicit Deviate Sexual Relations.

A person is guilty of a petty misdemeanor if he loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations.

→§ 251.4. Obscenity.

(1) **Obscene Defined.** Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. Undeveloped photographs, molds, printing plates, and the like, shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(2) **Offenses.** Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he knowingly or recklessly:

(a) sells, delivers or provides, or offers or agrees to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene; or

(b) presents or directs an obscene play, dance or performance, or participates in that portion thereof which makes it obscene; or

(c) publishes, exhibits or otherwise makes available any obscene material; or

(d) possesses any obscene material for purposes of sale or other commercial dissemination; or

(e) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene.

A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly.

(3) **Justifiable and Non-Commercial Private Dissemination.** It is an affirmative defense to prosecution under this Section that dissemination was restricted to:

(a) institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or

(b) non-commercial dissemination to personal associates of the actor.

(4) **Evidence; Adjudication of Obscenity.** In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

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(f) the good repute of the author, creator, publisher or other person from whom the material originated.

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**APPENDIX G
OPTION 6**

§ 920. Art. 120. Non-Consensual Sexual Offenses

a. *Text.*

(a) Any person, subject to this chapter who—

(1) commits an act of sexual intercourse with another person,

(A) by forcible compulsion,⁷²⁸ physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping;⁷²⁹ or

(B) with a person who is less than 12 years of age;⁷³⁰ or

⁷²⁸ If “forcible compulsion” is used, the term must be defined. In Option 6 this definition is provided in a change to *MCM*, Pt. IV, paragraph 45. A better alternative would be to make all definitions part of Article 120 itself. *See* discussion at pages 66 to 71, *supra*, indicating *MCM*’s definitions of terms are unlikely to be accepted by Court of Appeals for the Armed Forces. Several states use the term “forcible compulsion.” Option 6 adopts this term from ALA. CODE § 13A-6-61(a)(1) (2004), *see infra* at pages 482; New York State Consolidated Laws §§ 130.00(8) and 130.35 [*see infra* at pages 674 and 677]; ARK. CODE ANN. § 5-14-103(a)(1)(A) (Michie 2004), *see infra* at page 496; Missouri Annotated Statutes, Title 38, § 566.030(1) [*see infra* at page 640]; and Pennsylvania Consolidated Statutes, Title 18, § 3121(a)(1) [*see infra* at page 704].

⁷²⁹ Rather than use the term “forcible compulsion,” in the alternative, the nature of the act itself could be defined by using the phrase “physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping”; this phrase derives from the Model Penal Code, § 213.1(1)(a) [*see infra* at page 326].

⁷³⁰ Many jurisdictions have created a “per se” rule of “rape” for individuals engaging in sexual intercourse with children below a specified age. *See* Georgia Annotated Code § 16-6-1(a)(2)(defining rape as sexual intercourse with an individual under ten years of age) [*see infra* at page 558]; KY. REV. STAT. ANN. § 510.040(1)(b)(1) (Michie 2004) (defining rape as sexual intercourse with an individual under 12 years of age), *see infra* at page 595; Michigan Compiled Laws § 750.520b(1)(a)(defining criminal sexual conduct as sexual penetration with an individual under 13 years of age) [*see infra* at page 621]; and New York State Consolidated Laws § 130.35(3)(defining rape as sexual intercourse with an individual under 11 years of age) [*see infra* at page 677]. *See also* Model Penal Code, § 213.1(1)(d)(defining rape as sexual intercourse with an individual under ten years of age) [*see infra* at page 326]. Option 6 recommends continuing the current “per se” prohibition against sexual activity with children who are “less than twelve years of age.” This per se rule like that under Title 18 prevents an accused from raising a mistake of fact defense for engaging in sexual intercourse with a child who is less than twelve years of age. *See MCM*, Pt. IV, paragraph 45 [*see infra* at page 369].

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- (C) with a person who is at least 12 years of age but less than 16 years of age and is:⁷³¹
- (i) a member of the accused's household; or
 - (ii) a relative, within the fourth degree, of the accused; or
 - (iii) subjected to the accused's authority and coerced into engaging in sexual intercourse by the accused; or
- (D) with a person who the accused knows or should reasonably know is incapable, by reason of a mental disability, or mental incapacity, of understanding the nature of the sexual act⁷³²; or
- (E) with a person who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act⁷³³

⁷³¹ Many jurisdictions prohibit, as “rape,” an individual from engaging in sexual intercourse with a child below a specified age when the child is a member of individual's household, related to the individual, or subjected to the individual's authority. *See* ARK. CODE ANN. § 5-14-103(a)(1)(D) (Michie 2004), *see infra* at page 496; Delaware Code Annotated § 773(a)(6) [*see infra* at page 538]; Illinois Compiled Statutes Annotated, Chapter 720, Title III, Pt. B, § 12-13(a)(4) [*see infra* at page 574]; Michigan Compiled Laws § 750.520b(1)(b) [*see infra* at page 621]; and New Jersey Statutes § 2C:14-2(a)(2) [*see infra* at page 661]. Our provision is similar to Michigan Compiled Laws § 750.520b(1)(b) [*see infra* at page 621].

⁷³² Many jurisdictions prohibit, as “rape,” anyone from engaging in sexual intercourse with a person he knows is incapable, by reason of a mental disability or mental incapacity, of understanding the nature sexual act. *See* ALASKA STAT. § 11.41.410(a)(3) (Michie 2004), *see infra* at page 485; COLO. REV. STAT. § 18-3-402(1)(b) (2004), *see infra* at page 523; Illinois Compiled Statutes Annotated, Chapter 720, Title III, Pt. B, § 12-13(a)(2) [*see infra* at page 574]; Maine Revised Statutes § 253(2)(C) [*see infra* at page 603]; Michigan Compiled Laws § 750.520b(1)(g) [*see infra* at page 622]; and New Jersey Statutes § 2C:14-2(a)(7) [*see infra* at page 661]. Option 6 is similar to New Jersey Statutes § 2C:14-2(a)(7) in that it establishes a standard that the accused knew or reasonably should have known the “victim” was mentally incapable of understanding the nature of the sexual act.

⁷³³ Many jurisdictions prohibit, as “rape,” a person from engaging in sexual intercourse with someone that he knows is physically incapable of consenting to the sexual act. *See* ALA. CODE § 13A-6-61(a)(2) (2004), *see infra* at pages 482; ALASKA STAT. § 11.41.410(a)(3) (Michie 2004), *see infra* at page 485; ARK. CODE ANN. § 5-14-103(a)(1)(B) (Michie 2004), *see infra* at page 496; COLO. REV. STAT. § 18-3-402(1)(h) (2004), *see infra* at page 523; KAN. STAT. ANN. § 21-3502(a)(1)(B) (2003-Lexis does not have update), *see infra* at page 588; KY. REV. STAT. ANN. § 510.040(1)(b)(1) (Michie 2004), *see infra* at page 595; Maine Revised Statutes § 253(2)(D) [*see infra* at page 603]; Michigan Compiled Laws § 750.520b(1)(g) [*see infra* at page 622]; and New Jersey Statutes § 2C:14-2(a)(7) [*see infra* at page 661]. Our provision is similar

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is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct; or

(2) commits an act of sexual intercourse with another person under circumstances not amounting to rape under section 120(a)(1)(A), by threat or coercion⁷³⁴ of sufficient consequence reasonably calculated to cause submission without consent⁷³⁵ is guilty of aggravated sexual intercourse⁷³⁶ and shall be punished as a court-martial may direct; or

(3) commits an act of sexual intercourse with another person under circumstances not amounting: to rape under section 120(a)(1)(A), or to aggravated sexual intercourse under section 120(a)(2); who is not his or her spouse and who has attained the age of 12 years, but has not attained the age of 16 years, is guilty of carnal knowledge and shall be punished as a court-

to New Jersey Statutes § 2C:14-2(a)(7) in that it establishes a standard that the accused knew or reasonably should have known the “victim” was physically incapable of consenting to the sexual act.

⁷³⁴ “Coercion” to be defined in *MCM*, Pt. IV, paragraph 45. This provision recognizes the possibility that an accused could use threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping to “compel” sexual intercourse. Under this proposal, engaging under such conduct would constitute a less aggravated version of “rape.”

⁷³⁵ The phrase “of sufficient consequence reasonably calculated to cause submission without consent” is based on COLO. REV. STAT. § 18-3-402(1)(a) (2004), *see infra* at page 523; and recognizes that not all threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping will be sufficient to turn an act of sexual intercourse into “aggravated sexual intercourse,” an act of sodomy into “forcible sodomy,” or sexual contact into an “indecent assault. A threat or coercion is of sufficient consequence if the person complies with the accused’s demands out of a reasonable fear that non-compliance would result in the accused or another harming or injuring the person, the person’s property, or person or property of another. Whether a threat or coercion is of sufficient consequence depends upon the circumstances of each case. It may include a threat or coercion to cause physical injury to some person; cause destruction or damage to property; accuse some person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of position, rank, or authority, adversely affect some person. Proof that the accused actually intended to engage in the above conduct is not required.

⁷³⁶ “Aggravated sexual intercourse” is a term of art used to denote a less aggravated version of rape; it is akin to the term “second degree rape” used in some jurisdictions.

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martial may direct. However, it shall be an affirmative defense to carnal knowledge that the person with whom the accused committed the act of sexual intercourse had, at the time of the sexual intercourse, attained the age of twelve years and the accused reasonably believed that the person had, at the time of the sexual intercourse, attained the age of sixteen years. The accused has the burden of proving this defense by a preponderance of the evidence; or

- (4) engages in sodomy with another person,
- (A) by forcible compulsion,⁷³⁷ physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
 - (B) who is less than 12 years of age; or
 - (C) who is at least 12 years of age but less than 16 years of age and is:
 - (i) a member of the accused's household; or
 - (ii) a relative, within the fourth degree, of the accused; or
 - (iii) subjected to the accused's authority and coerced into engaging in the sodomy by the accused; or
 - (D) who the accused knows or should reasonably know is incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual act; or
 - (E) who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act

is guilty of aggravated forcible sodomy⁷³⁸ and shall be punished as a court-martial may direct; or

- (5) engages in sodomy with another person under circumstances not amounting to aggravated forcible sodomy under section 120(a)(4)(A), by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent⁷³⁹ is guilty of forcible sodomy⁷⁴⁰ and shall be punished as a court-martial may direct; or

⁷³⁷ See explanation in footnote 728 *supra*.

⁷³⁸ The analysis and rationale of this offense follows the analysis and rationale of Option 6's proposed "rape" article...the only difference being the nature of the sexual act, i.e. sodomy as opposed to sexual intercourse.

⁷³⁹ See explanation in footnote 735 *supra*.

⁷⁴⁰ The analysis and rationale of this offense follows the analysis and rationale of our proposed "aggravated sexual intercourse" article...the only difference being the nature of the sexual act, i.e. sodomy as opposed to sexual intercourse.

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- (6) engages in sodomy with a child under the age of 16, who is not his or her spouse, is guilty of sodomy with a child or minor⁷⁴¹ and shall be punished as a court-martial may direct; or
- (7) engages in sodomy with an animal is guilty of bestial sodomy⁷⁴² and shall be punished as a court-martial may direct; or
- (8) engages in sexual contact⁷⁴³ with another person,
(A) by forcible compulsion,⁷⁴⁴ physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping; or
(B) who is less than 12 years of age; or
(C) who is at least 12 years of age but less than 16 years of age and is:
(i) a member of the accused's household; or
(ii) a relative, within the fourth degree, of the accused; or
(iii) subjected to the accused's authority and coerced into engaging in the sexual contact by the accused; or
(D) who the accused knows or should reasonably know is incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual act; or
(E) who the accused knows or should reasonably know is incapable, by reason of a physical incapacity, of consenting to the sexual act

is guilty of aggravated indecent assault⁷⁴⁵ and shall be punished as a court-martial directs; or

⁷⁴¹ The analysis and rationale of this offense follows the analysis and rationale of the proposed "carnal knowledge" article...the only differences being the nature of the sexual act, i.e. sodomy as opposed to sexual intercourse, and the lack of an affirmative defense for sodomy with a child.

⁷⁴² This offense is similar to the current "sodomy" Article 125, UCMJ. *See MCM*, Pt. IV, paragraph 51 [*see infra* at page 372].

⁷⁴³ Option 6 proposes expanding the definition of "indecent acts" to include not only those acts done with the "intent to arouse, appeal to, or gratify the lust, passions, or desires of the accused, the victim, or both" but also to include those acts done with the "intent to abuse, humiliate, harass, or degrade." The latter language was added to the definition of "sexual contact" in recognition of the fact that sexual acts or often engaged in to abuse, humiliate, harass, or degrade. *See New York State Consolidated Laws* § 130.52 [*see infra* at page 678].

⁷⁴⁴ *See* explanation in footnote 728 *supra*.

⁷⁴⁵ The analysis and rationale of this offense follows the analysis and rationale of our proposed "rape" and "aggravated forcible sodomy" articles...the only difference being

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- (9) engages in sexual contact⁷⁴⁶ with another person under circumstances not amounting to aggravated indecent assault under section 120(a)(8), by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent⁷⁴⁷ is guilty of indecent assault⁷⁴⁸ and shall be punished as a court-martial may direct; or
- (10) engages in sexual contact⁷⁴⁹ with a child under the age of 16, who is not his or her spouse, is guilty of indecent acts with a child⁷⁵⁰ and shall be punished as a court-martial may direct; or
- (11) engages in conduct that amounts to taking indecent liberties,
(a) in the presence of a child under the age of 16, not his or her spouse, with the intent to arouse or gratify the sexual desire of any person; or
(b) in the presence of a child under the age of 16, with the intent to abuse, humiliate, harass, or degrade any person⁷⁵¹
is guilty of indecent liberties with a child⁷⁵² and shall be punished as a court-martial may direct; or
- (12) willfully and wrongfully exposes the sexual or other intimate parts of the body to public view in an indecent manner, is guilty of indecent exposure⁷⁵³ and shall be punished as a court-martial may direct; or

the nature of the sexual act, i.e. an intentional touching of the sexual organs, either directly or through the clothing, as opposed to sexual intercourse or sodomy.

⁷⁴⁶ See explanation in footnote 743 *supra*.

⁷⁴⁷ See explanation in footnote 735 *supra*.

⁷⁴⁸ The analysis and rationale of this offense follows the analysis and rationale of Option 6's proposed "aggravated sexual intercourse" and "forcible sodomy" articles...the only difference being the nature of the sexual act, i.e. an intentional touching of the sexual organs, either directly or through the clothing, as opposed to sexual intercourse or sodomy.

⁷⁴⁹ See explanation in footnote 743 *supra*.

⁷⁵⁰ This offense is similar to the existing "indecent acts with a child" article. See *MCM*, Pt. IV, paragraph 87 [*see infra* at page 386].

⁷⁵¹ See explanation in footnote 743 *supra*.

⁷⁵² This offense is similar to the existing "indecent liberties with a child" article. See *MCM*, Pt. IV, paragraph 87 [*see infra* at page 386].

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(13) compels another person to engage in an act of sexual intercourse for hire and reward is guilty of forcible pandering⁷⁵⁴ and shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Rape.*

- (a) That the accused committed an act of sexual intercourse; and
- (b) That the act of sexual intercourse was done
 - (i) by [forcible compulsion] [physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping]; or
 - (ii) with a person who was less than 12 years of age; or
 - (iii) with a person who was at least 12 years of age but less than 16 years of age and was:
 - (a) a member of the accused's household; or
 - (b) a relative, within the fourth degree, of the accused; or
 - (c) subjected to the accused's authority and coerced into engaging in sexual intercourse by the accused; or
 - (iv) with a person who the accused knew or should have reasonably known was incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual act; or
 - (v) with a person who the accused knew or should have reasonably known was incapable, by reason of a physical incapacity, of consenting to the sexual act.

(2) *Aggravated sexual intercourse.*

- (a) That the accused committed an act of sexual intercourse; and
- (b) That the act of sexual intercourse was done by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent.

(3) *Carnal knowledge.*

- (a) That the accused committed an act of sexual intercourse with a certain person;
- (b) That the person was not the accused's spouse; and

⁷⁵³ This offense is similar to the existing "indecent exposure" article. See *MCM*, Pt. IV, paragraph 88 [see *infra* at page 388].

⁷⁵⁴ This offense is similar to the existing "pandering by compelling" article. See *MCM*, Pt. IV, paragraph 97.

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- (c) That at the time of the sexual intercourse the person was less than 16 years of age.
- (4) *Aggravated forcible sodomy.*
 - (a) That the accused engaged in sodomy with a certain person;
 - (b) That the act of sodomy was done
 - (i) by [forcible compulsion] [physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping]; or
 - (ii) with a person who was less than 12 years of age; or
 - (iii) with a person who was at least 12 years of age but less than 16 years of age and was:
 - (a) a member of the accused's household; or
 - (b) a relative, within the fourth degree, of the accused; or
 - (c) subjected to the accused's authority and coerced into engaging in sexual intercourse by the accused; or
 - (iv) with a person who the accused knew or should have reasonably known was incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual act; or
 - (v) with a person who the accused knew or should have reasonably known was incapable, by reason of a physical incapacity, of consenting to the sexual act.
- (5) *Forcible sodomy.*
 - (a) That the accused engaged in sodomy with a certain person; and
 - (b) That the act of sodomy was done by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent.
- (6) *Sodomy with a child.*
 - (a) That the accused engaged in sodomy with a certain person;
 - (b) That the person was not the accused's spouse;
 - (c) That at the time of the sodomy the person was less than 16 years of age.
- (7) *Bestial sodomy.*
 - (a) That the accused engaged in sodomy with an animal.
- (8) *Aggravated indecent assault.*
 - (a) That the accused engaged in sexual contact with a certain person;
 - (b) That the sexual contact was done
 - (i) by [forcible compulsion] [physical force, use of a dangerous weapon, or threat of immediate death, serious bodily injury, or kidnapping]; or
 - (ii) with a person who was less than 12 years of age; or
 - (iii) with a person who was at least 12 years of age but less than 16 years of age and was:
 - (a) a member of the accused's household; or
 - (b) a relative, within the fourth degree, of the accused; or

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- (c) subjected to the accused's authority and coerced into engaging in sexual intercourse by the accused; or
 - (iv) with a person who the accused knew or should have reasonably known was incapable, by reason of a mental disability or mental incapacity, of understanding the nature of the sexual act; or
 - (v) with a person who the accused knew or should have reasonably known was incapable, by reason of a physical incapacity, of consenting to the sexual act.
- (9) *Indecent assault.*
- (a) That the accused engaged in sexual contact with a certain person; and
 - (b) That the sexual contact was done by threat or coercion of sufficient consequence reasonably calculated to cause submission without consent.
- (10) *Indecent acts with a child.*
- (a) That the accused engaged in sexual contact with a certain person;
 - (b) That the person was not the accused's spouse; and
 - (c) That at the time of the sexual contact the person was less than 16 years of age.
- (11) *Indecent liberties with a child.*
- (a) That the accused engaged in conduct;
 - (b) That the conduct amounted to the taking of indecent liberties;
 - (c) That the accused engaged in the conduct in the presence of a certain person;
 - (d) That the person was not the accused's spouse; and
 - (e) That at the time of the conduct the person was less than 16 years of age.
- (12) *Indecent exposure.*
- (a) That the accused exposed the sexual or other intimate parts of the accused's body to public view in an indecent manner; and
 - (b) That the exposure was willful and wrongful.
- (13) *Forcible pandering.*
- (a) That the accused compelled another person to engage in an act of sexual intercourse for hire and reward.

c. Explanation.

(1) *Forcible Compulsion.*⁷⁵⁵ Forcible compulsion means to compel by physical force, by the use of a dangerous weapon, or by threats of immediate death, bodily injury, or kidnapping.

⁷⁵⁵ "Without consent" is from current Article 120. The definition is provided in a change to *MCM*, Pt. IV, paragraph 45. Several states use the term "forcible

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(2) *Indecent Liberties.* Indecent liberties includes, but is not limited to, sexual intercourse, sodomy, sexual contact, or any other sexually explicit conduct. As used in this definition, sexually-explicit conduct means actual or simulated: sexual intercourse, sodomy, bestiality, masturbation, sadistic or masochistic abuse, lascivious exhibition of the genitals or intimate parts of any person, or the lascivious exhibition of sexually-explicit materials.

(3) *Lack of Consent.*⁷⁵⁶ The term “consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A person is deemed incapable of giving consent when he or she is less than 16 years of age; lacks, because of a mental disability or mental incapacity, the mental ability to understand the nature of the act; or, lacks, because of a physical incapacity, the physical ability to consent to the act. Thus, consent of the victim is not an issue in alleged violations of subdivisions (1)(B-E), (3), (4)(B-E), (6), (7), (8)(B-E), (10), and (11) of this article. Whether or not specifically stated, consent is an element of the offenses listed in subdivisions (1)(A), (2), (4)(A), (5), (8), (9), (12), and (13) of this article, that the sexual act was committed without the consent of the victim. A victim does not have an independent, affirmative duty to manifest a “lack of consent.” However, where there is no manifestation of a “lack of consent,” an inference may be drawn that the victim consented or a reasonable inference may be raised that an accused was reasonably and honestly mistaken as to the victim’s consent. Moreover, a finding of “lack of consent” does not require proof that the victim physically resisted the attacker. A victim can manifest a “lack of consent” in ways other than by physical resistance and “lack of consent” is determined by the totality of circumstances. For example, when an accused’s actions, words or conduct, coupled with the surrounding

compulsion.” Option 6 adopts the term from ALA. CODE § 13A-6-60(8) (2004), *see infra* at page 481. This section states:

(8) Forcible compulsion. Physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person.

Seven other state statutes also use and define forcible compulsion: ARK. CODE ANN. § 5-14-101(2) (Michie 2004), *see infra* at page 501; KY. PENAL CODE Title 50 § 510.010(2) (2004), *see infra* at page 594; MO. ANN. STAT. §§ 566.030(1) (2004), *see infra* at page 640; N.Y. PENAL §§ 130.00(8) (2004) [*see infra* at page 674] and 130.35 (2004)[*see infra* at page 677]; OR. REV. STAT. § 163.305 (2004), *see infra* at page 698; 18 PA. CONS. STAT. §§ 3101 and 3121(a)(1) 3101(2004), *see infra* at pages 702 and 704; and WASH. REV. CODE 9A.44.010(6) (2004), *see infra* at page 752.

⁷⁵⁶ Majority of language derived from DA Pamphlet 27-9 and existing military case law.

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circumstances, create a reasonable belief in the victim's mind that death or serious physical injury would be inflicted on her and that further resistance would be futile, the sexual act would be accomplished without consent.

(4) *Physical Force*. Physical force is physical violence or power applied by the accused to the victim to overcome or prevent active resistance. A sexual act occurs "by physical force" when the accused uses physical violence or power to compel the victim to submit against the victim's will.

(5) *Sexual Act*. Sexual act means sexual contact, sexual intercourse, or sodomy.

(6) *Sexual Contact*. Sexual contact is the intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person. It includes the touching of the accused by the victim, as well as the touching of the victim by the accused or any object controlled or held by the accused, whether directly or through clothing.

(7) *Sexual Intercourse*. Sexual intercourse means penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

(8) *Sodomy*. A person commits sodomy by taking into that person's mouth or anus the sexual organ of another person or animal; placing that person's sexual organ in the mouth or anus of another person or animal; copulating in any opening of the body, except the sexual reproductive parts, of another person; or, copulating with an animal. Penetration, however slight, is sufficient to complete the offense.

(9) *Threat or coercion of sufficient consequence*.⁷⁵⁷ A threat or coercion is of sufficient consequence if the person complies with the accused's demands out of a reasonable fear that non-compliance would result in the accused or another harming or injuring the person, the person's property, or person or property of another. Whether a threat or coercion is of sufficient consequence depends upon the circumstances of each case. It may include a threat or coercion to cause physical injury to some person; cause destruction or damage to property; accuse some person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of position, rank, or authority, adversely affect some person. Proof that the accused actually intended to engage in the above conduct is not required.

⁷⁵⁷ The phrase "of sufficient consequence reasonably calculated to cause submission without consent" is based on COLO. REV. STAT. § 18-3-402(1)(a) (2004), *see infra* at page 523, and recognizes that not all threats or coercion short of threats of immediate death, serious bodily injury, or kidnapping will be sufficient to turn an act of sexual intercourse into "aggravated sexual intercourse," an act of sodomy into "forcible sodomy," or sexual contact into an "indecent assault.

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d. *Lesser included offenses.*

(1) *Rape.*

- (a) Article 120—aggravated sexual intercourse; carnal knowledge; aggravated indecent assault; indecent assault; indecent acts with a child; indecent liberties with a child
- (b) Article 128—assault consummated by a battery
- (c) Article 134—assault with the intent to commit rape
- (d) Article 134—prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (e) Article 80—attempts

(2) *Aggravated sexual intercourse.*

- (a) Article 120—carnal knowledge; aggravated indecent assault; indecent assault; indecent acts with a child; indecent liberties with a child
- (b) Article 128—assault consummated by a battery
- (c) Article 134—prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (d) Article 80—attempts

(3) *Carnal knowledge.*

- (a) Article 120—indecent acts with a child; indecent liberties with a child;
- (b) Article 80—attempts

(4) *Aggravated forcible sodomy.*

- (a) Article 120—forcible sodomy; sodomy with a child; aggravated indecent assault; indecent assault; indecent acts with a child; indecent liberties with a child
- (b) Article 128—assault consummated by a battery
- (c) Article 134—assault with the intent to commit sodomy
- (d) Article 134—prejudicial relationships involving sexual activity (prejudicial sodomy); prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (e) Article 80—attempts

(5) *Forcible sodomy.*

- (a) Article 120—sodomy with a child; indecent assault; indecent acts with a child; indecent liberties with a child
- (b) Article 128—assault consummated by a battery
- (c) Article 134—assault with the intent to commit sodomy

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- (d) Article 134—prejudicial relationships involving sexual activity (prejudicial sodomy); prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (e) Article 80—attempts

(6) *Sodomy with a child.*

- (a) Article 120—indecent acts with a child; indecent liberties with a child
- (b) Article 134—prejudicial relationships involving sexual activity (prejudicial sodomy); prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (c) Article 80—attempts

(7) *Bestial sodomy.*—Article 80—attempts

(8) *Aggravated indecent assault.*

- (a) Article 120—indecent assault
- (b) Article 128—assault consummated by a battery
- (c) Article 134—prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (d) Article 80—attempts

(9) *Indecent assault.*

- (a) Article 128—assault consummated by a battery
- (b) Article 134—prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (c) Article 80—attempts

(10) *Indecent acts with a child.*

- (a) Article 128—assault consummated by a battery
- (b) Article 134—prejudicial relationships involving sexual activity (prejudicial sexual contact)
- (c) Article 80—attempts

(11) *Indecent liberties with a child.*—Article 80—attempts

(12) *Indecent exposure.*—Article 80—attempts

(13) *Forcible pandering.*—Article 80—attempts

e. *Maximum punishment.*

- (1) *Rape.* Death or such other punishment as a court-martial may direct.

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(2) *Aggravated sexual intercourse.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(3) *Carnal knowledge.*

(a). *Carnal knowledge with a child who, at the time of the offense, had attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b). *Carnal knowledge with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(4) *Aggravated forcible sodomy.* Death or such other punishment as a court-martial may direct.⁷⁵⁸

(5) *Forcible sodomy.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.⁷⁵⁹

(6) *Sodomy with a child.*

(a). *Sodomy with a child who, at the time of the offense, had attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b). *Sodomy with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(7) *Bestial sodomy.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(8) *Aggravated indecent assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

(9) *Indecent assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

⁷⁵⁸ This misconduct is analogous in degrees of severity to rape, the offense upon which the maximum punishment is based.

⁷⁵⁹ This misconduct is analogous in degrees of severity to aggravated sexual intercourse, the offense upon which the maximum punishment is based.

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(10) *Indecent acts with a child.*

(a). *Indecent acts with a child who, at the time of the offense, had attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

(b). *Indecent acts with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(11) *Indecent liberties with a child.*

(a). *Indecent liberties with a child who, at the time of the offense, had attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

(b). *Indecent liberties with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(12) *Indecent exposure.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for one year.

(13) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

f. *Sample specifications.*

(1) *Rape.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, rape _____.

(2) *Aggravated sexual intercourse.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of aggravated sexual intercourse against _____.

(3) *Carnal knowledge.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of carnal knowledge with _____ (a child who had not attained the age of 12 years).

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(4) *Aggravated forcible sodomy.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of aggravated forcible sodomy against _____.

(5) *Forcible sodomy.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of forcible sodomy against _____.

(6) *Sodomy with a child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of sodomy with _____ a child who (had) (had not) attained the age of 12 years.

(7) *Bestial sodomy.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit the act of sodomy with an animal, to wit: a (chicken) (dog) (_____).

(8) *Aggravated indecent assault.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit an aggravated indecent assault against _____.

(9) *Indecent assault.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit an indecent assault against _____.

(10) *Indecent acts with a child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit an indecent act (upon) (with) the body of _____, a child who (had) (had not) attained the age of 12 years, not the spouse of the said _____, by (touching) the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____.

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(11) *Indecent liberties with a child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, take indecent liberties with _____, a child who (had) (had not) attained the age of 12 years, not the spouse of the said _____, by (_____).

(12) *Indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, while (at the barracks window) (_____) willfully and wrongfully expose in an indecent manner to public view (his) (her) _____.

(13) *Forcible pandering.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, compel _____ to engage in (an act) (acts) of sexual intercourse for hire and reward.

Changes to MCM, Part IV, to create comprehensive Article 134 offense for certain offenses that are manifested through consensual sexual activity.

62. Article 134—Prejudicial Relationships Involving Sexual Activity

- a. *Text* See paragraph 60.
- b. *Elements.*

(1) *Prejudicial sodomy.*

- (a) That the accused engaged in sodomy with another person and
- (b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.⁷⁶⁰

(2) *Prejudicial sexual contact.*

- (a) That the accused engaged in sexual contact with another person and
- (b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces⁷⁶¹; or

⁷⁶⁰ This offense is similar to the existing sodomy (consensual) article. See MCM, Pt. IV, paragraph 51 [see *infra* at page 372].

⁷⁶¹ This offense is similar to the existing indecent acts with another (consensual) article. See MCM, Pt. IV, paragraph 90 [see *infra* at page 391].

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(3) *Prostitution.*

- (a) That the accused wrongfully had sexual intercourse with another person, not the spouse of the accused;
- (b) That the accused did so for the purpose of receiving money or other compensation; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.⁷⁶²

(4) *Patronizing a prostitute.*⁷⁶³

- (a) That the accused had sexual intercourse with another person not the accused's spouse;
- (b) That the accused induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation;
- (c) That this act was wrongful; and
- (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(5) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse.*

- (a) That the accused induced, enticed, procured, arranged, or received consideration for arranging another person to engage in the act of sexual intercourse for hire and reward and
- (b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.⁷⁶⁴

(6) *Adultery.*

- (a) That the accused wrongfully had sexual intercourse with another person;
- (b) That, at the time of the sexual intercourse, the accused or the other person was married to someone else; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.⁷⁶⁵

⁷⁶² This offense is similar to the existing "prostitution" article. See *MCM*, Pt. IV, paragraph 97.

⁷⁶³ The Joint Service Committee recently voted and agreed to recommend adopting this proposed article.

⁷⁶⁴ This offense is similar to the existing "pandering" article. See *MCM*, Pt. IV, paragraph 97.

⁷⁶⁵ This offense is similar to the existing "adultery" article. See *MCM*, Pt. IV, ¶h 62.

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c. Explanation.

(1) *Nature of the offenses.*⁷⁶⁶ The offenses addressed concern personal relationships that involve consensual sexual activity occurring under circumstances that directly prejudice good order and discipline or bring discredit upon the armed forces. These offenses involve conduct under circumstances not amounting to a violation of Article 120, and are commonly referred to as non-forcible sodomy, indecent acts, prostitution, pandering, and adultery. Not every consensual sexual act constitutes an offense under this article. Relationships that are directly prejudicial include consensual sexual acts that have an obvious and measurably divisive effect on the discipline, morale, or cohesion of a military unit or organization, or that has a clearly detrimental impact on the authority, stature, or esteem of a service member. Service discrediting conduct includes consensual sexual acts that have a tendency, because of their open or notorious nature, to bring the service into disrepute, to make it subject to public ridicule, or to lower it in public esteem.

Under some circumstances, consensual sexual acts may not be prejudicial to good order and discipline but may, nonetheless, be service discrediting. Likewise, depending on the circumstances, consensual sexual acts may be prejudicial to good order and discipline but not be service discrediting. In determining whether a consensual sexual act is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, commanders should consider all relevant circumstances, including, but not limited to the following factors:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, or position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the co-actor's spouse, or their relationship to the armed forces;
- (d) The impact, if any, of the consensual sexual act on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the consensual sexual act;
- (f) Whether the consensual sexual act persisted despite counseling or orders to desist; the flagrancy of the consensual sexual act, such as whether any notoriety ensued; and whether the consensual sexual act was accompanied by other violations of the UCMJ;
- (g) The impact of the consensual sexual act, if any, on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) Whether the accused or co-actor was legally separated;

⁷⁶⁶ The majority of this language is derived from the explanation under the existing "adultery" article. *See MCM*, Pt. IV, ¶ 62.

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(i) Whether the consensual sexual act involves an ongoing or recent relationship or is remote in time;

(j) Where the consensual sexual act occurred;

(k) Who may have known of the consensual sexual act; and

(l) The nature, if any, of the official and personal relationship between the accused and co-actor.

(2) *Definitions.* As used in this article

(a) *Sexual Contact.* Sexual contact is the intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person. It includes the touching of the accused by the victim, as well as the touching of the victim by the accused or any object controlled or held by the accused, whether directly or through clothing.

(b) *Sexual Intercourse.* Sexual intercourse means penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

(c) *Sodomy.* A person commits sodomy by taking into that person's mouth or anus the sexual organ of another person or animal; placing that person's sexual organ in the mouth or anus of another person or animal; copulating in any opening of the body, except the sexual reproductive parts, of another person; or, copulating with an animal. Penetration, however slight, is sufficient to complete the offense.

d. *Lesser included offenses.*

i. *Prejudicial sodomy.*—Article 80—attempts

ii. *Prejudicial sexual contact.*—Article 80—attempts

(3) *Prostitution.*—Article 80—attempts

(4) *Patronizing a prostitute.*—Article 80—attempts

(5) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse.*—Article 80—attempts

(6) *Adultery.*—Article 80—attempts

e. *Maximum punishment.*

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- (c) *Prejudicial sodomy*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.⁷⁶⁷
- (d) *Prejudicial sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.⁷⁶⁸
- (e) *Prostitution*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.
- (4) *Patronizing a prostitute*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.
- (5) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.⁷⁶⁹
- (6) *Adultery*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

f. *Sample specifications.*

(1) *Prejudicial sodomy.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, commit sodomy with _____.

(2) *Prejudicial sexual contact.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in sexual contact with _____.

(3) *Prostitution.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in (an act) (acts) of sexual intercourse with _____, a person not (his) (her) spouse, for the purpose of receiving (money) (_____).

⁷⁶⁷ This maximum punishment is based on the current maximum punishment.

⁷⁶⁸ This misconduct is analogous in degrees of severity to adultery, the offense upon which the maximum punishment is based.

⁷⁶⁹ This maximum punishment is based on the current maximum punishment.

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(4) *Patronizing a prostitute.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully induced, enticed, or procured _____, a person not (his) (her) spouse, to engage in an act of sexual intercourse in exchange for (money) (_____).

(5) *Pandering by inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (induce) (entice) (procure) _____ to engage in (an act) (acts) of sexual intercourse for hire and reward.

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for) _____ to engage in (an act) (acts) of sexual intercourse with _____.

(6) *Adultery.*

In that _____ (personal jurisdiction data), (a married man) (a married woman), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully have sexual intercourse with _____, a (married) (woman/man) not (his wife) (her husband).

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**Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005
(Enrolled as Agreed to or Passed by Both House and Senate)**

SEC. 571. REVIEW ON HOW SEXUAL OFFENSES ARE COVERED BY UNIFORM CODE OF MILITARY JUSTICE.

(a) REVIEW REQUIRED- The Secretary of Defense shall review the Uniform Code of Military Justice and the Manual for Courts-Martial 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 and the Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.

(b) REPORT- Not later than March 1, 2005, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the review carried out under subsection (a). The report shall include the recommendations of the Secretary for revisions to the Uniform Code of Military Justice and, for each such revision, the rationale behind that revision.

SEC. 572. WAIVER OF RECOUPMENT OF TIME LOST FOR CONFINEMENT IN CONNECTION WITH A TRIAL.

Section 972 of title 10, United States Code, is amended by adding at the end the following new subsection:

`(c) WAIVER OF RECOUPMENT OF TIME LOST FOR CONFINEMENT- The Secretary concerned shall waive liability for a period of confinement in connection with a trial under subsection (a)(3), or exclusion of a period of confinement in connection with a trial under subsection (b)(3), in a case upon the occurrence of any of the following events:

`(1) For each charge--

`(A) the charge is dismissed before or during trial in a final disposition of the charge; or

`(B) the trial results in an acquittal of the charge.

`(2) For each charge resulting in a conviction in such trial--

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`(A) the conviction is set aside in a final disposition of such charge, other than in a grant of clemency; or

`(B) a judgment of acquittal or a dismissal is entered upon a reversal of the conviction on appeal.’.

SEC. 573. PROCESSING OF FORENSIC EVIDENCE COLLECTION KITS AND ACQUISITION OF SUFFICIENT STOCKS OF SUCH KITS.

(a) ELIMINATION OF BACKLOG, ETC- The Secretary of Defense shall take such steps as may be necessary to ensure that--

(1) the United States Army Criminal Investigation Laboratory has the personnel and resources to effectively process forensic evidence used by the Department of Defense within 60 days of receipt by the laboratory of such evidence;

(2) consistent policies are established among the Armed Forces to reduce the time period between the collection of forensic evidence and the receipt and processing of such evidence by United States Army Criminal Investigation Laboratory; and

(3) there is an adequate supply of forensic evidence collection kits--

(A) for all United States military installations, including the military service academies; and

(B) for units of the Armed Forces deployed in theaters of operation.

(b) TRAINING- The Secretary shall take such measures as the Secretary considers appropriate to ensure that personnel are appropriately trained--

(1) in the use of forensic evidence collection kits; and

(2) in the prescribed procedures to ensure protection of the chain of custody of such kits once used.

SEC. 574. AUTHORITIES OF THE JUDGE ADVOCATES GENERAL.

(a) DEPARTMENT OF THE ARMY- Section 3037 of title 10, United States Code, is amended--

(1) in subsection (a), by striking the second and third sentences and inserting ‘The term of office of the Judge Advocate General and the Assistant Judge Advocate General is four years.’; and

(2) by adding at the end the following new subsection:

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`(e) No officer or employee of the Department of Defense may interfere with--

`(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or

`(2) the ability of judge advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.’.

(b) DEPARTMENT OF THE NAVY- (1) Section 5148 of such title is amended by adding at the end the following new subsection:

`(e) No officer or employee of the Department of Defense may interfere with--

`(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Navy or the Chief of Naval Operations; or

`(2) the ability of judge advocates of the Navy assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.’.

(2) Section 5046 of such title is amended by adding at the end the following new subsection:

`(c) No officer or employee of the Department of Defense may interfere with--

`(1) the ability of the Staff Judge Advocate to the Commandant of the Marine Corps to give independent legal advice to the Commandant of the Marine Corps; or

`(2) the ability of judge advocates of the Marine Corps assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.’.

(c) DEPARTMENT OF THE AIR FORCE- Section 8037 of title 10, United States Code, is amended--

(1) in subsection (a), by striking `, but may be’ in the second sentence and all that follows in that sentence through `President’;

(2) in subsection (c)--

(A) by striking `shall’ in the matter preceding paragraph (1);

(B) by striking paragraph (2);

(C) by redesignating paragraph (1) as paragraph (3) and in that paragraph--

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(i) inserting `shall' before `receive,'; and

(ii) by striking `; and' at the end and inserting a period; and

(D) by inserting before paragraph (3), as so redesignated, the following new paragraphs:

`(1) is the legal adviser of the Secretary of the Air Force and of all officers and agencies of the Department of the Air Force;

`(2) shall direct the officers of the Air Force designated as judge advocates in the performance of their duties; and';

(3) in subsection (d)(1), by striking `, but may be' in the second sentence and all that follows in that sentence through `President'; and

(4) by adding at the end the following new subsection:

`(f) No officer or employee of the Department of Defense may interfere with--

`(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Air Force or the Chief of Staff of the Air Force; or

`(2) the ability of officers of the Air Force who are designated as judge advocates who are assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.'.

(d) INDEPENDENT REVIEW- (1) The Secretary of Defense shall establish an independent panel of outside experts to conduct a study and review of the relationships between the legal elements of each of the military departments and to prepare a report setting forth the panel's recommendations as to statutory, regulatory, and policy changes that the panel considers to be desirable to improve the effectiveness of those relationships and to enhance the legal support provided to the leadership of each military department and each of the Armed Forces.

(2) The panel shall be composed of seven members, appointed by the Secretary of Defense from among private United States citizens who have substantial expertise in military law and the organization and functioning of the military departments. No more than one member of the panel may have served as the Judge Advocate General of an Armed Force, and no more than one member of the panel may have served as the General Counsel of a military department.

(3) The Secretary of Defense shall designate the chairman of the panel from among the members of the panel other than a member who has served as a Judge Advocate General or as a military department General Counsel.

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(4) Members shall be appointed for the life of the panel. Any vacancy in the panel shall be filled in the same manner as the original appointment.

(5) The panel shall meet at the call of the chairman.

(6) All original appointments to the panel shall be made by January 15, 2005. The chairman shall convene the first meeting of the panel not later than February 1, 2005.

(7) In carrying out the study and review required by paragraph (1), the panel shall--

(A) review the history of relationships between the uniformed and civilian legal elements of each of the Armed Forces;

(B) analyze the division of duties and responsibilities between those elements in each of the Armed Forces;

(C) review the situation with respect to civilian attorneys outside the offices of the service general counsels and their relationships to the Judge Advocates General and the General Counsels;

(D) consider whether the ability of judge advocates to give independent, professional legal advice to their service staffs and to commanders at all levels in the field is adequately provided for by policy and law; and

(E) consider whether the Judge Advocates General and General Counsels possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties.

(8) Not later than April 15, 2005, the panel shall submit a report on the study and review required by paragraph (1) to the Secretary of Defense. The report shall include the findings and conclusions of the panel as a result of the study and review, together with any recommendations for legislative or administrative action that the panel considers appropriate. The Secretary of Defense shall transmit the report, together with any comments the Secretary wishes to provide, to the Committees on Armed Services of the Senate and House of Representatives not later than May 1, 2005.

(9) In this section, the term 'Armed Forces' does not include the Coast Guard.

Subtitle K--Sexual Assault in the Armed Forces

SEC. 576. EXAMINATION OF SEXUAL ASSAULT IN THE ARMED FORCES BY THE DEFENSE TASK FORCE ESTABLISHED TO

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**EXAMINE SEXUAL HARASSMENT AND VIOLENCE AT THE
MILITARY SERVICE ACADEMIES.**

(a) EXTENSION OF TASK FORCE- (1) The task force in the Department of Defense established by the Secretary of Defense pursuant to section 526 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 117 Stat. 1466) to examine matters relating to sexual harassment and violence at the United States Military Academy and United States Naval Academy shall continue in existence for a period of at least 18 months after the date as of which the task force would otherwise be terminated pursuant to subsection (i) of that section.

(2) Upon the completion of the functions of the task force referred to in paragraph (1) pursuant to section 526 of the National Defense Authorization Act for Fiscal Year 2004, the name of the task force shall be changed to the Defense Task Force on Sexual Assault in the Military Services, and the task force shall then carry out the functions specified in this section. The task force shall not begin to carry out the functions specified in this section until it has completed its functions under such section 526.

(3) Before the task force extended under this subsection begins to carry out the functions specified in this section, the Secretary of Defense may, consistent with the qualifications required by section 526(f) of Public Law 108-136, change the composition of the task force as the Secretary considers appropriate for the effective performance of such functions, except that--

(A) any change initiated by the Secretary in the membership of the task force under this paragraph may not take effect before the task force has completed its functions under section 526 of Public Law 108-136; and

(B) the total number of members of the task force may not exceed 14.

(b) EXAMINATION OF MATTERS RELATING TO SEXUAL ASSAULT IN THE ARMED FORCES- The task force shall conduct an examination of matters relating to sexual assault in cases in which members of the Armed Forces are either victims or commit acts of sexual assault.

(c) RECOMMENDATIONS- The Task Force shall include in its report under subsection (e) recommendations of ways by which civilian officials within the Department of Defense and leadership within the Armed Forces may more effectively address matters relating to sexual assault. That report shall include an assessment of, and recommendations (including any recommendations for changes in law) for measures to improve, with respect to sexual assault, the following:

(1) Victim care and advocacy programs.

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(2) Effective prevention.

(3) Collaboration among military investigative organizations with responsibility or jurisdiction.

(4) Coordination and resource sharing between military and civilian communities, including local support organizations.

(5) Reporting procedures, data collection, tracking of cases, and use of data on sexual assault by senior military and civilian leaders.

(6) Oversight of sexual assault programs, including development of measures of the effectiveness of those programs in responding to victim needs.

(7) Military justice issues.

(8) Progress in developing means to investigate and prosecute assailants who are foreign nationals.

(9) Adequacy of resources supporting sexual assault prevention and victim advocacy programs, particularly for deployed units and personnel.

(10) Training of military and civilian personnel responsible for implementation of sexual assault policies.

(11) Programs and policies, including those related to confidentiality, designed to encourage victims to seek services and report offenses.

(12) Other issues identified by the task force relating to sexual assault.

(d) **METHODOLOGY**- In carrying out its examination under subsection (b) and in formulating its recommendations under subsection (c), the task force shall consider the findings and recommendations of previous reviews and investigations of sexual assault conducted by the Department of Defense and the Armed Forces.

(e) **REPORT**- (1) Not later than one year after the initiation of its examination under subsection (b), the task force shall submit to the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force a report on the activities of the task force and on the activities of the Department of Defense and the Armed Forces to respond to sexual assault.

(2) The report shall include the following:

(A) A description of any barrier to implementation of improvements as a result of previous efforts to address sexual assault.

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(B) Other areas of concern not previously addressed in prior reports.

(C) The findings and conclusions of the task force.

(D) Any recommendations for changes to policy and law that the task force considers appropriate.

(3) Within 90 days after receipt of the report under paragraph (1), the Secretary of Defense shall submit the report, together with the Secretary's evaluation of the report, to the Committees on Armed Services of the Senate and House of Representatives.

(f) TERMINATION- The task force shall terminate 90 days after the date on which the report of the task force is submitted to the Committees on Armed Services of the Senate and House of Representatives pursuant to subsection (e)(3).

**SEC. 577. DEPARTMENT OF DEFENSE POLICY AND PROCEDURES
ON PREVENTION AND RESPONSE TO SEXUAL ASSAULTS
INVOLVING MEMBERS OF THE ARMED FORCES.**

(a) COMPREHENSIVE POLICY ON PREVENTION AND RESPONSE TO SEXUAL ASSAULTS- (1) Not later than January 1, 2005, the Secretary of Defense shall develop a comprehensive policy for the Department of Defense on the prevention of and response to sexual assaults involving members of the Armed Forces.

(2) The policy shall be based on the recommendations of the Department of Defense Task Force on Care for Victims of Sexual Assaults and on such other matters as the Secretary considers appropriate.

(3) Before developing the comprehensive policy required by paragraph (1), the Secretary of Defense shall develop a definition of sexual assault. The definition so developed shall be used in the comprehensive policy under paragraph (1) and otherwise within the Department of Defense and Coast Guard in matters involving members of the Armed Forces. The definition shall be uniform for all the Armed Forces and shall be developed in consultation with the Secretaries of the military departments and the Secretary of Homeland Security with respect to the Coast Guard.

(b) ELEMENTS OF COMPREHENSIVE POLICY- The comprehensive policy developed under subsection (a) shall, at a minimum, address the following matters:

(1) Prevention measures.

(2) Education and training on prevention and response.

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- (3) Investigation of complaints by command and law enforcement personnel.
- (4) Medical treatment of victims.
- (5) Confidential reporting of incidents.
- (6) Victim advocacy and intervention.
- (7) Oversight by commanders of administrative and disciplinary actions in response to substantiated incidents of sexual assault.
- (8) Disposition of victims of sexual assault, including review by appropriate authority of administrative separation actions involving victims of sexual assault.
- (9) Disposition of members of the Armed Forces accused of sexual assault.
- (10) Liaison and collaboration with civilian agencies on the provision of services to victims of sexual assault.
- (11) Uniform collection of data on the incidence of sexual assaults and on disciplinary actions taken in substantiated cases of sexual assault.

(c) REPORT ON IMPROVEMENT OF CAPABILITY TO RESPOND TO SEXUAL ASSAULTS- Not later than March 1, 2005, the Secretary of Defense shall submit to Congress a proposal for such legislation as the Secretary considers necessary to enhance the capability of the Department of Defense to address matters relating to sexual assaults involving members of the Armed Forces.

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Appendix I

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⁷⁷⁰ In 2004, Major Carl A. Johnson, authored as his LL.M. thesis, NONCONSENSUAL SEX CRIMES AND THE UCMJ: A PROPOSAL FOR REFORM. This paper was an invaluable resource for this report, and is on file with The Judge Advocate General's Legal Center and School Library in Charlottesville, Virginia.

Appendix J

Current MCM Provisions Pertaining to Sex Crimes

17. Article 93--Cruelty and maltreatment

a. *Text.*

“Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. *Explanation.*

(1) *Nature of victim.* “Any person subject to his orders” means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) *Nature of act.* The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that ___ (personal jurisdiction data), (at/on board--location) (subject-matter

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jurisdiction data, if required), on or about ____ 20__, (was cruel toward) (did (oppress) (maltreat)) ____, a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water) (____).

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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) 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.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person was under 16 years of age.

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c. Explanation.

(1) *Rape.*

(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force and without consent of the victim. 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.

(2) *Carnal knowledge.* "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

d. Lesser included offenses.

(1) *Rape.*

(a) Article 128--assault; assault consummated by a battery

(b) Article 134--assault with intent to commit rape

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(c) Article 134--indecent assault

(d) Article 80--attempts

(e) Article 120(b)--carnal knowledge

(2) *Carnal knowledge.*

(a) Article 134--indecent acts or liberties with a person under 16

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Carnal knowledge with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

f. *Sample specifications.*

(1) *Rape.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, rape ____, (a person who had not attained the age of 16 years).

(2) *Carnal knowledge.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, commit the offense of carnal knowledge with ___.

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51. Article 125--Sodomy

a. *Text.*

“(a) 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.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add either or both of the following elements, if applicable)

(2) That the act was done with a child under the age of 16.

(3) That the act was done by force and without the consent of the other person.

c. *Explanation.* It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s 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 with an animal.

d. *Lesser included offenses.*

(1) *With a child under the age of 16.*

(a) Article 125--forcible sodomy (and offenses included therein; *see* subparagraph (2) below)

(b) Article 134--indecent acts with a child under 16

(c) Article 80--attempts

(2) *Forcible sodomy.*

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(a) Article 125--sodomy (and offenses included therein; *see* subparagraph (3) below)

(b) Article 134--assault with intent to commit sodomy

(c) Article 134--indecent assault

(d) Article 80--attempts.

(3) *Sodomy.*

(a) Article 134--indecent acts with another

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(4) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that ____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ____ 20__, commit sodomy with ____ (a child under the age of 16 years) (by force and without the consent of the said ____).

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59. Article 133--Conduct unbecoming an officer and gentleman

a. *Text.*

“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. *Explanation.*

(1) *Gentleman.* As used in this article, “gentleman” includes both male and female commissioned officers, cadets, and midshipmen.

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person’s standing as an officer, cadet, or midshipman or the person’s character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

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(3) *Examples of offenses.* Instances of violation of this article include making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

f. *Sample specifications.*

(1) *Copying or using examination paper.*

In that ____ (personal jurisdiction data), did, (at/on board--location), on or about ____ 20__, while undergoing a written examination on the subject of ____, wrongfully and dishonorably (receive) (request) unauthorized aid by ((using) (copying) the examination paper of ____)) (____).

(2) *Drunk or disorderly.*

In that ____ (personal jurisdiction data), was, (at/on board--location), on or about ____ 20__, in a public place, to wit: ____, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

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60. Article 134—General article

a. Text.

“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”

b. Elements. The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:

- (1) That the accused did or failed to do certain acts; and
- (2) That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *In general.* Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as “clauses 1, 2, and 3” of Article 134.

Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act, *see* subsection (4) below. If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article. *See* subparagraph (5)(a) below. However, *see* paragraph 59c for offenses committed by commissioned officers, cadets, and midshipmen. (2)

Disorders and neglects to the prejudice of good order and discipline in the armed forces.

(clause 1).

(a) *To the prejudice of good order and discipline.* “To the prejudice of good order and discipline” refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces. However, *see* R.C.M. 203 concerning subject – matter jurisdiction.

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(b) *Breach of custom of the service.* A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, “custom” means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of the customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive. *See* paragraph 16c.

(3) *Conduct of a nature to bring discredit upon the armed forces (clause 2).*

“Discredit” means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, *see* R.C.M. 203 concerning subject matter jurisdiction.

(4) *Crimes and offenses not capital (clause 3).*

(a) *In general.* State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act— *see* subparagraph (4)(c) below). For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes which are punishable regardless where they may be committed), and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).

(b) *Crimes and offenses of unlimited application.*

Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

(c) *Crimes and offenses of local application.*

(i) *In general.* A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States.

Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134. There are two types of congressional enactments of local application: specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws).

(ii) *Federal Assimilative Crimes Act (18 U.S.C. § 13).*

The Federal Assimilative Crimes Act is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct

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committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the state wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows: Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(5) *Limitations on Article 134.*

(a) *Preemption doctrine.* The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

(b) *Capital offense.* A capital offense may not be tried under Article 134.

(6) *Drafting specifications for Article 134 offenses.*

(a) *In general.* A specification alleging a violation of Article 134 need not expressly allege that the conduct was “a disorder or neglect,” that it was “of a nature to bring discredit upon the armed forces,” or that it constituted “a crime or offense not capital.” The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces.

(b) *Specifications under clause 3.* When alleging a clause 3 violation, each element of the federal or assimilated statute must be alleged expressly or by necessary implication. In addition, the federal or assimilated statute should be identified.

(c) *Specifications for clause 1 or 2 offenses not listed.* If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual (paragraphs 61 through 113 of this Part) a specification not listed in this Manual may be used to allege the offense.

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62. Article 134--(Adultery)

a. *Text.* See paragraph 60.

b. *Elements.*

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Nature of offense.* Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.

(2) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember. Adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;

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(d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
(e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;

(f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;

(g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(h) Whether the accused or co-actor was legally separated; and

(i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.

(3) *Marriage*. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) *Mistake of fact*. A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification*.

In that ___ (personal jurisdiction data), (a married man/a married woman), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, wrongfully have sexual intercourse with ___, a (married) (woman/man) not (his wife) (her husband).

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63. Article 134--(Assault--indecent)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of “indecent”, see paragraph 90 c.

d. *Lesser included offenses.*

(1) Article 128--assault consummated by a battery; assault

(2) Article 134--indecent acts

(3) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that ____ (personal jurisdiction data), did (at/on board--location), (subject-matter jurisdiction data, if required), on or about ____ 20__, commit an indecent assault upon ____ a person not his/her wife/husband by ____, with intent to gratify his/her (lust) (sexual desires).

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65. Article 134--(Bigamy)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused had a living lawful spouse;

(2) That while having such spouse the accused wrongfully married another person; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* Bigamy is contracting another marriage by one who already has a living lawful spouse. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was only voidable and has not been voided by a competent court, this is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable. See R.C.M. 916(j)(1).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification.*

In that ___ (personal jurisdiction data), did, at ___, (subject-matter jurisdiction data, if required), on or about ___ 20___, wrongfully marry ___, having at the time of his/her said marriage to ___ a lawful wife/husband then living, to wit: ___.

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69. Article 134--(Cohabitation, wrongful)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That, during a certain period of time, the accused and another person openly and publicly lived together as husband and wife, holding themselves out as such;

(2) That the other person was not the spouse of the accused;

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* This offense differs from adultery (*see* paragraph 62) in that it is not necessary to prove that one of the partners was married or that sexual intercourse took place. Public knowledge of the wrongfulness of the relationship is not required, but the partners must behave in a manner, as exhibited by conduct or language, that leads others to believe that a martial relationship exists.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. *Sample specification.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), from about ___ 20__, to about 20__, wrongfully cohabit with ___, (a woman not his wife) (a man not her husband).

**SEX CRIMES AND THE UCMJ:
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83. Article 134--(Fraternization)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) *Regulations.* Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 16.

d. *Lesser included offense.* Article 80—attempts

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e. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification.*

In that ____ (personal jurisdiction data), did, (at/on board--location), on or about ____, 20__ , fraternize with ____, an enlisted person, on terms of military equality, to wit: ____, in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality.

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87. Article 134--(Indecent acts or liberties with a child)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Physical contact.*

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *No physical contact.*

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person;

(d) That this person was under 16 years of age and not the spouse of the accused;

(e) That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Consent.* Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.

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(2) *Indecent liberties.* When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.

(3) *Indecent.* See paragraph 89c and 90c.

d. *Lesser included offense.*

(1) Article 134--indecent acts with another

(2) Article 128--assault; assault consummated by a battery

(3) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. *Sample specification.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, (take (**indecent**) liberties with) (commit an indecent act (upon) (with) the body of) ___, a (female) (male) under 16 years of age, not the (wife) (husband) of the said ___, by (fondling (her) (him) and placing his/her hands upon (her) (his) leg and private parts) (___), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said ___ (and ___).

**SEX CRIMES AND THE UCMJ:
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88. Article 134--(Indecent exposure)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* "Willful" means an intentional exposure to public view. Negligent **indecent** exposure is not punishable as a violation of the code. See paragraph 90c concerning "indecent."

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, while (at a barracks window) (___) willfully and wrongfully expose in an indecent manner to public view his or her ___.

**SEX CRIMES AND THE UCMJ:
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89. Article 134--(Indecent language)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: In appropriate cases add the following element after element (1): That the person to whom the language was communicated was a child under the age of 16.]

c. *Explanation.* “Indecent” language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.

d. *Lesser included offenses.*

(1) Article 117--provoking speeches

(2) Article 80—attempts

e. *Maximum punishment.* Indecent or insulting language.

(1) *Communicated to any child under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Other cases.* Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

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In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20__, (orally) (in writing) communicate to ___, (a child under the age of 16 years), certain indecent language, to wit: ___.

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90. Article 134--(Indecent acts with another)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* “Indecent” signifies 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 the morals with respect to sexual relations.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that ___ (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20___, wrongfully commit an indecent act with ___ by ___.

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97. Article 134—(Pandering and prostitution)

a. Text. See paragraph 60.

b. Elements.

(1) *Prostitution.*

- (a) That the accused has sexual intercourse with another person not the accused's spouse;
- (b) That the accused did so for the purpose of receiving money or other compensation;
- (c) That this act was wrongful; and
- (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Pandering by compelling, inducing, enticing, or procuring act of prostitution.*

- (a) That the accused compelled, induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;
- (b) That this compelling, inducing, enticing, or procuring was wrongful; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) *Pandering by arranging or receiving consideration for arranging for sexual intercourse or sodomy.*

- (a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in sexual intercourse or sodomy with another person;
- (b) That the arranging (and receipt of consideration) was wrongful; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

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c. *Explanation.* Prostitution may be committed by males or females. Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 51. Evidence that sodomy was for money or compensation may be a matter in aggravation. *See* R.C.M. 1001(b)(4).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Prostitution.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Prostitution.*

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 20__, wrongfully engage in (an act) (acts) of sexual intercourse with _____, a person not his/her spouse, for the purpose of receiving (money) (_____).

(2) *Compelling, inducing, enticing, or procuring act of prostitution.*

In that (personal jurisdiction data), did, (at/on board—location) subject-matter jurisdiction data, if required), on or about 20__, wrongfully (compel) (induce) (entice) (procure) _____ to engage in (an act) (acts) of (sexual intercourse for hire and reward) with persons to be directed to him/her by the said _____.

(3) *Arranging, or receiving consideration for arranging for sexual intercourse or sodomy.*

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 20__, wrongfully (arrange for) (receive valuable consideration, to wit: on account of arranging for_____ to engage in (an act) (acts) of (sexual intercourse) (sodomy) with _____.

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APPENDIX K

18 U.S.C. § 2241

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

18 USCS § 2241 (2004)

18 U.S.C. § 2241 (2004). Aggravated sexual abuse

(a) By force or threat. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act--

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children. Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) State of mind proof requirement. In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

HISTORY: (Added Nov. 10, 1986, P.L. 99-646, § 87(b), 100 Stat. 3620, and Nov. 14, 1986, P.L. 99-654, § 2, 100 Stat. 3660.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330021(1), 108 Stat. 2150; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 7(b))], 110 Stat. 3009-31; Oct 30, 1998, P.L. 105-314, Title III, § 301(a), 112 Stat. 2978.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2241 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P.L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P.L. 99-654, § 4, 100 Stat. 3664, both of which appear as a note to this section, provide that this section shall take effect 30 days after their respective enactment.

Amendments:

1994. Act Sept. 13, 1994, in subsec. (a)(2), substituted “kidnapping” for “kidnaping”.

1996. Act Sept. 30, 1996 substituted subsec. (c) for one which read: “(c) With children. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person

who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.”.

1998. Act Oct. 30, 1998, in subsec. (c), substituted “younger than the person so engaging” for “younger than that person”.

Short titles:

Act Nov. 10, 1986, P.L. 99-646, § 87(a), 100 Stat. 3620, provides: “This section may be cited as the ‘Sexual Abuse Act of 1986’.”. For full classification of such section, consult USCS Tables volumes.

Act Nov. 14, 1986, P.L. 99-654, § 1, 100 Stat. 3660, provides: “This Act may be cited as the ‘Sexual Abuse Act of 1986’.”. For full classification of such Act, consult USCS Tables volumes.

Act Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 7(a))], 110 Stat. 3009-31, provides: “This section [amending *18 USCS* § § 2241(c) and 2243(a)] may be cited as the ‘Amber Hagerman Child Protection Act of 1996’.”.

Other provisions:

Effective date of Nov. 10, 1986 amendments. Act Nov. 10, 1986, P.L. 99-646, § 87(e), 100 Stat. 3624, provides: “This section and the amendments made by this section [adding this section, among other things; for full classification, consult USCS Tables volumes] shall take effect 30 days after the date of the enactment of this Act.”.

Effective date of Nov. 14, 1986 amendments. Act Nov. 14, 1986, P.L. 99-654, § 4, 100 Stat. 3664, provides: “This Act and the amendments made by this Act [adding *18 USCS* § § 2241-2245 and making various amendments] shall take effect 30 days after the date of the enactment of this Act.”.

NOTES:

Sentencing Guidelines for the United States Courts, *18 USCS Appx* § 2A3.1.

This section is referred to in *18 USCS* § 2244.

Federal Procedure:

26 Moore’s Federal Practice (Matthew Bender 3d ed.), Verdict § 631.10.

28 Moore’s Federal Practice (Matthew Bender 3d ed.), Federal Habeas Corpus § 671.03.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Sex Offense Cases; Relevance of Alleged Victim’s Past Behavior § 412.02.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Child Molestation Cases § 414.03.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

12 Fed Proc L Ed, Evidence § 33:219.

Am Jur:

8A Am Jur 2d, Bail and Recognizance § 17.

41 Am Jur 2d, Indians § 193.

63C Am Jur 2d, Prostitution § 31.

65 Am Jur 2d, Rape § 1.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

Annotations:

Mistake or lack of information as to victim's age as defense to statutory rape. *46 ALR5th 499.*

Admissibility of Expert Testimony as to Proper Techniques for Interviewing Children or Evaluating Techniques Employed in Particular Case. *87 ALR5th 693.*

I. IN GENERAL

.5. Constitutionality

1. Relationship with state laws

Rape as charged under [former] *18 USCS § 2031* was federal crime, defined and punished by federal law, and federal court was not bound by any state court decision, or to all aspects of state decision once cited, but federal court could choose to adopt as federal law those principles enunciated by state tribunals that it found to be sensible and well reasoned. *United States v Henry (1977, CA9 Nev) 560 F2d 963.*

2. Multiple offenses

Crimes of entering military reservation for purposes of breaking into building in violation of 18 USCS § 1382 assault with machete in violation of § 113(c), and rape in violation of [former] § 2031, which grew out of occurrence on single evening, were obviously “meaningful distinct,” and defendant could properly be convicted of all 3. *United States v Quinones* (1975, CA1 Puerto Rico) 516 F2d 1309, cert den 423 US 852, 46 L Ed 2d 76, 96 S Ct 97.

II. ELEMENTS OF CRIME

3. Intent

In prosecution under [former] 18 USCS § 2031 only intent necessary was intent to have carnal knowledge of prosecutrix by force and without her consent. *Carlton v United States* (1968, CA9 Or) 395 F2d 10, cert den 393 US 1030, 21 L Ed 2d 574, 89 S Ct 642.

Despite testimony that accused was highly intoxicated at time of acts which led to charge and despite medical expert’s testimony that defendant would have been physically incapable of committing rape at time in question, jury could convict defendant for assault with intent to rape because although defendant’s intoxication may have rendered him sexually impotent and incapable of rape he nevertheless could have entertained criminal intent to commit assault with intent to rape. *United States v Contreras* (1970, CA9 Nev) 422 F2d 828.

Because 18 USCS § 2244 contains specific intent element that 18 USCS § 2241 does not, crime of abusive sexual contact is not lesser included offense of crime of aggravated sexual abuse of child under age of twelve. *United States v Velarde* (2000, CA10 NM) 214 F3d 1204, 2000 Colo J C A R 3092.

Discrete conduct elements of 18 USCS § 2241(c): crossing of state lines, intent to engage in sexual act, and attempt to do so, compel conclusion that Congress intended statute to be treated as continuing offense; thus, where defendant traveled from Texas to Oklahoma to complete his crime. *United States v Cryar* (2000, CA10 Okla) 232 F3d 1318, 2000 Colo J C A R 6317.

Mistake of age is no defense to 18 USCS § 2241(c) offense; defendant’s Equal Protection rights were not violated by fact that mistake of age is defense under 18 USCS § 2243(ca), since distinction to which defendant objected was permissible legislative choice. *United States v Juvenile Male* (2000, CA9 Mont) 211 F3d 1169, 2000 CDOS 3716, 2000 Daily Journal DAR 4969.

III. PROSECUTION AND PUNISHMENT

4. Jurisdiction

Where defendant accosted victim in parking lot on Air Force base, forced her into automobile, then drove to motel off base where actual penetration occurred, federal

court had jurisdiction under predecessor statute (former *18 USCS § 2031*) because sovereign has jurisdiction to try offense when only part of offense has been committed within its boundaries, and element of force employed by defendant to achieve purpose began on federal lands and continued to consummation of crime at site off Air Force base. *Leonard v United States* (1974, CA5 Ala) 500 F2d 673.

Federal courts have had jurisdiction over Indians charged with violating *18 USCS § § 2241* and *2243* since December 1986. *United States v Whitted* (1993, CA8 SD) 994 F2d 444, *37 Fed Rules Evid Serv 189*, vacated, reh gr (CA8 SD) 1993 US App LEXIS 19752.

Sovereignty offended alone had power and right to prosecute accused for substantive offense of rape committed within its exclusive jurisdiction; incidental fact that accused was navy man did not transfer this essential jurisdiction to navy courts, or give them concurrent jurisdiction in absence of expression by Congress to that effect. *Ex parte Mulvaney* (1949, DC Hawaii) 82 F Supp 743.

Undocumented alien charged with committing various sexual offenses against 2 females in Mexico and Guatemala cannot be tried for alleged crimes in federal district court, where victims were also undocumented aliens, even though indictment alleges assaults were committed while in course of illegally bringing victims into United States, because express language of *18 USCS § § 113, 2241, 2242* and *2244* provides that prohibited conduct must occur “within special maritime and territorial jurisdiction of United States,” and *18 USCS § 3238* is mere venue statute that is not independent source of extraterritorial jurisdiction. *United States v Velasquez-Mercado* (1988, SD Tex) 697 F Supp 292, affd (CA5 Tex) 872 F2d 632, reh den (CA5) 1989 US App LEXIS 7793 and cert den (US) 107 L Ed 2d 142, 110 S Ct 187.

5. Indictment or information

In prosecution for rape under predecessor statute (former *18 USCS § 2031*), government did not have to allege as element of offense that victim was not wife of defendant, nor did government have to prove at trial that victim was not wife of defendant absent some colorable indication raised by evidence or defendant that victim was in fact married to defendant; it was sufficient that prosecution allege and prove that defendant had carnal knowledge of female by force without her consent. *United States v Lone Bear* (1978, CA9 Mont) 579 F2d 522.

When charged offense is aggravated sexual abuse by digital penetration under *18 USCS § 2241(c)*, abusive sexual contact is lesser-included offense, since elements of lesser offense are subset of elements of charged offense. *United States v Torres* (1991, CA9 Ariz) 937 F2d 1469, *91 CDOS 5370*, *91 Daily Journal DAR 8004*.

6. Evidence; admissibility

To introduce the testimony of another woman to effect that accused had taken her out in his car and raped her about fifteen days prior to alleged rape on prosecutrix and to go into circumstances as fully as though that case were on trial was reversible error,

since there was no issue of identity, knowledge, motive, or intent. *Lovely v United States* (1948, CA4 SC) 169 F2d 386, later app (CA4 SC) 175 F2d 312, 44 BNA LRRM 2674, cert den 338 US 834, 94 L Ed 508, 70 S Ct 38.

In prosecution for rape charged to have been committed in national park, official map of army corps of engineers, and map taken from official files of the park, both showing its boundaries, and book entitled United States Military Reservations, showing its location, description, and title history of tracts comprising it, authenticated by war department, were admissible for the purpose of proving that United States had jurisdiction over park, its boundaries, and that offense was committed therein. *Krull v United States* (1957, CA5 Ga) 240 F2d 122, cert den 353 US 915, 1 L Ed 2d 668, 77 S Ct 674.

In prosecution under [former] 18 USCS § 2031, evidence regarding victim's claimed infidelity while husband was in Vietnam would be irrelevant and could not be used for impeachment of victim's trial testimony. *United States v Stone* (1973, CA5 Ga) 472 F2d 909, cert den 449 US 1020, 66 L Ed 2d 482, 101 S Ct 586, later proceeding 219 Ct Cl 604, 618 F2d 119, later proceeding 4 Cl Ct 250, later proceeding 4 Cl Ct 264 and (disagreed with by multiple cases as stated in *Bundy v Dugger* (CA11 Fla) 850 F2d 1402, 26 Fed Rules Evid Serv 322, reh den, en banc (CA11 Fla) 859 F2d 928 and cert den 488 US 1034, 102 L Ed 2d 980, 109 S Ct 849, post-conviction proceeding (Fla) 538 So 2d 445, 14 FLW 42).

Evidence of defendant's prior act of aggravated sexual assault was probative and relevant to prove intent to commit aggravated sexual assault in violation of 18 USCS § 2241 and 1153, where factual similarities were abundant, and time span of 7 and one-half years between 2 assaults was reasonable considering 30 month sentence served by defendant during that time. *United States v Cuch* (1988, CA10 Utah) 842 F2d 1173, 25 Fed Rules Evid Serv 113.

In prosecution of defendant for aggravated sexual abuse of minor under 18 USCS § 2241, it was not harmless error to exclude evidence of her prior sexual abuse by another, including her cross-examination, to show contrast between acts of 2 men, since her testimony would have disproved penetration, and jury might have found lesser offense of "sexual contact." *United States v Begay* (1991, CA10 NM) 937 F2d 515.

18 USCS § 2241 does not violate defendant's due process or equal protection rights by not allowing defense for reasonable mistake of age, since statutory rape has traditionally been viewed as strict liability offense, it does not impinge on other protected constitutional rights, and it furthers legitimate government interest. *United States v Ransom* (1991, CA10 Okla) 942 F2d 775.

Court did not abuse its discretion in allowing leading questions to 8-year-old girl, in light of her age and nature of testimony, where questions would not have resulted in denial of fair trial if they had been improper because of evidence that defendant had

admitted to crime. *United States v Castro-Romero* (1992, CA9 Idaho) 964 F2d 942, 92 CDOS 4255, 92 Daily Journal DAR 6739.

Physician's testimony as to his final diagnosis that alleged victim had suffered repeated child sexual abuse was inadmissible, since victim had engaged in consensual intercourse with her peers during three years since abuse allegedly occurred--depriving doctor's vaginal findings of any probative value--and he was not qualified to judge victim's truthfulness. *United States v Whitted* (1993, CA8 SD) 11 F3d 782, 38 Fed Rules Evid Serv 939.

Restriction of evidence concerning undisputed sexual assault by three older boys of 6-year-old prior to alleged sexual assault by father, offered as alternative explanation for behavioral manifestations of abused child, was disproportionate to court's concerns and was abuse of discretion requiring reversal, since basic factual details of assault were constitutionally required for fair trial. *United States v Bear Stops* (1993, CA8 SD) 997 F2d 451, reh, en banc, den (CA8) 1993 US App LEXIS 23728.

Defendant may assert no privilege regarding his communications of sexual experiences with children during psychotherapy, regardless of whether or not he waived privilege, since such privilege did not exist at common law and Congress has not created it, and there is significant need for this type of evidence due to clandestine manner in which child sexual abuse crimes occur and vulnerable segment of society they victimize. *United States v Burtrum* (1994, CA10 Okla) 17 F3d 1299, 38 Fed Rules Evid Serv 1377, petition for certiorari filed (Jun 27, 1994).

Evidence of defendant's violence against his daughter, whom he was accused of sexually abusing in violation of 18 USCS § 2241, and her family members was admissible to explain her submission to his acts and her delay in reporting them, since evidence was relevant to issues other than his character, was reliable and necessary, and was more probative than prejudicial, given judge's wide discretion. *United States v Powers* (1995, CA4 NC) 59 F3d 1460.

Evidence of prior bad acts was admissible to prove how child could be afraid enough to submit to such actions quietly without telling her mother, who was nearby, where evidence was not remote in time, was sufficient to prove that prior abuse occurred, and where knowledge and intent were not at issue. *United States v Tsinnijinnie* (1996, CA9 Ariz) 91 F3d 1285, 96 CDOS 5686, 96 Daily Journal DAR 9327.

It was error to allow child to present her testimony about alleged sexual abuse by closed-circuit television as permitted under 18 USCS § 3509, where child's own testimony disavowed any fear of defendant, and social worker, who lacked psychological or psychiatric qualifications, did not testify that child had particularized fear; error was not harmless where need for confrontation was critical. *United States v Moses* (1998, CA6 Mich) 137 F3d 894, 1998 FED App 68P.

Admissibility of evidence of defendant's prior conviction for federal crime of carnal knowledge, which involved sexual abuse of minor, was not abuse of discretion under

Rules 413 and 414, even though crime had occurred ten years before and involved sex with individual now his common law wife, since wife testified, evidence was relevant, and age of conviction could be discounted since defendant was incarcerated for six of ten years. *United States v Eagle* (1998, CA8 SD) 137 F3d 1011.

There was no error in admitting testimony of crime lab technician that she had observed seven sperm heads on fecal material taken from alleged infant victim, where technician had had substantial practical experience in identification of sperm, and two other qualified serologists with undoubted credentials agreed with her as to at least one sperm cell. *United States v Bruguier* (1998, CA8 SD) 161 F3d 1145, 50 Fed Rules Evid Serv 1001, reh den (1999, CA8 SD) 1999 US App LEXIS 1430.

District court did not abuse its discretion in refusing to admit exculpatory polygraph results for father convicted of aggravated sexual abuse of his nine-year-old daughter without holding reliability hearing, even where polygraph test had been done at behest of government who did not comply with discovery by providing information defense needed to argue reliability, since Rule 403 provided alternative ground for exclusion. *United States v Waters* (1999, CA8 SD) 194 F3d 926, reh, en banc, den (2000, CA8) 2000 US App LEXIS 81.

District court erred in failing to make reliability determination with respect to expert testimony as to whether sexual abuse of child had in fact occurred, where there was relatively little other evidence besides young girl's testimony as to single incident of abuse, and defendant's credibility was not obviously suspect. *United States v Velarde* (2000, CA10 NM) 214 F3d 1204, 2000 Colo J C A R 3092.

District court did not abuse its discretion in excluding, pursuant to Rule 412's notice requirement, testimony of defendant's sister regarding prior consensual use of inanimate objects during sex, since that evidence was not probative of whether sex after brutal beating was consensual under Rule 403. *United States v Ramone* (2000, CA10 NM) 218 F3d 1229, 2000 Colo J C A R 4466.

Error in admitting minor sex abuse victim's statement identifying perpetrator, made to examining physician but not relevant to treatment, was harmless, where statement was consistent with and cumulative to her trial testimony. *United States v Gabe* (2001, CA8 SD) 237 F3d 954.

District court's admission into evidence of defendant's confession to sexual abuse of twenty-one-month old was not abuse of discretion, where defendant failed to file pretrial motion to suppress his oral confession as required by Rule 12(b)(3). *United States v Blue* (2001, CA8 SD) 255 F3d 609.

Evidence of defendant's sexual molestation of his cousins in 1989 when he was twelve years old was admissible under Rule 414, which is constitutional, since evidence was indisputably relevant to issue of whether he had done same thing to his nephews in 1997 and was more probative than prejudicial, highly reliable, and

necessary to prove case. *United States v LeMay* (2001, CA9 Mont) 260 F3d 1018, 2001 CDOS 6861, 2001 Daily Journal DAR 8449, 56 Fed Rules Evid Serv 1193.

Error in admitting expert testimony of psychologist as to out-of-court statements of child victim in sexual abuse case was not harmless, since it was crucial to government's case and thus must have had more than slight influence on verdict, where psychologist did not discuss with child victim need for truthful revelations or emphasize that identification of her abuser was important to his attempts to help her overcome any emotional trauma resulting from abuse to which she had been subjected, and there was no clear evidence she knew she had been brought to him for medical diagnosis or possible treatment for any medical or emotional problems. *United States v Sumner* (2000, CA8 Minn) 204 F3d 1182.

7. --Sufficiency

In prosecution for rape under predecessor statute (former 18 USCS § 2031), where victim testified she was very frightened and she thought her life was in danger, there existed substantial evidence of rape with all essential elements. *Laughlin v United States* (1966, CA9 Wash) 368 F2d 558, cert den 386 US 1041, 18 L Ed 2d 609, 87 S Ct 1500.

18 USCS § 2241 envisions actual force, which results when sexual contact resulted from restraint upon other person sufficient that other person could not escape sexual contact, and was not met merely by proof that offense was committed by adult person, stepfather of victim, young child. *United States v Fire Thunder* (1990, CA8 SD) 908 F2d 272.

Evidence was insufficient that defendant committed anal sexual assault, where victim testified only that he "pulled down his pants" and "touched[h]is thing by my butt," although it was sufficient to prove attempt; however, any error, due to inability to tell from general verdict whether jury found sexual assault or only attempt, would be harmless, since legal import of attempt and act is same, and his sentence would remain unchanged. *United States v Nazarenus* (1993, CA8 SD) 983 F2d 1480.

Evidence was sufficient that 63-year-old defendant used force sufficient to overcome or restrain his 12-year-old victim, where he would push her to floor or bed and lie down on top of her, while she was on her stomach, prior to engaging in sexual contact with her. *United States v Fulton* (1993, CA9 Wash) 987 F2d 631, 93 CDOS 1573, 93 Daily Journal DAR 2904.

Two-hundred pound defendant's threatening statements made to non-obese 10-year-old child that he would tell her mother of "dirty book" she had found, admitted without objection through psychologists' evaluation, were sufficient to establish that defendant used "force" as set forth in 18 USCS § 2241(a), since statements establish "threat of harm sufficient to coerce or compel submission" by child; size disparity alone might have been sufficient. *United States v Bordeaux* (1993, CA8 SD) 997 F2d 419.

There was no need to instruct jury on sexual assault, *18 USCS § 2242(1)*, even if it were lesser included offense of aggravated sexual assault under *18 USCS § 2214(a)(1)*, where evidence of defendant's guilt in using force to cause victim to engage in sexual intercourse with him was overwhelming. *United States v Boyles (1995, CA7 Wis) 57 F3d 535*.

Court could reasonably acquit defendant on two counts of sexual abuse of minor in violation of *18 USCS § § 1153, 2241* while convicting on separate count, where counts involved separate incidents, and court could reasonably find that child witness was credible, and that evidence was convincing as to count of conviction but not as to other two counts, where both children's testimony was corroborated by social workers and one of mothers. *United States v Juvenile NB (1995, CA8 SD) 59 F3d 771*, reh, en banc, den (1995, CA8) *1995 US App LEXIS 25292*.

Evidence was sufficient to prove that defendant used force in violating *18 USCS § 2241, 1153*, where thirteen-year-old female victim with mental age of seven testified that he pushed her down on bed, raped her, and performed acts on her that hurt her, and jury could observe her fear of him while testifying. *United States v Eagle (1998, CA8 SD) 133 F3d 608*, reh den (1998, CA8 SD) *1998 US App LEXIS 1845*.

Evidence was sufficient that defendant physically restrained victim for purposes of *18 USCS § 2244*, where he lay on top of her and resisted her attempts to push him away while having sexual intercourse with her, since *18 USCS § 2241(a)(1)* does not require force that prevents eventual escape of victim but only that sufficient to restrain victim and allow defendant to engage in sexual conduct. *United States v Allery (1998, CA8 ND) 139 F3d 609*.

Evidence was sufficient to support jury's verdict convicting defendant of attempted aggravated sexual abuse, in violation of *18 USCS § 2241(a)(1)*; evidence was more than sufficient to permit reasonable jury to find both physical and mental elements of aggravated sexual assault by means of attempted forcible digital penetration. *United States v Crowley (2003, CA2 NY) 318 F3d 401*.

Companion's convictions under *18 USCS § § 2241* and *2242* are supported by sufficient evidence, even though he never actually touched victim during sexual assault, where he was at her bedside along with main perpetrator, because rational jury could believe he participated in attempt to cause victim to engage in sexual act through use of force or fear and that he wished to bring about her compliance with oral sex request. *United States v Crowley (1999, ED NY) 79 F Supp 2d 138*.

8. Comments of trial judge

Remarks of trial court before sentencing indicating sentiment in favor of leaving defendant to hands of other inmates or of rape victims' husbands required resentencing because surrender to desire to speak one's mind, as occurred at trial, suggested that capacity for discriminating judgment in other respects might also have been lacking.

United States v Duhart (1974, CA9 Wash) 496 F2d 941, cert den 419 US 967, 42 L Ed 2d 182, 95 S Ct 230.

9. Instructions

Trial court's instruction impermissibly infringed upon jury's sphere where he told jury that if you believe beyond reasonable doubt that testimony of rape victim was not so inherently incredible or so contrary to human experience or usual human behavior as to render it unworthy of belief, then testimony of prosecutrix, even if uncorroborated, is sufficient to support conviction [under former 18 USCS § 2031] if all other elements of crime have been proven beyond reasonable doubt. *United States v Smith* (1962, CA4 Va) 303 F2d 341.

In prosecution under predecessor statute (former 18 USCS § 2031), trial court properly refused to give defendant's requested instruction concerning rape that should jury find defendant lacked intent to put prosecutrix in fear of death or grave bodily harm, defendant would be not guilty, because requested instruction did not properly state law. *Carlton v United States* (1968, CA9 Or) 395 F2d 10, cert den 393 US 1030, 21 L Ed 2d 574, 89 S Ct 642.

Trial court's instruction to jury respecting assault count, that assault is done with intent to commit rape whether assault is on person of female intended to be raped or on person of some other individual, was erroneous because to constitute offense assault must be upon person intended to be raped, and government's theory that assault was committed on all 4 women with intent from outset of raping one was refuted by defendant's explanation that he ordered 4 women to disrobe not intending to rape them, but simply to make escape more difficult. *United States v Duhart* (1974, CA9 Wash) 496 F2d 941, cert den 419 US 967, 42 L Ed 2d 182, 95 S Ct 230.

Trial court did not err in denying defendant's motion to strike victims' ages from indictment and to instruct jurors that they must totally disregard offense of statutory rape where jury was properly informed of law applicable to charge of violation of predecessor statute (former 18 USCS § 2031). *United States v Littlewind* (1977, CA8 ND) 551 F2d 244, 1 Fed Rules Evid Serv 837.

Trial court's refusal to give defendant's proffered instruction warning jury that rape is charge easily made and requiring special attention to testimony of female was not error, since evidence clearly pointed to defendant's guilt, victim's testimony was corroborated, and trial was fair. *United States v Henry* (1977, CA9 Nev) 560 F2d 963.

In prosecution under 18 USCS § 2241, trial court is not required to give instruction on affirmative defense of reasonable mistake unless and until defendant introduces some evidence, direct or circumstantial, of reasonable basis for having made mistake. *United States v Norquay* (1993, CA8 Minn) 987 F2d 475.

District court did not err in refusing to instruct that sexual abuse of minor, 18 USCS § 2243(a), was lesser included offense of aggravated sexual abuse, 18 USCS §

2241(a), since former includes age element not required for latter and is not subset of it. *United States v Rivera* (1995, CA9 Mont) 43 F3d 1291, 95 CDOS 56, 95 Daily Journal DAR 154.

Defendant's counsel was not guilty of ineffective assistance of counsel for failing to request instruction on abusive sexual conduct, 18 USCS § 2244, as lesser included offense of aggravated sexual abuse, 18 USCS § 2246, since attempt to perform sexual act does not require intent as described in 18 USCS § 2246(3). *United States v Hourihan* (1995, CA2 NY) 66 F3d 458.

District court did not commit plain error in refusing to instruct on abusive sexual conduct as lesser included offense of aggravated sexual abuse, based on evidence. *United States v Waters* (1999, CA8 SD) 194 F3d 926, reh, en banc, den (2000, CA8) 2000 US App LEXIS 81.

Failure to instruct on venue was not reversible error, where facts establishing completion of crime begun in Texas but continuing into Oklahoma were not contested, so that jury verdict by necessity incorporated findings of venue. *United States v Cryar* (2000, CA10 Okla) 232 F3d 1318, 2000 Colo J C A R 6317.

Board of Immigration Appeals (BIA) was not obligated to use definition of "sexual abuse of minor" found in 18 USCS § 2243(a), which defines minor as being between ages of twelve and sixteen, in determining that defendant had committed "sexual abuse of minor" under recently enacted provisions of Immigration and Nationality Act, 8 USCS § 1101(a)(43)(A), where victim was four-year-old child; BIA did not improperly look beyond state statute of conviction to determine that defendant had sexually assaulted minor. *Lara-Ruiz v INS* (2001, CA7) 241 F3d 934.

In action in which defendant was convicted of attempted aggravated sexual abuse, in violation of 18 USCS § 2241(a)(1), jury instructions given by district court could not be characterized as plain error; there was no reasonable likelihood that jury would have been more likely to find defendant not guilty if judge had glossed "substantial step" requirement with definition proposed by defense. *United States v Crowley* (2003, CA2 NY) 318 F3d 401.

10. Judgment and sentence

Under predecessor statute (former 18 USCS § 2031), court, and not jury, has sole penalty-fixing power, within statutory limits, for rape committed within territorial jurisdiction of United States. *Krull v United States* (1957, CA5 Ga) 240 F2d 122, cert den 353 US 915, 1 L Ed 2d 668, 77 S Ct 674.

Remarks of trial court before sentencing indicating sentiment in favor of leaving defendant to hands of other inmates or of rape victims' husbands required resentencing because surrender to desire to speak one's mind, as occurred at trial, suggested that capacity for discriminating judgment in other respects might also have been lacking.

United States v Duhart (1974, CA9 Wash) 496 F2d 941, cert den 419 US 967, 42 L Ed 2d 182, 95 S Ct 230.

Four-level sentence enhancement under USSG § 2A3.1(b)(1) for use of force was proper for violation of USCS § 2241(a)(1), “aggravated sexual abuse by force,” even though adjustment would always apply for “aggravated sexual abuse by force,” so long as evidence was sufficient. *United States v Graves* (1993, CA6 Ky) 4 F3d 450.

Where district court vacated defendant’s conviction under 18 USCS § 2241(c) because it violated ex post facto clause of Federal Constitution’s Art I, § 9, cl 3, subsequent conviction under substituted statute, 18 USCS § 2244(a)(1), without further trial violated grand jury clause of Constitution’s Fifth Amendment and must be reversed, since there was impermissible amendment of indictment. *United States v Downer* (1998, CA4 Md) 143 F3d 819.

Prosecutor did not violate his plea agreement with defendant by making comments in opposition to defendant’s motion for downward departure from sentence under 18 USCS § § 2241 and 2246, although prosecutor had said he would not oppose any motion for downward departure made in good faith, where motion was not made in good faith. *United States v Peterson* (2000, CA10 NM) 225 F3d 1167, 2000 Colo J C A R 5266.

Where defendant pleaded guilty to violation of 18 USCS § 2423(b) but also stipulated to facts which constituted aggravated sexual abuse, in violation of 18 USCS § 2241(c), pursuant to USSG § 1B1.2, he may be sentenced for offense of conviction, 18 USCS § 2423(b), by application of USSG § 2A3.1 which is guideline for violation of § 2241(c), even though defendant was not convicted of § 2241(c) violation. *United States v Rhodes* (2001, CA5 Tex) 253 F3d 800.

District court did not err by refusing to treat defendant’s prior conviction under *Cal. Penal Code* § 288(a) for lewd and lascivious conduct upon child as predicate conviction for two-strike sentencing enhancement under 18 USCS § 2241(c) because *Cal. Penal Code* § 288(a) reached conduct that did not qualify as predicate under 18 USCS § 2241(c), and therefore, it was unclear whether defendant was convicted of skin-to-skin conduct as required. *United States v Etimani* (2003, CA9 Hawaii) 328 F3d 493, 2003 CDOS 3274, 2003 Daily Journal DAR 4200, 61 Fed Rules Evid Serv 182.

Officer’s objection to use of sexual abuse guideline for his sentencing must fail, even though he says his conduct--forcing broken broomstick approximately 6 inches into detainee’s rectum--falls outside “heartland” of guideline since there was no sexual pleasure or gratification involved in incident, because his abusive, intimidating sodomization of detainee surely constituted aggravated sexual assault as defined in 18 USCS § § 2241 and 2246(2)(C). *United States v Volpe* (1999, ED NY) 78 F Supp 2d 76.

Where defendant pleaded guilty to violating 18 USCS § 2242(1), but contested force enhancement under USSG § 2A3.1(b), court found that force used by defendant

complied with requirements of *18 USCS § 2241(a)*, as interpreted by *U.S. Court of Appeals for Second Circuit. United States v Denjen (2003, ED NY) 258 F Supp 2d 194.*

APPENDIX L

LEXSTAT 18 USC 2242

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 2242 (2004)

18 U.S.C. § 2242 (2004). Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

HISTORY: (Added Nov. 10, 1986, P.L. 99-646, § 87(b), 100 Stat. 3621, and Nov. 14, 1986, P.L. 99-654, § 2, 100 Stat. 3661.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330021(1), 108 Stat. 2150.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2242 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P.L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P.L. 99-654, § 4, 100 Stat. 3664, both of which appear as *18 USCS § 2241* note, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1994. Act Sept. 13, 1994, in para. (1), substituted “kidnapping” for “kidnaping”.

NOTES:

CROSS REFERENCES

Sentencing Guidelines for the United States Courts, *18 USCS Appx § 2A3.1*.

This section is referred to in *18 USCS § 2244*.

RESEARCH GUIDE

Federal Procedure:

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Sex Offense Cases; Relevance of Alleged Victim’s Past Behavior § 412.02.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

Am Jur:

8A Am Jur 2d, Bail and Recognizance § 17.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

INTERPRETIVE NOTES AND DECISIONS

Defendant was entitled to jury instruction on defense of voluntary intoxication in trial for attempted sexual abuse under *18 USCS § 2242*, since it is specific intent crime. *United States v Sneezer (1990, CA9 Ariz) 900 F2d 177*.

Defendant was entitled to jury instruction on defense of voluntary intoxication in trial for attempted sexual abuse under *18 USCS § 2242*, since it is specific intent crime. *United States v Sneezer (1990, CA9 Ariz) 900 F2d 177* (disagreed with by multiple cases as stated in *United States v Sotelo-Rivera (CA9 Ariz) 906 F2d 1324*).

18 USCS § 2242 was not unconstitutionally void for vagueness as applied to defendant on issue of whether fear induced in victim refers to nonphysical harm or fear of trivial bodily injury, where defendant's testimony provides ample foundation for conclusion that defendant's actions placed her in fear of at least some bodily harm. *United States v Cherry (1991, CA7 Ill) 938 F2d 748*, reh, en banc, den (CA7) 1991 US App LEXIS 19477.

Defendant was not entitled to instruction on lesser included offense of "abusive sexual contact" as defined in *18 USCS § § 2244* and *2245*, where he was charged under *18 USCS § 2242* with engaging in "sexual act" with his daughter, where government's evidence clearly showed penetration, since elements differentiating two offenses were not in dispute, and jury could not rationally have convicted defendant of "abusive sexual contact" and acquitted him of engaging in sexual act with his daughter. *United States v Rafaelito (1991, CA10 NM) 946 F2d 107*.

Evidence that member of Ojibwa Indian band who served as parent and spiritual teacher to victim placed her in fear was sufficient under *18 USCS § § 1153, 2242*, even though victim attributed some of her fears of harm to spirits rather than directly to defendant, where, in addition to dominating every aspect of her life over period of years, his intertwining of purportedly spiritual teachings with sexual abuse accentuated, rather than diminished, her fears. *United States v Johns (1994, CA8 Minn) 15 F3d 740*.

There was no need to instruct jury on sexual assault, *18 USCS § 2242(1)*, even if it were lesser included offense of aggravated sexual assault under *18 USCS § 2241(a)(1)*, where evidence of defendant's guilt in using force to cause victim to engage in sexual intercourse with him was overwhelming. *United States v Boyles (1995, CA7 Wis) 57 F3d 535*.

Evidence was insufficient to prove victim's incapacitation to support conviction under *18 USCS § 2242(2)(B)*, where fact that victim was unsuccessful in fending off defendant did not mean that she was physically incapable of expressing her desire not to participate in sexual activity with him. *United States v Williams (1996, CA4 SC) 89 F3d 165*.

Statements of thirteen-year-old blind and incommunicable victim's mother to examining nurse were admissible hearsay, where they were consistent with promoting treatment and reasonably pertinent, were trustworthy, offered to prove material fact,

more probative than any other evidence, and admitted in best service of rules of evidence and interests of justice. *Lovejoy v United States* (1996, CA8 Neb) 92 F3d 628, 45 Fed Rules Evid Serv 389, reh den (1996, CA8 Neb) 1996 US App LEXIS 23373.

Because 18 USCS § 2244 contains specific intent element that 18 USCS § § 2242 and 2243 do not have, crime of abusive sexual contact is not lesser included offense of crime of sexual abuse. *United States v Castillo* (1998, CA10 NM) 140 F3d 874, 98 Colo J C A R 1616.

Where jury could infer that male parent attempting to perform sexual acts with his children would place them in fear of bodily harm, buttressed by victim's mother's testimony that defendant had physically abused child victim and herself in child's presence, implicit threats were sufficient to establish element of fear under 18 USCS § 2242. *United States v Castillo* (1998, CA10 NM) 140 F3d 874, 98 Colo J C A R 1616.

Where defendant pled guilty to violation of 18 USCS § 2244(a)(2), which expressly cross-referenced 18 USCS § 2242 and admitted to engaging in "sexual act" with victim, his admission and plea taken together constitute admission to committing "criminal sexual abuse" in violation of 18 USCS § 2242. *United States v Morgan* (1999, CA9 Mont) 164 F3d 1235, 99 CDOS 429, 99 Daily Journal DAR 519.

District court did not abuse its discretion in admitting evidence of defendant's prior conviction for sexually abusing his granddaughters in his prosecution for allegedly sexually abusing his nieces, even where there were no eyewitnesses, no direct evidence, and defendant denied accusations; district court did not abuse its discretion in refusing to exclude expert testimony of government's witnesses for whom government failed to provide Rule 16 summaries for them, and their impermissible vouching for credibility of alleged victim was harmless error. *United States v Charley* (1999, CA10 NM) 189 F3d 1251, 1999 Colo J C A R 5453.

District court must make particularized findings as to whether defendant engaged in activity that reasonably amounted to criminal sexual abuse or attempted sexual abuse as defined by federal statutes in order to cross-reference to sexual abuse guideline, USSG § 2A3.1, pursuant to USSG § 2G1.1(c)(2), in sentencing defendant under 18 USCS § 2422(b). *United States v Angle* (2000, CA7 Ind) 234 F3d 326.

Court of appeals lacked jurisdiction to entertain 18 USCS § 2242 defendant's appeal of district court's upward sentencing departure based on defendant's receipt and download of three instances of child pornography; thus, it could not consider whether district court had abused its discretion in denying continuance to permit defendant to gather evidence to show that he had not solicited pornographic images that had been mailed to his Internet account, where district court made no mistake of law. *United States v Dewire* (2001, CA1 Mass) 271 F3d 333.

There was no plain error in district court's failure to instruct jury on defense of voluntary intoxication, where defendant did not object to instructions at trial, and error was not plain where it appeared from fair reading of record that defendant's key

defense to offense under *18 USCS § 2242* was that fourteen-year-old witness was not telling truth or was coaxed into making allegations that defendant sexually violated his friend's wife without waking her or her husband, after defendant, friend, and wife had been drinking heavily together from early evening into early morning hours. *United States v Yellow Hawk (2002, CA8 SD) 276 F3d 953*, reh, en banc, den (2002, CA8) 2002 US App LEXIS 2507.

Evidence was insufficient to convict Indian male of engaging in nonconsensual sexual act with Indian female on reservation in violation of *18 USCS § 2242*, where, after consuming twelve beers, during two-hour period, she lay down next to him on floor, allegedly passed out, followed him to back bedroom, and he engaged in sexual act with her, since there was no evidence, other than fact that she appeared intoxicated when police arrived at end of two-hour time span, that at time sexual act occurred she was physically incapable of declining participation, or that he knowingly engaged in sexual act with her when she was physically incapable of declining participation. *United States v Peters (2002, CA7 Wis) 277 F3d 963*.

Definition in *18 USCS § § 2242, 2243, 2246*, is too restrictive to encompass numerous state crimes that can be viewed as sexual abuse and diverse types of conduct that would fit within "sexual abuse of minor" under *8 USCS § 1101(a)(43)* as it is commonly used. *Santapaola v Ashcroft (2003, DC Conn) 249 F Supp 2d 181*.

Where defendant pleaded guilty to violating *18 USCS § 2242(1)*, but contested force enhancement under *USSG § 2A3.1(b)*, court found that force used by defendant complied with requirements of *18 USCS § 2241(a)*, as interpreted by Court of Appeals for Second Circuit. *United States v Denjen (2003, ED NY) 258 F Supp 2d 194*.

Defendant's motion for judgment of acquittal or new trial on claim that telephone solicitations to young boys aimed at persuading them to engage in illegal sex acts were protected by First Amendment was denied where statutes under which defendant was charged, *18 USCS § 2242(b)* and *Kan. Stat. Ann. § 21-3516*, were narrowly tailored to regulate communications that targeted minors for sexual exploitation and were thus not protected by *First Amendment*. *United States v Riccardi (2003, DC Kan) 258 F Supp 2d 1212, 61 Fed Rules Evid Serv 820*.

Sexual abuse and sexual abuse of minor are not lesser included offenses of aggravated sexual abuse by force, since threatening or placing victim in fear is not necessary element of aggravated sexual abuse by force, and it is possible to commit aggravated sexual abuse by force without committing sexual abuse of minor. *United States v Amos (1991, CA8 SD) 952 F2d 992*, petition for certiorari filed (Mar 23, 1992).

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

APPENDIX M

18 USCS § 2243 (2004)

18 U.S.C. § 2243 (2004). Sexual abuse of a minor or ward

(a) Of a minor. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who--

- (1) has attained the age of 12 years but has not attained the age of 16 years; and
- (2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is--

- (1) in official detention; and
- (2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses.

(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement. In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

HISTORY: (Added Nov. 10, 1986, P.L. 99-646, § 87(b), 100 Stat. 3621 and Nov. 14, 1986, P.L. 99-654, § 2, 100 Stat. 3661.)

(As amended Nov. 29, 1990, P.L. 101-647, Title III, Subtitle B, § 322, 104 Stat. 4818; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 7(c))], 110 Stat. 3009-31; Oct 30, 1998, P.L. 105-314, Title III, § 301(b), 112 Stat. 2979.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2243 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P.L. 99-646, § 87(e), 100 Stat. 3624 and Act Nov. 14, 1986, P.L. 99-654, § 4, 100 Stat. 3664, both of which appear as *18 USCS § 2241* note, provide that this section shall take effect 30 days after their respective enactment.

Amendments:

1990. Act Nov. 29, 1990, in subsec. (a), in the concluding matter, substituted “15 years” for “five years”.

1996. Act Sept. 30, 1996, in subsec. (a), in the introductory matter, inserted “crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or”.

1998. Act Oct. 30, 1998, in subsec. (a), in the introductory matter, deleted “crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or” following “Whoever”.

NOTES:

CROSS REFERENCES

Sentencing Guidelines for the United States Courts, *18 USCS Appx* § § 2A3.2, 2A3.3.

This section is referred to in *18 USCS* § 2244.

RESEARCH GUIDE

Federal Procedure:

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Sex Offense Cases; Relevance of Alleged Victim’s Past Behavior § 412.02.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

Am Jur:

8A Am Jur 2d, Bail and Recognizance § 17.

39 Am Jur 2d, Guardian and Ward § 227.

65 Am Jur 2d, Rape § § 11, 84, 87.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

INTERPRETIVE NOTES AND DECISIONS

1. Elements of offense; intent
2. Force or violence

3. Lesser included offense
4. Indictment or information
5. Jurisdiction
6. Evidence; admissibility
7. Sufficiency
8. Instructions
1. Elements of offense; intent

Under predecessor statute, evidence of lewd and lascivious conduct toward female under sixteen was insufficient to show requisite intent to commit rape where intercourse did not take place although girl was not unwilling. *Oyamada v United States (1930, CA9 Alaska) 44 F2d 564.*

Definition in *18 USCS § § 2242, 2243, 2246*, is too restrictive to encompass numerous state crimes that can be viewed as sexual abuse and diverse types of conduct that would fit within “sexual abuse of minor” under *8 USCS § 1101(a)(43)* as it is commonly used. *Santapaola v Ashcroft (2003, DC Conn) 249 F Supp 2d 181.*

2. Force or violence

Conviction under predecessor statute (former *18 USCS § 2032*) required showing that defendant carnally knew female, not his wife, who at time of act was under 16 years of age, and no showing that defendant used or threatened use of force or violence was required. *United States v Bear Ribs (1977, CA8 SD) 562 F2d 563, cert den 434 US 974, 54 L Ed 2d 465, 98 S Ct 531.*

3. Lesser included offense

Since crime of assault required use or threat of use of force or violence, while crime of carnal knowledge under predecessor statute (former *18 USCS § 2032*) did not, former could not be lesser included offense of latter. *United States v Bear Ribs (1977, CA8 SD) 562 F2d 563, cert den 434 US 974, 54 L Ed 2d 465, 98 S Ct 531.*

District court did not err in refusing to instruct that sexual abuse of minor, *18 USCS § 2243(a)*, was lesser included offense of aggravated sexual abuse, *18 USCS § 2241(a)*, since former includes age element not required for latter and is not subset of it. *United States v Rivera (1995, CA9 Mont) 43 F3d 1291, 95 CDOS 56, 95 Daily Journal DAR 154.*

Because *18 USCS § 2244* contains specific intent element that *18 USCS § § 2242* and *2243* do not have, crime of abusive sexual contact is not lesser included offense of

crime of sexual abuse. *United States v Castillo* (1998, CA10 NM) 140 F3d 874, 98 Colo J C A R 1616.

Sexual abuse and sexual abuse of minor are not lesser included offenses of aggravated sexual abuse by force, since threatening or placing victim in fear is not necessary element of aggravated sexual abuse by force, and it is possible to commit aggravated sexual abuse by force without committing sexual abuse of minor. *United States v Amos* (1991, CA8 SD) 952 F2d 992, petition for certiorari filed (Mar 23, 1992).

4. Indictment or information

Indictment charging violation of predecessor statute did not need to allege that act was done with girl's consent. *Callahan v United States* (1917, CA9 Alaska) 240 F 683.

5. Jurisdiction

Statutory rape of Indian girl committed on defendant's ranch located within boundaries of Blackfeet Indian Reservation and acquired by tax deed without express reservation of any federal jurisdiction over land was committed within special territorial jurisdiction of United States. *Guith v United States* (1956, CA9 Mont) 230 F2d 481.

Federal courts have had jurisdiction over Indians charged with violating 18 USCS § 2241 and 2243 since December 1986. *United States v Whitted* (1993, CA8 SD) 994 F2d 444, 37 Fed Rules Evid Serv 189, vacated, reh gr (CA8 SD) 1993 US App LEXIS 19752.

18 USCS § 7(3) incorporated by reference into 18 USCS § 2243 does not apply extraterritorially; therefore, civilian husband of soldier may not be prosecuted in court of United States for his conduct on United States military installation in Germany. *United States v Gatlin* (2000, CA2 NY) 216 F3d 207.

Although sexual contact with minor in violation of 18 USCS § 2244(a)(3) occurred in foreign territorial waters, United States had criminal jurisdiction since both § 2244(a)(3) and cross-referenced statute relating to minors, 18 USCS § 2243(a), expressly invoked extraterritorial jurisdiction and exercising such jurisdiction did not offend any principles of international law. *United States v Neil* (2002, CA9 Cal) 312 F3d 419, 2002 CDOS 11275, 2002 Daily Journal DAR 13110.

6. Evidence; admissibility

In prosecution under predecessor statute, evidence was improperly admitted, to prejudice of defendant, of conversation between alleged victim and another girl, wherein victim related what had occurred between her and defendant and that defendant had paid her sum of money, defendant not being present at such conversation. *Callahan v United States* (1917, CA9 Alaska) 240 F 683.

In prosecution for having carnal knowledge of female under age 16, contrary to predecessor statute (former *18 USCS § 2032*), testimony as to other acts, including one act of intercourse with victim's mother, was admissible where no basis for distinguishing one act involving mother from subsequent ones involving daughter existed, because in both instances method employed by defendant was essentially same (that is, guise of therapy or treatment), and evidence was relevant and material. *United States v Gano* (1977, CA10 Kan) 560 F2d 990, 2 Fed Rules Evid Serv 692, later proceeding (DC Kan) 597 F Supp 1325.

Exclusion of testimony as to age of minor victim of sexual abuse was reversible error, where defendant asserted that he had had no sexual relations with victim and that he reasonably believed she was at least 16 years old, since defendant was entitled to assert even inconsistent defenses. *Arcoren v United States* (1991, CA8 SD) 929 F2d 1235.

Physician's testimony as to his final diagnosis that alleged victim had suffered repeated child sexual abuse was inadmissible, since victim had engaged in consensual intercourse with her peers during three years since abuse allegedly occurred--depriving doctor's vaginal findings of any probative value--and he was not qualified to judge victim's truthfulness. *United States v Whitted* (1993, CA8 SD) 11 F3d 782, 38 Fed Rules Evid Serv 939.

Physician's testimony as to his final diagnosis, that defendant's daughter had suffered repeated sexual abuse, was inadmissible, not because it may have embraced ultimate issue, but because physical findings were consistent with either consensual or abusive sexual intercourse, and his diagnosis, which was actually based on his subjective belief of alleged victim's view of events rather than on objective medical findings, unfairly tipped credibility scale in favor of alleged victim. *United States v Whitted* (1993, CA8 SD) 994 F2d 444, 37 Fed Rules Evid Serv 189, vacated, reh gr (CA8 SD) 1993 US App LEXIS 19752.

7. Sufficiency

For purposes of former statute, evidence of lewd and lascivious conduct toward female under sixteen was insufficient to show requisite intent to commit rape where the intercourse did not take place although the girl was not unwilling. *Oyamada v United States* (1930, CA9 Alaska) 44 F2d 564.

Evidence was sufficient to support defendant's convictions for sexual abuse of minor and incest, where he told his wife he would not deny that fourteen-year-old niece's baby was his, several witnesses testified to their "unusual" relationship, police officer found him in her bedroom, and three DNA experts testified against him. *United States v Black Cloud* (1996, CA8 SD) 101 F3d 1258.

8. Instructions

Trial court did not err in refusing to instruct jury to view testimony of complainants with caution where instructions given adequately informed jury of factors to be taken into account in assessing testimony, including witness' intelligence, motive, state of mind, demeanor while on stand and age. *United States v Bear Ribs* (1977, CA8 SD) 562 F2d 563, cert den 434 US 974, 54 L Ed 2d 465, 98 S Ct 531.

District court did not err in instructing jury that government was not required to prove under either 18 USCS § 2251(a) or 18 USCS § 2423(a) that defendants knew that individual whom they prostituted and videotaped performing sexual acts was minor. *United States v Griffith* (2002, CA2 NY) 284 F3d 338.

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

APPENDIX N

18 USCS § 2244 (2004)

18 U.S.C. § 2244 (2004). Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter [*18 USCS § § 2241 et seq.*]. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate--

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than six months, or both.

(b) In other circumstances. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than six months, or both.

(c) Offenses involving young children. If the sexual contact that violates this section is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

HISTORY: (Added Nov. 10, 1986, P.L. 99-646, § 87(b), 100 Stat. 3622, and Nov. 14, 1986, P.L. 99-654, § 2, 100 Stat. 3661; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7058(a), 102 Stat. 4403.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330016(1)(K), 108 Stat. 2147; Oct 30, 1998, P.L. 105-314, Title III, § 302, 112 Stat. 2979.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2244 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Section 87(e) of Act Nov. 10, 1986, P.L. 99-646, and § 4 of Act Nov. 14, 1986, P.L. 99-654, both of which appear as *18 USCS § 2241* note, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a), in para. (1), substituted “ten years” for “five years”, and in para. (3), substituted “two years” for “one year”.

1994. Act Sept. 13, 1994, in subsecs. (a)(4) and (b), substituted “under this title” for “not more than \$ 5,000”.

1998. Act Oct. 30, 1998 added subsec. (c).

NOTES:

CROSS REFERENCES

Sentencing Guidelines for the United States Courts, *18 USCS Appx § 2A3.4*.

RESEARCH GUIDE

Federal Procedure:

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Sex Offense Cases; Relevance of Alleged Victim’s Past Behavior § 412.02.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

Am Jur:

8A Am Jur 2d, Bail and Recognizance § 17.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Jurisdiction
3. Evidence
4. Sentencing
1. Generally

Abusive sexual contact, as defined in *18 USCS § 2245*, is lesser included offense of both aggravated sexual abuse and sexual abuse of minor, since sexual act necessarily requires sexual contact. *United States v Demarrias (1989, CA8 SD) 876 F2d 674, 28 Fed Rules Evid Serv 234.*

Defendant used sufficient force to constitute felony rather than misdemeanor under *USCS § 2244*, where he prevented assault victim from walking away from him and held her head forcibly with both hands, since restraint such that another person cannot escape is sufficient force under *18 USCS § 2244. United States v Lauck (1990, CA2 NY) 905 F2d 15.*

Defendant used sufficient force to constitute felony rather than misdemeanor under *USCS § 2244*, where he prevented assault victim from walking away from him and held her head forcibly with both hands, since restraint such that another person cannot escape is sufficient force under *18 USCS § 2244. United States v Lauck (1990, CA2 NY) 905 F2d 15.*

When aggravated sexual abuse by digital penetration under *18 USCS § 2241(c)* is charged, abusive sexual contact under *18 USCS § 2244(a)(1)* is lesser included offense, since elements of lesser offense are subset of elements of charged offense.

United States v Torres (1991, CA9 Ariz) 937 F2d 1469, 91 CDOS 5370, 91 Daily Journal DAR 8004.

Because 18 USCS § 2244 contains specific intent element that 18 USCS § § 2242 and 2243 do not have, crime of abusive sexual contact is not lesser included offense of crime of sexual abuse. *United States v Castillo* (1998, CA10 NM) 140 F3d 874, 98 Colo J C A R 1616.

Defendant's prior conviction for sexual contact with minor was "crime of violence" as defined by USSG § 4B1.2, since by its nature it presented serious potential risk of injury to victim. *United States v Coronado-Cervantes* (1998, CA10 NM) 154 F3d 1242, 1998 Colo J C A R 5001.

District court erred when it refused to instruct jury on assault under 18 USCS § 113(a)(5) as lesser included offense of abusive sexual conduct under 18 USCS § 2244(a)(1). *United States v Williams* (1999, CA11 Ga) 197 F3d 1091, 13 FLW Fed C 231.

Because 18 USCS § 2244 contains specific intent element that 18 USCS § 2241 does not, crime of abusive sexual contact is not lesser included offense of crime of aggravated sexual abuse of child under age of twelve. *United States v Velarde* (2000, CA10 NM) 214 F3d 1204, 2000 Colo J C A R 3092.

18 USCS § 2244(b) does not infringe upon defendant's First Amendment rights to content-based speech. *United States v Bailey* (2000, CA6 Tenn) 228 F3d 637, 2000 FED App 349P.

Evidence was sufficient under 18 USCS § 2244(b), where minors testified that defendant, under alias, contacted each of them individually, urging each one to meet him, and used graphic language to describe how he wanted to perform oral sex on each one, in addition to which FBI had retrieved explicit messages and internet user names of minors from defendant's computer. *United States v Bailey* (2000, CA6 Tenn) 228 F3d 637, 2000 FED App 349P.

Defendant's statutory maximum was enhanced to four years because conduct underlying defendant's plea of guilty to prior state charge (which included touching breasts of two 13 year old girls) constituted abusive sexual contact under 18 USCS § 2244(a)(3), and therefore constituted appropriate predicate crime to trigger 18 USCS § 2426(b). *United States v Breitweiser* (2002, ND Ga) 220 F Supp 2d 1374.

2. Jurisdiction

District court had subject matter jurisdiction over defendant's prosecution for violation of 18 USCS § 2244, where he was detained in Marshals' Service cell block in federal courthouse, facility clearly intended to detain federal prisoners, squarely within Congress' definition of "prison." *United States v Urrabazo* (2000, CA5 Tex) 234 F3d 904.

Although sexual contact with minor in violation of *18 USCS § 2244(a)(3)* occurred in foreign territorial waters, United States had criminal jurisdiction since both § 2244(a)(3) and cross-referenced statute relating to minors, *18 USCS § 2243(a)*, expressly invoked extraterritorial jurisdiction and exercising such jurisdiction did not offend any principles of international law. *United States v Neil (2002, CA9 Cal) 312 F3d 419, 2002 CDOS 11275, 2002 Daily Journal DAR 13110.*

Undocumented alien charged with committing various sexual offenses against 2 females in Mexico and Guatemala cannot be tried for alleged crimes in federal district court, where victims were also undocumented aliens, even though indictment alleges assaults were committed while in course of illegally bringing victims into United States, because express language of *18 USCS § § 113, 2241, 2242 and 2244* provides that prohibited conduct must occur “within special maritime and territorial jurisdiction of United States,” and *18 USCS § 3238* is mere venue statute that is not independent source of extraterritorial jurisdiction. *United States v Velasquez-Mercado (1988, SD Tex) 697 F Supp 292, affd (CA5 Tex) 872 F2d 632, reh den (CA5) 1989 US App LEXIS 7793 and cert den (US) 107 L Ed 2d 142, 110 S Ct 187.*

3. Evidence

It was error to allow child to present her testimony about alleged sexual abuse by closed-circuit television as permitted under *18 USCS § 3509*, where child’s own testimony disavowed any fear of defendant, and social worker, who lacked psychological or psychiatric qualifications, did not testify that child had particularized fear; error was not harmless where need for confrontation was critical. *United States v Moses (1998, CA6 Mich) 137 F3d 894, 1998 FED App 68P.*

Evidence was sufficient that defendant physically restrained victim for purposes of *18 USCS § 2244*, where he lay on top of her and resisted her attempts to push him away while having sexual intercourse with her, since *18 USCS § 2241(a)(1)* does not require force that prevents eventual escape of victim but only that sufficient to restrain victim and allow defendant to engage in sexual conduct. *United States v Allery (1998, CA8 ND) 139 F3d 609.*

Where defendant pled guilty to violation of *18 USCS § 2244(a)(2)*, which expressly cross-referenced *18 USCS § 2242*, and admitted to engaging in “sexual act” with victim, his admission and plea taken together constitute admission to committing “criminal sexual abuse” in violation of *18 USCS § 2242*. *United States v Morgan (1999, CA9 Mont) 164 F3d 1235, 99 CDOS 429, 99 Daily Journal DAR 519.*

Failure to prove date of alleged sexual abuse of minor as charged in indictment was not fatal, where government established that offense occurred during month of June, relying on mother’s testimony that abuse occurred when she was away for week during that month. *United States v Lee (2000, CA8 SD) 232 F3d 653.*

Error in admitting minor sex abuse victim’s statement identifying perpetrator, made to examining physician but not relevant to treatment, was harmless, where statement

was consistent with and cumulative to her trial testimony. *United States v Gabe* (2001, CA8 SD) 237 F3d 954.

District court properly excluded teacher assistant's testimony that when defendant guidance counselor and her friend picked her up and threw her over his shoulders in his office in presence of other adults his hand either brushed her crotch or lingered there for few seconds, in his prosecution for sexually abusing and harassing high school student; fact that defendant may have touched teacher assistant through clothing did not preclude act from qualifying as sexual offense under definition of 18 USCS § 2246 for purposes of 18 USCS § 2244, provided it met requirements of Rule 413(d). *Johnson v Elk Lake Sch. Dist.* (2002, CA3 Pa) 283 F3d 138, 58 Fed Rules Evid Serv 38.

District court's failure to instruct jury that it could consider evidence of defendant's good character and double counting during enhancement defendant's sentence because of victim's age constituted reversible error. *United States v John* (2002, CA5 Miss) 309 F3d 298.

Error in admitting expert testimony of psychologist as to out-of-court statements of child victim in sexual abuse case was not harmless, since it was crucial to government's case and thus must have had more than slight influence on verdict, where psychologist did not discuss with child victim need for truthful revelations or emphasize that identification of her abuser was important to his attempts to help her overcome any emotional trauma resulting from abuse to which she had been subjected, and there was no clear evidence she knew she had been brought to him for medical diagnosis or possible treatment for any medical or emotional problems. *United States v Sumner* (2000, CA8 Minn) 204 F3d 1182.

4. Sentencing

Age cannot be factored into computation of base offense level 10 as applied to 18 USCS § 2244(a)(3) but not to 18 USCS § 2244(a)(1). *United States v John* (2002, CA5 Miss) 309 F3d 298.

Age was factored twice in overall calculation of base offense level 16--once in calculation of base offense level 10, and subsequently in six-level enhancement pursuant to U.S. Sentencing Guidelines Manual § 2A3.4(b)(1); therefore, district court engaged in double counting. *United States v John* (2002, CA5 Miss) 309 F3d 298.

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

APPENDIX O

18 USCS § 2245 (2004)

§ 2245. Sexual abuse resulting in death

A person who, in the course of an offense under this chapter [*18 USCS § § 2241 et seq.*], engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

HISTORY: (Added Sept. 13, 1994, P.L. 103-322, Title VI, § 60010(a)(2), 108 Stat. 1972.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior § 2245 was redesignated § 2246 by Act Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle E, § 40502, Title VI, § 60010(a), 108 Stat. 1945, 1972.

NOTES:

CROSS REFERENCES

Sentencing Guidelines for the United States Courts, *18 USCS Appx § 2A1.1*.

RESEARCH GUIDE

Federal Procedure:

26 Moore's Federal Practice (Matthew Bender 3d ed.), Verdict § 631.10.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Sex Offense Cases; Relevance of Alleged Victim's Past Behavior § 412.02.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein's Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

Am Jur:

65 Am Jur 2d, Rape § 95.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

Appendix P

18 U.S.C. § 2246

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 108-217, APPROVED 4/05/04 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 109A. SEXUAL ABUSE

18 USCS § 2246 (2004)

18 U.S.C. § 2246 (2004). Definitions for chapter

As used in this chapter [*18 USCS § § 2241 et seq.*]--

(1) the term “prison” means a correctional, detention, or penal facility;

(2) the term “sexual act” means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term “official detention” means--

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term “State” means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

HISTORY: (Added Nov. 10, 1986, P.L. 99-646, § 87(b), 100 Stat. 3622 and Nov. 14, 1986, P.L. 99-654, § 2, 100 Stat. 3662.)

(As amended Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle E, § 40502, Title VI, § 60010(a), 108 Stat. 1945, 1972; Oct 30, 1998, P.L. 105-314, Title III, § 301(c), 112 Stat. 2979.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Identical sections 2245 were added by Act Nov. 10, 1986 and Act Nov. 14, 1986.

Effective date of section:

Act Nov. 10, 1986, P.L. 99-646, § 87(e), 100 Stat. 3624, and Act Nov. 14, 1986, P.L. 99-654, § 4, 100 Stat. 3664, both of which appear as *18 USCS § 2241* note, provide that this section shall take effect 30 days after their respective dates of enactment.

Amendments:

1994. Act Sept. 13, 1994, in para. (2), in subpara. (B), deleted “or” after the concluding semicolon, in subpara. (C), substituted “; or” for “; and”, and added subpara. (D).

Such Act further redesignated this section, enacted as § 2245, as § 2246.

1998. Act Oct. 30, 1998, in para. (5), substituted “; and” for a concluding period, and added para. (6).

NOTES:

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Federal Procedure:

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Crimes in Sexual Assault Cases § 413.03.

2 Weinstein’s Federal Evidence (Matthew Bender 2d ed.), Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation § 415.03.

Am Jur:

63C Am Jur 2d, Prostitution § 31.

Immigration:

6 Immigration Law and Procedure (Matthew Bender rev. ed.), Grounds for Deportation § 71.05.

INTERPRETIVE NOTES AND DECISIONS

Defendant’s counsel was not guilty of ineffective assistance of counsel for failing to request instruction on abusive sexual conduct, *18 USCS § 2244*, as lesser included offense of aggravated sexual abuse, *18 USCS § 2246*, since attempt to perform sexual act does not require intent as described in *18 USCS § 2246(3)*. *United States v Hourihan (1995, CA2 NY) 66 F3d 458.*

Where at time of defendant’s arrest, indictment, trial, conviction, and sentencing, *18 USCS § 2423(b)* by reference to 18 former USCS § 2245 did not proscribe criminal liability for conduct in which he engaged, district court erred, in absence of contemporaneous legislative history, in treating *18 USCS § 2423(b)*’s cross reference to § 2245 as mistake. *United States v Childress (1996, CA4 Md) 104 F3d 47.*

While inclusion of threats in instruction on use of force was error, it was harmless, where fact that relevant evidence concerned physical force precluded jury from basing its verdict on infirm portion of instruction. *United States v Jones (1997, CA8 SD) 104 F3d 193*, reh, en banc, den (1997, CA8) *1997 US App LEXIS 2730.*

Defendant who intentionally caused his sleeping stepdaughter to touch his genitalia with intent to gratify his sexual desire fell within definition of “sexual contact” as defined by *18 USCS § 2246(3)* and constituted abusive sexual contact under *18 USCS § 2244(a)(1)*, since intentional touching in *18 USCS § 2246(3)* refers to defendant’s, not victim’s, mental state. *United States v Sagg (1997, CA9 Ariz) 125 F3d 1294, 97 CDOS 7553, 97 Daily Journal DAR 12166.*

Definition of penetration in *18 USCS § 2246(C)* incorporates penetration through clothing, although existence of intervening material may raise issue of fact regarding whether penetration occurred. *United States v Norman T. (1997, CA10 NM) 129 F3d 1099, 97 Colo J C A R 2807.*

District court had subject matter jurisdiction over defendant’s prosecution for violation of *18 USCS § 2244*, where he was detained in Marshals’ Service cell block in federal courthouse, facility clearly intended to detain federal prisoners, squarely within Congress’ definition of “prison.” *United States v Urrabazo (2000, CA5 Tex) 234 F3d 904.*

District court properly excluded teacher assistant’s testimony that when defendant guidance counselor and her friend picked her up and threw her over his shoulders in his office in presence of other adults his hand either brushed her crotch or lingered there for few seconds, in his prosecution for sexually abusing and harassing high school student; fact that defendant may have touched teacher assistant through clothing did not preclude act from qualifying as sexual offense under definition of *18 USCS § 2246* for purposes of *18 USCS § 2244*, provided it met requirements of Rule 413(d). *Johnson v Elk Lake Sch. Dist. (2002, CA3 Pa) 283 F3d 138, 58 Fed Rules Evid Serv 38.*

Definition in *18 USCS § § 2242, 2243, 2246*, is too restrictive to encompass numerous state crimes that can be viewed as sexual abuse and diverse types of conduct that would fit within “sexual abuse of minor” under *8 USCS § 1101(a)(43)* as it is commonly used. *Santapaola v Ashcroft (2003, DC Conn) 249 F Supp 2d 181.*

APPENDIX Q

3-45-1. RAPE (ARTICLE 120)

(1) That (*state the time and place alleged*), the accused committed an act of sexual intercourse with (*state the name of the alleged victim*); and

(2) That the act of sexual intercourse was done by force and without the consent of (*state the name of the alleged victim*);

“Sexual intercourse” is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

The “female sex organ” includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”

Both force and lack of consent are necessary to the offense. Force is physical violence or power applied by the accused to the victim. An act of sexual intercourse occurs “by force” when the accused uses physical violence or power to compel the victim to submit against her will.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words)

(conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances)

(because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

There is evidence which, if believed, indicates that the accused (used) (abused) his (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (*state the name of the alleged victim*) to have sexual intercourse. Specifically, I draw your attention to (*summarize the evidence concerning the accused's possible use or abuse of his position, rank, or authority*). You may consider this evidence in deciding whether (*state the name of the alleged victim*) had a reasonable belief that death or great bodily harm would be inflicted on her and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may consider in deciding whether (*state the name of the alleged victim*) consented to the act of sexual intercourse.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of

authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (*state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred*). If (*state the name of the alleged victim*) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in a child's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, an act of sexual intercourse has been accomplished by force.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to

resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (*state the name of the alleged victim*) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case, including but not limited to: (*state any lay or expert testimony relevant to the child's development*) (*state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any*).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (*the age of the child when the alleged abuse started*) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (*state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred*). If (*state the name of the alleged victim*) (did not resist) (or) (ceased resistance) due to the

(compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (*state the name of the alleged victim*) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case, including but not limited to: (*state any lay or expert testimony relevant to the child's development*) (*state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any*).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus the

requirement of force is satisfied. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

When a victim is incapable of consenting because she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (*state the name of the alleged victim*) was incapable, due to mental infirmity, of giving consent, then the act was done by force and without her consent. A person is capable of consenting to an act of sexual intercourse unless her mental infirmity is so severe that she is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had, at the time of the sexual intercourse, the requisite mental capacity to consent you should consider all the evidence in the case, including but not limited to: (*state any expert testimony relevant to the alleged victim's mental infirmity*) (*state any other information about the alleged victim, such as the level and extent of education; ability, or inability, to hold a job or manage finances; and prior sex education and experiences, if any*). You may also consider her demeanor in court and her general intelligence as indicated by her answers to questions propounded to her in court.

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

Both force and lack of consent are necessary to the offense. Force is physical violence or power applied by the accused to the victim. An act of sexual intercourse occurs "by

force” when the accused uses physical violence or power to compel the victim to submit against her will.

When a victim is incapable of consenting because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is 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 consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (*state the name of the alleged victim*) was incapable, due to lack of mental or physical faculties, of giving consent, then the act was done by force and without consent. A person is capable of consenting to an act of sexual intercourse unless she is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had consented to the sexual intercourse you should consider all the evidence in the case, including but not limited to: ((the degree of the alleged victim’s) (intoxication, if any,) (and) (or) (consciousness or unconsciousness) (and) (or) (mental alertness)); ((the ability or inability of the alleged victim) (to walk) (and) (or) (to communicate coherently)); ((whether the alleged victim may have consented to the act of sexual intercourse prior) (to lapsing into unconsciousness) (and) (or) (falling asleep)); (and) (or) (*state any other evidence tending to show the alleged victim may have been acquiescing to the intercourse rather than actually being asleep, unconscious, or otherwise unable to consent*).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent because she was (asleep) (unconscious) (intoxicated), the act of sexual intercourse was done by force and without consent.

The evidence has raised the issue of mistake on the part of the accused concerning whether (*state the name of the alleged victim*) consented to sexual intercourse in relation to the offense of rape.

If the accused had an honest and mistaken belief that (*state the name of the alleged victim*) consented to the act of sexual intercourse, he is not guilty of rape if the accused's belief was reasonable.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (*state the name of the alleged victim*) was consenting to the sexual intercourse.

In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) consented, you should consider the probability or improbability of the evidence presented on the matter.

You should also consider the accused's (age) (education) (experience) (prior contact with (*state the name of the alleged victim*)) (the nature of any conversations between the accused and (*state the name of the alleged victim*)) (_____) along with the other evidence on this issue (including but not limited to (*here the military judge may summarize other evidence that may bear on the accused's mistake of fact*)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged rape, the accused was not under the mistaken belief that (*state the name of the alleged victim*) consented to the sexual intercourse, the defense of mistake does not exist. Even if you conclude that the accused was under the honest and mistaken belief that (*state the name of the alleged victim*) consented to the sexual intercourse, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.

There is evidence in this case that indicates that at the time of the alleged rape, the accused may have been under the influence of (alcohol) (drugs).

The accused's voluntary intoxication may not be considered in deciding whether the accused reasonably believed that (*state the name of the alleged victim*) consented to sexual intercourse. A reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

The evidence has raised the issue of mistake on the part of the accused concerning whether (*state the name of the alleged victim*) ((consented) (would consent)) to sexual intercourse in relation to the offense of (*state the alleged offense*).

I advised you earlier that to find the accused guilty of the offense of (attempted rape) (assault with intent to commit rape) (burglary with intent to commit rape) (conspiracy to commit rape) (_____), you must find beyond a reasonable doubt that the accused had the specific intent to commit rape, that is, sexual intercourse by force and without consent.

If the accused at the time of the offense was under the honest and mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)) to sexual intercourse, then he cannot be found guilty of the offense of (attempted rape) (assault with intent to commit rape) (burglary with intent to commit rape) (conspiracy to commit rape) (_____).

The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)), you should consider the probability or improbability of the evidence presented on the matter. You should also consider the accused's (age) (education) (experience) (prior contact with (*state the name of the alleged victim*)) (the nature of any conversations between the accused and (*state the name of the alleged victim*)) (_____) along with the other evidence on this issue (including but not limited to (*here the military judge may summarize other evidence that may bear on the accused's mistake of fact*)).

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense the accused was not under the mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)) to sexual intercourse, then the defense of mistake does not exist.

Carnal knowledge is a lesser included offense of rape. If you have a reasonable doubt about either the element of force or lack of consent, but you do find beyond a reasonable doubt:

(1) That (*state the time and place alleged*), the accused committed an act of sexual intercourse with a female, namely (*state the name of the alleged victim*);

(2) That (*state the name of the alleged victim*) was not the accused's (husband) (wife); and

(3) That at the time of the act of sexual intercourse (*state the name of the alleged victim*) was under (16) (12) years of age; you may find the accused guilty of the lesser included offense of carnal knowledge.

Neither force nor lack of consent are required for this lesser included offense. (Stated conversely, neither lack of force nor consent are defenses.) (It is no defense that the alleged victim was of unchaste character.) (Unless you find that the accused honestly and reasonably believed that (*state the name of the alleged victim*) was over 16 years of age), it is no defense that the accused was ignorant or misinformed as to the true age of the alleged victim.)

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of carnal knowledge, as alleged in (the) Specification(s) (_____) of (the) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief as to the age of (*state the name of the alleged victim*) when the alleged act(s) of sexual intercourse occurred.

For mistake of fact to be a defense, the burden is on the defense to convince you by a preponderance of evidence that the mistake exists. A preponderance of the evidence merely means that it is more likely than not that a fact exists. In this case, if you are convinced that, at the time of the alleged act(s), it is more likely than not that (the person with whom (he) (she) had sexual intercourse was at least 12 years old; and) the accused honestly and reasonably believed that the person with whom (he) (she) had sexual intercourse was at least 16 years old, then this mistake on the part of the accused is a complete defense to the offense of carnal knowledge.

To be reasonable, the accused's belief must have been based on information, or lack of it, which would indicate to a reasonable person that (*state the name of the alleged victim*) was at least 16 years old at the time of the alleged offense(s).

In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) was at least 16 years old, you should consider the probability or improbability of the evidence presented on the matter. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (prior contact or prior conversations with (*state the name of the alleged victim*)) (prior contact or prior conversations with (*state the name of the alleged victim*)'s family member(s))) (the location where the accused met (*state the name of the alleged victim*)) (_____), as well as (*state the name of the alleged victim*)'s (appearance) (level of maturity) (demeanor) (actions) (statements made to the accused concerning (*state the name of the alleged victim*)'s age) (_____) (*here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides*).

There is evidence in this case that indicates that, at the time of the alleged carnal knowledge offense(s), the accused may have been under the influence of (alcohol) (drugs). The accused's voluntary intoxication may not be considered in deciding whether the accused honestly and reasonably believed that (*state the name of the alleged victim*) was at least 16 years old. A reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

If you are not convinced by a preponderance of the evidence (that (*state the name of the alleged victim*) was at least 12 years old, or) that the accused's belief that (*state the name of the alleged victim*) was at least 16 years old was honest and reasonable, then this defense of mistake does not exist.

Even if the defense fails to convince you that this defense of mistake exists, the burden remains on the prosecution to prove the accused's guilt beyond a reasonable doubt, to include each and every element of the offense of carnal knowledge.

The accused is charged with the offense of rape. The offense of carnal knowledge is a lesser included offense of rape. These two offenses differ primarily in that rape is a non-consensual sexual offense, while in carnal knowledge, consent is not relevant. The

focus of the offense of carnal knowledge is sexual intercourse with a child. In some circumstances, about which I will provide more detailed instructions later in the trial, the accused's reasonable mistake of fact as to the child's age may be a defense. You have just (heard testimony) (reviewed evidence) which has been admitted for the limited purpose of its tendency, if any, to establish the accused's honest and reasonable belief that (*state the name of the alleged victim*) was over the age of 16 at the time the alleged act of sexual intercourse occurred. You may not consider this evidence for any other purpose in this trial.

APPENDIX R

3-45-2. CARNAL KNOWLEDGE (ARTICLE 120)

(1) That (*state the time and place alleged*), the accused committed an act of sexual intercourse with (*state the name of the alleged victim*);

(2) That (*state the name of the alleged victim*) was not the accused's (husband) (wife); and

(3) That at the time of the act of sexual intercourse (*state the name of the alleged victim*) was under (16) (12) years of age.

“Sexual intercourse” is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

Neither force nor lack of consent are required for this offense. (Stated conversely, neither lack of force nor consent are defenses.) (It is no defense that the alleged victim was of unchaste character.) (Unless you find that the accused honestly and reasonably believed that (*state the name of the alleged victim*) was over 16 years of age), it is no defense that the accused was ignorant or misinformed as to the true age of the alleged victim.)

The “female sex organ” includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of carnal knowledge, as alleged in (the) Specification(s) (_____) of (the) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief as to the age of (*state the name of the alleged victim*) when the alleged act(s) of sexual intercourse occurred.

For mistake of fact to be a defense, the burden is on the defense to convince you by a preponderance of evidence that the mistake exists. A preponderance of the evidence merely means that it is more likely than not that a fact exists. In this case, if you are convinced that, at the time of the alleged act(s), it is more likely than not that (the person with whom (he) (she) had sexual intercourse was at least 12 years old; and) the accused honestly and reasonably believed that the person with whom (he) (she) had sexual intercourse was at least 16 years old, then this mistake on the part of the accused is a complete defense to the offense of carnal knowledge.

To be reasonable, the accused's belief must have been based on information, or lack of it, which would indicate to a reasonable person that (*state the name of the alleged victim*) was at least 16 years old at the time of the alleged offense(s).

In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) was at least 16 years old, you should consider the probability or improbability of the evidence presented on the matter. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (prior contact or prior conversations with (*state the name of the alleged victim*) (prior contact or prior conversations with (*state the name of the alleged victim*)'s family member(s)) (the location where the accused met (*state the name of the alleged victim*) (_____)), as well as (*state the name of the alleged victim*)'s (appearance) (level of maturity) (demeanor) (actions) (statements made to the accused concerning (*state the name of the alleged victim*)'s age) (_____)) (*here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides*).

There is evidence in this case that indicates that, at the time of the alleged carnal knowledge offense(s), the accused may have been under the influence of (alcohol) (drugs). The accused's voluntary intoxication may not be considered in deciding whether the accused honestly and reasonably believed that (*state the name of the alleged victim*) was at least 16 years old. A reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

If you are not convinced by a preponderance of the evidence (that (*state the name of the alleged victim*) was at least 12 years old, or) that the accused's belief that (*state the name of the alleged victim*) was at least 16 years old was honest and reasonable, then this defense of mistake does not exist.

Even if the defense fails to convince you that this defense of mistake exists, the burden remains on the prosecution to prove the accused's guilt beyond a reasonable doubt, to include each and every element of the offense of carnal knowledge.

APPENDIX S

3-51-1. SODOMY--NOT INVOLVING FORCE (ARTICLE 125)

(1) That (*state the time and place alleged*), the accused engaged in unnatural carnal copulation with (*state the name of the alleged victim*) by _____.[and]

[(2)] That (*state the name of the alleged victim*) was a child under the age of (12) (16) years.

Sodomy is unnatural carnal copulation. Unnatural carnal copulation occurs when a person (takes into (his) (her) (mouth) (anus) the reproductive sexual organ of another person) (places his penis into the (mouth) (anus) of another) (penetrates the female sex organ with (his) (her) (mouth) (lips) (tongue)) (places (his) (her) sexual reproductive organ into any opening of the body, except the sexual reproductive parts, of another person) (places (his) (her) sexual reproductive organ into any opening of an animal's body).

Penetration of the (mouth) (anus) (_____), however slight, is required to establish this offense. An ejaculation is not required.

Neither force nor lack of consent are required for this offense. (*Stated conversely, neither lack of force nor consent are defenses.*)

(It is also no defense that the accused was ignorant or misinformed as to the true age of the child (or that the child was of unchaste character.) It is the fact of the child's age, and not the accused's knowledge or belief, that fixes criminal responsibility.)

The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

APPENDIX T

3-51-2. FORCIBLE SODOMY (ARTICLE 125)

(1) That (*state the time and place alleged*), the accused engaged in unnatural carnal copulation with (*state the name of the alleged victim*) by (*state the manner alleged*); (and)

(2) That the act was done by force and without the consent of (*state the name of the alleged victim*). [and]

[(3)] That (*state the name of the alleged victim*) was a child under the age of (12) (16) years.

Sodomy is unnatural carnal copulation. Unnatural carnal copulation occurs when the person (takes into (his) (her) (mouth) (anus) the reproductive sexual organ of another person) (places his penis into the (mouth) (anus) of another) (penetrates the female sex organ with (his) (her) (mouth) (lips) (tongue)) (places (his) (her) sexual reproductive organ into any opening of the body, except the sexual reproductive parts, of another person).

Penetration of the (mouth) (anus) (_____), however slight, is required to establish this offense. An ejaculation is not required.

The “female sex organ” includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”

Both force and lack of consent are necessary to the offense.

Force is physical violence or power applied by the accused to the victim. An act of sodomy occurs “by force” when the accused uses physical violence or power to compel the victim to submit against her/his will.

If the alleged victim consents to the act of sodomy, it was not done without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was committed without consent.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

If the alleged victim consents to the act of sodomy, it was not done without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical inability) (_____), the act was done without consent.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act has been accomplished by force.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

There is evidence which, if believed, indicates that the accused (used) (abused) (his) (her) (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (*state the name of the alleged victim*) to commit sodomy. (Specifically, I draw your attention to (*summarize the evidence concerning the accused's possible use or abuse of (his) (her) position, rank, or authority*).) You may consider this evidence in deciding whether (*state the name of the alleged victim*) had a reasonable belief that death or great bodily injury would be inflicted on her/him and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may use in deciding whether (*state the name of the alleged victim*) consented to the act of sodomy.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (*state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred*). If (*state the name of the alleged victim*) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sodomy was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent a child's active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in a child's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, an act of sodomy has been accomplished by force.

When a victim is incapable of consenting because she/he lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or

great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (*state the name of the alleged victim*) was incapable, due to her/his (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sodomy until she/he understands the act, its motive, and its possible consequences. In deciding whether (*state the name of alleged victim*) had, at the time of the sodomy, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case (including but not limited to: (*the military judge may state any lay or expert testimony relevant to the child's development or any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any*)).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sodomy was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent’s) (stepparent’s) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child’s resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child’s ability to fully comprehend the nature of the acts

involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (*the military judge may state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred*). If (*state the name of the alleged victim*) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sodomy was done by force and without consent.

When a victim is incapable of consenting because she/he lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (*state the name of the alleged victim*) was incapable, due to her/his (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sodomy until she/he understands the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had, at the time of the sodomy, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case (including but not limited to: (*the military judge may state any lay or expert testimony relevant to the child's development or any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any*)).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sodomy was done by force and without consent.

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is

actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

When a victim is incapable of consenting because she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because (he) (she) was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (*state the name of the alleged victim*) was incapable, due to mental infirmity, of giving consent, then the act was done by force and without her/his consent. A person is capable of consenting to an act of sodomy unless her/his mental infirmity is so severe that she/he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had, at the time of the sodomy, the requisite mental capacity to consent you should consider all the evidence in the case (including but not limited to: (*the military judge may state any expert testimony relevant to the alleged victim’s mental infirmity or any other information about the alleged victim, such as the level and extent of education; ability, or inability, to hold a job or manage finances; and prior sex education and experiences, if any*)). You may also consider her/his demeanor in court and her/his general intelligence as indicated by her/his answers to questions propounded to her/him in court. If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent, the act of sodomy was done by force and without consent.

Both force and lack of consent are necessary to the offense. Force is physical violence or power applied by the accused to the victim. An act of sodomy occurs “by force” when the accused uses physical violence or power to compel the victim to submit against her/his will.

When a victim is incapable of consenting because she/he is asleep, unconscious, or intoxicated to the extent that she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his 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/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (*state the name of the alleged victim*) consented.

If (*state the name of the alleged victim*) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (*state the name of the alleged victim*) was incapable, due to lack of mental or physical faculties, of giving consent, then the act was done by force and without consent. A person is capable of consenting to an act of sodomy unless she/he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (*state the name of the alleged victim*) had consented to the sodomy you should consider all the evidence in the case, (including but not limited to: ((the degree of the alleged victim’s) (intoxication, if any,) (and) (or) (consciousness or unconsciousness) (and) (or) (mental alertness)) ((the ability or inability of the alleged victim) (to walk) (and) (or) (to communicate coherently)) ((whether the alleged victim may have consented to the act of sodomy prior) (to lapsing into unconsciousness) (and) (or) (falling asleep)) (*the military judge may state any other evidence tending to show the alleged victim may have been acquiescing to the act rather than actually being asleep, unconscious, or otherwise unable to consent*)).

If (*state the name of the alleged victim*) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (*state the name of the alleged victim*) was incapable of giving consent because he/she was (asleep) (unconscious) (intoxicated), the act of sodomy was done by force and without consent.

The evidence has raised the issue of mistake on the part of the accused concerning whether (*state the name of the alleged victim*) consented to sodomy.

If the accused had an honest and mistaken belief that (*state the name of the alleged victim*) consented to the act of sodomy, (he) (she) is not guilty of forcible sodomy, if the accused's belief was reasonable. To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (*state the name of the alleged victim*) was consenting to sodomy.

In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) consented, you should consider the probability or improbability of the evidence presented on the matter.

You should also consider the accused's (age) (education) (experience) (prior contact with (*state the name of the alleged victim*) (the nature of any conversations between the accused and (*name of alleged victim*)) (_____)) along with the other evidence on this issue, (including but not limited to (*here state other evidence that may bear on the accused's mistake of fact*)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged sodomy, the accused was not under the mistaken belief that (*state the name of the alleged victim*) consented to sodomy, the defense of mistake does not exist. Even if you conclude that the accused was under the honest and mistaken belief that (*state the name of the alleged victim*) consented to sodomy, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.

There is evidence in this case that indicates that at the time of the alleged sodomy, the accused may have been under the influence of (alcohol) (drugs).

You may not consider the accused's voluntary intoxication in deciding whether the accused reasonably believed (*name of victim*) consented to sodomy. A reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

The evidence has raised the issue of mistake on the part of the accused concerning whether (*state the name of the alleged victim*) ((consented) (would consent)) to an act of forcible sodomy in relation to the offense of _____.

I advised you earlier that to find the accused guilty of the offense of (attempted forcible sodomy) (assault with intent to commit forcible sodomy) (burglary with intent to commit forcible sodomy) (conspiracy to commit forcible sodomy) (_____), you must find beyond a reasonable doubt that the accused had the specific intent to commit forcible sodomy, that is, sodomy by force and without consent.

If the accused at the time of the offense was under the mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)) to sodomy, then (he) (she)

cannot be found guilty of the offense of (attempted forcible sodomy) (assault with intent to commit forcible sodomy) (burglary with intent to commit forcible sodomy) (conspiracy to commit forcible sodomy) (_____).

The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)) to sodomy, you should consider the probability or improbability of the evidence presented on the matter.

(You should also consider the accused's (age) (education) (experience) (prior contact with (*state the name of the alleged victim*)) (the nature of any conversations between the accused and (*state the name of the alleged victim*)) (_____) along with the other evidence on this issue (including but not limited to (*here the military judge may state other evidence that may bear on the accused's mistake of fact*)).)

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense the accused was not under the mistaken belief that (*state the name of the alleged victim*) ((would consent) (consented)) to sodomy, then the defense of mistake does not exist.

If you have no reasonable doubt that the accused committed an act of sodomy with (*state the name of the alleged victim*) who was a child under the age of (12) (16), but you do have a reasonable doubt that the act was by force or was without consent, you may find the accused guilty of non-forcible sodomy with a child under the age of (12) (16). The findings worksheet which I will give you includes a form for announcing such a finding.

Neither force nor lack of consent are required to make this finding. (Stated conversely, neither lack of force or consent are defenses.)

(It is also no defense that the accused was ignorant or misinformed as to the true age of the child (or that the child was of unchaste character.) It is the fact of the child's age, and not the accused knowledge or belief, that fixes criminal responsibility.)

If you have no reasonable doubt that the accused committed an act of sodomy with (*state the name of the alleged victim*) by force and without consent, but you do have a reasonable doubt that (*state the name of the alleged victim*) was a child under the age of (12) (16), you may find the accused guilty of forcible sodomy. The findings worksheet which I will give you includes a form for announcing such a finding.

Consensual sodomy is a lesser included offense of the offense of sodomy by force and without consent. If you have a reasonable doubt about either the element of force or lack of consent, but you are convinced beyond a reasonable doubt that an act of sodomy occurred between the accused and (*state the name of the alleged victim*), you may find the accused guilty of the lesser included offense of consensual sodomy.

Neither force nor lack of consent are required to establish this lesser included offense.
(Stated conversely, neither lack of force or consent are defenses.)

APPENDIX U

3-63-1. INDECENT ASSAULT (ARTICLE 134)

- (1) That (*state the time and place alleged*), the accused (attempted to do) (offered to do) (did) bodily harm to (*state the name of the alleged victim*);
- (2) That the accused did so by (*state the alleged manner of the assault or battery*);
- (3) That the act(s) (was) (were) done with unlawful force or violence;
- (4) That (*state the name of the alleged victim*) was not the (husband) (wife) of the accused;
- (5) That the accused's acts were done without the consent of (*state the name of the alleged victim*) and against his/her will;
- (6) That the acts were done with the intent to gratify the (lust) (and) (or) (sexual desires) of the accused; and
- (7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem.

Although the word "indecent" is in the charged specification, the elements of this offense do not require that the manner of the assault be "indecent." However, as I have instructed you, what is required as an element is that the act(s) (was) (were) done with the intent to gratify the (lust) (and) (or) (sexual desires) of the accused.

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability and specific intent to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an attempt to do bodily harm.)

An "offer to do bodily harm" is an intentional act which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an offer to do bodily harm.)

An assault in which bodily harm is inflicted is called a battery. A “battery” is an unlawful and intentional application of force or violence to another. The term “bodily harm” means any physical injury to or offensive touching of another person, however slight.

APPENDIX V

3-87-1. INDECENT ACTS WITH A CHILD--PHYSICAL CONTACT (ARTICLE 134)

- (1) That (*state the time and place alleged*), the accused committed (a) certain act(s) (upon) (with) the body of (*state the name of the alleged victim*) by (*state the act and manner alleged*);
- (2) That, at the time of the alleged act(s), (*state the name of the alleged victim*) was a male/female under the age of 16 years;
- (3) That the act(s) of the accused (was) (were) indecent;
- (4) That (*state the name of the alleged victim*) was a person not the spouse of the accused;
- (5) That the accused committed the act(s) with the intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of (the accused) (*state the name of the alleged victim*) (the accused and (*state the name of the alleged victim*)); and
- (6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem.

Indecent acts 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 the morals with respect to sexual relations.

APPENDIX W

3-87-2. INDECENT ACTS (LIBERTIES) WITH A CHILD--NO PHYSICAL CONTACT (ARTICLE 134)

(1) That (*state the time and place alleged*), the accused committed (a) certain act(s) by (*state the act(s) and manner alleged*);

(2) That, at the time of the alleged act(s), (*state the name of the alleged victim*) was a male/female under the age of 16 years;

(3) That (*state the name of the alleged victim*) was a person not the spouse of the accused;

(4) That the act(s) of the accused amounted to the taking of indecent liberties with (*state the name of the alleged victim*);

(5) That the accused committed the act(s) with the intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of (the accused) (*state the name of the alleged victim*) (the accused and (*state the name of the alleged victim*));

(6) That the accused committed the act(s) in the presence of (*state the name of the alleged victim*); and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem.

(Indecent acts) (Indecent liberties) 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 the morals with respect to sexual relations.

3-90-1. INDECENT ACTS WITH ANOTHER (ARTICLE 134)

(1) That (*state the time and place alleged*), the accused committed a certain wrongful act with (*state the name of the alleged victim*) by (*state the act and manner alleged*);

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem.

“Indecent act” signifies 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 the morals with respect to sexual relations.

APPENDIX X

Modern Federal Jury Instructions-Criminal

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Part III JURY INSTRUCTIONS

SEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) for the Seventh Circuit

STAR-0 Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2242(2)

P 18 U.S.C. § 2242(2) (Sexual Abuse--Incapacitated Victim--Elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant knowingly engaged in a sexual act with [name of victim];

Second, [name of victim] was [incapable of recognizing the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2243(a)

P 18 U.S.C. § 2243(a) (Sexual Abuse of Minor--Elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, that the defendant knowingly engaged in a sexual act with [name of victim];

Second, [name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

Third, [name of victim] was at least four years younger than the defendant.

Fourth, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2243(c)(1)

P 18 U.S.C. § 2243(c)(1) (Defense of Reasonable Belief of Minor's Age)

It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that [name of victim] had attained the age of 16 years. The defendant has the burden of proving that it is more probably true than not true that he reasonably believed that [name of victim] had attained the age of 16 years.

If you find that the defendant reasonably believed that [name of victim] had attained the age of 16 years, you must find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2243(b)

P 18 U.S.C. § 2243(b) (Sexual Abuse of Person in Official Detention--Elements)

To sustain the charge of sexual abuse, the government must prove the following propositions:

First, the defendant knowingly engaged in a sexual act with [name of victim];

Second, at the time, [name of victim] was in official detention at the [name of institution];

Third, at the time, [name of victim] was under the custodial, supervisory or disciplinary authority of the defendant.

STAR-0 Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2243(b)

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2243(b)

P 18 U.S.C. § 2243(b) (Definition of “official detention”)

As used in these instructions, the term “official detention” means detention [custody] by [under the direction of] a Federal officer or employee, following [arrest] [surrender in lieu of arrest]

[a charge or conviction of an offense].

Committee Comment

The Committee has selected the most frequently charged types of “official detention.” The statute contains a more exhaustive list which should be consulted in particular cases.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2244(a)

P 18 U.S.C. § 2244(a) (Abusive Sexual Contact--Elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, that the defendant did so by threatening [name of victim] or placing [name of victim] in fear; and

Third, that the defendant’s actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2244(a)

P 18 U.S.C. § 2244(a) (Abusive Sexual Contact--Incapacitated Victim--Elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, [name of victim] was [incapable of recognizing the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2244(b)

P 18 U.S.C. § 2244(b) (Abusive Sexual Contact without Permission--Elements)

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, the defendant knowingly had sexual contact with [name of victim] at [name of institution], and

Second, the sexual contact was without [name of victim]'s permission.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2246(2)

P 18 U.S.C. § 2246(2) (Definition of “sexual act”)

As used in these instructions, the term “sexual act” means

- [penetration, however slight, of the [vulva] [anus] by the penis]
- [contact between the mouth and the [penis] [vulva] [anus]]
- [penetration, however slight, of the [anal] [genital] opening of another by [a hand] [a finger] [any object] with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person]
- [the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person].

Modern Federal Jury Instructions-Criminal P 18 U.S.C. § 2246(3)

P 18 U.S.C. § 2246(3) (Definition of “sexual contact”)

As used in these instructions, the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person.

APPENDIX Y

SEXUAL MISCONDUCT STATISTICS⁷⁷¹

The Department of the Navy's (DON) reported statistics on cases of insufficient evidence show how difficult these cases can be for investigators, prosecutors, and commanders. The DON (includes both Navy and Marine Corps data) identified 235 of its cases resulted in a determination of insufficient evidence and more than 38% of those determinations were because the victim refused to cooperate (59 cases) or victim fabrication was involved (31 cases).

The data provided by the military departments for this report reveals there were 1,634 military individuals identified and accused of sexual assault during the last two calendar years. Of the 1,634 alleged offenders identified, 401 were from the Air Force, 670 were from the Army, 440 were from the Navy, and 123 were from the Marine Corps. Of the 401 Air Force cases, charges were preferred, i.e., initiated, (rough equivalent of indictment) against 97 (just over 24%) of the alleged offenders and nonjudicial punishment proceedings under the UCMJ were initiated against another 42. Consequently, 139 cases (nearly 35%) resulted in some type of military justice action. None of the other military departments were able to provide information on the initial command actions taken in the cases reported. Due to the Army's self-identified problem of receiving timely and accurate commander's reports of disciplinary action for entry into its criminal databases, the Army was unable to identify final dispositions in nearly half (45%) of its cases. Army was only able to determine that there was court-martial action in 76 cases and nonjudicial punishment proceedings in another 97 cases.⁷⁷² Of the 563 DON cases (including both Navy and Marine Corps data), there was courts-martial action in 154 cases and nonjudicial punishment proceedings in

⁷⁷¹ The Department of Defense, *Care for Victims of Sexual Assault Task Force Report*, dated April 2004, at page 44 is the source for this statistical information about sexual assaults.

⁷⁷² The Army CID provided a list of 199 cases without disposition information. The Army Court-Martial Information System identified 56 of the 199 cases that were tried by General and Special Courts-Martial. It should be noted that the CID did not identify how many of the remaining 143 cases were prosecuted by civilian law enforcement. Review of military personnel records of the remaining 143 cases disclosed no evidence of adverse action on approximately 50 cases. Approximately 90 cases involved a soldier who was separated from the service. The eJustice Case Management System which is discussed at note 276 (page 64) should resolve the Army CID issue of lack of disposition information when eJustice is fielded—probably in late calendar year 2005.

another 85 cases. This data shows some type of military justice action was taken in nearly 43% of cases.

Excluding the Army's incomplete data on command actions taken, the combined data provided by the Air Force, Navy, and Marine Corps show that courts-martial charges were at least preferred (i.e., initiated) in 26% of cases, and military justice action was taken in over 39% of cases.

NUMBER	STATE	LABEL	CITATION	PAGE #
		OR MENACE		
		SPOUSAL RAPE	§ 263	505
3-As	COLORADO	SEXUAL ASSAULT	§ 18-3-402	523
		UNLAWFUL SEXUAL CONTACT	§ 18-3-404	524
4-As	CONNECTICUT	1ST DEGREE SEXUAL ASSAULT	§ 53A-70	530
		2ND DEGREE SEXUAL ASSAULT	§ 53A-71	531
4-R	DELAWARE⁷⁷⁶	1ST DEGREE RAPE	§ 773	537
		2ND DEGREE RAPE	§ 772	536
1-AB	DISTRICT OF COLUMBIA	1ST DEGREE SEXUAL ABUSE	§ 22-3002	545
		2ND DEGREE SEXUAL ABUSE	§ 22-3003	545
1-BA	FLORIDA	SEXUAL BATTERY	§ 794.011	554
		UNLAWFUL SEXUAL ACTIVITY WITH CERTAIN MINORS	§ 794.05	556
5-R	GEORGIA	RAPE	§ 16-6-1	558
		STATUTORY	§ 16-6-3	559

⁷⁷⁵ California separately prohibits sodomy.

⁷⁷⁶ Delaware defines sexual intercourse, which is an element of rape, as follows in § 761(e):

(e) "Sexual intercourse" means:

(1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required. This offense encompasses the crimes commonly known as rape and sodomy; or

(2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.

NUMBER	STATE	LABEL	CITATION	PAGE #
		RAPE		
5-AS	HAWAII ⁷⁷⁷	1ST DEGREE SEXUAL ASSAULT	§ 707-730	564
		2ND DEGREE SEXUAL ASSAULT	§ 707-731	565
6-R	IDAHO ⁷⁷⁸	RAPE	§ 18-6101	569
		MALE RAPE	§ 18-6108	570
6-AS	ILLINOIS	AGGRAVATED CRIMINAL SEXUAL ASSAULT	720 ILCS § 5/12-14	574
		CRIMINAL SEXUAL ASSAULT	720 ILCS § 5/12-13	573
7-R	INDIANA	RAPE	§ 35-42-4-1	580
		CRIMINAL DEVIATE CONDUCT	§ 35-42-4-2	580
2-AB	IOWA	1ST DEGREE SEXUAL ABUSE	§ 709.2	585
		2ND DEGREE SEXUAL ABUSE	§ 709.3	585
8-R	KANSAS	RAPE	§ 21-3502	588
		AGGRAVATED CRIMINAL SODOMY	§ 21-3506	589
9-R	KENTUCKY ⁷⁷⁹	1ST DEGREE	§ 510.040	595

⁷⁷⁷ Hawaii law at HAW. REV. STAT. ANN. § 707-700, defines, “sexual penetration” as “vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person’s body or of any object into the genital or anal opening of another person’s body; it occurs upon any penetration, however slight, but emission is not required.” *See infra* at page 564.

⁷⁷⁸ Idaho law defines rape “as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis accomplished with a female,” and “Male rape . . . as the penetration, however slight, of the oral or anal opening of another male, with the perpetrator’s penis, for the purpose of sexual arousal, gratification or abuse.”

NUMBER	STATE	LABEL	CITATION	PAGE #
		RAPE		
		1ST DEGREE SODOMY	§ 510.070	596
10-R	LOUISIANA ⁷⁸⁰	AGGRAVATED RAPE	§ 42	599
		FORCIBLE RAPE	§ 42.1	600
7-As	MAINE	GROSS SEXUAL ASSAULT	§ 253	603
		UNLAWFUL SEXUAL CONTACT	§ 255-A	605
11-R	MARYLAND	1ST DEGREE RAPE	§ 3-303	612
		2ND DEGREE RAPE	§ 3-304	613

⁷⁷⁹KY. REV. STAT. ANN. §510.010 (Michie 2004) (defining rape as sexual intercourse with an individual under 12 years of age), *see infra* at page 594, states,

(1) "Deviate sexual intercourse" means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person. "Deviate sexual intercourse" does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices;

(8) "Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ by a foreign object in the course of the performance of generally recognized health-care practices.

⁷⁸⁰ Louisiana law states in § 42A, "Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse. . ."

NUMBER	STATE	LABEL	CITATION	PAGE #
12-R	MASSACHUSETTS ⁷⁸¹	RAPE	CH 265 § 22	617
		RAPE OF CHILD	CH 265 § 23	618
1-Co	MICHIGAN	1ST DEGREE CRIMINAL SEXUAL CONDUCT	§ 750.520B	621
		2ND DEGREE CRIMINAL SEXUAL CONDUCT	§ 750.520C	622
2-Co	MINNESOTA	1ST DEGREE CRIMINAL SEXUAL CONDUCT	§ 609.342	629
		2D DEGREE CRIMINAL SEXUAL CONDUCT	§ 609.343	622
13-R	MISSISSIPPI ⁷⁸²	RAPE; ASSAULT WITH INTENT TO RAVISH	§ 97-3-71	637
		STATUTORY RAPE	§ 97-3-65	637
14-R	MISSOURI	FORCIBLE RAPE	§ 561.030	640
		FORCIBLE SODOMY	§ 561.060	641
1-IN	MONTANA	SEXUAL INTERCOURSE WITHOUT CONSENT	§ 45-5-503	646
		DEVIATE SEXUAL CONDUCT	§ 45-5-505	647
15-R	NEBRASKA	1ST DEGREE RAPE	§ 130.35	677
		2ND DEGREE RAPE	§ 130.30	677
8-AS	NEVADA	SEXUAL ASSAULT	§ 200.366	653

⁷⁸¹ “Rape” under Massachusetts law includes, “sexual intercourse or unnatural sexual intercourse with a person.”

⁷⁸² Under Mississippi law, “‘Sexual penetration’ includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person’s body by any part of a person’s body, and insertion of any object into the genital or anal openings of another person’s body.”

NUMBER	STATE	LABEL	CITATION	PAGE #
		INCEST	§ 200.180	651
9-AS	NEW HAMPSHIRE	AGGRAVATED FELONIOUS SEXUAL ASSAULT	§ 632-A:2	656
		FELONIOUS SEXUAL ASSAULT	§ 632-A:3	657
10-AS	NEW JERSEY	AGGRAVATED SEXUAL ASSAULT	§ 2C: 14-2	661
		AGGRAVATED CRIMINAL SEXUAL CONTACT	§ 2C: 14-3	662
1-PE	NEW MEXICO	CRIMINAL SEXUAL PENETRATION	§ 30-9-11	668
		CRIMINAL SEXUAL CONTACT	§ 30-9-12	669
16-R	NEW YORK	1ST DEGREE RAPE	§ 130.35	677
		FIRST DEGREE CRIMINAL SEXUAL ACT	§ 130.50	678
17-R	NORTH CAROLINA	1ST DEGREE RAPE	§ 14-27.2	681
		2D DEGREE RAPE	§ 14-27.3	682
1-IM	NORTH DAKOTA	GROSS SEXUAL IMPOSITION	§ 12.1-20-03	685
		SEXUAL IMPOSITION	§ 12.1-20-04	686
18-R	OHIO	RAPE	§ 2907.02	689
		SEXUAL BATTERY	§ 2907.03	691
19-R	OKLAHOMA	1ST DEGREE RAPE	§ 1114A	696
		2D DEGREE RAPE	§ 1114B	696
20-R	OREGON	1ST DEGREE RAPE	§ 163.375	699
		2D DEGREE RAPE	§ 163.365	698
21-R	PENNSYLVANIA	RAPE	§ 3121	704
		INVOLUNTARY DEVIATE SEXUAL	§ 3123	705

NUMBER	STATE	LABEL	CITATION	PAGE #
		INTERCOURSE		
11-AS	RHODE ISLAND	1ST DEGREE SEXUAL ASSAULT	§ 11-37-2	711
		2ND DEGREE SEXUAL ASSAULT	§ 11-37-4	711
3-CO	SOUTH CAROLINA	1ST DEGREE CRIMINAL SEXUAL CONDUCT	§ 16-3-652	713
		2ND DEGREE CRIMINAL SEXUAL CONDUCT	§ 16-3-653	714
22-R	SOUTH DAKOTA	1ST DEGREE RAPE	§ 22-22-1	716
		2D DEGREE RAPE	§ 22-22-1	716
23-R	TENNESSEE	AGGRAVATED RAPE	§ 39-13-502	719
		RAPE	§ 39-13-503	719
12-AS	TEXAS	AGGRAVATED SEXUAL ASSAULT	§ 22.021	727
		SEXUAL ASSAULT	§ 22.011	724
24-R	UTAH	RAPE	§ 76-5-402	732
		FORCIBLE SODOMY	§ 76-5-403	733
13-AS	VERMONT	AGGRAVATED SEXUAL ASSAULT	§ 3253	743
		SEXUAL ASSAULT	§ 3252	742
25-R	VIRGINIA	RAPE	§ 18.2-61	745
		FORCIBLE SODOMY	§ 18.2-67.1	747
26-R	WASHINGTON ⁷⁸³	1ST DEGREE	§ 9A.44.040	754

⁷⁸³ In WASH. REV. CODE 9A.44.010(1) (2004), *see infra* at page 752 defines “Sexual intercourse” as follows:

NUMBER	STATE	LABEL	CITATION	PAGE #
		RAPE		
		2ND DEGREE RAPE	§9A.44.050	754
14-AS	WEST VIRGINIA	1ST DEGREE SEXUAL ASSAULT	§ 61-8B-3	760
		2ND DEGREE SEXUAL ASSAULT	§ 61-8B-4	761
15-AS	WISCONSIN	1ST DEGREE SEXUAL ASSAULT	§ 940.225(1)	764
		2ND DEGREE SEXUAL ASSAULT	§ 940.225(2)	764
16-AS	WYOMING	1ST DEGREE SEXUAL ASSAULT	§ 6-2-302	772
		2ND DEGREE SEXUAL ASSAULT	§ 6-2-303	773
	TITLE 18	AGGRAVATED SEXUAL ABUSE	18 U.S.C. § 2241	394
		SEXUAL ABUSE	18 U.S.C. § 2242	409
	MODEL PENAL CODE	RAPE	§ 213.1	326
		DEVIATE SEXUAL INTERCOURSE BY FORCE OR IMPOSITION	§ 213.2	326

- (a) has its ordinary meaning and occurs upon any penetration, however slight, and
- (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
- (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

APPENDIX Z

MICHIE'S ALABAMA CODE
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*** CURRENT THROUGH 2003 SECOND SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THRU MAY 14, 2004 ***

TITLE 13A. CRIMINAL CODE
CHAPTER 6. OFFENSES INVOLVING DANGER TO THE PERSON
ARTICLE 4. SEXUAL OFFENSES

Code of Ala. § 13A-6-60 (2004)

§ 13A-6-60. Definitions

The following definitions apply in this article:

- (1) Sexual intercourse. Such term has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.
- (2) Deviate sexual intercourse. Any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.
- (3) Sexual contact. Any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party.
- (4) Female. Any female person.
- (5) Mentally defective. Such term means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.
- (6) Mentally incapacitated. Such term means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other incapacitating act committed upon him without his consent.
- (7) Physically helpless. Such term means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
- (8) Forcible compulsion. Physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person.

§ 13A-6-61. Rape; first degree

(a) A person commits the crime of rape in the first degree if:

(1) He or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion; or

(2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He or she, being 16 years or older, engages in sexual intercourse with a member of the opposite sex who is less than 12 years old.

(b) Rape in the first degree is a Class A felony.

§ 13A-6-62. Rape; second degree

(a) A person commits the crime of rape in the second degree if:

(1) Being 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the member of the opposite sex.

(2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally defective.

(b) Rape in the second degree is a Class B felony.

§ 13A-6-63. Sodomy; first degree

(a) A person commits the crime of sodomy in the first degree if:

(1) He engages in deviate sexual intercourse with another person by forcible compulsion; or

(2) He engages in deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He, being 16 years old or older, engages in deviate sexual intercourse with a person who is less than 12 years old.

(b) Sodomy in the first degree is a Class A felony.

§ 13A-6-64. Sodomy; second degree

(a) A person commits the crime of sodomy in the second degree if:

(1) He, being 16 years old or older, engages in deviate sexual intercourse with another person less than 16 and more than 12 years old.

(2) He engages in deviate sexual intercourse with a person who is incapable of consent by reason of being mentally defective.

(b) Sodomy in the second degree is a Class B felony.

§ 13A-6-65. Sexual misconduct

(a) A person commits the crime of sexual misconduct if:

(1) Being a male, he engages in sexual intercourse with a female without her consent, under circumstances other than those covered by Sections 13A-6-61 and 13A-6-62; or with her consent where consent was obtained by the use of any fraud or artifice; or

(2) Being a female, she engages in sexual intercourse with a male without his consent; or

(3) He or she engages in deviate sexual intercourse with another person under circumstances other than those covered by Sections 13A-6-63 and 13A-6-64. Consent is no defense to a prosecution under this subdivision.

(b) Sexual misconduct is a Class A misdemeanor.

13A-6-65.1. Sexual torture

(a) A person commits the crime of sexual torture:

(1) By penetrating the vagina or anus or mouth of another person with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse.

(2) By penetrating the vagina or anus or mouth of a person who is incapable of consent by reason of physical helplessness or mental incapacity with an inanimate object, with the intent to sexually torture or to sexually abuse.

(3) By penetrating the vagina or anus or mouth of a person who is less than 12 years old with an inanimate object, by a person who is 16 years old or older with the intent to sexually torture or to sexually abuse.

(b) The crime of sexual torture is a Class A felony.

§ 13A-6-66. Sexual abuse; first degree

(a) A person commits the crime of sexual abuse in the first degree if:

(1) He subjects another person to sexual contact by forcible compulsion; or

(2) He subjects another person to sexual contact who is incapable of consent by reason of being physically helpless or mentally incapacitated; or

(3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old.

(b) Sexual abuse in the first degree is a Class C felony.

§ 13A-6-67. Sexual abuse; second degree

(a) A person commits the crime of sexual abuse in the second degree if:

(1) He subjects another person to sexual contact who is incapable of consent by reason of some factor other than being less than 16 years old; or

(2) He, being 19 years old or older, subjects another person to sexual contact who is less than 16 years old, but more than 12 years old.

(b) Sexual abuse in second degree is a Class A misdemeanor, except that if a person commits a second or subsequent offense of sexual abuse in the second degree within one year of another sexual offense, the offense is a Class C felony.

§ 13A-6-69. Child molestation; enticing, inviting, etc., child to propose sexual acts

It shall be unlawful for any person with lascivious intent to entice, allure, persuade or invite, or attempt to entice, allure, persuade or invite, any child under 16 years of age to enter any vehicle, room, house, office or other place for the purpose of proposing to such child the performance of an act of sexual intercourse or an act which constitutes the offense of sodomy or for the purpose of proposing the fondling or feeling of the sexual or genital parts of such child or the breast of such child, or for the purpose of committing an aggravated assault on such child, or for the purpose of proposing that such child fondle or feel the sexual or genital parts of such person.

Any person violating the provisions of this section shall, for the first violation, be punished by a fine not to exceed \$ 5,000.00 or by confinement for a term not to exceed five years, or by both fine and imprisonment; and any person who shall be convicted for the second violation of this section shall be punished by confinement in the penitentiary for not less than two nor more than 10 years, and such person shall not be eligible for probation.

§ 13A-6-70. Consent of victim

(a) Whether or not specifically stated, it is an element of every offense defined in this article, with the exception of subdivision (a)(3) of Section 13A-6-65, that the sexual act was committed without consent of the victim.

(b) Lack of consent results from:

(1) Forcible compulsion; or

(2) Incapacity to consent; or

(3) If the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(c) A person is deemed incapable of consent if he is:

(1) Less than 16 years old; or

(2) Mentally defective; or

(3) Mentally incapacitated; or

(4) Physically helpless.

ALASKA STATUTES
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*** CURRENT THRU ALL 2004 SESSIONS ***
*** ANNOTATIONS CURRENT THRU OPINIONS DECIDED AS OF SEPTEMBER 17, 2004 ***

TITLE 11. CRIMINAL LAW
CHAPTER 41. OFFENSES AGAINST THE PERSON
ARTICLE 4. SEXUAL OFFENSES

Alaska Sexual Offenses

Sec. 11.41.410. Sexual assault in the first degree

- (a) An offender commits the crime of sexual assault in the first degree if
- (1) the offender engages in sexual penetration with another person without consent of that person;
 - (2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;
 - (3) the offender engages in sexual penetration with another person
 - (A) who the offender knows is mentally incapable; and
 - (B) who is in the offender's care
 - (i) by authority of law; or
 - (ii) in a facility or program that is required by law to be licensed by the state; or
 - (4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and
 - (A) the offender is a health care worker; and
 - (B) the offense takes place during the course of professional treatment of the victim.

Sec. 11.41.420. Sexual assault in the second degree

- (a) An offender commits the crime of sexual assault in the second degree if
- (1) the offender engages in sexual contact with another person without consent of that person;
 - (2) the offender engages in sexual contact with a person
 - (A) who the offender knows is mentally incapable; and
 - (B) who is in the offender's care
 - (i) by authority of law; or
 - (ii) in a facility or program that is required by law to be licensed by the state;
 - (3) the offender engages in sexual penetration with a person who the offender knows is

- (A) mentally incapable;
 - (B) incapacitated; or
 - (C) unaware that a sexual act is being committed; or
- (4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and
- (A) the offender is a health care worker; and
 - (B) the offense takes place during the course of professional treatment of the victim.

Sec. 11.41.425. Sexual assault in the third degree

- (a) An offender commits the crime of sexual assault in the third degree if the offender
 - (1) engages in sexual contact with a person who the offender knows is
 - (A) mentally incapable;
 - (B) incapacitated; or
 - (C) unaware that a sexual act is being committed;
 - (2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or
 - (3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.
- (b) Sexual assault in the third degree is a class C felony.

Sec. 11.41.430. Sexual assault in the third degree. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.427. Sexual assault in the fourth degree

- (a) An offender commits the crime of sexual assault in the fourth degree if
 - (1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment; or
 - (2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person.

Sec. 11.41.432. Defenses

- (a) It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is
 - (1) mentally incapable; or

(2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant.

Sec. 11.41.443. Spousal relationship no defense. [Repealed, § 61 ch 50 SLA 1989. For current law, see AS 11.41.432(b).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree

(a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

Sec. 11.41.436. Sexual abuse of a minor in the second degree

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS

11.41.455(a)(2) -- (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the

offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

Sec. 11.41.438. Sexual abuse of a minor in the third degree

(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree

(a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

Sec. 11.41.445. General provisions

(a) In a prosecution under AS 11.41.434 -- 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the offense was committed without the consent of the victim.

(b) In a prosecution under AS 11.41.410 -- 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the victim to be that age or older; and

(2) undertook reasonable measures to verify that the victim was that age or older.

Sec. 11.41.450. Incest

(a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

Sec. 11.41.455. Unlawful exploitation of a minor

(a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct listed in (1) -- (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration; (2) the lewd touching of another person's genitals, anus, or breast; (3) the lewd touching by another person of the child's genitals, anus, or breast; (4) masturbation; (5) bestiality; (6) the lewd exhibition of the child's genitals; or (7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc.

Sec. 11.41.458. Indecent exposure in the first degree

(a) An offender commits the crime of indecent exposure in the first degree if

- (1) the offender violates AS 11.41.460(a);
- (2) while committing the act constituting the offense, the offender knowingly masturbates; and
- (3) the offense occurs within the observation of a person under 16 years of age.

Sec. 11.41.460. Indecent exposure in the second degree

(a) An offender commits the crime of indecent exposure in the second degree if the offender knowingly exposes the offender's genitals in the presence of another person with reckless disregard for the offensive, insulting, or frightening effect the act may have.

Sec. 11.41.470. Definitions

For purposes of AS 11.41.410 -- 11.41.470, unless the context requires otherwise,

(1) "health care worker" includes a person who is or purports to be an anesthesiologist, acupuncturist, chiropractor, dentist, health aide, hypnotist, massage therapist, mental health counselor, midwife, nurse, nurse practitioner, osteopath, naturopath, physical therapist, physical therapy assistant, physician, physician assistant, psychiatrist, psychologist, psychological associate, radiologist, religious healing practitioner, surgeon, x-ray technician, or a substantially similar position;

(2) "incapacitated" means temporarily incapable of appraising the nature of one's own

conduct or physically unable to express unwillingness to act;

(3) "legal guardian" means a person who is under a duty to exercise general supervision over a minor or other person committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 as a result of a court order, statute, or regulation, and includes Department of Health and Social Services employees, foster parents, and staff members and other employees of group homes or youth facilities where the minor or other person is placed as a result of a court order or the action of the Department of Health and Social Services, and police officers, probation officers, and social workers when those persons are exercising custodial control over a minor or other person.

(4) "mentally incapable" means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person;

(5) "position of authority" means an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor;

(6) "sexual act" means sexual penetration or sexual contact;

(7) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(8) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant

*THIS DOCUMENT IS CURRENT THROUGH 3RD SPECIAL SESSION OF THE 46TH
LEGISLATURE*

* ANNOTATIONS CURRENT THROUGH JULY 1, 2004 *

TITLE 13. CRIMINAL CODE
CHAPTER 14. SEXUAL OFFENSES

Arizona Sexual Offenses

§ 13-1401. **Definitions**

In this chapter, unless the context otherwise requires:

1. "Oral sexual contact" means oral contact with the penis, vulva or anus.
2. "Sexual contact" means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact.
3. "Sexual intercourse" means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.
4. "Spouse" means a person who is legally married and cohabiting.
5. "Without consent" includes any of the following:
 - (a) The victim is coerced by the immediate use or threatened use of force against a person or property.
 - (b) The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For purposes of this subdivision, "mental defect" means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
 - (c) The victim is intentionally deceived as to the nature of the act.
 - (d) The victim is intentionally deceived to erroneously believe that the person is the victim's spouse

§ 13-1402. **Indecent exposure; classifications**

A. A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

§ 13-1403. Public sexual indecency; public sexual indecency to a minor; classifications

A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:

1. An act of sexual contact.
2. An act of oral sexual contact.
3. An act of sexual intercourse.
4. An act involving contact between the person's mouth, vulva or genitals and the anus or genitals of an animal.

B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present.

§ 13-1404. Sexual abuse; classifications

Text of section as amended applies only to persons who commit a felony offense after January 1, 1994, by Laws 1993, Ch. 255, § 99

A. A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.

§ 13-1405. Sexual conduct with a minor; classifications

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

§ 13-1406. Sexual assault; classification; increased punishment

A. A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.

§ 13-1406.01. Sexual assault of a spouse; violation; classification

A. A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.

§ 13-1408. Adultery; classification; punishment; limitation on prosecution

A. A married person who has sexual intercourse with another than his or her spouse, and an unmarried person who has sexual intercourse with a married person not his or her spouse, commits adultery and is guilty of a class 3 misdemeanor. When the act is committed between parties only one of whom is married, both shall be punished.

B. No prosecution for adultery shall be commenced except upon complaint of the husband or wife.

§ 13-1410. Molestation of child; classification

Text of section as amended applies only to persons who commit a felony offense after January 1, 1994, by Laws 1993, Ch. 255, § 99

A. A person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age.

§ 13-1417. Continuous sexual abuse of a child; classification

A. A person who over a period of three months or more in duration engages in three or more acts in violation of section 13-1405, 13-1406 or 13-1410 with a child under fourteen years of age is guilty of continuous sexual abuse of a child.

B. Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to section 13-604.01.

C. To convict a person of continuous sexual abuse of a child, the trier of fact shall unanimously agree that the requisite number of acts occurred. The trier of fact does not need to agree on which acts constitute the requisite number.

D. Any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved. If more than one victim is involved, a separate count may be charged for each victim.

§ 13-1418. Sexual misconduct; behavioral health professionals; classification

Text of section effective until July 1, 2004. For text of section effective July 1, 2004. See the following version.

A. A behavioral health professional certified pursuant to title 32, chapter 33 or a psychiatrist or psychologist licensed pursuant to title 32, chapter 13, 17 or 19.1 commits sexual misconduct by intentionally or knowingly engaging in sexual intercourse with a patient who is currently under the care or supervision of the certified behavioral health professional, psychiatrist or psychologist.

B. Sexual misconduct by a certified behavioral health professional, psychiatrist or

psychologist is a class 6 felony.

C. This section does not apply to any act of sexual conduct that occurs between a certified behavioral health professional, psychiatrist or psychologist and a patient after the patient has completed a course of treatment or if the patient is not under the care of the certified behavioral health professional, psychiatrist or psychologist.

§ 13-1419. Unlawful sexual conduct; correctional employees; persons in custody; classification

A. A person who is employed by the state department of corrections, the department of juvenile corrections, a private prison facility or a city or county jail or who contracts to provide services with the state department of corrections, the department of juvenile corrections, a private prison facility or a city or county jail commits unlawful sexual conduct by engaging in oral sexual contact, sexual contact or sexual intercourse with a person who is in the custody of the state department of corrections, the department of juvenile corrections, a private prison facility or a city or county jail or with an offender who is under the supervision of either department or a city or county.

B. A prisoner who is in the custody of the state department of corrections, a private prison facility or a city or county jail or an offender who is on release status and who is under the supervision of the state department of corrections or a city or county commits unlawful sexual conduct by engaging in oral sexual contact, sexual contact or sexual intercourse with a person who is employed by the state department of corrections, a private prison facility or a city or county jail or who contracts to provide services with the state department of corrections, a private prison facility or a city or county jail.

C. This section does not apply to:

1. A person who is employed by the state department of corrections, a private prison facility or a city or county jail or who contracts to provide services with the state department of corrections, a private prison facility or a city or county jail or an offender who is on release status if the person was lawfully married to the prisoner or offender on release status before the prisoner or offender was sentenced to the state department of corrections or was incarcerated in a city or county jail.

2. An offender who is on release status and who was lawfully married to a person who is employed by the state department of corrections, a private prison facility or a city or county jail or who contracts to provide services with the state department of corrections, a private prison facility or a city or county jail if the marriage occurred prior to the offender being sentenced to the state department of corrections or incarcerated in a city or county jail.

§ 13-1420. Sexual offense; evidence of similar crimes; definition

A. If the defendant is charged with a violation of a sexual offense, the court may admit evidence that the defendant committed past acts which would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is

relevant.

B. This section does not limit the admission or consideration of evidence under any court rule.

C. For the purposes of this section, “sexual offense” means any of the following:

1. Sexual abuse, in violation of section 13-1404.
2. Sexual conduct with a minor in violation of section 13-1405.
3. Sexual assault, in violation of section 13-1406.
4. Sexual assault of a spouse, in violation of section 13-1406.01.
5. Molestation of a child, in violation of section 13-1410.
6. Continuous sexual abuse of a child, in violation of section 13-1417.
7. Sexual misconduct by a behavioral health professional, in violation of section 13-1418.
8. Commercial sexual exploitation of a minor, in violation of section 13-3552.
9. Sexual exploitation of a minor, in violation of section 13-3553.

§ 13-1422. Sexually oriented businesses; hours of operation; classification; definitions

A. An adult arcade, adult bookstore or video store, adult cabaret, adult motion picture theater, adult theater, escort agency or nude model studio shall not remain open at any time between the hours of 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between the hours of 1:00 a.m. and 12:00 noon on Sunday.

§ 13-1423. Violent sexual assault; natural life sentence

A. A person is guilty of violent sexual assault if in the course of committing an offense under section 13-1404, 13-1405, 13-1406, 13-1406.01 or 13-1410 the offense involved the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or involved the intentional or knowing infliction of serious physical injury and the person has a historical prior felony conviction for a sexual offense under this chapter or any offense committed outside this state that if committed in this state would constitute a sexual offense under this chapter.

*** THIS DOCUMENT CURRENT THROUGH ALL 2003-2004 LEGISLATION ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2004 ***

TITLE 5. CRIMINAL OFFENSES
SUBTITLE 2. OFFENSES AGAINST THE PERSON
CHAPTER 14. SEXUAL OFFENSES
SUBCHAPTER 1. GENERAL PROVISIONS

Arkansas Sexual Offenses

§ 5-14-103. **Rape**

(a) (1) A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person:

(A) By forcible compulsion; or

(B) Who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated; or

(C) (i) Who is less than fourteen (14) years of age.

(ii) It is an affirmative defense to prosecution under subdivision (a)(1)(C)(i) of this section that the actor was not more than three (3) years older than the victim; or

(D) (i) Who is less than eighteen (18) years of age, and the actor:

(a) Is the victim's guardian;

(b) Is the victim's uncle, aunt, grandparent, step-grandparent, or grandparent by adoption;

(c) Is the victim's brother or sister of the whole or half blood or by adoption; or

(d) Is the victim's nephew, niece, or first cousin.

(ii) It is an affirmative defense to prosecution under subdivision (a)(1)(D)(i) of this section that the actor was not more than three (3) years older than the victim.

(2) It is no defense to prosecution under subdivisions (a)(1)(C) or (D) of this section that the victim consented to the conduct.

(3) Rape is a Class Y felony.

(b) (1) A court may issue a permanent no contact order when:

(A) A defendant pleads guilty or nolo contendere; or

(B) All the defendant's appeals have been exhausted and the defendant remains convicted.

(2) If a judicial officer has reason to believe that mental disease or defect of the

defendant will or has become an issue in the case, the judicial officer shall enter such orders as are consistent with § 5-2-305.

§ 5-14-110. Sexual indecency with a child

(a) A person commits sexual indecency with a child if:

(1) Being eighteen (18) years old or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in sexual intercourse, deviate sexual activity, or sexual contact; or

(2) (A) With the purpose to arouse or gratify the sexual desires of himself or herself or those of any other person, the person purposefully exposes his or her sex organs to another person who is less than fifteen (15) years of age.

(B) It is an affirmative defense if the person is within three (3) years of age of the victim.

§ 5-14-111. Public sexual indecency

(a) A person commits public sexual indecency if he engages in any of the following acts in a public place or public view:

(1) An act of sexual intercourse; or

(2) An act of deviate sexual activity; or

(3) An act of sexual contact.

§ 5-14-112. Indecent exposure

(a) A person commits indecent exposure if, with the purpose to arouse or gratify the sexual desire of the person or of any other person, he or she exposes his or her sex organs:

(1) In a public place or in public view; or

(2) Under circumstances in which the person knows the conduct is likely to cause affront or alarm.

(b) (1) Indecent exposure is a Class A misdemeanor.

(2) (A) If the indecent exposure is committed against a person under the age of fifteen (15) years, a second or subsequent offense of indecent exposure against a person under the age of fifteen (15) years shall be a Class D felony.

(B) Subdivision (b)(2)(A) of this section shall not apply if the actor is under the age of eighteen (18) years at the time of the offense.

§ 5-14-122. Sodomy

(a) A person commits sodomy if such person performs any act of sexual gratification involving:

(1) The penetration, however slight, of the anus or mouth of an animal or a person

by the penis of a person of the same sex or an animal; or

(2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal.

§ 5-14-123. Exposing another person to human immunodeficiency virus

(a) A person with acquired immunodeficiency syndrome or who tests positive for the presence of human immunodeficiency virus antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public.

(b) A person commits the offense of exposing another to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person to such viral infection through the parenteral transfer of blood or blood products or engages in sexual penetration with another person without first having informed the other person of the presence of human immunodeficiency virus.

(c) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.

§ 5-14-124. Sexual assault in the first degree

(a) A person commits sexual assault in the first degree if the person engages in sexual intercourse or deviate sexual activity with another person, not the person’s spouse, who is less than eighteen (18) years of age and:

(1) (A) The actor is employed with:

- (i) The Department of Correction;
- (ii) The Department of Community Correction;
- (iii) The Department of Human Services;
- (iv) Any city or county jail; or
- (v) A juvenile detention facility; and

(B) The victim is in the custody of:

- (B) (i) (a) The Department of Correction;
- (b) The Department of Community Correction;
- (c) The Department of Human Services;
- (d) Any city or county jail; or
- (e) A juvenile detention facility; or
- (ii) Their contractors or agents;

(2) Is a professional under § 12-12-507(b) and is in a position of trust or authority over the victim and uses the position to engage in sexual intercourse or deviate sexual activity; or

(3) (A) Is an employee in the victim's school or school district, a temporary caretaker, or a person in a position of trust or authority over the victim.

(B) It is an affirmative defense to prosecution under subdivision (a)(3)(A) of this section that the actor was not more than three (3) years older than the victim.

(b) It is no defense to prosecution under this section that the victim consented to the conduct.

§ 5-14-125. **Sexual assault in the second degree**

(a) A person commits sexual assault in the second degree if the person:

(1) Engages in sexual contact with another person by forcible compulsion;

(2) Engages in sexual contact with another person who is incapable of consent because the person is physically helpless, mentally defective, or mentally incapacitated;

(3) Being eighteen (18) years of age or older, engages in sexual contact with another person, not the person's spouse, who is less than fourteen (14) years of age;

(4) (A) Engages in sexual contact with another person who is less than eighteen (18) years of age and the person:

(i) Is employed with the Department of Correction, Department of Community Correction, any city or county jail, or any juvenile detention facility, and the minor is in custody at a facility operated by the agency or contractor employing the person;

(ii) Is a professional under § 12-12-507(b) and is in a position of trust or authority over the minor; or

(iii) Is the minor's guardian, an employee in the minor's school or school district, a temporary caretaker, or a person in a position of trust or authority over the minor.

(B) For purposes of subdivision (a)(4)(A) of this section, consent of the minor is not a defense to prosecution;

(5) (A) Being less than eighteen (18) years of age, engages in sexual contact with a person, not his or her spouse, who is less than fourteen (14) years of age.

(B) (i) It is an affirmative defense to prosecution under subdivision (a)(5)(A) of this section that the person was not more than three (3) years older than the victim if the victim is less than twelve (12) years of age.

(ii) It is an affirmative defense to prosecution under subdivision (a)(5)(A) of this section that the person was not more than four (4) years older than the victim if the victim is twelve (12) years of age or older; or

(6) Is a teacher in a public school in grades kindergarten through twelve (K-12) and engages in sexual contact with another person who is a student enrolled in the school and who is less than twenty-one (21) years of age.

(b) (1) Sexual assault in the second degree is a Class B felony.

(2) Sexual assault in the second degree is a Class D felony if committed by a person less than eighteen (18) years of age with a person, not the person's spouse, who is less than fourteen (14) years of age.

§ 5-14-126. Sexual assault in the third degree

(a) (1) A person commits sexual assault in the third degree if the person engages in sexual intercourse or deviate sexual activity with another person, not the person's spouse, and the person:

(A) Is employed with the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail, and the victim is in the custody of the Department of Correction, Department of Community Correction, Department of Human Services, or any city or county jail; or

(B) Is a professional under § 12-12-507(b) or a member of the clergy and is in a position of trust or authority over the victim and uses the position to engage in sexual intercourse or deviate sexual activity.

(2) (A) A person commits sexual assault in the third degree if the person being under eighteen (18) years of age engages in sexual intercourse or deviate sexual activity with another person not the person's spouse who is less than fourteen (14) years of age.

(B) It is an affirmative defense under subdivision (a)(2) of this section that the person was not more than three (3) years older than the victim.

(b) It is no defense to prosecution under this section that the victim consented to the conduct.

5-14-127. Sexual assault in the fourth degree

(a) A person commits sexual assault in the fourth degree if, being twenty (20) years of age or older, the person engages in:

(1) Sexual intercourse with another person, not the person's spouse, who is less than sixteen (16) years of age; or

(2) Deviate sexual activity with another person, not the person's spouse, who is less than sixteen (16) years of age; or

(3) The person engages in sexual contact with another person, not the person's spouse, who is less than sixteen (16) years of age.

(b) (1) Sexual assault in the fourth degree under subdivisions (a)(1) and (2) of this section is a Class D felony.

(2) Sexual assault in the fourth degree under subdivision (a)(3) of this section is a Class A misdemeanor if the person engages only in sexual contact with another person as described in subdivision (a)(3) of this section.

§ 5-14-128. Registered offender living near school or daycare prohibited.

(a) It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand feet (2,000') of the property on which any public or private elementary or secondary school or daycare

facility is located.

(b) (1) It shall not be a violation of this section if the property on which the sex offender resides is owned and occupied by the offender and was purchased prior to the date on which the school or daycare center was established.

(2) The exclusion in subsection (b)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after the school or daycare center is established.

(c) (1) It shall not be a violation of this section if the sex offender resides on property he or she owns prior to July 16, 2003.

(2) The exclusion in subsection (c)(1) of this section shall not apply to a sex offender who pleads guilty or nolo contendere to or is found guilty of another sex offense after July 16, 2003.

(d) A sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., and who knowingly violates the provisions of this section shall be guilty of a Class D felony.

§ 5-14-101. **Definitions**

As used in this chapter, unless the context otherwise requires:

(1) "Deviate sexual activity" means any act of sexual gratification involving:

(A) The penetration, however slight, of the anus or mouth of one person by the penis of another person; or

(B) The penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person;

(2) "Forcible compulsion" means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;

(3) "Guardian" means a parent, stepparent, legal guardian, legal custodian, foster parent, or anyone who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor.

(4) (A) "Mentally defective" means that a person suffers from a mental disease or defect which renders the person:

(i) Incapable of understanding the nature and consequences of sexual acts; or

(ii) Unaware the sexual act is occurring.

(B) A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient;

(5) "Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance:

(A) Administered to the person without the person's consent; or

(B) Which renders the person unaware the sexual act is occurring;

- (6) "Physically helpless" means that a person is:
- (A) (i) Unconscious; or
 - (ii) Physically unable to communicate lack of consent; or
 - (B) Rendered unaware the sexual act is occurring;

(7) "Public place" means a publicly or privately owned place to which the public or substantial numbers of people have access;

(8) "Public view" means observable or likely to be observed by a person in a public place;

(9) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and

(10) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

§ 5-14-102. In general

(a) The definition of an offense that excludes conduct with a spouse shall not be construed to preclude accomplice liability of a spouse.

(b) When the criminality of conduct depends on a child's being below the age of fourteen (14) years and the actor is twenty (20) years of age or older, it is no defense that the actor did not know the age of the child or reasonably believed the child to be fourteen (14) years of age or older.

(c) (1) When criminality of conduct depends on a child's being below the age of fourteen (14) years and the actor is under the age of twenty (20) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

(2) The actor may be guilty, however, of the lesser offense defined by the age that he or she reasonably believed the child to be.

(d) (1) When criminality of conduct depends on a child's being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above.

(2) The actor may be guilty, however, of the lesser offense defined by the age that he or she reasonably believed the child to be.

(e) When criminality of conduct depends on a victim's being incapable of consent because he or she is mentally defective or mentally incapacitated, it is an affirmative defense that the actor reasonably believed that the victim was capable of consent.

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SUPPLEMENT ***
INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH.68, 6/24/04
2003-04 3RD EXTRA. SESS., CH.1 AND 5TH EXTRA. SESS., CH.2

PENAL CODE
PART 1. Crimes and Punishments
TITLE 9. Of Crimes Against the Person Involving Sexual Assault, and Crimes Against
Public Decency and Good Morals
CHAPTER 1. Rape, Abduction, Carnal Abuse of Children, and Seduction

Cal Pen Code § 261 (2004)

§ 261. **Rape; “Duress”; “Menace”**

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(5) Where a person submits under the belief that the person committing the act is the

victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

§ 261.5. Unlawful sexual intercourse with a minor; Misdemeanor or felony violation; Civil penalties

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

(e)(1) Notwithstanding any other provision of this section, an adult who engages in an act of sexual intercourse with a minor in violation of this section may be liable for civil penalties in the following amounts:

(A) An adult who engages in an act of unlawful sexual intercourse with a minor less than two years younger than the adult is liable for a civil penalty not to exceed two thousand dollars (\$ 2,000).

(B) An adult who engages in an act of unlawful sexual intercourse with a minor at least two years younger than the adult is liable for a civil penalty not to exceed five thousand dollars (\$ 5,000).

(C) An adult who engages in an act of unlawful sexual intercourse with a minor at least three years younger than the adult is liable for a civil penalty not to exceed ten thousand dollars (\$ 10,000).

(D) An adult over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor under 16 years of age is liable for a civil penalty not to exceed twenty-five thousand dollars (\$ 25,000).

(2) The district attorney may bring actions to recover civil penalties pursuant to this subdivision. From the amounts collected for each case, an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by the Legislature.

(3) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars (\$ 70) against any person who violates this section with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

§ 261.6. "Consent"; Effect of current or previous relationship

In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.

Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.

§ 261.7. "Consent"; Communication to use condom or other birth control device

In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.

§ 262. Spousal rape

(a) Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:

(1) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(2) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.

(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(4) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(5) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) Section 800 shall apply to this section. However, no prosecution shall be commenced under this section unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation. This reporting requirement shall not apply if the victim's allegation of the offense is corroborated by independent evidence that would otherwise be admissible during trial.

(c) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(d) As used in this section, "menace" means any threat, declaration, or act that shows an intention to inflict an injury upon another.

(e) If probation is granted upon conviction of a violation of this section, the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(1) That the defendant make payments to a battered women's shelter, up to a maximum of one thousand dollars (\$ 1,000).

(2) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

§ 263. Penetration

The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime.

§ 264. Punishment for rape; AIDS education fine

(a) Rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years.

(b) In addition to any punishment imposed under this section the judge may assess a fine not to exceed seventy dollars (\$ 70) against any person who violates Section 261 or 262 with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

264.1. Punishment for aiding or abetting rape

The provisions of Section 264 notwithstanding, in any case in which the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed an act described in Section 261, 262, or 289, either personally or by aiding and abetting the other person, that fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, the defendant shall suffer confinement in the state prison for five, seven, or nine years.

§ 266. Procurement

Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of 18 years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the state prison, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars (\$ 2,000), or by both such fine and imprisonment.

§ 266a. Procurement by force or fraud

Every person who, within this state, takes any person against his or her will and without his or her consent, or with his or her consent procured by fraudulent inducement or misrepresentation, for the purpose of prostitution, as defined in subdivision (b) of Section 647, is punishable by imprisonment in the state prison, and a fine not exceeding two thousand dollars (\$ 2,000).

§ 266b. Compelling an illicit relationship

Every person who takes any other person unlawfully, and against his or her will, and by force, menace, or duress, compels him or her to live with such person in an illicit relation, against his or her consent, or to so live with any other person, is punishable by imprisonment in the state prison.

§ 266c. Inducing consent to sexual act by fraud or fear

Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act, is punishable by imprisonment in a county jail for not more than one year or in the state prison for two, three, or four years.

As used in this section, "fear" means the fear of physical injury or death to the person or to any relative of the person or member of the person's family.

§ 266d. Causing cohabitation for profit

Any person who receives any money or other valuable thing for or on account of placing in custody any other person for the purpose of causing the other person to cohabit with any person to whom the other person is not married, is guilty of a felony.

§ 266e. Acquiring prostitute

Every person who purchases, or pays any money or other valuable thing for, any person for the purpose of prostitution as defined in subdivision (b) of Section 647, or for the purpose of placing such person, for immoral purposes, in any house or place against his or her will, is guilty of a felony.

§ 266f. Selling prostitute

Every person who sells any person or receives any money or other valuable thing for or on account of his or her placing in custody, for immoral purposes, any person, whether with or without his or her consent, is guilty of a felony.

§ 266g. Procurement of wife by husband

Every man who, by force, intimidation, threats, persuasion, promises, or any other means, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution, or connives at or consents to, or permits, the placing or leaving of his wife in a house of prostitution, or allows or permits her to remain therein, is guilty of a felony and punishable by imprisonment in the state prison for two, three or four years; and in all prosecutions under this section a wife is a competent witness against her husband.

§ 266h. Pimping

(a) Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punished by imprisonment in the state prison for three, four, or six years .

(b) If the person engaged in prostitution is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for three, four, or six years. If the person engaged in prostitution is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

§ 266i. Pandering

(a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punished by imprisonment in the state prison for three, four, or six years:

(1) Procures another person for the purpose of prostitution.

(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.

(3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.

(4) By promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.

(5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.

(6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution.

(b) If the other person is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for three, four, or six years. Where the other person is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

§ 266j. Procurement of child

Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years, and by a fine not to exceed fifteen thousand dollars (\$ 15,000).

§ 267. Abduction of minor for prostitution

Every person who takes away any other person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison, and a fine not exceeding two thousand dollars (\$ 2,000).

§ 269. Aggravated sexual assault of child

(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child:

(1) A violation of paragraph (2) of subdivision (a) of Section 261.

(2) A violation of Section 264.1.

(3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another

person.

(4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) A violation of subdivision (a) of Section 289.

(b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life.

285. Incest

Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

§ 286. Sodomy

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

(b)(1) Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.

(c)(1) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(3) Any person who commits an act of sodomy where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for five,

seven, or nine years.

(e) Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility, as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.

(f) Any person who commits an act of sodomy, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

(1) Was unconscious or asleep.

(2) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact.

(4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(g) Except as provided in subdivision (h), a person who commits an act of sodomy, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison for three, six, or eight years. Notwithstanding the existence of a conservatorship pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(h) Any person who commits an act of sodomy, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for not more than one year. Notwithstanding the existence of a conservatorship pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(i) Any person who commits an act of sodomy, where the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for three, six, or eight years.

(j) Any person who commits an act of sodomy, where the victim submits under the belief that the person committing the act is the victim’s spouse, and this belief is

induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for three, six, or eight years.

(k) Any person who commits an act of sodomy, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for three, six, or eight years.

As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(l) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury, or death.

(m) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars (\$ 70) against any person who violates this section, with the proceeds of this fine to be used in accordance with Section 1463.23. The court, however, shall take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

§ 286.5. Sexual assault on animal

Any person who sexually assaults any animal protected by Section 597f for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor. Section 597f pertains to abandoned animals. It does not specify cats, dogs, horses, etc.

§ 288. Lewd or lascivious acts involving children

(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

(b) (1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent adult by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

(c) (1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent adult, with the intent described in subdivision (a), is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.

(d) In any arrest or prosecution under this section or Section 288.5, the peace officer, district attorney, and the court shall consider the needs of the child victim and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim or to prevent psychological harm to the dependent adult victim resulting from participation in the court process.

(e) Upon the conviction of any person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars (\$ 10,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime. Every fine imposed and collected under this section shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs pursuant to Section 13837.

If the court orders a fine imposed pursuant to this subdivision, the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

(f) For purposes of paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c), the following definitions apply:

(1) "Caretaker" means an owner, operator, administrator, employee, independent contractor, agent, or volunteer of any of the following public or private facilities when the facilities provide care for elder or dependent adults:

(A) Twenty-four hour health facilities, as defined in [Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code](#); (B) Clinics; (C) Home health agencies; (D) Adult day health care centers; (E) Secondary schools that serve dependent adults ages 18 to 22 years and postsecondary educational institutions that serve dependent adults or elders; (F) Sheltered workshops; (G) Camps; (H) Community care facilities, as defined by [Section 1402 of the Health and Safety Code](#), and residential care facilities for the elderly, as defined in [Section 1569.2 of the Health and Safety Code](#); (I) Respite care facilities.

(J) Foster homes; (K) Regional centers for persons with developmental disabilities.

(L) A home health agency licensed in accordance with Chapter 8 (commencing with [Section 1725\) of Division 2 of the Health and Safety Code](#); (M) An agency that supplies in-home supportive services; (N) Board and care facilities; (O) Any other protective or public assistance agency that provides health services or social services to elder or

dependent adults, including, but not limited to, in-home supportive services, as defined in [Section 14005.14 of the Welfare and Institutions Code](#); (P) Private residences.

(2) “Board and care facilities” means licensed or unlicensed facilities that provide assistance with one or more of the following activities:

(A) Bathing; (B) Dressing; (C) Grooming; (D) Medication storage; (E) Medical dispensation; (F) Money management.

(3) “Dependent adult” means any person 18 years of age or older who has a mental disability or disorder that restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have developmental disabilities, persons whose mental abilities have significantly diminished because of age.

(g) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) apply to the owners, operators, administrators, employees, independent contractors, agents, or volunteers working at these public or private facilities and only to the extent that the individuals personally commit, conspire, aid, abet, or facilitate any act prohibited by paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c).

(h) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) do not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent adult under care.

§ 288a. Oral copulation

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.

(b)(1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.

(c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) Any person who commits an act of oral copulation when the act is accomplished against the victim’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(3) Any person who commits an act of oral copulation where the act is accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting that other person, commits an act of oral copulation (1) when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, or (2) where the act is accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will

execute the threat, or (3) where the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison for five, seven, or nine years. Notwithstanding the appointment of a conservator with respect to the victim pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime described under paragraph (3), that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(e) Any person who participates in an act of oral copulation while confined in any state prison, as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(f) Any person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison for a period of three, six, or eight years. As used in this subdivision, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

(1) Was unconscious or asleep.

(2) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact.

(4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraudulent representation that the oral copulation served a professional purpose when it served no professional purpose.

(g) Except as provided in subdivision (h), any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, shall be punished by imprisonment in the state prison, for three, six, or eight years. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(h) Any person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical

disability rendered the alleged victim incapable of giving legal consent.

(i) Any person who commits an act of oral copulation, where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(j) Any person who commits an act of oral copulation, where the victim submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(k) Any person who commits an act of oral copulation, where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

As used in this subdivision, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(l) As used in subdivisions (c) and (d), "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(m) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars (\$ 70) against any person who violates this section, with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

§ 289. Penetration by foreign object

(a)(1) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.

(b) Except as provided in subdivision (c), any person who commits an act of sexual penetration, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. Notwithstanding the appointment of a conservator with respect to the victim pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney

shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(c) Any person who commits an act of sexual penetration, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act or causing the act to be committed and both the defendant and the victim are at the time confined in a state hospital for the care and treatment of the mentally disordered or in any other public or private facility for the care and treatment of the mentally disordered approved by a county mental health director, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with [Section 5000](#)) of [Division 5 of the Welfare and Institutions Code](#)), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving legal consent.

(d) Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, “unconscious of the nature of the act” means incapable of resisting because the victim meets one of the following conditions:

- (1) Was unconscious or asleep.
- (2) Was not aware, knowing, perceiving, or cognizant that the act occurred.
- (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact.
- (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(e) Any person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(f) Any person who commits an act of sexual penetration when the victim submits under the belief that the person committing the act or causing the act to be committed is the victim’s spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

(g) Any person who commits an act of sexual penetration when the act is accomplished against the victim’s will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official, shall be punished by imprisonment in the state prison for a period of three, six, or eight years.

As used in this subdivision, “public official” means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(h) Except as provided in Section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of age shall be punished by

imprisonment in the state prison or in the county jail for a period of not more than one year.

(i) Except as provided in Section 288, any person over the age of 21 years who participates in an act of sexual penetration with another person who is under 16 years of age shall be guilty of a felony.

(j) Any person who participates in an act of sexual penetration with another person who is under 14 years of age and who is more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(k) As used in this section:

(1) "Sexual penetration" is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.

(2) "Foreign object, substance, instrument, or device" shall include any part of the body, except a sexual organ.

(3) "Unknown object" shall include any foreign object, substance, instrument, or device, or any part of the body, including a penis, when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body.

(l) As used in subdivision (a), "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury or death.

(m) As used in this section, "victim" includes any person who the defendant causes to penetrate the genital or anal opening of the defendant or another person or whose genital or anal opening is caused to be penetrated by the defendant or another person and who otherwise qualifies as a victim under the requirements of this section.

§ 289.6. Employee or officer of detention facility; Engaging in sexual activity with consenting adult confined in detention facility

(a)(1) An employee or officer of a public entity health facility, or an employee, officer, or agent of a private person or entity that provides a health facility or staff for a health facility under contract with a public entity, who engages in sexual activity with a consenting adult who is confined in a health facility is guilty of a public offense. As used in this paragraph, "health facility" means a health facility as defined in subdivisions (b), (e), (g), (h), and (j), and subparagraph (C) of paragraph (2) of subdivision (i) of [Section 1250 of the Health and Safety Code](#), in which the victim has been confined involuntarily.

(2) An employee or officer of a public entity detention facility, or an employee, officer, or agent of a private person or entity that provides a detention facility or staff for a detention facility, or person or agent of a public or private entity under contract with a detention facility, or a volunteer of a private or public entity detention facility, who engages in sexual activity with a consenting adult who is confined in a detention facility, is guilty of a public offense.

(3) An employee with a department, board, or authority under the Youth and Adult Correctional Agency or a facility under contract with a department, board, or authority under the Youth and Adult Correctional Agency, who, during the course of his or her

employment directly provides treatment, care, control, or supervision of inmates, wards, or parolees, and who engages in sexual activity with a consenting adult who is an inmate, ward, or parolee, is guilty of a public offense.

(b) As used in this section, the term “public entity” means the state, federal government, a city, a county, a city and county, a joint county jail district, or any entity created as a result of a joint powers agreement between two or more public entities.

(c) As used in this section, the term “detention facility” means:

(1) A prison, jail, camp, or other correctional facility used for the confinement of adults or both adults and minors.

(2) A building or facility used for the confinement of adults or adults and minors pursuant to a contract with a public entity.

(3) A room that is used for holding persons for interviews, interrogations, or investigations and that is separate from a jail or located in the administrative area of a law enforcement facility.

(4) A vehicle used to transport confined persons during their period of confinement.

(5) A court holding facility located within or adjacent to a court building that is used for the confinement of persons for the purpose of court appearances.

(d) As used in this section, “sexual activity” means:

(1) Sexual intercourse.

(2) Sodomy, as defined in subdivision (a) of Section 286.

(3) Oral copulation, as defined in subdivision (a) of Section 288a.

(4) Sexual penetration, as defined in subdivision (k) of Section 289.

(5) The rubbing or touching of the breasts or sexual organs of another, or of oneself in the presence of and with knowledge of another, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of oneself or another.

(e) Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.

(f) This section does not apply to sexual activity between consenting adults that occurs during an overnight conjugal visit that takes place pursuant to a court order or with the written approval of an authorized representative of the public entity that operates or contracts for the operation of the detention facility where the conjugal visit takes place, to physical contact or penetration made pursuant to a lawful search, or bona fide medical examinations or treatments, including clinical treatments.

(g) Any violation of paragraph (1) of subdivision (a), or a violation of paragraph (2) or (3) of subdivision (a) as described in paragraph (5) of subdivision (d), is a misdemeanor.

(h) Any violation of paragraph (2) or (3) of subdivision (a), as described in paragraph (1), (2), (3), or (4) of subdivision (d), shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison, or by a fine of not more than ten thousand dollars (\$ 10,000) or by both that fine and imprisonment.

(i) Any person previously convicted of a violation of this section shall, upon a subsequent violation, be guilty of a felony.

(j) Anyone who is convicted of a felony violation of this section who is employed by a department, board, or authority within the Youth and Adult Correctional Agency shall be terminated in accordance with the State Civil Service Act (Part 2 (commencing with [Section 18500](#)) of Title 2 of Division 5 of the Government Code). Anyone who has been convicted of a felony violation of this section shall not be eligible to be hired or

reinstated by a department, board, or authority within the Youth and Adult Correctional Agency.

§ 314. Indecent exposure

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in [Section 635 of the Vehicle Code](#), or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

§ 318. Prevailing upon person to visit place for gambling or prostitution

Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of illegal gambling or prostitution, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars (\$ 500), or be punished by both that fine and imprisonment.

§ 12022.85. Sentence enhancement for specified violations; Prosecutor's use of test results

(a) Any person who violates one or more of the offenses listed in subdivision (b) with knowledge that he or she has acquired immune deficiency syndrome (AIDS) or with the knowledge that he or she carries antibodies of the human immunodeficiency virus at the time of the commission of those offenses, shall receive a three-year enhancement for each violation in addition to the sentence provided under those sections.

(b) Subdivision (a) applies to the following crimes:

- (1) Rape in violation of Section 261.
- (2) Unlawful intercourse with a person under 18 years of age in violation of Section 261.5.
- (3) Rape of a spouse in violation of Section 262.
- (4) Sodomy in violation of Section 286.
- (5) Oral copulation in violation of Section 288a.

(c) For purposes of proving the knowledge requirement of this section, the prosecuting attorney may use test results received under subdivision (c) of Section 1202.1 or subdivision (g) of Section 1202.6.

COLORADO REVISED STATUTES

*** THIS SECTION IS CURRENT THROUGH THE 2003 SUPPLEMENT (2003 SESSIONS) ***

TITLE 18. CRIMINAL CODE
ARTICLE 3. OFFENSES AGAINST THE PERSON
PART 4. UNLAWFUL SEXUAL BEHAVIOR

C.R.S. 18-3-401. **Definitions**

As used in this part 4, unless the context otherwise requires:

(1) “Actor” means the person accused of a sexual offense pursuant to this part 4.

(1.5) “Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4.

(1.7) “Diagnostic test” means a human immunodeficiency virus (HIV) screening test followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) “Intimate parts” means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

(2.5) “Pattern of sexual abuse” means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

(3) “Physically helpless” means unconscious, asleep, or otherwise unable to indicate willingness to act.

(3.5) One in a “position of trust” includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent’s rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child’s welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

(4) “Sexual contact” means the knowing touching of the victim’s intimate parts by the actor, or of the actor’s intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.

(5) “Sexual intrusion” means any intrusion, however slight, by any object or any part of a person’s body, except the mouth, tongue, or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(6) “Sexual penetration” means sexual intercourse, cunnilingus, fellatio, anilingus, or

anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime.

(7) “Victim” means the person alleging to have been subjected to a criminal sexual assault.

18-3-402. Sexual assault

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim’s will; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim’s conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim’s spouse; or

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

(2) Sexual assault is a class 4 felony, except as provided in subsections (3), (3.5), (4), and (5) of this section.

(3) Sexual assault is a class 1 misdemeanor if committed under the circumstances of paragraph (e) of subsection (1) of this section.

(3.5) Sexual assault is a class 3 felony if committed under the circumstances described in paragraph (h) of subsection (1) of this section.

(4) Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence; or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), “to retaliate” includes threats of kidnapping, death, serious bodily injury, or extreme pain; or

(d) The actor has substantially impaired the victim’s power to appraise or control the

victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission.

(e) (Deleted by amendment, L. 2002, p. 1578, § 2, effective July 1, 2002.)

(5) (a) Sexual assault is a class 2 felony if any one or more of the following circumstances exist:

(I) In the commission of the sexual assault, the actor is physically aided or abetted by one or more other persons; or

(II) The victim suffers serious bodily injury; or

(III) The actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim.

(b) (I) If a defendant is convicted of sexual assault pursuant to this subsection (5), the court shall sentence the defendant in accordance with section 18-1.3-401 (8) (e). A person convicted solely of sexual assault pursuant to this subsection (5) shall not be sentenced under the crime of violence provisions of section 18-1.3-406 (2). Any sentence for a conviction under this subsection (5) shall be consecutive to any sentence for a conviction for a crime of violence under section 18-1.3-406.

(II) The provisions of this paragraph (b) shall apply to offenses committed prior to November 1, 1998.

(6) Any person convicted of sexual assault committed on or after November 1, 1998, under any of the circumstances described in this section shall be sentenced in accordance with the provisions of part 10 of article 1.3 of this title.

18-3-404. Unlawful sexual contact

(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

(a) The actor knows that the victim does not consent; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or

(e) Repealed.

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or

(g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child by any of the means set forth in section 18-3-402 to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits unlawful sexual contact. For

the purposes of this subsection (1.5), the term “child” means any person under the age of eighteen years.

(1.7) Any person who knowingly observes or takes a photograph of another person’s intimate parts without that person’s consent, in a situation where the person observed has a reasonable expectation of privacy, for the purpose of the observer’s own sexual gratification, commits unlawful sexual contact. For purposes of this subsection (1.7), “photograph” includes any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material.

(2) Unlawful sexual contact is a class 1 misdemeanor, but it is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4) (a), (4) (b), or (4) (c) or if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section or subsection (1.5) of this section.

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to subsection (1.5) or (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall not apply to paragraph (g) of subsection (1) of this section as it applies to subsection (2) of this section.

18-3-405. Sexual assault on a child

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or

(b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor has the present ability to execute the threat; or

(c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or

(d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years prior to or at any time after the offense charged in the information or indictment. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraphs (a) to (d) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

18-3-405.3. Sexual assault on a child by one in a position of trust

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim.

(2) Sexual assault on a child by one in a position of trust is a class 3 felony if:

(a) The victim is less than fifteen years of age; or

(b) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time need be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years prior to or at any time after the offense charged in the information or indictment. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) Sexual assault on a child by one in a position of trust is a class 4 felony if the victim is fifteen years of age or older but less than eighteen years of age and the offense is not committed as part of a pattern of sexual abuse, as described in paragraph (b) of subsection (2) of this section.

(4) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

18-3-408.5. Jury instruction on consent - when required

In any criminal prosecution under section 18-3-402 (1) (a) or 18-3-404 (1) (a), (1) (c), (1) (d), or (1.7) or under section 18-3-402 (1) (b), (1) (c), or (1) (e) or 18-3-403 (1) (a) or (1) (b), for offenses committed before July 1, 2000, or for attempt or conspiracy to commit any crime listed in this section, upon request of any party to the proceedings, the jury shall be instructed on the definition of consent as set forth in section 18-3-401 (1.5). Notwithstanding the provisions of section 18-1-505 (4), an instruction on the definition of consent given pursuant to this section shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense.

18-1.3-1004. Indeterminate sentence

(1) (a) Except as otherwise provided in this subsection (1) and in subsection (2) of this section, the district court having jurisdiction shall sentence a sex offender to the custody of the department for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the sex offender's natural life.

(b) If the sex offender committed a sex offense that constitutes a crime of violence, as defined in section 18-1.3-406, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least the midpoint in the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(c) If the sex offender committed a sex offense that makes him or her eligible for sentencing as an habitual sex offender against children pursuant to section 18-3-412, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for

the level of offense committed and a maximum of the sex offender's natural life.

(d) If the sex offender committed a sex offense that constitutes a sexual offense, as defined in section 18-3-415.5, and the sex offender, prior to committing the offense, had notice that he or she had tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, the district court shall sentence the sex offender to the custody of the department for an indeterminate term of at least three times the upper limit of the presumptive range for the level of offense committed and a maximum of the sex offender's natural life.

(2) (a) The district court having jurisdiction, based on consideration of the evaluation conducted pursuant to section 16-11.7-104, C.R.S., and the factors specified in section 18-1.3-203, may sentence a sex offender to probation for an indeterminate period of at least ten years for a class 4 felony or twenty years for a class 2 or 3 felony and a maximum of the sex offender's natural life; except that, if the sex offender committed a sex offense that constitutes a crime of violence, as defined in section 18-1.3-406, or committed a sex offense that makes him or her eligible for sentencing as a habitual sex offender against children pursuant to section 18-3-412, the court shall sentence the sex offender to the department of corrections as provided in subsection (1) of this section. For any sex offender sentenced to probation pursuant to this subsection (2), the court shall order that the sex offender, as a condition of probation, participate in an intensive supervision probation program established pursuant to section 18-1.3-1007, until further order of the court.

(b) The court, as a condition of probation, may sentence a sex offender to a residential community corrections program pursuant to section 18-1.3-301 for a minimum period specified by the court. Following completion of the minimum period, the sex offender may be released to intensive supervision probation as provided in section 18-1.3-1008 (1.5).

(3) Each sex offender sentenced pursuant to this section shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to section 16-11.7-105, C.R.S.

(4) (a) The court may sentence any person pursuant to the provisions of this section if: (I) The person is convicted of or pleads guilty or nolo contendere to a crime specified in paragraph (b) of this subsection (4); and

(II) An assessment of the person pursuant to section 16-11.7-104, C.R.S., determines that the person is likely to commit one or more of the offenses specified in section 18-3-414.5 (1) (a) (II), under the circumstances described in section 18-3-414.5 (1) (a) (III).

(b) The provisions of this subsection (4) shall apply to any person who is convicted of or pleads guilty or nolo contendere to any of the following offenses or criminal attempt, conspiracy, or solicitation to commit any of the following offenses:

(I) Trafficking in children, as described in section 18-6-402;

(II) Felony sexual exploitation of children, as described in section 18-6-403;

(III) Procurement of a child for sexual exploitation, as described in section 18-6-404;

(IV) Soliciting for child prostitution, as described in section 18-7-402;

(V) Pandering of a child, as described in section 18-7-403;

(VI) Procurement of a child, as described in section 18-7-403.5;

(VII) Keeping a place of child prostitution, as described in section 18-7-404;

(VIII) Pimping of a child, as described in section 18-7-405;

(IX) Inducement of child prostitution, as described in section 18-7-405.5.

(c) Any person sentenced as a sex offender pursuant to this subsection (4) shall be subject to the provisions of this part 10.

(5) (a) Any sex offender sentenced pursuant to subsection (1) or (4) of this section and convicted of one or more additional crimes arising out of the same incident as the sex offense shall be sentenced for the sex offense and such other crimes so that the sentences are served consecutively rather than concurrently.

(b) (I) Except as otherwise provided in subparagraph (II) of this paragraph (b), if a sex offender sentenced pursuant to this part 10 is convicted of a subsequent crime prior to being discharged from parole pursuant to section 18-1.3-1006 or discharged from probation pursuant to section 18-1.3-1008, any sentence imposed for the second crime shall not supersede the sex offender's sentence pursuant to the provisions of this part 10. If the sex offender commits the subsequent crime while he or she is on parole or probation and the sex offender receives a sentence to the department of corrections for the subsequent crime, the sex offender's parole or probation shall be deemed revoked pursuant to section 18-1.3-1010, and the sex offender shall continue to be subject to the provisions of this part 10.

(II) The provisions of subparagraph (I) of this paragraph (b) shall not apply if the sex offender commits a subsequent crime that is a class 1 felony.

LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

* THIS DOCUMENT IS CURRENT THROUGH THE JAN. 6, 2003 SPECIAL SESSION *

TITLE 53a. PENAL CODE
CHAPTER 952 PENAL CODE: OFFENSES
PART VI SEX OFFENSES

Connecticut Sexual Offenses

§ 53a-65. Definitions.

As used in this part, except section 53a-70b, the following terms have the following meanings:

- (1) "Actor" means a person accused of sexual assault.
- (2) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body.
- (3) "Sexual contact" means any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person.
- (4) "Mentally defective" means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of such person's conduct.
- (5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling such person's conduct owing to the influence of a drug or intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent.
- (6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
- (7) "Use of force" means: (A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim.
- (8) "Intimate parts" means the genital area, groin, anus, inner thighs, buttocks or breasts.
- (9) "Psychotherapist" means a physician, psychologist, nurse, substance abuse counselor, social worker, clergyman, marital and family therapist, mental health service provider or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.
- (10) "Psychotherapy" means the professional treatment, assessment or counseling of a mental or emotional illness, symptom or condition.
- (11) "Emotionally dependent" means that the nature of the patient's or former patient's

emotional condition and the nature of the treatment provided by the psychotherapist are such that the psychotherapist knows or has reason to know that the patient or former patient is unable to withhold consent to sexual contact by or sexual intercourse with the psychotherapist.

(12) "Therapeutic deception" means a representation by a psychotherapist that sexual contact by or sexual intercourse with the psychotherapist is consistent with or part of the patient's treatment.

(13) "School employee" means a teacher, substitute teacher, school administrator, school superintendent, guidance counselor, psychologist, social worker, nurse, physician, school paraprofessional or coach employed by a local or regional board of education or a private elementary or secondary school or working in a public or private elementary or secondary school.

§ 53a-70. Sexual assault in the first degree: Class B or A felony.

(a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person, or (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person, or (3) commits sexual assault in the second degree as provided in section 53a-71 and in the commission of such offense is aided by two or more other persons actually present, or (4) engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse.

(b) (1) Except as provided in subdivision (2) of this subsection, sexual assault in the first degree is a class B felony for which two years of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court.

(2) Sexual assault in the first degree is a class A felony if the offense is a violation of subdivision (1) of subsection (a) of this section and the victim of the offense is under sixteen years of age or the offense is a violation of subdivision (2) of subsection (a) of this section. Any person found guilty under said subdivision (1) or (2) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim is under ten years of age or of which five years of the sentence imposed may not be suspended or reduced by the court if the victim is under sixteen years of age.

(3) Any person found guilty under this section shall be sentenced to a term of imprisonment and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of at least ten years.

§ 53a-70b. Sexual assault in spousal or cohabiting relationship: Class B felony.

(a) For the purposes of this section:

(1) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body; and

(2) "Use of force" means: (A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim.

(b) No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.

(c) Any person who violates any provision of this section shall be guilty of a class B felony.

§ 53a-71. Sexual assault in the second degree: Class C or B felony.

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; or (2) such other person is mentally defective to the extent that such other person is unable to consent to such sexual intercourse; or (3) such other person is physically helpless; or (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare; or (5) such other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (6) the actor is a psychotherapist and such other person is (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional; or (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor; or (9) the actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or (B) is under eighteen years of age.

(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court.

§ 53a-72a. Sexual assault in the third degree: Class D or C felony.

(a) A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person, or (B) by the threat of use of force against such other person or against a third person, which reasonably causes such other person to fear physical injury to himself or herself or a third person, or (2) engages in sexual intercourse with another person whom the actor knows to be related to him or her within any of the degrees of kindred specified in section 46b-21.

(b) Sexual assault in the third degree is a class D felony or, if the victim of the offense is under sixteen years of age, a class C felony.

§ 53a-72b. Sexual assault in the third degree with a firearm: Class C or B felony.

(a) A person is guilty of sexual assault in the third degree with a firearm when such person commits sexual assault in the third degree as provided in section 53a-72a, and in the commission of such offense, such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a pistol, revolver, machine gun, rifle, shotgun or other firearm. No person shall be convicted of sexual assault in the third degree and sexual assault in the third degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information.

(b) Sexual assault in the third degree with a firearm is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which two years of the sentence imposed may not be suspended or reduced by the court and a period of special parole pursuant to subsection (b) of section 53a-28 which together constitute a sentence of ten years.

§ 53a-73a. **Sexual assault in the fourth degree: Class A misdemeanor or class D felony.**

(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age, or (B) mentally defective or mentally incapacitated to the extent that such other person is unable to consent to such sexual contact, or (C) physically helpless, or (D) less than eighteen years old and the actor is such other person's guardian or otherwise responsible for the general supervision of such other person's welfare, or (E) in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (2) such person subjects another person to sexual contact without such other person's consent; or (3) such person engages in sexual contact with an animal or dead body; or (4) such person is a psychotherapist and subjects another person to sexual contact who is (A) a patient of the actor and the sexual contact occurs during the psychotherapy session, or (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual contact occurs by means of therapeutic deception; or (5) such person subjects another person to sexual contact and accomplishes the sexual contact by means of false

representation that the sexual contact is for a bona fide medical purpose by a health care professional; or (6) such person is a school employee and subjects another person to sexual contact who is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor; or (7) such person is a coach in an athletic activity or a person who provides intensive, ongoing instruction and subjects another person to sexual contact who is a recipient of coaching or instruction from the actor and (A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or (B) is under eighteen years of age.

(b) Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony.

*** THIS DOCUMENT IS CURRENT THROUGH 74 DEL. LAWS, CH 426 ***
*** ANNOTATIONS CURRENT THROUGH JULY 7, 2004 ***

TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART I. DELAWARE CRIMINAL CODE
CHAPTER 5. SPECIFIC OFFENSES
SUBCHAPTER II. OFFENSES AGAINST THE PERSON
SUBPART D. SEXUAL OFFENSES

Delaware Sexual Offenses

§ 763. Sexual harassment; unclassified misdemeanor

A person is guilty of sexual harassment when:

(1) The person threatens to engage in conduct likely to result in the commission of a sexual offense against any person; or

(2) The person suggests, solicits, requests, commands, importunes or otherwise attempts to induce another person to have sexual contact or sexual intercourse or unlawful sexual penetration with the actor, knowing that the actor is thereby likely to cause annoyance, offense or alarm to that person.

§ 766. Incest; class A misdemeanor

(a) A person is guilty of incest if the person engages in sexual intercourse with another person with whom the person has one of the following relationships:

A male and his child. A male and his parent. A male and his brother. A male and his sister.

A male and his grandchild. A male and his niece or nephew. A male and his father's sister or brother. A male and his mother's sister or brother. A male and his father's wife. A male and his wife's child. A male and the child of his wife's son or daughter. A female and her parent.

A female and her child. A female and her brother. A female and her sister. A female and her grandchild. A female and her niece or nephew. A female and her father's sister or brother. A female and her mother's sister or brother. A female and her mother's husband. A female and her husband's child. A female and the child of her husband's son or daughter.

(b) The relationships referred to herein include blood relationships without regard to legitimacy and relationships by adoption.

§ 767. Unlawful sexual contact in the third degree; class A misdemeanor

A person is guilty of unlawful sexual contact in the third degree when the person has sexual contact with another person or causes the victim to have sexual contact with the

person or a third person and the person knows that the contact is either offensive to the victim or occurs without the victim's consent.

§ 768. Unlawful sexual contact in the second degree; class G felony

A person is guilty of unlawful sexual contact in the second degree when the person intentionally has sexual contact with another person who is less than 16 years of age or causes the victim to have sexual contact with the person or a third person.

§ 769. Unlawful sexual contact in the first degree; class F felony

A person is guilty of unlawful sexual contact in the first degree when, in the course of committing unlawful sexual contact in the third degree or in the course of committing unlawful sexual contact in the second degree, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury to the victim or the person displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument.

§ 770. Rape in the fourth degree; class C felony

(a) A person is guilty of rape in the fourth degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached his or her sixteenth birthday; or

(2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached his or her eighteenth birthday, and the person is 30 years of age or older, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse; or

(3) Intentionally engages in sexual penetration with another person under any of the following circumstances:

a. The sexual penetration occurs without the victim's consent; or

b. The victim has not reached his or her sixteenth birthday; or

(4) Intentionally engages in sexual intercourse or sexual penetration with another person, and the victim has reached his or her sixteenth birthday but has not yet reached his or her eighteenth birthday and the defendant stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(b) Subsections (a)(3) and (a)(4) of this section do not apply to a licensed medical doctor or nurse who places 1 or more fingers or an object inside a vagina or anus for the purpose of diagnosis or treatment or to a law enforcement officer who is engaged in the lawful performance of his or her duties.

§ 771. Rape in the third degree; class B felony

(a) A person is guilty of rape in the third degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the victim has

not reached his or her sixteenth birthday and the person is at least 10 years older than the victim, or the victim has not yet reached his or her fourteenth birthday and the person has reached his or her nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title; or

(2) Intentionally engages in sexual penetration with another person under any of the following circumstances:

a. The sexual penetration occurs without the victim's consent and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim; or

b. The victim has not reached his or her sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim.

(b) Subsection (a)(2) of this section does not apply to a licensed medical doctor or nurse who places 1 or more fingers or an object inside a vagina or anus for the purpose of diagnosis or treatment, or to a law enforcement officer who is engaged in the lawful performance of his or her duties.

(c) Notwithstanding any law to the contrary, in any case in which a violation of subsection (a) of this section has resulted in the birth of a child who is in the custody and care of the victim or the victim's legal guardian(s), the court shall order that the defendant, as a condition of any probation imposed pursuant to a conviction under this section, timely pay any child support ordered by the Family Court for such child.

(d) Nothing in this section shall preclude a separate charge, conviction and sentence for any other crime set forth in this title, or in the Delaware Code.

§ 772. Rape in the second degree; class B felony

(a) A person is guilty of rape in the second degree when the person:

(1) Intentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent; or

(2) Intentionally engages in sexual penetration with another person under any of the following circumstances:

a. The sexual penetration occurs without the victim's consent and during the commission of the crime, or during the immediate flight following the commission of the crime, or during an attempt to prevent the reporting of the crime, the person causes serious physical injury to the victim; or

b. The sexual penetration occurs without the victim's consent, and was facilitated by or occurred during the course of the commission or attempted commission of:

1. Any felony; or

2. Any of the following misdemeanors: reckless endangering in the second degree; assault in the third degree; terroristic threatening; unlawfully administering drugs; unlawful imprisonment in the second degree; coercion or criminal trespass in the first, second or third degree; or

c. The victim has not yet reached his or her sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an

attempt to prevent the reporting of the crime, the person causes serious physical injury to the victim; or

d. The sexual penetration occurs without the victim's consent and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument; or

e. The victim has not yet reached his or her sixteenth birthday and during the commission of the crime, or during the immediate flight from the crime, or during an attempt to prevent the reporting of the crime, the person displays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument; or

f. The sexual penetration occurs without the victim's consent, and a principal-accomplice relationship within the meaning set forth in § 271 of this title existed between the defendant and another person or persons with respect to the commission of the crime; or

g. The victim has not yet reached his or her twelfth birthday, and the defendant has reached his or her eighteenth birthday; or

h. The victim has not yet reached his or her sixteenth birthday and the defendant stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(b) Nothing in this section shall preclude a separate charge, conviction and sentence for any other crime set forth in this title, or in the Delaware Code.

(c) Notwithstanding any provision of this title to the contrary, the minimum sentence for a person convicted of rape in the second degree in violation of this section shall be 10 years at Level V.

§ 773. Rape in the first degree; class A felony

(a) A person is guilty of rape in the first degree when the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist:

(1) The sexual intercourse occurs without the victim's consent and during the commission of the crime, or during the immediate flight following the commission of the crime, or during an attempt to prevent the reporting of the crime, the person causes physical injury or serious mental or emotional injury to the victim; or

(2) The sexual intercourse occurs without the victim's consent and it was facilitated by or occurred during the course of the commission or attempted commission of:

a. Any felony; or

b. Any of the following misdemeanors: reckless endangering in the second degree; assault in the third degree; terroristic threatening; unlawfully administering drugs; unlawful imprisonment in the second degree; coercion; or criminal trespass in the first, second or third degree; or

(3) In the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a

deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon or dangerous instrument; or

(4) The sexual intercourse occurs without the victim's consent, and a principal-accomplice relationship within the meaning set forth in § 271 of this title existed between the defendant and another person or persons with respect to the commission of the crime; or

(5) The victim has not yet reached his or her twelfth birthday, and the defendant has reached his or her eighteenth birthday; or

(6) The victim has not yet reached his or her sixteenth birthday and the defendant stands in a position of trust, authority or supervision over the child, or is an invitee or designee of a person who stands in a position of trust, authority or supervision over the child.

(b) Nothing contained in this section shall preclude a separate charge, conviction and sentence for any other crime set forth in this title, or in the Delaware Code.

(c) Notwithstanding any law to the contrary, a person convicted of rape in the first degree shall be sentenced to life imprisonment without benefit of probation, parole or any other reduction if:

(1) The victim had not yet reached his or her 16th birthday at the time of the offense and the person inflicts serious physical injury on the victim; or

(2) The person intentionally causes serious and prolonged disfigurement to the victim permanently, or intentionally destroys, amputates or permanently disables a member or organ of the victim's body; or

(3) The person is convicted of rape against 3 or more separate victims; or

(4) The person has previously been convicted of unlawful sexual intercourse in the first degree, rape in the second degree or rape in the first degree, or any equivalent offense under the laws of this State, any other state or the United States.

§ 776. Sexual extortion; class E felony

A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving contact, penetration or intercourse with the person or another or others by means of instilling in the victim a fear that, if such sexual act is not performed, the defendant or another will:

(1) Cause physical injury to anyone;

(2) Cause damage to property;

(3) Engage in other conduct constituting a crime;

(4) Accuse anyone of a crime or cause criminal charges to be instituted against anyone;

(5) Expose a secret or publicize an asserted fact, whether true or false, intending to subject anyone to hatred, contempt or ridicule;

(6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(7) Perform any other act which is calculated to harm another person materially with respect to the other person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

§ 777. Bestiality

A person is guilty of bestiality when the person intentionally engages in any sexual act involving sexual contact, penetration or intercourse with the genitalia of an animal or intentionally causes another person to engage in any such sexual act with an animal for purposes of sexual gratification.

§ 778. Continuous sexual abuse of a child; class B felony.

(a) A person is guilty of continuous sexual abuse of a child when, either residing in the same home with the minor child or having recurring access to the child, the person intentionally engages in 3 or more acts of sexual conduct with a child under the age of 14 years over a period of time, not less than 3 months in duration.

(b) Sexual conduct under this section is defined as any of those criminal sexual acts defined under § 768, § 769, § 770, § 771, § 772, § 773, or § 1108 of this title.

(c) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred, not on which acts constitute the requisite number.

§ 779. Dangerous crime against a child, definitions, sentences

(a) A “dangerous crime against a child” is defined as any criminal sexual conduct against a minor under the age of 14 years as defined in §§ 770-773 or §§ 1108-1112A of this title. For purposes of this section only, and § 762(a) of this title to the contrary notwithstanding, the defendant may use as an affirmative defense that the defendant believed that the victim of the crime was over the age of 16 years of age.

(b) Except as otherwise provided in this title, a person who is at least 18 years of age, or who has been tried as an adult and who is convicted of a dangerous crime against a child as defined in subsection (a) of this section, shall be guilty of a class B felony. For a second offense under this section, the Court shall impose a mandatory sentence of life imprisonment.

(c) A person sentence pursuant to this section shall not be eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the sentence imposed by the Court has been served.

§ 780. Female genital mutilation

(a) A person is guilty of female genital mutilation when:

(1) A person knowingly circumcises, excises or infibulates the whole or any part of the labia majora, labia minora or clitoris of a female minor; or

(2) A parent, guardian or other person legally responsible or charged with the care or custody of a female minor allows the circumcision, excision or infibulation, in whole or in part, of such minor’s labia majora, labia minora or clitoris.

(b) Female genital mutilation is a class E felony.

(c) It is not a defense to a violation that the conduct described in (a) above is required as a matter of custom, ritual or standard practice, or that the minor on whom it is

performed or the minor's parent or legal guardian consented to the procedure.

(d) A surgical procedure is not a violation of this section if the procedure is:

(1) Necessary to the health of the minor on whom it is performed and is performed by a licensed physician under § 1720 of Title 24 or a physician-in-training under the supervision of a licensed physician; or

(2) Performed on a minor who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a licensed physician under § 1720 of Title 24 or a physician-in-training under the supervision of a licensed physician, or a licensed midwife under § 3336 of Title 18.

§ 761. Definitions generally applicable to sexual offenses

(a) "Cunnilingus" means any oral contact with the female genitalia.

(b) "Fellatio" means any oral contact with the male genitalia.

(c) "Object" means any item, device, instrument, substance or any part of the body. It does not mean a medical instrument used by a licensed medical doctor or nurse for the purpose of diagnosis or treatment.

(d) "Sexual offense" means any offense defined by §§ 761-773 and §§ 1108-1112A of this title.

(e) "Sexual intercourse" means:

(1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required. This offense encompasses the crimes commonly known as rape and sodomy; or

(2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.

(f) "Sexual contact" means:

(1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or

(2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. Sexual contact shall also include touching when covered by clothing.

(g) "Sexual penetration" means:

(1) The unlawful placement of an object, as defined in subsection (c) of this section, inside the anus or vagina of another person; or

(2) The unlawful placement of the genitalia or any sexual device inside the mouth of another person.

(h) "Without consent" means:

(1) The defendant compelled the victim to submit by any act of coercion as defined in §§ 791 and 792 of this title, or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit. It is not required that the victim resist such force or threat to the utmost, or to resist if resistance would be futile or foolhardy, but the victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to

the defendant; or

(2) The defendant knew that the victim was unconscious, asleep or otherwise unaware that a sexual act was being performed; or

(3) The defendant knew that the victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct; or

(4) Where the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling, the commission of acts of sexual contact, sexual penetration or sexual intercourse by such person shall be deemed to be without consent of the victim where such acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested. For purposes of this paragraph, "health professional" includes all individuals who are licensed or who hold themselves out to be licensed or who otherwise provide professional physical or mental health services, diagnosis, treatment or counseling and shall include, but not be limited to, doctors of medicine and osteopathy, dentists, nurses, physical therapists, chiropractors, psychologists, social workers, medical technicians, mental health counselors, substance abuse counselors, marriage and family counselors or therapists and hypnotherapists; or

(5) The defendant had substantially impaired the victim's power to appraise or control the victim's own conduct by administering or employing without the other person's knowledge or against the other person's will, drugs, intoxicants or other means for the purpose of preventing resistance.

(i) "Position of trust, authority or supervision over a child" includes, but is not limited to:

(1) Familial or custodial authority or supervision; or

(2) A teacher, instructor, coach, babysitter, day care provider, or aide or any other person having regular direct contact with children through affiliation with a school, church or religious institution, athletic or charitable organization or any other organization, whether such a person is compensated or acting as a volunteer.

(j) A child who has not yet reached his or her sixteenth birthday is deemed unable to consent to a sexual act with a person more than 4 years older than said child. Children who have not yet reached their twelfth birthday are deemed unable to consent to a sexual act under any circumstances.

§ 791. Acts constituting coercion; class A misdemeanor

A person is guilty of coercion when the person compels or induces a person to engage in conduct which the victim has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which the victim has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the defendant or another will:

(1) Cause physical injury to a person; or

(2) Cause damage to property; or

- (3) Engage in other conduct constituting a crime; or
- (4) Accuse some person of a crime or cause criminal charges to be instituted against a person; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (6) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (7) Use or abuse the defendant's position as a public servant by performing some act within or related to the defendant's official duties, or by failing or refusing to perform an official duty in such manner as to affect some person adversely; or
- (8) Perform any other act which is calculated to harm another person materially with respect to that person's health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion is a class A misdemeanor.

§ 792. Coercion; truth and proper motive as a defense

In any prosecution for coercion committed by instilling in the victim a fear that the victim or another person would be charged with a crime, it is a defense that the defendant believed the threatened charge to be true and that the defendant's sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

§ 762. Provisions generally applicable to sexual offenses

(a) *Mistake as to age.* -- Whenever in the definition of a sexual offense, the criminality of conduct depends on whether the person has reached his or her sixteenth birthday, it is no defense that the actor did not know the person's age, or that the actor reasonably believed that the person had reached his or her sixteenth birthday.

(b) *Gender.* -- Unless a contrary meaning is clearly required, the male pronoun shall be deemed to refer to both male and female.

(c) *Separate acts of sexual contact, penetration and sexual intercourse.* -- Nothing in this title precludes a defendant from being charged with separate offenses when multiple acts of sexual contact, penetration or intercourse are committed against the same victim.

(d) *Teenage defendant.* -- As to sexual offenses in which the victim's age is an element of the offense because the victim has not yet reached his or her sixteenth birthday, where the person committing the sexual act is no more than 4 years older than the victim, it is an affirmative defense that the victim consented to the act "knowingly" as defined in § 231 of this title. Sexual conduct pursuant to this section will not be a crime. This affirmative defense will not apply if the victim had not yet reached his or her twelfth birthday at the time of the act.

*** CURRENT THRU ACT 15-441; 51 DCR 6524, JUNE 25, 2004 ***
*** ANNOTATIONS CURRENT THRU JUNE 17, 2004 ***
TITLE 22. CRIMINAL OFFENSES AND PENALTIES
SUBTITLE I. CRIMINAL OFFENSES
CHAPTER 30. SEXUAL ABUSE
SUBCHAPTER I. GENERAL PROVISIONS

District of Columbia Sexual Offenses

§ 22-3001. Definitions [Formerly § 22-4101]

For the purposes of this chapter:

- (1) "Actor" means a person accused of any offense proscribed under this chapter.
- (2) "Bodily injury" means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.
- (3) "Child" means a person who has not yet attained the age of 16 years.
- (4) "Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.
- (5) "Force" means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.
- (6) "Official custody" means:
 - (A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion;
 - (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or
 - (C) Probation or parole.
- (7) "Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
- (8) "Sexual act" means:
 - (A) The penetration, however slight, of the anus or vulva of another by a penis;
 - (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or
 - (C) The penetration, however slight, of the anus or vulva by a hand or finger or by

any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.

(9) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(10) "Significant relationship" includes:

(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, or adoption;

(B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim;

(C) The person or the spouse or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and

(D) A teacher, scout master, coach, recreation center leader, or others in similar positions.

(11) "Victim" means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.

§ 22-3002. **First degree sexual abuse**

(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined in an amount not to exceed \$ 250,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

(1) By using force against that other person;

(2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;

(3) After rendering that other person unconscious; or

(4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

(b) The court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.

§ 22-3003. **Second degree sexual abuse**

A person shall be imprisoned for not more than 20 years and may be fined in an amount not to exceed \$ 200,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct;

(B) Incapable of declining participation in that sexual act; or

(C) Incapable of communicating unwillingness to engage in that sexual act.

§ 22-3004. **Third degree sexual abuse**

A person shall be imprisoned for not more than 10 years and may be fined in an amount not to exceed \$ 100,000, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By using force against that other person;

(2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;

(3) After rendering that person unconscious; or

(4) After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

§ 22-3005. **Fourth degree sexual abuse**

A person shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$ 50,000, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct;

(B) Incapable of declining participation in that sexual contact; or

(C) Incapable of communicating unwillingness to engage in that sexual contact.

22-3006. Misdemeanor sexual abuse

Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not to exceed \$ 1,000.

§ 22-3007. Defense to sexual abuse [Formerly § 22-4107]

Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.

§ 22-3008. First degree child sexual abuse

Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined an amount not to exceed \$ 250,000. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.

§ 22-3009. Second degree child sexual abuse

Whoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$ 100,000.

§ 22-3010. Enticing a child [Formerly § 22-4110]

Whoever, being at least 4 years older than a child, takes that child to any place, or entices, allures, or persuades a child to go to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 and 22-3009 shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$ 50,000

§ 22-3011. Defenses to child sexual abuse [Formerly § 22-4111]

(a) Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.

(b) Marriage between the defendant and the child at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under § 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child.

§ 22-3013. First degree sexual abuse of a ward [Formerly § 22-4113]

Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:

(1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and

(2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$ 100,000.

§ 22-3014. Second degree sexual abuse of a ward [Formerly § 22-4114]

Whoever engages in sexual contact with another person or causes another person to engage in or submit to sexual contact when that other person:

(1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and

(2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$ 50,000.

§ 22-3015. First degree sexual abuse of a patient or client [Formerly § 22-4115]

(a) A person is guilty of first degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual act with another person who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided; or

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual act.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$ 100,000.

§ 22-3016. Second degree sexual abuse of a patient or client [Formerly § 22-4116]

(a) A person is guilty of second degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual contact with another person

who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual contact is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided; or

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual contact.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$ 50,000.

§ 22-3017. Defenses to sexual abuse of a ward, patient, or client [Formerly § 22-4117]

(a) Consent is not a defense to a prosecution under § § 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.

(b) Marriage between the defendant and victim at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under § § 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.

§ 22-3020. Aggravating circumstances [Formerly § 22-4120]

(a) Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists:

(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim;

(3) The victim sustained serious bodily injury as a result of the offense;

(4) The defendant was aided or abetted by 1 or more accomplices;

(5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or

(6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.

(b) It is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply under subsection (a)(4) of this section.

(c) No person who stands convicted of an offense under this subchapter shall be sentenced to increased punishment (or enhanced penalty) by reason of the aggravating factors set forth in subsection (a) of this section, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the aggravating factors to be relied upon.

D.C. Code § 22-1312 (2004). Lewd, indecent, or obscene acts [Formerly § 22-1112]

(a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than \$ 300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.

(b) Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed \$ 1,000, or both, for each and every such offense.

D.C. Code § 22-1307 (2004). Unlawful assembly; profane and indecent language [Formerly § 22-1107]

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than \$ 250 or imprisonment for not more than 90 days, or both for each and every such offense.

D.C. Code § 22-2201 (2004). Certain obscene activities and conduct declared unlawful;

definitions; penalties; affirmative defenses; exception [Formerly § 22-2001]

(a) (1) It shall be unlawful in the District of Columbia for a person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(B) To present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;

(C) To pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(D) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing, or device which is intended for or represented as being for indecent or immoral use;

(E) To create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) To advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) To advertise or otherwise promote the sale of material represented or held out by such person to be obscene.

(2) (A) For purposes of subparagraph (E) of paragraph (1) of this subsection, the creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection.

(B) For purposes of paragraph (1) of this subsection, the term “knowingly” means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.

(3) When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person’s arrest.

(b) (1) It shall be unlawful in the District of Columbia for any person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide to a minor:

(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(ii) Any book, magazine, or other printed matter however reproduced or sound recording, which depicts nudity, sexual conduct, or sado-masochistic abuse or which

contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(B) To exhibit to a minor, or to sell or provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon there is exhibited, a motion picture, show, or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(2) For purposes of paragraph (1) of this subsection:

(A) The term “minor” means any person under the age of 17 years.

(B) The term “nudity” includes the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(C) The term “sexual conduct” includes acts of sodomy, masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

(D) The term “sexual excitement” includes the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(E) The term “sado-masochistic abuse” includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(F) The term “knowingly” means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of:

(i) The character and content of any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and

(ii) The age of the minor.

(c) It shall be an affirmative defense to a charge of violating subsection (a) or (b) of this section that the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material.

(d) Nothing in this section shall apply to a licensee under the Communications Act of 1934 ([47 U.S.C.S. § 151](#) et seq.) while engaged in activities regulated pursuant to such Act.

(e) A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than \$ 1,000 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than \$ 1,000 nor more than \$ 5,000 or imprisoned not less than 6 months or more than 3 years, or both.

§ 22-4107. Defense to sexual abuse

Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-4102 to 22-4106, prosecuted alone or in conjunction with charges under § 22-4118 or §§ 22-501 and 22-503.

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***
*** Annotations current through November 3, 2004 ***

TITLE 46. CRIMES

Florida Sexual Offenses

§ 794.011. **Sexual battery**

(1) As used in this chapter:

(a) “Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission. “Consent” shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.

(b) “Mentally defective” means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.

(c) “Mentally incapacitated” means temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.

(d) “Offender” means a person accused of a sexual offense in violation of a provision of this chapter.

(e) “Physically helpless” means unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

(f) “Retaliation” includes, but is not limited to, threats of future physical punishment, kidnapping, false imprisonment or forcible confinement, or extortion.

(g) “Serious personal injury” means great bodily harm or pain, permanent disability, or permanent disfigurement.

(h) “Sexual battery” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

(i) “Victim” means a person who has been the object of a sexual offense.

(j) “Physically incapacitated” means bodily impaired or handicapped and substantially limited in ability to resist or flee.

(2) (a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in *ss. 775.082 and 921.141*.

(b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a life felony, punishable as provided in *s. 775.082, s. 775.083, s. 775.084, or s. 794.0115*.

(3) A person who commits sexual battery upon a person 12 years of age or older, without that person’s consent, and in the process thereof uses or threatens to use a deadly

weapon or uses actual physical force likely to cause serious personal injury commits a life felony, punishable as provided in *s. 775.082*, *s. 775.083*, *s. 775.084*, or *s. 794.0115*.

(4) A person who commits sexual battery upon a person 12 years of age or older without that person's consent, under any of the following circumstances, commits a felony of the first degree, punishable as provided in *s. 775.082*, *s. 775.083*, *s. 775.084*, or *s. 794.0115*:

(a) When the victim is physically helpless to resist.

(b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.

(c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute the threat in the future.

(d) When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

(e) When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

(f) When the victim is physically incapacitated.

(g) When the offender is a law enforcement officer, correctional officer, or correctional probation officer as defined by *s. 943.10(1)*, (2), (3), (6), (7), (8), or (9), who is certified under the provisions of *s. 943.1395* or is an elected official exempt from such certification by virtue of *s. 943.253*, or any other person in a position of control or authority in a probation, community control, controlled release, detention, custodial, or similar setting, and such officer, official, or person is acting in such a manner as to lead the victim to reasonably believe that the offender is in a position of control or authority as an agent or employee of government.

(5) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in *s. 775.082*, *s. 775.083*, *s. 775.084*, or *s. 794.0115*.

(6) The offense described in subsection (5) is included in any sexual battery offense charged under subsection (3) or subsection (4).

(7) A person who is convicted of committing a sexual battery on or after October 1, 1992, is not eligible for basic gain-time under *s. 944.275*. This subsection may be cited as the "Junny Rios-Martinez, Jr. Act of 1992."

(8) Without regard to the willingness or consent of the victim, which is not a defense to prosecution under this subsection, a person who is in a position of familial or custodial authority to a person less than 18 years of age and who:

(a) Solicits that person to engage in any act which would constitute sexual battery under paragraph (1)(h) commits a felony of the third degree, punishable as provided in *s. 775.082*, *s. 775.083*, or *s. 775.084*.

(b) Engages in any act with that person while the person is 12 years of age or older but less than 18 years of age which constitutes sexual battery under paragraph (1)(h)

commits a felony of the first degree, punishable as provided in *s. 775.082*, *s. 775.083*, or *s. 775.084*.

(c) Engages in any act with that person while the person is less than 12 years of age which constitutes sexual battery under paragraph (1)(h), or in an attempt to commit sexual battery injures the sexual organs of such person commits a capital or life felony, punishable pursuant to subsection (2).

(9) For prosecution under paragraph (4)(g), acquiescence to a person reasonably believed by the victim to be in a position of authority or control does not constitute consent, and it is not a defense that the perpetrator was not actually in a position of control or authority if the circumstances were such as to lead the victim to reasonably believe that the person was in such a position.

(10) Any person who falsely accuses any person listed in paragraph (4)(g) or other person in a position of control or authority as an agent or employee of government of violating paragraph (4)(g) is guilty of a felony of the third degree, punishable as provided in *s. 775.082*, *s. 775.083*, or *s. 775.084*.

§ 794.05. **Unlawful sexual activity with certain minors**

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in *s. 775.082*, *s. 775.083*, or *s. 775.084*. As used in this section, “sexual activity” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose.

(2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

(3) The victim’s prior sexual conduct is not a relevant issue in a prosecution under this section.

(4) If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61.

§ 794.023. **Sexual battery by multiple perpetrators; reclassification of offenses**

(1) The Legislature finds that an act of sexual battery, when committed by more than one person, presents a great danger to the public and is extremely offensive to civilized society. It is therefore the intent of the Legislature to reclassify offenses for acts of sexual battery committed by more than one person.

(2) A violation of [s. 794.011](#) shall be reclassified as provided in this subsection if it is charged and proven by the prosecution that, during the same criminal transaction or episode, more than one person committed an act of sexual battery on the same victim.

(a) A felony of the second degree is reclassified to a felony of the first degree.

(b) A felony of the first degree is reclassified to a life felony.

This subsection does not apply to life felonies or capital felonies. For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense that is reclassified under this subsection is ranked one level above the ranking under [s. 921.0022](#) or [s. 921.0023](#) of the offense committed.

491.0112. Sexual misconduct by a psychotherapist; penalties

(1) Any psychotherapist who commits sexual misconduct with a client, or former client when the professional relationship was terminated primarily for the purpose of engaging in sexual contact, commits a felony of the third degree, punishable as provided in [s. 775.082](#) or [s. 775.083](#); however, a second or subsequent offense is a felony of the second degree, punishable as provided in [s. 775.082](#), [s. 775.083](#), or [s. 775.084](#).

(2) Any psychotherapist who violates subsection (1) by means of therapeutic deception commits a felony of the second degree punishable as provided in [s. 775.082](#), [s. 775.083](#), or [s. 775.084](#).

(3) The giving of consent by the client to any such act shall not be a defense to these offenses.

(4) For the purposes of this section:

(a) The term "psychotherapist" means any person licensed pursuant to chapter 458, chapter 459, part I of chapter 464, chapter 490, or chapter 491, or any other person who provides or purports to provide treatment, diagnosis, assessment, evaluation, or counseling of mental or emotional illness, symptom, or condition.

(b) "Therapeutic deception" means a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client.

(c) "Sexual misconduct" means the oral, anal, or vaginal penetration of another by, or contact with, the sexual organ of another or the anal or vaginal penetration of another by any object.

(d) "Client" means a person to whom the services of a psychotherapist are provided.

TITLE 16. CRIMES AND OFFENSES
CHAPTER 6. SEXUAL OFFENSES

Georgia Sexual Offenses

§ 16-6-1. **Rape**

(a) A person commits the offense of rape when he has carnal knowledge of:

- (1) A female forcibly and against her will; or
- (2) A female who is less than ten years of age.

Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.

(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of *Code Sections 17-10-6.1* and *17-10-7*.

(c) When evidence relating to an allegation of rape is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

§ 16-6-2. **Sodomy; aggravated sodomy; medical expenses**

(a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person or when he or she commits sodomy with a person who is less than ten years of age. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than ten nor more than 30 years. Any person convicted under this Code section of the offense of aggravated sodomy shall, in addition, be subject to the sentencing and punishment provisions of *Code Sections 17-10-6.1* and *17-10-7*.

(c) When evidence relating to an allegation of aggravated sodomy is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be financially responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

§ 16-6-3. **Statutory rape**

(a) A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.

(b) A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years; provided, further, that if the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.

§ 16-6-4. **Child molestation; aggravated child molestation**

(a) A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

(b) A person convicted of a first offense of child molestation shall be punished by imprisonment for not less than five nor more than 20 years. Upon such first conviction of the offense of child molestation, the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should not be imposed, he or she shall sentence the defendant to imprisonment; provided, further, that upon a defendant's being incarcerated on a conviction for such first offense, the Department of Corrections shall provide counseling to such defendant. Upon a second or subsequent conviction of an offense of child molestation, the defendant shall be punished by imprisonment for not less than ten years nor more than 30 years or by imprisonment for life; provided, however, that prior to trial, a defendant shall be given notice, in writing, that the state intends to seek a punishment of life imprisonment. Adjudication of guilt or imposition of sentence for a conviction of a second or subsequent offense of child molestation, including a plea of nolo contendere, shall not be suspended, probated, deferred, or withheld.

(c) A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.

(d)(1) A person convicted of the offense of aggravated child molestation shall be punished by imprisonment for not less than ten nor more than 30 years. Any person convicted under this Code section of the offense of aggravated child molestation shall, in addition, be subject to the sentencing and punishment provisions of *Code Sections 17-10-6.1* and *17-10-7*.

(2) The court sentencing a person who has been convicted of a first offense of aggravated child molestation when the victim is 16 years of age or younger at the time of the offense is authorized to require, before sentencing, that the defendant undergo a

psychiatric evaluation to ascertain whether or not medroxyprogesterone acetate chemical treatment or its equivalent would be effective in changing the defendant's behavior. If it is determined by a qualified mental health professional that such treatment would be effective, the court may require, as a condition of probation and upon provisions arranged between the court and the defendant, the defendant to undergo medroxyprogesterone acetate treatment or its chemical equivalent which must be coupled with treatment by a qualified mental health professional. In case of a person sentenced to probation who is required to undergo such treatment or its chemical equivalent and is in the custody of a law enforcement agency or confined in a jail at the time of sentencing, when he or she becomes eligible for probation, such person shall begin medroxyprogesterone acetate treatment and counseling prior to his or her release from custody or confinement. A person sentenced to probation who is required to undergo such treatment and who is not in the custody of a law enforcement agency or confined in a jail at the time of sentencing shall be taken into custody or confined until treatment can begin. Additional treatment may continue after such defendant's release from custody or confinement until the defendant demonstrates to the court that such treatment is no longer necessary. No such treatment shall be administered until such person has been fully informed of the side effects of hormonal chemical treatment and has consented to the treatment in writing. The administration of the treatment shall conform to the procedures and conditions set out in subsection (c) of *Code Section 42-9-44.2*.

(3) Any physician or qualified mental health professional who acts in good faith in compliance with the provisions of this Code section and subsection (c) of *Code Section 42-9-44.2* in the administration of treatment or provision of counseling provided for in this Code section shall be immune from civil or criminal liability for his or her actions in connection with such treatment or counseling.

§ 16-6-6. **Bestiality**

(a) A person commits the offense of bestiality when he performs or submits to any sexual act with an animal involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(b) A person convicted of the offense of bestiality shall be punished by imprisonment for not less than one nor more than five years.

§ 16-6-7. **Necrophilia**

(a) A person commits the offense of necrophilia when he performs any sexual act with a dead human body involving the sex organs of the one and the mouth, anus, penis, or vagina of the other.

(b) A person convicted of the offense of necrophilia shall be punished by imprisonment for not less than one nor more than ten years.

§ 16-6-8. **Public indecency**

(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:

- (1) An act of sexual intercourse;
- (2) A lewd exposure of the sexual organs;
- (3) A lewd appearance in a state of partial or complete nudity; or
- (4) A lewd caress or indecent fondling of the body of another person.

(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.

(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(d) For the purposes of this Code section only, "public place" shall include jails and penal and correctional institutions of the state and its political subdivisions.

(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

§ 16-6-22.1. **Sexual battery**

(a) For the purposes of this Code section, the term "intimate parts" means the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female.

(b) A person commits the offense of sexual battery when he intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.

(c) Except as otherwise provided in this Code section, a person convicted of the offense of sexual battery shall be punished as for a misdemeanor of a high and aggravated nature.

(d) A person convicted of the offense of sexual battery against any child under the age of 16 years shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

§ 16-6-22.2. **Aggravated sexual battery**

(a) For the purposes of this Code section, the term "foreign object" means any article or instrument other than the sexual organ of a person.

(b) A person commits the offense of aggravated sexual battery when he intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person.

(c) A person convicted of the offense of aggravated sexual battery shall be punished by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of *Code Sections 17-10-6.1* and *17-10-7*.

§ 16-6-5.1. Sexual assault against persons in custody; sexual assault against person detained or patient in hospital or other institution; sexual assault by practitioner of psychotherapy against patient

(a) As used in this Code section, the term:

(1) “Actor” means a person accused of sexual assault.

(2) “Intimate parts” means the genital area, groin, inner thighs, buttocks, or breasts of a person.

(3) “Psychotherapy” means the professional treatment or counseling of a mental or emotional illness, symptom, or condition.

(4) “Sexual contact” means any contact for the purpose of sexual gratification of the actor with the intimate parts of a person not married to the actor.

(b) A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person. A person convicted of sexual assault shall be punished by imprisonment for not less than one nor more than three years.

(c)(1) A person commits sexual assault when such person has supervisory or disciplinary authority over another person and such person engages in sexual contact with that other person who is:

(A) In the custody of law; or

(B) Detained in or is a patient in a hospital or other institution.

(2) A person commits sexual assault when, as an actual or purported practitioner of psychotherapy, he or she engages in sexual contact with another person who the actor knew or should have known is the subject of the actor’s actual or purported treatment or counseling, or, if the treatment or counseling relationship was used to facilitate sexual contact between the actor and said person.

(3) Consent of the victim shall not be a defense to a prosecution under this subsection.

(4) A person convicted of sexual assault under this subsection shall be punished by imprisonment for not less than one nor more than three years.

(d) A person who is an employee, agent, or volunteer at any facility licensed or required to be licensed under *Code Section 31-7-3*, relating to long-term care facilities, or *Code Section 31-7-12*, relating to personal care homes, or who is required to be licensed pursuant to *Code Section 31-7-151* or *31-7-173*, relating to home health care and hospices, commits sexual assault when such person engages in sexual contact with another person who has been admitted to or is receiving services from such facility, person, or entity. A person convicted of sexual assault pursuant to this subsection shall be punished by imprisonment for not less than one nor more than five years, or a fine of not more than \$5,000.00, or both. Any violation of this subsection shall constitute a separate offense.

MICHIE'S HAWAII REVISED STATUTES ANNOTATED
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*** STATUTES CURRENT THRU THE 2003 REGULAR AND SPECIAL SESSIONS

*** ANNOTATIONS CURRENT THRU DECEMBER 17, 2003 ***

DIVISION 5. CRIMES AND CRIMINAL PROCEEDINGS
TITLE 37. HAWAII PENAL CODE
CHAPTER 707. OFFENSES AGAINST THE PERSON
PART V. SEXUAL OFFENSES

§ 707-700. Definitions of terms in this chapter

In this chapter, unless a different meaning plainly is required:

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

“Compulsion” means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.

“Dangerous instrument” means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

“Deviate sexual intercourse” means any act of sexual gratification between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

“Married” includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.

“Mentally defective” means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person’s conduct.

“Mentally incapacitated” means a person rendered temporarily incapable of appraising or controlling the person’s conduct owing to the influence of a substance administered to the person without the person’s consent.

“Person” means a human being who has been born and is alive.

“Physically helpless” means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

“Relative” means parent, ancestor, brother, sister, uncle, aunt, or legal guardian.

“Restrain” means to restrict a person’s movement in such a manner as to interfere substantially with the person’s liberty:

- (1) By means of force, threat, or deception; or
- (2) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of the person.

“Serious bodily injury” means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

“Sexual contact” means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

“Sexual penetration” means vaginal intercourse, anal intercourse, fellatio, cunnilingus, analingus, deviate sexual intercourse, or any intrusion of any part of a person’s body or of any object into the genital or anal opening of another person’s body; it occurs upon any penetration, however slight, but emission is not required. For purposes of this chapter, each act of sexual penetration shall constitute a separate offense.

“Strong compulsion” means the use of or attempt to use one or more of the following to overcome a person:

- (1) A threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped;
- (2) A dangerous instrument; or
- (3) Physical force.

“Substantial bodily injury” means bodily injury which causes:

- (1) A major avulsion, laceration, or penetration of the skin;
- (2) A burn of at least second degree severity;
- (3) A bone fracture;
- (4) A serious concussion; or
- (5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.

§ 707-730. Sexual assault in the first degree

- (1) A person commits the offense of sexual assault in the first degree if:
 - (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion;
 - (b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old; or
 - (c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:

- (i) The person is not less than five years older than the minor; and
- (ii) The person is not legally married to the minor.

Paragraphs (b) and (c) shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.

(2) Sexual assault in the first degree is a class A felony.

§ 707-731. Sexual assault in the second degree

(1) A person commits the offense of sexual assault in the second degree if:

- (a) The person knowingly subjects another person to an act of sexual penetration by compulsion;
- (b) The person knowingly subjects to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless; or
- (c) The person, while employed:
 - (i) In a state correctional facility;
 - (ii) By a private company providing services at a correctional facility;
 - (iii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute;
 - (iv) By a private correctional facility operating in the state of Hawaii; or
 - (v) As a law enforcement officer as defined in section 710-1000(13),

knowingly subjects to sexual penetration an imprisoned person, a person confined to a detention facility, a person residing in a private correctional facility operating in the state of Hawaii, or a person in custody; provided that paragraph (b) and this paragraph shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices; and further provided that this paragraph shall not be construed to prohibit a law enforcement officer from performing a lawful search pursuant to a warrant or exception to the warrant clause.

(2) Sexual assault in the second degree is a class B felony.

§ 707-732. Sexual assault in the third degree

(1) A person commits the offense of sexual assault in the third degree if:

- (a) The person recklessly subjects another person to an act of sexual penetration by compulsion;
- (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;
- (c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

- (i) The person is not less than five years older than the minor; and
- (ii) The person is not legally married to the minor.

(d) The person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor;

- (e) The person, while employed in a state correctional facility;
 - (i) By a private company providing services at a correctional facility;
 - (ii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this

statute; or

(iii) By a private correctional facility operating in the state of Hawaii, knowingly subjects to sexual contact an imprisoned person, a person committed to the director of public safety, or a person residing in a private correctional facility operating in the state of Hawaii or causes the person to have sexual contact with the actor; or

(f) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.

Paragraphs (b), (c), (d), and (e) shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices.

(2) Sexual assault in the third degree is a class C felony.

§ 707-733. Sexual assault in the fourth degree

(1) A person commits the offense of sexual assault in the fourth degree if:

(a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion;

(b) The person knowingly exposes the person's genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury; or

(c) The person knowingly trespasses on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.

(2) Sexual assault in the fourth degree is a misdemeanor.

(3) Whenever a court sentences a defendant for an offense under this section, the court may order the defendant to submit to a pre-sentence mental and medical examination pursuant to section 706-603.

§ 707-734. Indecent exposure

(1) A person commits the offense of indecent exposure if, the person intentionally exposes the person's genitals to a person to whom the person is not married under circumstances in which the actor's conduct is likely to cause affront.

(2) Indecent exposure is a petty misdemeanor.

§ 707-741. Incest

(1) A person commits the offense of incest if the person commits an act of sexual penetration with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.

(2) Incest is a class C felony.

709-906. Abuse of family or household members; penalty

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or

reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

(2) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:

(a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;

(b) Where the police officer has reasonable grounds to believe that there is probable danger of further physical abuse or harm being inflicted by one person upon a family or household member, the police officer lawfully may order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;

(c) Where the police officer makes the finding referred to in paragraph (b) and the incident occurs after 12:00 p.m. on any Friday, or on any Saturday, Sunday, or legal holiday, the order to leave the premises and to initiate no further contact shall commence immediately and be in full force, but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;

(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person;

(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the abused person, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and

(f) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense that occurs within one year of the first conviction, the person shall be termed a “repeat offender” and serve a minimum jail sentence of thirty days. Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

(6) Whenever a court sentences a person pursuant to subsection (5), it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under subsection (5)(a) and (b), upon the condition that the defendant remain arrest-free and conviction-free or complete court-ordered intervention.

(7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the person shall be charged with a class C felony.

(8) Any police officer who arrests a person pursuant to this section shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting the arrest.

(9) The family or household member who has been physically abused or harmed by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith or may file a criminal complaint through the prosecuting attorney of the applicable county.

(10) The respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may dismiss the petition or hold the respondent in custody, subject to bail. Where the petition is not dismissed, a hearing shall be set.

(11) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.

(12) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this section in the preparation of the penal summons or arrest warrant.

(13) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

(14) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court’s order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered domestic violence intervention. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the intervention ordered by the court.

Idaho Code § 18-6101

Idaho Code
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***** STATUTES CURRENT THROUGH THE 2004 SESSION *****
***** ANNOTATIONS CURRENT THROUGH OCTOBER 28, 2004 *****

PENAL CODE
TITLE 18. CRIMES AND PUNISHMENTS
CHAPTER 61. RAPE

Idaho Sexual Offenses

§ 18-6101. Rape defined

Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator's penis accomplished with a female under any one (1) of the following circumstances:

1. Where the female is under the age of eighteen (18) years.
2. Where she is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental deficiency or developmental disability, whether temporary or permanent, of giving legal consent.
3. Where she resists but her resistance is overcome by force or violence.
4. Where she is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anaesthetic substance.
5. Where she is at the time unconscious of the nature of the act. As used in this section, "unconscious of the nature of the act" means incapable of resisting because the victim meets one (1) of the following conditions:
 - (a) Was unconscious or asleep;
 - (b) Was not aware, knowing, perceiving, or cognizant that the act occurred.
6. Where she submits under the belief that the person committing the act is her husband, and the belief is induced by artifice, pretense or concealment practiced by the accused, with intent to induce such belief.
7. Where she submits under the belief, instilled by the actor, that if she does not submit, the actor will cause physical harm to some person in the future; or cause damage to property; or engage in other conduct constituting a crime; or accuse any person of a crime or cause criminal charges to be instituted against her; or expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule.

§ 18-6107. Rape of spouse

No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3. and 4. of section 18-6101, Idaho Code.

§ 18-6108. **Male rape**

Male rape is defined as the penetration, however slight, of the oral or anal opening of another male, with the perpetrator's penis, for the purpose of sexual arousal, gratification or abuse, under any of the following circumstances:

1. Where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving consent.
2. Where the victim resists but his resistance is overcome by force or violence.
3. Where the victim is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution.
4. Where the victim is prevented from resistance by the use of any intoxicating, narcotic, or anaesthetic substance administered by or with the privity of the accused.
5. Where the victim is at the time unconscious of the nature of the act, and this is known to the accused.

§ 18-6110. **Sexual contact with a prisoner**

It is a felony for any officer, employee or agent of a state, local or private correctional facility, as those terms are defined in section 18-101A, Idaho Code, to have sexual contact with a prisoner, whether an in-state or out-of-state prisoner, as those terms are defined in section 18-101A, Idaho Code, housed in such facility. For the purposes of this section "sexual contact" means sexual intercourse, genital-genital, manual-anal, manual-genital, oral-genital, anal-genital or oral-anal, between persons of the same or opposite sex.

Any person found guilty of sexual contact with a prisoner is punishable by imprisonment in the state prison for a term not to exceed life.

§ 18-6605. **Crime against nature -- Punishment**

Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.

§ 18-6608. **Forcible sexual penetration by use of foreign object**

Every person who, for the purpose of sexual arousal, gratification or abuse, causes the penetration, however slight, of the genital or anal opening of another person, by any object, instrument or device, against the victim's will by use of force or violence or by duress, or by threats of immediate and great bodily harm, accompanied by apparent power of execution, or where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent, or where the victim is prevented from resistance by any intoxicating, narcotic or anesthetic substance, shall be guilty of a felony and shall be punished by imprisonment in the state prison for not more than life.

*** THIS SECTION IS CURRENT THROUGH PUBLIC ACT 93-1047 ***
*** NOVEMBER 1, 2004 ANNOTATION SERVICE ***

CHAPTER 720. CRIMINAL OFFENSES
CRIMINAL CODE
CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART B. OFFENSES DIRECTED AGAINST THE PERSON
ARTICLE 12. BODILY HARM

ILLINOIS

720 ILCS 5/12-12 (2004)
[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 38, para. 12-12]

720 ILCS 5/11-9.2. Custodial sexual misconduct

Sec. 11-9.2. Custodial sexual misconduct. (a) A person commits the offense of custodial sexual misconduct when: (1) he or she is an employee of a penal system and engages in sexual conduct or sexual penetration with a person who is in the custody of that penal system or (2) he or she is an employee of a treatment and detention facility and engages in sexual conduct or sexual penetration with a person who is in the custody of that treatment and detention facility.

(b) A probation or supervising officer or surveillance agent commits the offense of custodial sexual misconduct when the probation or supervising officer or surveillance agent engages in sexual conduct or sexual penetration with a probationer, parolee, or releasee or person serving a term of conditional release who is under the supervisory, disciplinary, or custodial authority of the officer or agent so engaging in the sexual conduct or sexual penetration.

(c) Custodial sexual misconduct is a Class 3 felony.

(d) Any person convicted of violating this Section immediately shall forfeit his or her employment with a penal system, treatment and detention facility, or conditional release program.

(e) For purposes of this Section, the consent of the probationer, parolee, releasee, or inmate in custody of the penal system or person detained or civilly committed under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.] shall not be a defense to a prosecution under this Section. A person is deemed incapable of consent, for purposes of this Section, when he or she is a probationer, parolee, releasee, or inmate in custody of a penal system or person detained or civilly committed under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.].

(f) This Section does not apply to:

(1) Any employee, probation, or supervising officer, or surveillance agent who is lawfully married to a person in custody if the marriage occurred before the date of

custody.

(2) Any employee, probation or supervising officer, or surveillance agent who has no knowledge, and would have no reason to believe, that the person with whom he or she engaged in custodial sexual misconduct was a person in custody.

(g) In this Section:

(1) "Custody" means:

(i) pretrial incarceration or detention;

(ii) incarceration or detention under a sentence or commitment to a State or local penal institution;

(iii) parole or mandatory supervised release;

(iv) electronic home detention;

(v) probation;

(vi) detention or civil commitment either in secure care or in the community under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.].

(2) "Penal system" means any system which includes institutions as defined in Section 2-14 of this Code [[720 ILCS 5/2-14](#)] or a county shelter care or detention home established under Section 1 of the County Shelter Care and Detention Home Act [[55 ILCS 75/1](#)].

(2.1) "Treatment and detention facility" means any Department of Human Services facility established for the detention or civil commitment of persons under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.].

(2.2) "Conditional release" means a program of treatment and services, vocational services, and alcohol or other drug abuse treatment provided to any person civilly committed and conditionally released to the community under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.];

(3) "Employee" means:

(i) an employee of any governmental agency of this State or any county or municipal corporation that has by statute, ordinance, or court order the responsibility for the care, control, or supervision of pretrial or sentenced persons in a penal system or persons detained or civilly committed under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.];

(ii) a contractual employee of a penal system as defined in paragraph (g)(2) of this Section who works in a penal institution as defined in Section 2-14 of this Code [[720 ILCS 5/2-14](#)];

(iii) a contractual employee of a "treatment and detention facility" as defined in paragraph (g)(2.1) of this Code or a contractual employee of the Department of Human Services who provides supervision of persons serving a term of conditional release as defined in paragraph (g)(2.2) of this Code.

(4) "Sexual conduct" or "sexual penetration" means any act of sexual conduct or sexual penetration as defined in Section 12-12 of this Code [[720 ILCS 5/12-12](#)].

(5) "Probation officer" means any person employed in a probation or court services department as defined in Section 9b of the Probation and Probation Officers Act [[730 ILCS 110/9b](#)].

(6) "Supervising officer" means any person employed to supervise persons placed on parole or mandatory supervised release with the duties described in Section 3-14-2 of the Unified Code of Corrections [[730 ILCS 5/3-14-2](#)].

(7) "Surveillance agent" means any person employed or contracted to supervise persons placed on conditional release in the community under the Sexually Violent Persons Commitment Act [[725 ILCS 207/1](#) et seq.].

§ 720 ILCS 5/12-12. Definitions

Sec. 12-12. Definitions. For the purposes of Sections 12-13 through 12-18 of this Code [[720 ILCS 5/12-13](#) through [720 ILCS 5/12-18](#)], the terms used in these Sections shall have the following meanings ascribed to them:

(a) "Accused" means a person accused of an offense prohibited by Sections 12-13, 12-14, 12-15 or 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-15](#) or [720 ILCS 5/12-16](#)] or a person for whose conduct the accused is legally responsible under Article 5 of this Code [[720 ILCS 5/5-1](#) et seq.].

(b) "Bodily harm" means physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy and impotence.

(c) "Family member" means a parent, grandparent, or child, whether by whole blood, half-blood or adoption and includes a step-grandparent, step-parent or step-child.

"Family member" also means, where the victim is a child under 18 years of age, an accused who has resided in the household with such child continuously for at least one year.

(d) "Force or threat of force" means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

(1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or

(2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.

(e) "Sexual conduct" means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.

(f) "Sexual penetration" means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration.

(g) "Victim" means a person alleging to have been subjected to an offense prohibited by Sections 12-13, 12-14, 12-15 or 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-15](#) or [720 ILCS 5/12-16](#)].

§ 720 ILCS 5/12-13. Criminal Sexual Assault

Sec. 12-13. Criminal Sexual Assault. (a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by the use of force or threat of force; or
(2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
(3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
(4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

(b) Sentence.

(1) Criminal sexual assault is a Class 1 felony.

(2) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of criminal sexual assault, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of criminal sexual assault, commits a Class X felony for which the person shall be sentenced to a term of imprisonment of not less than 30 years and not more than 60 years. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (2) to apply.

(3) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of aggravated criminal sexual assault or the offense of predatory criminal sexual assault of a child, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of aggravated criminal sexual assault or the offense of criminal predatory sexual assault shall be sentenced to a term of natural life imprisonment. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (3) to apply.

(4) A second or subsequent conviction for a violation of paragraph (a)(3) or (a)(4) or under any similar statute of this State or any other state for any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexual assault prohibited under paragraph (a)(3) or (a)(4) is a Class X felony.

(5) When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a Class X felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

§ 720 ILCS 5/12-14. Aggravated Criminal Sexual Assault

Sec. 12-14. Aggravated Criminal Sexual Assault. (a) The accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:

(1) the accused displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
(2) the accused caused bodily harm, except as provided in subsection (a)(10), to the victim; or
(3) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
(4) the criminal sexual assault was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or
(5) the victim was 60 years of age or over when the offense was committed; or
(6) the victim was a physically handicapped person; or
(7) the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance; or
(8) the accused was armed with a firearm; or
(9) the accused personally discharged a firearm during the commission of the offense; or
(10) the accused, during the commission of the offense, personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person.

(b) The accused commits aggravated criminal sexual assault if the accused was under 17 years of age and (i) commits an act of sexual penetration with a victim who was under 9 years of age when the act was committed; or (ii) commits an act of sexual penetration with a victim who was at least 9 years of age but under 13 years of age when the act was committed and the accused used force or threat of force to commit the act.

(c) The accused commits aggravated criminal sexual assault if he or she commits an act of sexual penetration with a victim who was a severely or profoundly mentally retarded person at the time the act was committed.

(d) Sentence.

(1) Aggravated criminal sexual assault in violation of paragraph (2), (3), (4), (5), (6), or (7) of subsection (a) or in violation of subsection (b) or (c) is a Class X felony. A violation of subsection (a)(1) is a Class X felony for which 10 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(8) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(9) is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(10) is a Class X felony for which 25 years or up to a term of natural life imprisonment shall be added to the term of imprisonment imposed by the court.

(2) A person who is convicted of a second or subsequent offense of aggravated criminal sexual assault, or who is convicted of the offense of aggravated criminal sexual assault after having previously been convicted of the offense of criminal sexual assault or the offense of predatory criminal sexual assault of a child, or who is convicted of the offense of aggravated criminal sexual assault after having previously been convicted under the laws of this or any other state of an offense that is substantially equivalent to the offense of criminal sexual assault, the offense of aggravated criminal sexual assault or the offense of predatory criminal sexual assault of a child, shall be sentenced to a term of natural life

imprisonment. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (2) to apply.

§ 720 ILCS 5/12-15. Criminal sexual abuse

Sec. 12-15. Criminal sexual abuse. (a) The accused commits criminal sexual abuse if he or she:

- (1) commits an act of sexual conduct by the use of force or threat of force; or
- (2) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.

(b) The accused commits criminal sexual abuse if the accused was under 17 years of age and commits an act of sexual penetration or sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed.

(c) The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was less than 5 years older than the victim.

(d) Sentence. Criminal sexual abuse for a violation of subsection (b) or (c) of this Section is a Class A misdemeanor. Criminal sexual abuse for a violation of paragraph (1) or (2) of subsection (a) of this Section is a Class 4 felony. A second or subsequent conviction for a violation of subsection (a) of this Section is a Class 2 felony. For purposes of this Section it is a second or subsequent conviction if the accused has at any time been convicted under this Section or under any similar statute of this State or any other state for any offense involving sexual abuse or sexual assault that is substantially equivalent to or more serious than the sexual abuse prohibited under this Section.

§ 720 ILCS 5/12-16. Aggravated Criminal Sexual Abuse

Sec. 12-16. Aggravated Criminal Sexual Abuse. (a) The accused commits aggravated criminal sexual abuse if he or she commits criminal sexual abuse as defined in subsection (a) of Section 12-15 of this Code [[720 ILCS 5/12-15](#)] and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:

- (1) the accused displayed, threatened to use or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
- (2) the accused caused bodily harm to the victim; or
- (3) the victim was 60 years of age or over when the offense was committed; or
- (4) the victim was a physically handicapped person; or
- (5) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
- (6) the criminal sexual abuse was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or
- (7) the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception,

and for other than medical purposes, any controlled substance.

(b) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was under 18 years of age when the act was committed and the accused was a family member.

(c) The accused commits aggravated criminal sexual abuse if:

(1) the accused was 17 years of age or over and (i) commits an act of sexual conduct with a victim who was under 13 years of age when the act was committed; or (ii) commits an act of sexual conduct with a victim who was at least 13 years of age but under 17 years of age when the act was committed and the accused used force or threat of force to commit the act; or

(2) the accused was under 17 years of age and (i) commits an act of sexual conduct with a victim who was under 9 years of age when the act was committed; or (ii) commits an act of sexual conduct with a victim who was at least 9 years of age but under 17 years of age when the act was committed and the accused used force or threat of force to commit the act.

(d) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim.

(e) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was a severely or profoundly mentally retarded person at the time the act was committed.

(f) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

(g) Sentence. Aggravated criminal sexual abuse is a Class 2 felony.

§ 720 ILCS 5/12-17. Defenses

Sec. 12-17. Defenses. (a) It shall be a defense to any offense under Section 12-13 through 12-16 of this Code [[720 ILCS 5/12-13](#) through [720 ILCS 5/12-16](#)] where force or threat of force is an element of the offense that the victim consented. "Consent" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.

(b) It shall be a defense under subsection (b) and subsection (c) of Section 12-15 and subsection (d) of Section 12-16 of this Code [[720 ILCS 5/12-15](#) and [720 ILCS 5/12-16](#)] that the accused reasonably believed the person to be 17 years of age or over.

(c) A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.

§ 720 ILCS 5/12-18. General Provisions

Sec. 12-18. General Provisions. (a) No person accused of violating Sections 12-13, 12-14, 12-15 or 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-15](#) or [720 ILCS 5/12-16](#)] shall be presumed to be incapable of committing an offense prohibited by Sections 12-13, 12-14, 12-14.1, 12-15 or 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-14.1](#), [720 ILCS 5/12-15](#) or [720 ILCS 5/12-16](#)] because of age, physical condition or relationship to the victim, except as otherwise provided in subsection (c) of this Section. Nothing in this Section shall be construed to modify or abrogate the affirmative defense of infancy under Section 6-1 of this Code [[720 ILCS 5/6-1](#)] or the provisions of Section 5-805 of the Juvenile Court Act of 1987 [[705 ILCS 405/5-805](#)].

(b) Any medical examination or procedure which is conducted by a physician, nurse, medical or hospital personnel, parent, or caretaker for purposes and in a manner consistent with reasonable medical standards is not an offense under Sections 12-13, 12-14, 12-14.1, 12-15 and 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-14.1](#), [720 ILCS 5/12-15](#) and [720 ILCS 5/12-16](#)].

(c) Prosecution of a spouse of a victim under this subsection for any violation by the victim's spouse of Section 12-13, 12-14, 12-15 or 12-16 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-15](#) or [720 ILCS 5/12-16](#)] is barred unless the victim reported such offense to a law enforcement agency or the State's Attorney's office within 30 days after the offense was committed, except when the court finds good cause for the delay.

(d) In addition to the sentences provided for in Sections 12-13, 12-14, 12-14.1, 12-15 and 12-16 of the Criminal Code of 1961 [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), [720 ILCS 5/12-14.1](#), [720 ILCS 5/12-15](#) and [720 ILCS 5/12-16](#)] the Court may order any person who is convicted of violating any of those Sections to meet all or any portion of the financial obligations of treatment, including but not limited to medical, psychiatric, rehabilitative or psychological treatment, prescribed for the victim or victims of the offense.

(e) After a finding at a preliminary hearing that there is probable cause to believe that an accused has committed a violation of Section 12-13, 12-14, or 12-14.1 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), or [720 ILCS 5/12-14.1](#)], or after an indictment is returned charging an accused with a violation of Section 12-13, 12-14, or 12-14.1 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#) or [720 ILCS 5/12-14.1](#)], or after a finding that a defendant charged with a violation of Section 12-13, 12-14, or 12-14.1 of this Code [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#), or [720 ILCS 5/12-14.1](#)] is unfit to stand trial pursuant to Section 104-16 of the Code of Criminal Procedure of 1963 [[725 ILCS 5/100-1](#) et seq.] where the finding is made prior to preliminary hearing, at the request of the person who was the victim of the violation of Section 12-13, 12-14, or 12-14.1 [[720 ILCS 5/12-13](#), [720 ILCS 5/12-14](#) or [720 ILCS 5/12-14.1](#)], the prosecuting State's attorney shall seek an order from the court to compel the accused to be tested for any sexually transmissible disease, including a test for infection with human immunodeficiency virus (HIV). The medical tests shall be performed only by appropriately licensed medical practitioners. The test for infection with human

immunodeficiency virus (HIV) shall consist of an enzyme-linked immunosorbent assay (ELISA) test, or such other test as may be approved by the Illinois Department of Public Health; in the event of a positive result, the Western Blot Assay or a more reliable confirmatory test shall be administered. The results of the tests shall be kept strictly confidential by all medical personnel involved in the testing and must be personally delivered in a sealed envelope to the victim and to the judge who entered the order, for the judge's inspection in camera. Acting in accordance with the best interests of the victim and the public, the judge shall have the discretion to determine to whom, if anyone, the result of the testing may be revealed; however, in no case shall the identity of the victim be disclosed. The court shall order that the cost of the tests shall be paid by the county, and may be taxed as costs against the accused if convicted.

(f) Whenever any law enforcement officer has reasonable cause to believe that a person has been delivered a controlled substance without his or her consent, the law enforcement officer shall advise the victim about seeking medical treatment and preserving evidence.

(g) Every hospital providing emergency hospital services to an alleged sexual assault survivor, when there is reasonable cause to believe that a person has been delivered a controlled substance without his or her consent, shall designate personnel to provide:

(1) An explanation to the victim about the nature and effects of commonly used controlled substances and how such controlled substances are administered.

(2) An offer to the victim of testing for the presence of such controlled substances.

(3) A disclosure to the victim that all controlled substances or alcohol ingested by the victim will be disclosed by the test.

(4) A statement that the test is completely voluntary.

(5) A form for written authorization for sample analysis of all controlled substances and alcohol ingested by the victim.

A physician licensed to practice medicine in all its branches may agree to be a designated person under this subsection.

No sample analysis may be performed unless the victim returns a signed written authorization within 48 hours after the sample was collected.

Any medical treatment or care under this subsection shall be only in accordance with the order of a physician licensed to practice medicine in all of its branches. Any testing under this subsection shall be only in accordance with the order of a licensed individual authorized to order the testing.

Burns Ind. Code Ann. § 35-42-4-1

BURNS INDIANA STATUTES ANNOTATED
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*** (STATUTES CURRENT THROUGH 2004 REGULAR SESSION) ***
*** ANNOTATIONS CURRENT THROUGH JULY 22, 2004 ***

TITLE 35. CRIMINAL LAW AND PROCEDURE
ARTICLE 42. OFFENSES AGAINST THE PERSON
CHAPTER 4. SEX CRIMES

Burns Ind. Code Ann. § 35-42-4-1 (2004)

Indiana Sexual Offenses

§ 35-42-4-1. Rape

(a) Except as provided in subsection (b), a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

- (1) the other person is compelled by force or imminent threat of force;
 - (2) the other person is unaware that the sexual intercourse is occurring; or
 - (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;
- commits rape, a Class B felony.

(b) An offense described in subsection (a) is a Class A felony if:

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon;
- (3) it results in serious bodily injury to a person other than a defendant; or
- (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

§ 35-42-4-2. Criminal deviate conduct

(a) A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when:

- (1) the other person is compelled by force or imminent threat of force;
- (2) the other person is unaware that the conduct is occurring; or
- (3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given;

commits criminal deviate conduct, a Class B felony.

(b) An offense described in subsection (a) is a Class A felony if:

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon;
- (3) it results in serious bodily injury to any person other than a defendant; or
- (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

§ 35-42-4-8. **Sexual battery**

(a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:

- (1) compelled to submit to the touching by force or the imminent threat of force; or
 - (2) so mentally disabled or deficient that consent to the touching cannot be given;
- commits sexual battery, a Class D felony.

(b) An offense described in subsection (a) is a Class C felony if:

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon; or
- (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

§ 35-42-4-3. **Child molesting**

(a) A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony. However, the offense is a Class A felony if:

- (1) it is committed by a person at least twenty-one (21) years of age;
- (2) it is committed by using or threatening the use of deadly force or while armed with a deadly weapon;
- (3) it results in serious bodily injury; or
- (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

(b) A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony. However, the offense is a Class A felony if:

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon; or
- (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled

substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

(c) It is a defense that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct.

§ 35-42-4-5. **Vicarious sexual gratification**

(a) A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to touch or fondle himself or another child under the age of sixteen (16) with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification, a Class D felony. However, the offense is:

(1) a Class C felony if a child involved in the offense is under the age of fourteen (14);

(2) a Class B felony if:

(A) the offense is committed by using or threatening the use of deadly force or while armed with a deadly weapon; or

(B) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in [IC 16-42-19-2\(1\)](#)) or a controlled substance (as defined in [IC 35-48-1-9](#)) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge; and

(3) a Class A felony if it results in serious bodily injury.

(b) A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to:

(1) engage in sexual intercourse with another child under sixteen (16) years of age;

(2) engage in sexual conduct with an animal other than a human being; or

(3) engage in deviate sexual conduct with another person;

with intent to arouse or satisfy the sexual desires of a child or the older person commits vicarious sexual gratification, a Class C felony. However, the offense is a Class B felony if any child involved in the offense is less than fourteen (14) years of age, and it is a Class A felony if the offense is committed by using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, if it results in serious bodily injury, or if the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in [IC 16-42-19-2\(1\)](#)) or a controlled substance (as defined in [IC 35-48-1-9](#)) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

(c) A person eighteen (18) years of age or older who knowingly or intentionally:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct; or

(3) touches or fondles the person's own body;

in the presence of a child less than fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of the child or the older person commits performing sexual conduct in the presence of a minor, a Class D felony.

§ 35-42-4-6. **Child solicitation**

(a) As used in this section, "solicit" means to command, authorize, urge, incite,

request, or advise an individual:

(1) in person; (2) by telephone; (3) in writing; (4) by using a computer network (as defined in [IC 35-43-2-3\(a\)](#)); (5) by advertisement of any kind; or

(6) by any other means; to perform an act described in subsection (b).

(b) A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person; commits child solicitation, a Class D felony. However, the offense is a Class C felony if it is committed by using a computer network (as defined in [IC 35-43-2-3\(a\)](#)).

(c) In a prosecution under this section, including a prosecution for attempted solicitation, the state is not required to prove that the person solicited the child to engage in an act described in subsection (b) at some immediate time.

§ 35-42-4-7. **Child seduction**

(a) As used in this section, "adoptive parent" has the meaning set forth in [IC 31-9-2-6](#).

(b) As used in this section, "adoptive grandparent" means the parent of an adoptive parent.

(c) As used in this section, "child care worker" means a person who:

(1) provides care, supervision, or instruction to a child within the scope of the person's employment in a shelter care facility; or (2) is employed by a: (A) school corporation; or (B) nonpublic school; attended by a child who is the victim of a crime under this chapter.

(d) As used in this section, "custodian" means any person who resides with a child and is responsible for the child's welfare.

(e) As used in this section, "nonpublic school" has the meaning set forth in [IC 20-10.1-1-3](#).

(f) As used in this section, "school corporation" has the meaning set forth in [IC 20-10.1-1-1](#).

(g) As used in this section, "stepparent" means an individual who is married to a child's custodial or noncustodial parent and is not the child's adoptive parent.

(h) If a person who is:

(1) at least eighteen (18) years of age; and

(2) the: (A) guardian, adoptive parent, adoptive grandparent, custodian, or stepparent of; or (B) child care worker for; child at least sixteen (16) years of age but less than eighteen (18) years of age; engages with the child in sexual intercourse, deviate sexual conduct (as defined in [IC 35-41-1-9](#)), or any fondling or touching with the intent to arouse or satisfy the sexual desires of either the child or the adult, the person commits child seduction, a Class D felony.

§ 35-42-4-8. **Sexual battery**

(a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:

(1) compelled to submit to the touching by force or the imminent threat of force; or

(2) so mentally disabled or deficient that consent to the touching cannot be given; commits sexual battery, a Class D felony.

(b) An offense described in subsection (a) is a Class C felony if:

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon; or
- (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in [IC 16-42-19-2\(1\)](#)) or a controlled substance (as defined in [IC 35-48-1-9](#)) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

§ 35-42-4-9. **Sexual misconduct with a minor**

(a) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is:

(1) a Class B felony if it is committed by a person at least twenty-one (21) years of age; and

(2) a Class A felony if it is committed by using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, if it results in serious bodily injury, or if the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in [IC 16-42-19-2\(1\)](#)) or a controlled substance (as defined in [IC 35-48-1-9](#)) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

(b) A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a Class D felony. However, the offense is:

(1) a Class C felony if it is committed by a person at least twenty-one (21) years of age; and

(2) a Class B felony if it is committed by using or threatening the use of deadly force, while armed with a deadly weapon, or if the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in [IC 16-42-19-2\(1\)](#)) or a controlled substance (as defined in [IC 35-48-1-9](#)) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

(c) It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2).

(d) It is a defense that the child is or has ever been married. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2).

TITLE XVI. CRIMINAL LAW AND PROCEDURE
SUBTITLE 1. CRIME CONTROL AND CRIMINAL ACTS
CHAPTER 709. SEXUAL ABUSE

Iowa Sexual Offenses

709.1 Sexual abuse defined.

Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:

1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

2. Such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.

3. Such other person is a child.

709.1A Incapacitation.

As used in this chapter, “*incapacitated*” means a person is disabled or deprived of ability, as follows:

1. “*Mentally incapacitated*” means that a person is temporarily incapable of apprising or controlling the person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.

2. “*Physically helpless*” means that a person is unable to communicate an unwillingness to act because the person is unconscious, asleep, or is otherwise physically limited.

3. “*Physically incapacitated*” means that a person has a bodily impairment or handicap that substantially limits the person’s ability to resist or flee.

709.2 Sexual abuse in the first degree.

A person commits sexual abuse in the first degree when in the course of committing sexual abuse the person causes another serious injury.

Sexual abuse in the first degree is a class “A” felony.

709.3 Sexual abuse in the second degree.

A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

1. During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.
2. The other person is under the age of twelve.
3. The person is aided or abetted by one or more persons and the sex act is committed by force or against the will of the other person against whom the sex act is committed.

Sexual abuse in the second degree is a class “B” felony.

709.4 Sexual abuse in the third degree.

A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:

1. The act is done by force or against the will of the other person, whether or not the other person is the person’s spouse or is cohabiting with the person.
2. The act is between persons who are not at the time cohabiting as husband and wife and if any of the following are true:
 - a. The other person is suffering from a mental defect or incapacity which precludes giving consent.
 - b. The other person is twelve or thirteen years of age.
 - c. The other person is fourteen or fifteen years of age and any of the following are true:
 - (1) The person is a member of the same household as the other person.
 - (2) The person is related to the other person by blood or affinity to the fourth degree.
 - (3) The person is in a position of authority over the other person and uses that authority to coerce the other person to submit.
 - (4) The person is four or more years older than the other person.
3. The act is performed while the other person is under the influence of a controlled substance, which may include but is not limited to flunitrazepam, and all of the following are true:
 - a. The controlled substance, which may include but is not limited to flunitrazepam, prevents the other person from consenting to the act.
 - b. The person performing the act knows or reasonably should have known that the other person was under the influence of the controlled substance, which may include but is not limited to flunitrazepam.
4. The act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless.

Sexual abuse in the third degree is a class “C” felony.

702.7 Dangerous weapon.

A "*dangerous weapon*" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.

709.16 Sexual misconduct with offenders and juveniles.

1. An officer, employee, contractor, vendor, volunteer, or agent of the department of corrections, or an officer, employee, or agent of a judicial district department of correctional services, who engages in a sex act with an individual committed to the custody of the department of corrections or a judicial district department of correctional services commits an aggravated misdemeanor.

2. An officer, employee, contractor, vendor, volunteer, or agent of a juvenile placement facility who engages in a sex act with a juvenile placed at such facility commits an aggravated misdemeanor.

For purposes of this subsection, a "juvenile placement facility" means any of the following:

- a. A child foster care facility licensed under section 237.4.
- b. Institutions controlled by the department of human services listed in section 218.1.
- c. Juvenile detention and juvenile shelter care homes approved under section 232.142.
- d. Psychiatric medical institutions for children licensed under chapter 135H.
- e. Substance abuse facilities as defined in section 125.2.

3. An officer, employee, contractor, vendor, volunteer, or agent of a county who engages in a sex act with a prisoner incarcerated in a county jail commits an aggravated misdemeanor.

*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 SUPPLEMENT ***

CHAPTER 21. CRIMES AND PUNISHMENTS
ARTICLE 35. SEX OFFENSES

Kansas Sexual Offenses

21-3502. Rape.

(a) Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

(A) When the victim is overcome by force or fear;

(B) when the victim is unconscious or physically powerless; or

(C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender;

(2) sexual intercourse with a child who is under 14 years of age;

(3) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or

(4) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a legally required procedure within the scope of the offender's authority.

(b) It shall be a defense to a prosecution of rape under subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Rape as described in subsection (a)(1) or (2) is a severity level 1, person felony. Rape as described in subsection (a)(3) or (4) is a severity level 2, person felony.

21-3503. Indecent liberties with a child.

(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:

(1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of indecent liberties with a child as described in subsection (a)(1) that the child was married to the accused at the time of the offense.

(c) Indecent liberties with a child is a severity level 5, person felony.

21-3504. Aggravated indecent liberties with a child.

(a) Aggravated indecent liberties with a child is:

(1) Sexual intercourse with a child who is 14 or more years of age but less than 16 years of age;

(2) engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age and who does not consent thereto:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender, or both; or

(B) causing the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another; or

(3) engaging in any of the following acts with a child who is under 14 years of age:

(A) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(B) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(b) It shall be a defense to a prosecution of aggravated indecent liberties with a child as provided in subsection (a)(1), (a)(2)(A) and (a)(3)(A) that the child was married to the accused at the time of the offense.

(c) Aggravated indecent liberties with a child as described in subsections (a)(1) and (a)(3) is a severity level 3, person felony. Aggravated indecent liberties with a child as described in subsection (a)(2) is a severity level 4, person felony.

21-3505. Criminal sodomy.

(a) Criminal sodomy is:

(1) Sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal;

(2) sodomy with a child who is 14 or more years of age but less than 16 years of age; or

(3) causing a child 14 or more years of age but less than 16 years of age to engage in sodomy with any person or animal.

(b) It shall be a defense to a prosecution of criminal sodomy as provided in subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Criminal sodomy as provided in subsection (a)(1) is a class B nonperson misdemeanor. Criminal sodomy as provided in subsections (a)(2) and (a)(3) is a severity level 3, person felony.

21-3506. Aggravated criminal sodomy.

- (a) Aggravated criminal sodomy is:
- (1) Sodomy with a child who is under 14 years of age;
 - (2) causing a child under 14 years of age to engage in sodomy with any person or an animal; or
 - (3) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under any of the following circumstances:
 - (A) When the victim is overcome by force or fear;
 - (B) when the victim is unconscious or physically powerless; or
 - (C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender.
- (b) It shall be a defense to a prosecution of aggravated criminal sodomy under subsection (a)(1) that the child was married to the accused at the time of the offense.
- (c) Aggravated criminal sodomy is a severity level 2, person felony.

21-3508. Lewd and lascivious behavior.

- (a) Lewd and lascivious behavior is:
- (1) Publicly engaging in otherwise lawful sexual intercourse or sodomy with knowledge or reasonable anticipation that the participants are being viewed by others; or
 - (2) publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.
- (b) (1) Lewd and lascivious behavior if committed in the presence of a person 16 or more years of age is a class B nonperson misdemeanor.
- (2) Lewd and lascivious behavior if committed in the presence of a person under 16 years of age is a severity level 9, person felony.

21-3517. Sexual battery.

- (a) Sexual battery is the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another.
- (b) Sexual battery is a class A person misdemeanor.
- (c) This section shall be part of and supplemental to the Kansas criminal code.

21-3518. Aggravated sexual battery.

- (a) Aggravated sexual battery is the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another under any of the following circumstances:

- (1) When the victim is overcome by force or fear;
 - (2) when the victim is unconscious or physically powerless;
 - (3) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonably apparent to, the offender.
- (b) Aggravated sexual battery is a severity level 5, person felony.
- (c) This section shall be part of and supplemental to the Kansas criminal code.

21-3520. Unlawful sexual relations.

(a) Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is not married to the offender if:

(1) The offender is an employee of the department of corrections or the employee of a contractor who is under contract to provide services for a correctional institution and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is an inmate; or

(2) the offender is a parole officer or the employee of a contractor who is under contract to provide supervision services for persons on parole, conditional release or postrelease supervision and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is an inmate who has been released on parole or conditional release or postrelease supervision under the direct supervision and control of the offender; or

(3) the offender is a law enforcement officer, an employee of a jail, or the employee of a contractor who is under contract to provide services in a jail and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is confined by lawful custody to such jail; or

(4) the offender is a law enforcement officer, an employee of a juvenile detention facility or sanctions house, or the employee of a contractor who is under contract to provide services in such facility or sanctions house and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is confined by lawful custody to such facility or sanctions house; or

(5) the offender is an employee of the juvenile justice authority or the employee of a contractor who is under contract to provide services in a juvenile correctional facility and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is a person 16 years of age or older who is confined by lawful custody to such facility; or

(6) the offender is an employee of the juvenile justice authority or the employee of a contractor who is under contract to provide direct supervision and offender control services to the juvenile justice authority and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy is 16 years of age or older and (A) released on conditional release from a juvenile

correctional facility under the direct supervision and control of the offender or (B) placed in the custody of the juvenile justice authority under the direct supervision and control of the offender;

(7) the offender is an employee of the department of social and rehabilitation services or the employee of a contractor who is under contract to provide services in a social and rehabilitation services institution and the person with whom the offender is engaging in consensual sexual intercourse, not otherwise subject to subsection (a)(1)(C) of K.S.A. 21-3502, and amendments thereto, lewd fondling or touching, or sodomy, not otherwise subject to subsection (a)(3)(C) of K.S.A. 21-3506, and amendments thereto, is a person 16 years of age or older who is a patient in such institution; or

(8) the offender is a teacher or a person in a position of authority and the person with whom the offender is engaging in consensual sexual intercourse, lewd fondling or touching or sodomy is 16 or 17 years of age and a student enrolled at the school where the offender is employed. If the offender is the parent of the student, the provisions of K.S.A. 21-3603, and amendments thereto, shall apply, not this subsection.

(b) For purposes of this act:

(1) "Correctional institution" means the same as prescribed by K.S.A. 75-5202, and amendments thereto;

(2) "inmate" means the same as prescribed by K.S.A. 75-5202, and amendments thereto;

(3) "parole officer" means the same as prescribed by K.S.A. 75-5202, and amendments thereto;

(4) "postrelease supervision" means the same as prescribed in the Kansas sentencing guidelines act in K.S.A. 21-4703, and amendments thereto;

(5) "juvenile detention facility" means the same as prescribed by K.S.A. 38-1602, and amendments thereto;

(6) "juvenile correctional facility" means the same as prescribed by K.S.A. 38-1602, and amendments thereto;

(7) "sanctions house" means the same as prescribed by K.S.A. 38-1602, and amendments thereto;

(8) "institution" means the same as prescribed by K.S.A. 76-12a01, and amendments thereto; and

(9) "teacher" means and includes teachers, supervisors, principals, superintendents and any other professional employee in any public or private school.

(c) Unlawful sexual relations is a severity level 10, person felony.

21-3522. Unlawful voluntary sexual relations.

(a) Unlawful voluntary sexual relations is engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

(b) (1) Unlawful voluntary sexual relations as provided in subsection (a)(1) is a severity level 8, person felony.

(2) Unlawful voluntary sexual relations as provided in subsection (a)(2) is a severity level 9, person felony.

(3) Unlawful voluntary sexual relations as provided in subsection (a)(3) is a severity level 10, person felony.

KENTUCKY REVISED STATUTES ANNOTATED

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*** CURRENT THROUGH THE 2004 REGULAR SESSION ***

*** ANNOTATIONS CURRENT THROUGH JULY 16, 2004 ***

TITLE L. KENTUCKY PENAL CODE

CHAPTER 510. SEXUAL OFFENSES

Kentucky Sexual Offenses

§ 510.010. Definitions for chapter

The following definitions apply in this chapter unless the context otherwise requires:

(1) "Deviate sexual intercourse" means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person. "Deviate sexual intercourse" does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices;

(2) "Forcible compulsion" means physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition;

(3) "Mental illness" means a diagnostic term that covers many clinical categories, typically including behavioral or psychological symptoms, or both, along with impairment of personal and social function, and specifically defined and clinically interpreted through reference to criteria contained in the Diagnostic and Statistical Manual of Mental Disorders (Third Edition) and any subsequent revision thereto, of the American Psychiatric Association;

(4) "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined in KRS Chapter 202B;

(5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of an intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent;

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act. "Physically helpless" also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug;

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party;

(8) "Sexual intercourse" means sexual intercourse in its ordinary sense and includes

penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. "Sexual intercourse" does not include penetration of the sex organ by a foreign object in the course of the performance of generally recognized health-care practices; and

(9) "Foreign object" means anything used in commission of a sexual act other than the person of the actor.

§ 510.020. **Lack of consent**

(1) Whether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim.

(2) Lack of consent results from:

- (a) Forcible compulsion;
- (b) Incapacity to consent; or
- (c) If the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(3) A person is deemed incapable of consent when he is:

- (a) Less than sixteen (16) years old;
- (b) Mentally retarded or suffers from a mental illness;
- (c) Mentally incapacitated; or
- (d) Physically helpless.

§ 510.040. **Rape in the first degree**

(1) A person is guilty of rape in the first degree when:

- (a) He engages in sexual intercourse with another person by forcible compulsion; or
- (b) He engages in sexual intercourse with another person who is incapable of consent because he: 1. Is physically helpless; or 2. Is less than twelve (12) years old.

(2) Rape in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

§ 510.050. **Rape in the second degree**

(1) A person is guilty of rape in the second degree when:

- (a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old; or
- (b) He engages in sexual intercourse with another person who is mentally incapacitated.

(2) Rape in the second degree is a Class C felony.

§ 510.060. **Rape in the third degree**

(1) A person is guilty of rape in the third degree when:

- (a) He engages in sexual intercourse with another person who is incapable of consent because he is mentally retarded;

(b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old; or

(c) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Rape in the third degree is a Class D felony.

§ 510.070. Sodomy in the first degree

(1) A person is guilty of sodomy in the first degree when:

(a) He engages in deviate sexual intercourse with another person by forcible compulsion; or

(b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old.

(2) Sodomy in the first degree is a Class B felony unless the victim is under twelve (12) years old or receives a serious physical injury in which case it is a Class A felony.

§ 510.080. Sodomy in the second degree

(1) A person is guilty of sodomy in the second degree when:

(a) Being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old; or

(b) He engages in deviate sexual intercourse with another person who is mentally incapacitated.

(2) Sodomy in the second degree is a Class C felony.

§ 510.090. Sodomy in the third degree

(1) A person is guilty of sodomy in the third degree when:

(a) He engages in deviate sexual intercourse with another person who is incapable of consent because he is mentally retarded;

(b) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than sixteen (16) years old; or

(c) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Sodomy in the third degree is a Class D felony.

§ 510.100. Sodomy in the fourth degree

(1) A person is guilty of sodomy in the fourth degree when he engages in deviate sexual intercourse with another person of the same sex.

(2) Notwithstanding the provisions of KRS 510.020, consent of the other person shall not be a defense under this section, nor shall lack of consent of the other person be an element of this offense.

(3) Sodomy in the fourth degree is a Class A misdemeanor.

§ 510.110. **Sexual abuse in the first degree**

(1) A person is guilty of sexual abuse in the first degree when:

(a) He subjects another person to sexual contact by forcible compulsion; or

(b) He subjects another person to sexual contact who is incapable of consent because he:

1. Is physically helpless;

2. Is less than twelve (12) years old; or

3. Is mentally incapacitated.

(2) Sexual abuse in the first degree is a Class D felony.

§ 510.120. **Sexual abuse in the second degree**

(1) A person is guilty of sexual abuse in the second degree when:

(a) He subjects another person to sexual contact who is incapable of consent because he is mentally retarded;

(b) He subjects another person who is less than fourteen (14) years old to sexual contact;

(c) Being an employee, contractor, vendor, or volunteer of the Department of Corrections, or a detention facility as defined in KRS 520.010, or of an entity under contract with either the department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he subjects an offender who is incarcerated, supervised, evaluated, or treated by the Department of Corrections, the detention facility, or the contracting entity, to sexual contact. In any prosecution under this paragraph, the defendant may prove in exculpation that, at the time he engaged in the conduct constituting the offense, he and the offender were married to each other; or

(d) Being twenty-one (21) years old or more, he subjects another person to sexual contact who is less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Sexual abuse in the second degree is a Class A misdemeanor.

§ 510.130. **Sexual abuse in the third degree**

(1) A person is guilty of sexual abuse in the third degree when:

(a) He subjects another person to sexual contact without the latter's consent.

(b) In any prosecution under this section, it is a defense that:

1. The other person's lack of consent was due solely to incapacity to consent by reason of being less than sixteen (16) years old; and

2. The other person was at least fourteen (14) years old; and

3. The actor was less than five (5) years older than the other person.

(2) Sexual abuse in the third degree is a Class B misdemeanor.

§ 510.140. **Sexual misconduct**

(1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.

(2) Sexual misconduct is a Class A misdemeanor.

LOUISIANA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 FIRST EXTRA. SESSION ***

*** October 2004 Annotation Service ***

LOUISIANA REVISED STATUTES
TITLE 14. CRIMINAL LAW
CHAPTER 1. CRIMINAL CODE
PART II. OFFENSES AGAINST THE PERSON
SUBPART C. RAPE AND SEXUAL BATTERY

Louisiana Sexual Offenses

§ 41 Rape; defined

A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.

B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

C. For purposes of this Subpart, "oral sexual intercourse" means the intentional engaging in any of the following acts with another person:

(1) The touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender.

(2) The touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim.

§ 42 Aggravated rape

A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

(4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

(5) When two or more offenders participated in the act.

(6) When the victim is prevented from resisting the act because the victim suffers from a physical or mental infirmity preventing such resistance.

B. For purposes of Paragraph (5), “participate” shall mean:

(1) Commit the act of rape.

(2) Physically assist in the commission of such act.

C. For purposes of this Section, the following words have the following meanings:

(1) “Physical infirmity” means a person who is a quadriplegic or paraplegic.

(2) “Mental infirmity” means a person with an intelligence quotient of seventy or lower.

D. (1) Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of *C.Cr.P. Art. 782* relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of *C.Cr.P. Art. 782* relative to cases in which punishment is necessarily confinement at hard labor shall apply.

42.1 Forcible rape

A. Forcible rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

(2) When the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim.

B. Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence.

§ 43 Simple rape

A. Simple rape is a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances:

(1) When the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the victim's incapacity.

(2) When the victim is incapable, through unsoundness of mind, whether temporary or permanent, or understanding the nature of the act and the offender knew or should have known of the victim's incapacity.

(3) When the female victim submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

B. Whoever commits the crime of simple rape shall be imprisoned, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than twenty-five years.

§ 43.1 **Sexual battery**

A. Sexual battery is the intentional engaging in any of the following acts with another person where the offender acts without the consent of the victim, or where the act is consensual but the other person, who is not the spouse of the offender, has not yet attained fifteen years of age and is at least three years younger than the offender:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or

(2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

B. Lack of knowledge of the victim's age shall not be a defense. However, where the victim is under seventeen, normal medical treatment or normal sanitary care of an infant shall not be construed as an offense under the provisions of this Section.

C. Whoever commits the crime of sexual battery shall be punished by imprisonment, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than ten years.

§ 43.2 **Aggravated sexual battery**

A. Aggravated sexual battery is the intentional engaging in any of the following acts with another person when the offender intentionally inflicts serious bodily injury on the victim:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; or

(2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

B. For the purposes of this Section, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious

disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

C. Whoever commits the crime of aggravated sexual battery shall be punished by imprisonment, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than fifteen years.

§ 43.3 **Oral sexual battery**

A. Oral sexual battery is the intentional engaging in any of the following acts with another person, who is not the spouse of the offender when the other person has not yet attained fifteen years of age and is at least three years younger than the offender:

(1) The touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender; or

(2) The touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim.

B. Lack of knowledge of the victim's age shall not be a defense.

C. Whoever commits the crime of oral sexual battery shall be punished by imprisonment, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than ten years.

§ 89.1 **Aggravated crime against nature**

A. Aggravated crime against nature is crime against nature committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but such resistance is overcome by force;

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm accompanied by apparent power of execution;

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon; or

(4) When through idiocy, imbecility, or any unsoundness of mind, either temporary or permanent, the victim is incapable of giving consent and the offender knew or should have known of such incapacity;

(5) When the victim is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of mind produced by a narcotic or anesthetic agent, administered by or with the privity of the offender; or when he has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of such incapacity; or

(6) When the victim is under the age of seventeen years and the offender is at least three years older than the victim.

B. Whoever commits the crime of aggravated crime against nature shall be imprisoned at hard labor for not less than three nor more than fifteen years, such prison sentence to be without benefit of suspension of sentence, probation or parole.

MAINE REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***

TITLE 17-A. MAINE CRIMINAL CODE
PART 2. SUBSTANTIVE OFFENSES
CHAPTER 11. SEXUAL ASSAULTS

Maine Sexual Offenses

§ 253. **Gross sexual assault**

1. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

A. The other person submits as a result of compulsion, as defined in section 251, subsection , paragraph E. Violation of this paragraph is a Class A crime; or

B. The other person, not the actor's spouse, has not in fact attained the age of 14 years. Violation of this paragraph is a Class A crime.

2. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

A. The actor has substantially impaired the other person's power to appraise or control the other person's sexual acts by administering or employing drugs, intoxicants or other similar means. Violation of this paragraph is a Class B crime;

B. The actor compels or induces the other person to engage in the sexual act by any threat. Violation of this paragraph is a Class B crime;

C. The other person suffers from mental disability that is reasonably apparent or known to the actor, and which in fact renders the other person substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to deny or withdraw consent. Violation of this paragraph is a Class B crime;

D. The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act. Violation of this paragraph is a Class B crime;

E. The other person, not the actor's spouse, is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over the other person. Violation of this paragraph is a Class B crime;

F. The other person, not the actor's spouse, has not in fact attained the age of 18 years and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student. Violation of this paragraph is a Class C crime;

G. The other person, not the actor's spouse, has not attained the age of 18 years and is a resident in or attending a children's home, day care facility, residential child care facility, drug treatment center, camp or similar school, facility or

institution regularly providing care or services for children, and the actor is a teacher, employee or other person having instructional, supervisory or disciplinary authority over the other person. Violation of this paragraph is a Class C crime;

H. The other person has not in fact attained the age of 18 years and the actor is a parent, stepparent, foster parent, guardian or other similar person responsible for the long-term care and welfare of that other person. Violation of this paragraph is a Class B crime;

I. The actor is a psychiatrist, a psychologist or licensed as a social worker or purports to be a psychiatrist, a psychologist or licensed as a social worker to the other person and the other person, not the actor's spouse, is a patient or client for mental health therapy of the actor. As used in this paragraph, "mental health therapy" means psychotherapy or other treatment modalities intended to change behavior, emotions or attitudes, which therapy is based upon an intimate relationship involving trust and dependency with a substantial potential for vulnerability and abuse. Violation of this paragraph is a Class C crime; or

J. The actor owns, operates or is an employee of an organization, program or residence that is operated, administered, licensed or funded by the Department of Behavioral and Developmental Services or the Department of Human Services and the other person, not the actor's spouse, receives services from the organization, program or residence and the organization, program or residence recognizes the other person as a person with mental retardation. It is an affirmative defense to prosecution under this paragraph that the actor receives services for mental retardation or is a person with mental retardation as defined in Title 34-B, section 5001, subsection

2. Violation of this paragraph is a Class C crime.

3. It is a defense to a prosecution under subsection 2, paragraph A, that the other person voluntarily consumed or allowed administration of the substance with knowledge of its nature, except that it is no defense when the other person is a patient of the actor and has a reasonable belief that the actor is administering the substance for medical or dental examination or treatment.

4. REPEALED. Laws 2001, c. 383, § 18, eff. Jan. 31, 2003.

5. REPEALED. Laws 2001, c. 383, § 19, eff. Jan. 31, 2003.

6. In using a sentencing alternative involving a term of imprisonment for a person convicted of violating this section, a court shall, in determining the maximum period of incarceration as the 2nd step in the sentencing process, treat each prior Maine conviction for a violation of this section as an aggravating sentencing factor.

A. When the sentencing class for a prior conviction under this section is Class A, the court shall enhance the basic period of incarceration by a minimum of 4 years of imprisonment.

B. When the sentencing class for a prior conviction under this section is Class B, the court shall enhance the basic period of incarceration by a minimum of 2 years of imprisonment.

C. When the sentencing class for a prior conviction under this section is Class C, the court shall enhance the basic period of incarceration by a minimum of one year of imprisonment.

In arriving at the final sentence as the 3rd step in the sentencing process, the court may not suspend that portion of the maximum term of incarceration based on a prior conviction.

7. If the State pleads and proves that a violation of subsection 1 or subsection 2 was committed in a safe children zone, the court, in determining the appropriate sentence, shall treat this as an aggravating sentencing factor.

§ 254. **Sexual abuse of minors**

1. A person is guilty of sexual abuse of a minor if:

A. The person engages in a sexual act with another person, not the actor's spouse, who is either 14 or 15 years of age and the actor is at least 5 years older than the other person. Violation of this paragraph is a Class D crime;

A-1. The person violates paragraph A and the actor knows that the other person is related to the actor within the 2nd degree of consanguinity. Violation of this paragraph is a Class C crime;

A-2. The person violates paragraph A and the actor is at least 10 years older than the other person. Violation of this paragraph is a Class C crime;

B. Deleted. Laws 1989, c. 401, § A, 3.

C. The person is at least 21 years of age and engages in a sexual act with another person, not the actor's spouse, who is either 16 or 17 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official in the school district, school union, educational unit, school, facility or institution in which the student is enrolled. Violation of this paragraph is a Class E crime;

D. The person violates paragraph C and the actor knows that the student is related to the actor within the 2nd degree of consanguinity. Violation of this paragraph is a Class D crime;

E. The person violates paragraph C and the actor is at least 10 years older than the student. Violation of this paragraph is a Class D crime; or

F. The person intentionally subjects another person, not the actor's spouse, who is either 14 or 15 years of age to any sexual contact and the actor is at least 10 years older than the other person. Violation of this paragraph is a Class D crime.

2. It is a defense to a prosecution under subsection 1, paragraphs A, A-1, A-2 and F, that the actor reasonably believed the other person is at least 16 years of age.

3. DELETED. Laws 2001, c. 383, § 21.

4. As used in this section, "related to the actor within the 2nd degree of consanguinity" has the meaning set forth in section 556.

§ 255-A. **Unlawful sexual contact**

1. A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and:

A. The other person has not expressly or impliedly acquiesced in the sexual contact. Violation of this paragraph is a Class D crime;

B. The other person has not expressly or impliedly acquiesced in the sexual contact and the sexual contact includes penetration. Violation of this paragraph is a Class C crime;

C. The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual contact. Violation of this paragraph is a Class D crime;

D. The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual contact and the sexual contact includes penetration. Violation of this paragraph is a Class C crime;

E. The other person, not the actor's spouse, is in fact less than 14 years of age and the actor is at least 3 years older. Violation of this paragraph is a Class C crime;

F. The other person, not the actor's spouse, is in fact less than 14 years of age and the actor is at least 3 years older and the sexual contact includes penetration. Violation of this paragraph is a Class B crime;

G. The other person suffers from a mental disability that is reasonably apparent or known to the actor that in fact renders the other person substantially incapable of appraising the nature of the contact involved or of understanding that the other person has the right to deny or withdraw consent. Violation of this paragraph is a Class D crime;

H. The other person suffers from a mental disability that is reasonably apparent or known to the actor that in fact renders the other person substantially incapable of appraising the nature of the contact involved or of understanding that the other person has the right to deny or withdraw consent and the sexual contact includes penetration. Violation of this paragraph is a Class C crime;

I. The other person, not the actor's spouse, is in official custody as a probationer or parolee or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over the other person. Violation of this paragraph is a Class D crime;

J. The other person, not the actor's spouse, is in official custody as a probationer or parolee or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over the other person and the sexual contact includes penetration. Violation of this paragraph is a Class C crime;

K. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student. Violation of this paragraph is a Class D crime;

L. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student and the sexual contact includes penetration. Violation of this paragraph is a Class C crime;

M. The other person is in fact less than 18 years of age and the actor is a parent, stepparent, foster parent, guardian or other similar person responsible for the long-term general care and welfare of that other person. Violation of this paragraph is a Class C crime;

N. The other person is in fact less than 18 years of age and the actor is a parent, stepparent, foster parent, guardian or other similar person responsible for the long-term general care and welfare of that other person and the sexual contact includes penetration. Violation of this paragraph is a Class B crime;

O. The other person submits as a result of compulsion. Violation of this paragraph is a Class C crime;

P. The other person submits as a result of compulsion and the sexual contact includes penetration. Violation of this paragraph is a Class B crime;

Q. The actor owns, operates or is an employee of an organization, program or residence that is operated, administered, licensed or funded by the Department of Behavioral and Developmental Services or the Department of Human Services and the other person, not the actor's spouse, receives services from the organization, program or residence and the organization, program or residence recognizes that other person as a person with mental retardation. It is an affirmative defense to prosecution under this paragraph that the actor receives services for mental retardation or is a person with mental retardation as defined in Title 34-B, section 5001, subsection 3. Violation of this paragraph is a Class D crime;

R. The actor owns, operates or is an employee of an organization, program or residence that is operated, administered, licensed or funded by the Department of Behavioral and Developmental Services or the Department of Human Services and the other person, not the actor's spouse, receives services from the organization, program or residence and the organization, program or residence recognizes that other person as a person with mental retardation and the sexual contact includes penetration. It is an affirmative defense to prosecution under this paragraph that the actor receives services for mental retardation or is a person with mental retardation as defined in Title 34-B, section 5001, subsection 3. Violation of this paragraph is a Class C crime;

S. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor, who is at least 21 years of age, is a teacher, employee or other official in the school district, school union, educational unit, school, facility or institution in which the student is enrolled. Violation of this paragraph is a Class E crime; or

T. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor, who is at least 21 years of age, is a teacher, employee or other official in the school district, school union, educational unit, school, facility or institution in which the student is enrolled and the sexual contact includes penetration. Violation of this paragraph is a Class D crime.

§ 256. Visual sexual aggression against a child

1. A person is guilty of visual sexual aggression against a child if, for the purpose of arousing or gratifying sexual desire or for the purpose of causing affront or alarm, the actor, having in fact attained 18 years of age, exposes the actor's genitals to another person or causes the other person to expose that person's genitals to the actor and the other person, not the actor's spouse, has not in fact attained 14 years of age.

2. Visual sexual aggression against a child is a Class D crime.

§ 258. Sexual misconduct with a child under 14 years of age

1. A person is guilty of sexual misconduct with a child under 14 years of age if that person, having in fact attained 18 years of age knowingly displays any sexually explicit materials to another person, not the actor's spouse, who has not in fact attained the age of 14 years, with the intent to encourage the other person to engage in a sexual act or sexual contact.

2. As used in this section, "sexually explicit materials" means any book, magazine, print, negative, slide, motion picture, videotape or other mechanically reproduced visual material that the person knows or should know depicts a person, minor or adult, engaging in sexually explicit conduct, as that term is defined in Title 17, section 2921, subsection 5.

3. Sexual misconduct with a child under 14 years of age is a Class D crime.

§ 260. Unlawful sexual touching

1. UNLAWFUL SEXUAL TOUCHING. A person is guilty of unlawful sexual touching if the actor intentionally subjects another person to any sexual touching and:

A. The other person has not expressly or impliedly acquiesced in the sexual touching. Violation of this paragraph is a Class D crime;

B. The other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual touching. Violation of this paragraph is a Class D crime;

C. The other person, not the actor's spouse, is in fact less than 14 years of age and the actor is at least 5 years older. Violation of this paragraph is a Class D crime;

D. The other person suffers from a mental disability that is reasonably apparent or known to the actor that in fact renders the other person substantially incapable of appraising the nature of the touching involved or of understanding that the other person has the right to deny or withdraw consent. Violation of this paragraph is a Class D crime;

E. The other person, not the actor's spouse, is in official custody as a probationer or parolee or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary authority over the other person. Violation of this paragraph is a Class D crime;

F. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student. Violation of this paragraph is a Class D crime;

G. The other person is in fact less than 18 years of age and the actor is a parent, stepparent, foster parent, guardian or other similar person responsible for the long-term general care and welfare of that other person. Violation of this paragraph is a Class D crime;

H. The other person submits as a result of compulsion. Violation of this paragraph is a Class D crime;

I. The actor owns, operates or is an employee of an organization, program or residence that is operated, administered, licensed or funded by the Department of Behavioral and Developmental Services or the Department of Human Services and the other person, not the actor's spouse, receives services from the organization, program or residence and the organization, program or residence recognizes that other person as a person with mental retardation. It is an affirmative defense to prosecution under this paragraph that the actor receives services for mental retardation or is a person with mental retardation as defined in Title 34-B, section 5001, subsection 3. Violation of this paragraph is a Class D crime; or

J. The other person, not the actor's spouse, is in fact less than 18 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor, who is at least 21 years of age, is a teacher, employee or other official in the school district, school union, educational unit, school, facility or institution in which the student is enrolled. Violation of this paragraph is a Class E crime.

ANNOTATED CODE OF MARYLAND
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*** CURRENT THROUGH THE 2004 SESSION ***

*ANNOTATIONS CURRENT THROUGH DECISIONS POSTED ON LEXIS AS OF JUNE
29, 2004*

CRIMINAL LAW
TITLE 3. OTHER CRIMES AGAINST THE PERSON
SUBTITLE 3. SEXUAL CRIMES

Maryland Sexual Offenses

§ 3-301. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.
** REVISOR'S NOTE: This subsection formerly was Art. 27, § 461(a).

In this section, the references to this "subtitle" are substituted for the former references to this "subheading", although this subtitle is derived, in part, from material outside of that contained in the former "Sexual Offenses" subheading in Article 27. Because the material revised in this subtitle that was not contained in the former "Sexual Offenses" subheading does not use the terms defined in this section in a manner contrary to the meanings set forth here, no substantive change results. No other changes are made.

(b) Mentally defective individual. -- "Mentally defective individual" means an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of:

- (1) appraising the nature of the individual's conduct;
- (2) resisting vaginal intercourse, a sexual act, or sexual contact; or
- (3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.

** REVISOR'S NOTE This subsection is new language derived without substantive change from former Art. 27, § 461(b). The defined term "mentally defective individual" is substituted for the former defined term "mentally defective" for grammatical accuracy. The references to an "individual" are substituted for the former references to a "victim" because, where the defined term "mentally defective individual" is applicable in this subtitle, the term "victim" is used in the substantive crime. See §§ 3-304(a)(2), 3-306(a)(2)(i), and 3-307(a)(2) of this subtitle. The former redundant phrases "the act of" are deleted as implicit in the references to "vaginal intercourse".

(c) Mentally incapacitated individual. -- "Mentally incapacitated individual" means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of:

- (1) appraising the nature of the individual's conduct; or
- (2) resisting vaginal intercourse, a sexual act, or sexual contact.

** REVISOR'S NOTE: This subsection is new language derived without substantive change from former Art. 27, § 461(c). The defined term "mentally incapacitated individual" is substituted for the former defined term "mentally incapacitated" for grammatical accuracy. The references to an "individual" are substituted for the former references to a "victim" because, where the defined term "mentally defective individual" is applicable in this subtitle, the term "victim" is used in the substantive crime. *See* §§ 3-304(a)(2), 3-306(a)(2)(i), and 3-307(a)(2) of this subtitle. The former redundant phrase "the act of" is deleted as implicit in the reference to "vaginal intercourse".

(d) Physically helpless individual. -- "Physically helpless individual" means an individual who:

- (1) is unconscious; or (2) (i) does not consent to vaginal intercourse, a sexual act, or sexual contact; and (ii) is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact.

** REVISOR'S NOTE: This subsection is new language derived without substantive change from former Art. 27, § 461(d). The defined term "physically helpless individual" is substituted for the former defined term "physically helpless" for grammatical accuracy. The references to an "individual" are substituted for the former references to a "victim" because, where the defined term "physically helpless individual" is applicable in this subtitle, the term "victim" is used in the substantive crime. *See* §§ 3-304(a)(2), 3-306(a)(2)(i), and 3-307(a)(2) of this subtitle. The former redundant phrases "an act of" are deleted as implicit in the references to "vaginal intercourse".

(e) Sexual act. --

- (1) "Sexual act" means any of the following acts, regardless of whether semen is emitted: (i) analingus; (ii) cunnilingus; (iii) fellatio; (iv) anal intercourse, including penetration, however slight, of the anus; or (v) an act: 1. in which an object penetrates, however slightly, into another individual's genital opening or anus; and 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

- (2) "Sexual act" does not include: (i) vaginal intercourse; or (ii) an act in which an object penetrates an individual's genital opening or anus for an accepted medical purpose.

** REVISOR'S NOTE: This subsection is new language derived without substantive change from former Art. 27, § 461(e). In paragraph (1)(iv) of this subsection, the phrase "including penetration, however slight, of the anus" is substituted for the former inaccurate phrase "[p]enetration, however slight, is evidence of anal intercourse".

** DEFINED TERM:

"Vaginal intercourse"

§ 3-301**

(f) Sexual contact. -- **

(1) "Sexual contact", as used in §§ 3-307 and 3-308 of this subtitle, means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party. **

(2) "Sexual contact" includes an act: **

(i) in which a part of an individual's body, except the penis, mouth, or tongue, penetrates, however slightly, into another individual's genital opening or anus; and **

(ii) that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party. **

(3) "Sexual contact" does not include: **

(i) a common expression of familial or friendly affection; or **

(ii) an act for an accepted medical purpose.

REVISOR'S NOTE: This subsection is new language derived without substantive change from former Art. 27, § 461(f). In paragraph (1) of this subsection, the former reference to "any part of" a genital, anal, or other intimate area is deleted because the specific reference to touching a part of a genital, anal, or other intimate area is included in the general reference to touching that area. **

(g) Vaginal intercourse. -- **

(1) "Vaginal intercourse" means genital copulation, whether or not semen is emitted. ** (2) "Vaginal intercourse" includes penetration, however slight, of the vagina.

REVISOR'S NOTE: This subsection is new language derived without substantive change from former Art. 27, § 461(g). In paragraph (1) of this subsection, the former reference to "ordinary meaning" is deleted as surplusage. In paragraph (2) of this subsection, the phrase "includes penetration, however slight, of the vagina" is substituted for the former inaccurate phrase "[p]enetration, however slight, is evidence of vaginal intercourse" for clarity.

§ 3-303. Rape in the first degree

(a) Prohibited. -- A person may not:

(1) engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other; and

(2) (i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.

(b) Penalty. --

(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life.

(2) A person who violates this section is guilty of the felony of rape in the first degree and on conviction is subject to imprisonment not exceeding life without the possibility of parole if:

(i) the person is convicted in the same proceeding of violating § 3-503(a) (2) of this title and the victim was a child under the age of 16 years; or

(ii) the defendant was previously convicted of violating this section or § 3-305 of this subtitle.

(c) Required notice. -- If the State intends to seek a sentence of imprisonment for life without the possibility of parole under subsection (b)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

§ 3-304. Rape in the second degree

(a) Prohibited. -- A person may not engage in vaginal intercourse with another:

(1) by force, or the threat of force, without the consent of the other;

(2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

(b) Penalty. -- A person who violates this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment not exceeding 20 years.

§ 3-305. Sexual offense in the first degree

(a) Prohibited. -- A person may not:

(1) engage in a sexual act with another by force, or the threat of force, without the consent of the other; and

(2) (i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

(ii) suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

(iii) threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping;

(iv) commit the crime while aided and abetted by another; or

(v) commit the crime in connection with a burglary in the first, second, or third degree.

(b) Penalty. --

(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the felony of sexual offense in the first degree and on conviction is subject to imprisonment not exceeding life.

(2) A person who violates this section is guilty of the felony of sexual offense in the first degree and on conviction is subject to imprisonment not exceeding life without the possibility of parole if:

(i) the person is convicted in the same proceeding of violating § 3-503(a)(2) of this title and the victim was a child under the age of 16 years; or

(ii) the defendant was previously convicted of violating this section or § 3-303 of this subtitle.

(c) Required notice. -- If the State intends to seek a sentence of imprisonment for life without the possibility of parole under subsection (b)(2) of this section, the State shall notify the person in writing of the State's intention at least 30 days before trial.

§ 3-306. Sexual offense in the second degree

(a) Prohibited. -- A person may not engage in a sexual act with another:

(1) by force, or the threat of force, without the consent of the other;

(2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the sexual act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.

(b) Penalty. -- A person who violates this section is guilty of the felony of sexual offense in the second degree and on conviction is subject to imprisonment not exceeding 20 years.

§ 3-307. Sexual offense in the third degree

(a) Prohibited. -- A person may not:

(1) (i) engage in sexual contact with another without the consent of the other;
and

(ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or

4. commit the crime while aided and abetted by another;

(2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;

(3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;

(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

(5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

(b) Penalty. -- A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

§ 3-308. Sexual offense in the fourth degree

(a) Prohibited. -- A person may not engage in:

(1) sexual contact with another without the consent of the other;

(2) except as provided in § 3-307(a)(4) of this subtitle, a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim; or

(3) except as provided in § 3-307(a)(5) of this subtitle, vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 4 years older than the victim.

(b) Penalty. -- A person who violates this section is guilty of the misdemeanor of sexual offense in the fourth degree and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding \$ 1,000 or both.

*** THIS DOCUMENT IS CURRENT THROUGH CHAPTER 407, 11/23/04 ***

PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES
TITLE I. CRIMES AND PUNISHMENTS
CHAPTER 265. CRIMES AGAINST THE PERSON

Massachusetts Sexual Offenses

§ 13B. Indecent Assault and Battery on Child Under Fourteen.

Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished by imprisonment in the state prison for not more than ten years, or by imprisonment in a jail or house of correction for not more than two and one-half years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or any term of years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.

No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

In a prosecution under this section, a child under the age of fourteen years shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

§ 13F. Assault and Battery or Indecent Assault and Battery on Mentally Retarded Person; Penalty.

Whoever commits an indecent assault and battery on a mentally retarded person knowing such person to be mentally retarded shall for the first offense be punished by imprisonment in the state prison for not less than five years or not more than ten years; and for a second or subsequent offense, by imprisonment in the state prison for not less than ten years. Except in the case of a conviction for the first offense for violation of this section, the imposition or execution of the sentence shall not be suspended, and no probation or parole shall be granted until the minimum imprisonment herein provided for the offense shall have been served. This section

shall not apply to the commission of an indecent assault and battery by a mentally retarded person upon another mentally retarded person.

Whoever commits an assault and battery on a mentally retarded person knowing such person to be mentally retarded shall for the first offense be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years; and, for a second or subsequent offense, by imprisonment in the state prison for not more than ten years. This section shall not apply to the commission of an assault and battery by a mentally retarded person upon another mentally retarded person.

§ 13H. Indecent Assault and Battery on Person Over Fourteen.

Whoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction.

§ 22. Rape.

(a) Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission of an offense defined in section fifteen A, fifteen B, seventeen, nineteen or twenty-six of this chapter, section fourteen, fifteen, sixteen, seventeen or eighteen of chapter two hundred and sixty-six or section ten of chapter two hundred and sixty-nine shall be punished by imprisonment in the state prison for life or for any term of years.

No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

(b) Whoever has sexual intercourse or unnatural sexual intercourse with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for not more than twenty years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term or years.

Whoever commits any offense described in this section while being armed with a firearm, rifle, shotgun, machine-gun or assault weapon, shall be punished by

imprisonment in the state prison for not less than ten years. Whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years.

No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

For the purposes of prosecution, the offense described in subsection (b) shall be a lesser included offense to that described in subsection (a).

§ 22A. Rape of Child Under Sixteen.

Whoever has sexual intercourse or unnatural sexual intercourse with a child under sixteen, and compels said child to submit by force and against his will or compels said child to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years; and whoever over the age of eighteen commits a second or subsequent such offense shall be sentenced to the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.

Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be sentenced to the state prison for life or for any term of years, but not less than ten years. Whoever over the age of 18 commits a second or subsequent such offense shall be sentenced to the state prison for life or for any term of years, but not less than 20 years.

§ 23. Rape of Child.

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.

§ 24. Assault with Intent to Commit Rape.

Whoever assaults a person with intent to commit a rape shall be punished by imprisonment in the state prison for not more than twenty years or by imprisonment

in a jail or house of correction for not more than two and one-half years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years. Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 20 years.

No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

§ 24B. Assault on Child under Sixteen with Intent to Commit Rape.

Whoever assaults a child under sixteen with intent to commit a rape, as defined in section thirty-nine of chapter two hundred and seventy-seven, shall be punished by imprisonment in the state prison for life or for any term of years; and whoever over the age of eighteen commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years but not less than five years.

Whoever commits any offense described in this section while being armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for life or for any term of years, but not less than ten years. Whoever over the age of 18 commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years.

MICHIGAN COMPILED LAWS SERVICE
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*** THIS DOCUMENT IS CURRENT THROUGH P.A. 402, 11/12/04 ***
*** WITH THE EXCEPTION OF P.A. 364 AND 400 ***

CHAPTER 750 MICHIGAN PENAL CODE
THE MICHIGAN PENAL CODE
CHAPTER LXXVI. RAPE

Michigan Sexual Offenses

§ 750.520a. Definitions.

Sec. 520a. As used in this chapter:

- (a) "Actor" means a person accused of criminal sexual conduct.
- (b) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:
 - (i) It originated before the person became 18 years of age.
 - (ii) It has continued since its origination or can be expected to continue indefinitely.
 - (iii) It constitutes a substantial burden to the impaired person's ability to perform in society.
 - (iv) It is attributable to 1 or more of the following:
 - (A) Mental retardation, cerebral palsy, epilepsy, or autism.
 - (B) Any other condition of a person found to be closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.
- (c) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.
- (d) "Mental health professional" means that term as defined in section 100b of the mental health code, 1974 PA 258, [MCL 330.1100b](#).
- (e) "Mental illness" means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.
- (f) "Mentally disabled" means that a person has a mental illness, is mentally retarded, or has a developmental disability.
- (g) "Mentally incapable" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.
- (h) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent,

or due to any other act committed upon that person without his or her consent.

(i) "Mentally retarded" means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior.

(j) "Nonpublic school" means that term as defined in section 5 of the revised school code, 1976 PA 451, [MCL 380.5](#).

(k) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(l) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.

(m) "Public school" means that term as defined in section 5 of the revised school code, 1976 PA 451, [MCL 380.5](#).

(n) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger.

(o) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(p) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

§ 750.520b. **Criminal sexual conduct in the first degree; felony.**

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related to the victim by blood or affinity to the fourth degree.

(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

§ 750.520c. **Criminal sexual conduct in the second degree; felony.**

Sec. 520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related by blood or affinity to the fourth degree to the victim.

(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in sections 520b(1)(f)(i) to (v).

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f)(i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under section 20g of *1953 PA 232, MCL 791.220g*, who knows that the other person is under the jurisdiction of the department of corrections.

(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county's jurisdiction.

(l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

§ 750.520d. **Criminal sexual conduct in the third degree; felony.**

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

- (a) That other person is at least 13 years of age and under 16 years of age.
 - (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).
 - (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
 - (d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.
 - (e) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.
- (2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

§ 750.520e. **Criminal sexual conduct in the fourth degree; misdemeanor.**

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

- (a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.
- (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
 - (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
 - (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.
 - (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, “to retaliate” includes threats of physical punishment, kidnapping, or extortion.
 - (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
 - (v) When the actor achieves the sexual contact through concealment or by the element of surprise.
- (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
- (d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative

defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. A prosecution under this subsection shall not be used as evidence that the victim is mentally incompetent.

(f) That other person is at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school, and the actor is a teacher, substitute teacher, or administrator of that public or nonpublic school. This subdivision does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$500.00, or both.

§ 750.158. Crime against nature or sodomy; penalty.

Sec. 158. Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

§ 750.520g. Assault with intent to commit criminal sexual conduct; felony.

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

§ 750.520h. Corroboration of victim's testimony not required.

Sec. 520h. The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***

*** AUGUST 10, 2004 Annotation Service ***

Crimes, Criminals
CHAPTER 609 CRIMINAL CODE
SEX CRIMES

Minnesota Sexual Offenses

609.341 **Definitions**

Subdivision 1. For the purposes of sections 609.341 to 609.351, the terms in this section have the meanings given them.

Subd. 2. “Actor” means a person accused of criminal sexual conduct.

Subd. 3. “**Force**” means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Subd. 4. (a) “**Consent**” means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

(b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act.

(c) Corroboration of the victim’s testimony is not required to show lack of consent.

Subd. 5. “**Intimate parts**” includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being.

Subd. 6. “**Mentally impaired**” means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.

Subd. 7. “**Mentally incapacitated**” means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.

Subd. 8. “**Personal injury**” means bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy.

Subd. 9. “**Physically helpless**” means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.

Subd. 10. “**Position of authority**” includes but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent’s rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act. For the purposes of subdivision 11, “position of authority” includes a psychotherapist.

Subd. 11. (a) “**Sexual contact**,” for the purposes of sections 609.343, subdivision 1, clauses (a) to (f), and 609.345, subdivision 1, clauses (a) to (e), and (h) to (m), includes any of the following acts committed without the complainant’s consent, except in those cases where consent is not a defense, and committed with sexual or aggressive intent:

- (i) the intentional touching by the actor of the complainant’s intimate parts, or
- (ii) the touching by the complainant of the actor’s, the complainant’s, or another’s intimate parts effected by a person in a position of authority, or by coercion, or by inducement if the complainant is under 13 years of age or mentally impaired, or
- (iii) the touching by another of the complainant’s intimate parts effected by coercion or by a person in a position of authority, or
- (iv) in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts.

(b) “**Sexual contact**,” for the purposes of sections 609.343, subdivision 1, clauses (g) and (h), and 609.345, subdivision 1, clauses (f) and (g), includes any of the following acts committed with sexual or aggressive intent:

- (i) the intentional touching by the actor of the complainant’s intimate parts;
- (ii) the touching by the complainant of the actor’s, the complainant’s, or another’s intimate parts;
- (iii) the touching by another of the complainant’s intimate parts; or
- (iv) in any of the cases listed above, touching of the clothing covering the immediate area of the intimate parts.

(c) “**Sexual contact with a person under 13**” means the intentional touching of the complainant’s bare genitals or anal opening by the actor’s bare genitals or anal opening with sexual or aggressive intent or the touching by the complainant’s bare genitals or anal opening of the actor’s or another’s bare genitals or anal opening with sexual or aggressive intent.

Subd. 12. “**Sexual penetration**” means any of the following acts committed without the complainant’s consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:

- (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
- (2) any intrusion however slight into the genital or anal openings:
 - (i) of the complainant’s body by any part of the actor’s body or any object used by the actor for this purpose;
 - (ii) of the complainant’s body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or

(iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

Subd. 13. “**Complainant**” means a person alleged to have been subjected to criminal sexual conduct, but need not be the person who signs the complaint.

Subd. 14. “**Coercion**” means words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon, or hold in confinement, the complainant or another, or force the complainant to submit to sexual penetration or contact, but proof of coercion does not require proof of a specific act or threat.

Subd. 15. **Significant relationship.** “Significant relationship” means a situation in which the actor is:

- (1) the complainant’s parent, stepparent, or guardian;
- (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; or
- (3) an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant’s spouse.

Subd. 16. “**Patient**” means a person who seeks or obtains psychotherapeutic services.

Subd. 17. **Psychotherapist.** “Psychotherapist” means a person who is or purports to be a physician, psychologist, nurse, chemical dependency counselor, social worker, marriage and family therapist, licensed professional counselor, or other mental health service provider; or any other person, whether or not licensed by the state, who performs or purports to perform psychotherapy.

Subd. 18. “**Psychotherapy**” means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition.

Subd. 19. “**Emotionally dependent**” means that the nature of the former patient’s emotional condition and the nature of the treatment provided by the psychotherapist are such that the psychotherapist knows or has reason to know that the former patient is unable to withhold consent to sexual contact or sexual penetration by the psychotherapist.

Subd. 20. “**Therapeutic deception**” means a representation by a psychotherapist that sexual contact or sexual penetration by the psychotherapist is consistent with or part of the patient’s treatment.

Subd. 21. **Special transportation.** “Special transportation service” means motor vehicle transportation provided on a regular basis by a public or private entity or person that is intended exclusively or primarily to serve individuals who are vulnerable adults, handicapped, or disabled. Special transportation service includes, but is not limited to, service provided by buses, vans, taxis, and volunteers driving private automobiles.

609.293 Sodomy

Subdivision 1. Definition. "Sodomy" means carnally knowing any person by the anus or by or with the mouth.

Subd. 2-4. Repealed, 1977 c 130 s 10

Subd. 5. Consensual acts. Whoever, in cases not coming within the provisions of sections 609.342 or 609.344, voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$ 3,000, or both.

609.294 Bestiality

Whoever carnally knows a dead body or an animal or bird is guilty of bestiality, which is a misdemeanor. If knowingly done in the presence of another the person may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$ 3,000 or both.

609.342 Criminal sexual conduct in the first degree

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(e) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish sexual penetration; or

(ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

(ii) an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

Subd. 2. Penalty. (a) Except as otherwise provided in section 609.109, a person convicted under subdivision 1 may be sentenced to imprisonment for not more than 30 years or to a payment of a fine of not more than \$ 40,000, or both.

(b) Unless a longer mandatory minimum sentence is otherwise required by law or the Sentencing Guidelines provide for a longer presumptive executed sentence, the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section. Sentencing a person in a manner other than that described in this paragraph is a departure from the Sentencing Guidelines.

Subd. 3. Stay. Except when imprisonment is required under section 609.109, if a person is convicted under subdivision 1, clause (g), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse;

(2) a requirement that the offender complete a treatment program; and

(3) a requirement that the offender have no unsupervised contact with the complainant until the offender has successfully completed the treatment program unless approved by the treatment program and the supervising correctional agent.

609.343 Criminal sexual conduct in the second degree

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act

by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the dangerous weapon to cause the complainant to submit;

(e) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish the sexual contact; or

(ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

(ii) an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:

(i) the actor or an accomplice used force or coercion to accomplish the contact;

(ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

Subd. 2. Penalty. (a) Except as otherwise provided in section 609.109, a person convicted under subdivision 1 may be sentenced to imprisonment for not more than 25 years or to a payment of a fine of not more than \$ 35,000, or both.

(b) Unless a longer mandatory minimum sentence is otherwise required by law or the Sentencing Guidelines provide for a longer presumptive executed sentence, the court shall presume that an executed sentence of 90 months must be imposed on an offender convicted of violating subdivision 1, clause (c), (d), (e), (f), or (h). Sentencing a person in a manner other than that described in this paragraph is a departure from the Sentencing Guidelines.

Subd. 3. Stay. Except when imprisonment is required under section 609.109, if a person is convicted under subdivision 1, clause (g), the court may stay imposition or execution of the sentence if it finds that:

- (a) a stay is in the best interest of the complainant or the family unit; and
- (b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

- (1) incarceration in a local jail or workhouse;
- (2) a requirement that the offender complete a treatment program; and
- (3) a requirement that the offender have no unsupervised contact with the complainant until the offender has successfully completed the treatment program unless approved by the treatment program and the supervising correctional agent.

609.344 Criminal sexual conduct in the third degree

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

- (a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant shall be a defense;
- (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older. If the actor in such a case is no more than 48 months but more than 24 months older than the complainant, the actor may be sentenced to imprisonment for not more than five years. Consent by the complainant is not a defense;
- (c) the actor uses force or coercion to accomplish the penetration;
- (d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;
- (e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;
- (f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;
- (g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual penetration, and:
 - (i) the actor or an accomplice used force or coercion to accomplish the penetration;
 - (ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred:

(i) during the psychotherapy session; or

(ii) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists.

Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist;

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception. Consent by the complainant is not a defense;

(k) the actor accomplishes the sexual penetration by means of deception or false representation that the penetration is for a bona fide medical purpose. Consent by the complainant is not a defense;

(l) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

(i) the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or

(ii) the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense;

(m) the actor is an employee, independent contractor, or volunteer of a state, county, city, or privately operated adult or juvenile correctional system, including, but not limited to, jails, prisons, detention centers, or work release facilities, and the complainant is a resident of a facility or under supervision of the correctional system. Consent by the complainant is not a defense; or

(n) the actor provides or is an agent of an entity that provides special transportation service, the complainant used the special transportation service, and the sexual penetration occurred during or immediately before or after the actor transported the complainant. Consent by the complainant is not a defense.

Subd. 2. Penalty. A person convicted under subdivision 1 may be sentenced to imprisonment for not more than 15 years or to a payment of a fine of not more than \$ 30,000, or both.

Subd. 3. Stay. Except when imprisonment is required under section 609.109, if a person is convicted under subdivision 1, clause (f), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse;

(2) a requirement that the offender complete a treatment program; and

(3) a requirement that the offender have no unsupervised contact with the complainant until the offender has successfully completed the treatment program unless approved by the treatment program and the supervising correctional agent.

609.345 Criminal sexual conduct in the fourth degree

Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant. Neither mistake as to the complainant's age or consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant or in a position of authority over the complainant. Consent by the complainant to the act is not a defense. In any such case, it shall be an affirmative defense which must be proved by a preponderance of the evidence that the actor believes the complainant to be 16 years of age or older;

(c) the actor uses force or coercion to accomplish the sexual contact;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual contact, and:

(i) the actor or an accomplice used force or coercion to accomplish the contact;

(ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual contact occurred:

(i) during the psychotherapy session; or

(ii) outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists. Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist;

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual contact occurred by means of therapeutic deception. Consent by the complainant is not a defense;

(k) the actor accomplishes the sexual contact by means of deception or false representation that the contact is for a bona fide medical purpose. Consent by the complainant is not a defense;

(1) the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and:

(i) the sexual contact occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or

(ii) the sexual contact occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense;

(m) the actor is an employee, independent contractor, or volunteer of a state, county, city, or privately operated adult or juvenile correctional system, including, but not limited to, jails, prisons, detention centers, or work release facilities, and the complainant is a resident of a facility or under supervision of the correctional system. Consent by the complainant is not a defense; or

(n) the actor provides or is an agent of an entity that provides special transportation service, the complainant used the special transportation service, the complainant is not married to the actor, and the sexual contact occurred during or immediately before or after the actor transported the complainant. Consent by the complainant is not a defense.

Subd. 2. Penalty. A person convicted under subdivision 1 may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than \$ 20,000, or both.

Subd. 3. Stay. Except when imprisonment is required under section 609.109, if a person is convicted under subdivision 1, clause (f), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse;

(2) a requirement that the offender complete a treatment program; and

(3) a requirement that the offender have no unsupervised contact with the complainant until the offender has successfully completed the treatment program unless approved by the treatment program and the supervising correctional agent.

609.3451 Criminal sexual conduct in the fifth degree

Subdivision 1. Crime defined. A person is guilty of criminal sexual conduct in the fifth degree:

(1) if the person engages in nonconsensual sexual contact; or

(2) the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.

For purposes of this section, “sexual contact” has the meaning given in section 609.341, subdivision 11, paragraph (a), clauses (i) and (iv), but does not include the intentional touching of the clothing covering the immediate area of the buttocks. Sexual contact also includes the intentional removal or attempted removal of clothing covering the complainant’s intimate parts or undergarments, and the nonconsensual touching by the complainant of the actor’s intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent.

Subd. 2. Penalty. A person convicted under subdivision 1 may be sentenced to imprisonment for not more than one year or to a payment of a fine of not more than \$ 3,000, or both.

Subd. 3. Felony. A person is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$ 10,000, or both, if the person violates subdivision 1, clause (2), after having been previously convicted of or adjudicated delinquent for violating subdivision 1, clause (2); section 617.23, subdivision 2, clause (1); or a statute from another state in conformity with subdivision 1, clause (2), or section 617.23, subdivision 2, clause (1).

MISSISSIPPI CODE of 1972 ANNOTATED
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*** STATE COURT ANNOTATIONS CURRENT THROUGH APRIL 27, 2004 ***

TITLE 97. CRIMES
CHAPTER 3. CRIMES AGAINST THE PERSON

Mississippi Sexual Offenses

§ 97-3-71. **Rape; assault with intent to ravish**

Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

§ 97-3-65. **Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances**

(1) The crime of statutory rape is committed when:

- (a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:
- (i) Is at least fourteen (14) but under sixteen (16) years of age;
 - (ii) Is thirty-six (36) or more months younger than the person; and
 - (iii) Is not the person's spouse; or
- (b) A person of any age has sexual intercourse with a child who:
- (i) Is under the age of fourteen (14) years;
 - (ii) Is twenty-four (24) or more months younger than the person; and
 - (iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under paragraph (1)(a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars (\$ 5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under paragraph (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars (\$ 10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under paragraph (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under paragraph (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female.

§ 97-3-95. Sexual battery

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

- (a) Another person without his or her consent;
- (b) A mentally defective, mentally incapacitated or physically helpless person;
- (c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or
- (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

§ 97-3-97. Sexual battery; definitions

For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

(b) A "mentally defective person" is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.

(c) A "mentally incapacitated person" is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.

(d) A "physically helpless person" is one who is unconscious or one who for any other reason is physically incapable of communicating an unwillingness to engage in an act.

§ 97-3-104. Sexual penetration of incarcerated offenders by law enforcement officers or employees; offense; punishment

It shall be unlawful for any jailer, guard, employee of the Department of Corrections, sheriff, constable, marshal or other officer to engage in any sexual penetration as defined in Section 97-3-97, Mississippi Code of 1972, with any offender, with or without the offender's consent, who is incarcerated at any jail or any state, county or private correctional facility. Any person who violates this section shall be guilty of a felony and upon conviction shall be fined not more than Five Thousand Dollars (\$ 5,000.00) or imprisoned for a term not to exceed five (5) years, or both.

LEXISNEXIS (R) MISSOURI ANNOTATED STATUTES

*** THIS SECTION IS CURRENT THROUGH ALL 2003 LEGISLATION ***

*** ANNOTATIONS CURRENT THROUGH JULY 16, 2004 ***

TITLE 38. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS
CHAPTER 566. SEXUAL OFFENSES

Missouri Sexual Offenses

§ 566.010. Chapter 566 and chapter 568 definitions

As used in this chapter and chapter 568, RSMo, the following terms mean:

(1) "Deviate sexual intercourse", any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person;

(2) "Sexual conduct", sexual intercourse, deviate sexual intercourse or sexual contact;

(3) "Sexual contact", any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person;

(4) "Sexual intercourse", any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

§ 566.030. **Forcible rape and attempted forcible rape, penalties**

1. A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.

2. Forcible rape or an attempt to commit forcible rape is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

§ 566.032. Statutory rape, first degree, penalties

1. A person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years old.

2. Statutory rape in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

§ 566.034. Statutory rape, second degree, penalty

1. A person commits the crime of statutory rape in the second degree if being twenty-one years of age or older, he has sexual intercourse with another person who is less than seventeen years of age.

2. Statutory rape in the second degree is a class C felony.

§ 566.040. Sexual assault, penalties

1. A person commits the crime of sexual assault if he has sexual intercourse with another person knowing that he does so without that person's consent.

2. Sexual assault is a class C felony.

§ 566.060. Forcible sodomy, penalties

1. A person commits the crime of forcible sodomy if such person has deviate sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion includes the use of a substance administered without a victim's knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.

2. Forcible sodomy or an attempt to commit forcible sodomy is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

§ 566.062. Statutory sodomy, first degree, penalties

1. A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old.

2. Statutory sodomy in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

§ 566.064. **Statutory sodomy, second degree, penalty**

1. A person commits the crime of statutory sodomy in the second degree if being twenty-one years of age or older, he has deviate sexual intercourse with another person who is less than seventeen years of age.

2. Statutory sodomy in the second degree is a class C felony.

§ 566.070. **Deviate sexual assault, penalty**

1. A person commits the crime of deviate sexual assault if he has deviate sexual intercourse with another person knowing that he does so without that person's consent.

2. Deviate sexual assault is a class C felony.

§ 566.083. **Sexual misconduct involving a child, penalty**

1. A person commits the crime of sexual misconduct involving a child if the person:

(1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age;

(2) Knowingly exposes the person's genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; or

(3) Coerces a child less than fourteen years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.

2. As used in this section, the term "sexual act" means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fetishism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

3. Violation of this section is a class D felony; except that the second or any subsequent violation of this section is a class C felony.

§ 566.090. Sexual misconduct, first degree, penalties

1. A person commits the crime of sexual misconduct in the first degree if he has deviate sexual intercourse with another person of the same sex or he purposely subjects another person to sexual contact without that person's consent.

2. Sexual misconduct in the first degree is a class A misdemeanor unless the actor has previously been convicted of an offense under this chapter or unless in the course thereof the actor displays a deadly weapon in a threatening manner or the offense is committed as a part of a ritual or ceremony, in which case it is a class D felony.

§ 566.093. Sexual misconduct, second degree, penalties

1. A person commits the crime of sexual misconduct in the second degree if he:

(1) Exposes his genitals under circumstances in which he knows that his conduct is likely to cause affront or alarm; or

(2) Has sexual contact in the presence of a third person or persons under circumstances in which he knows that such conduct is likely to cause affront or alarm.

2. Sexual misconduct in the second degree is a class B misdemeanor unless the actor has previously been convicted of an offense under this chapter, in which case it is a class A misdemeanor.

§ 566.095. Sexual misconduct, third degree, penalty

1. A person commits the crime of sexual misconduct in the third degree if he solicits or requests another person to engage in sexual conduct under circumstances in which he knows that his requests or solicitation is likely to cause affront or alarm.

2. Sexual misconduct in the third degree is a class C misdemeanor.

§ 566.111. Unlawful sex with an animal, penalties

1. A person commits the crime of unlawful sex with an animal if that person engages in sexual conduct with an animal or engages in sexual conduct with an animal for commercial or recreational purposes.

2. Unlawful sex with an animal is a class A misdemeanor unless the defendant has previously been convicted under this section, in which case the crime is a class D felony.

3. In addition to any penalty imposed or as a condition of probation the court may:

(1) Prohibit the defendant from harboring animals or residing in any household where animals are present during the period of probation or if probation is not granted for a period of time not to exceed two years after the defendant's sentence is

completed;

(2) Order all animals in the defendant's possession subject to a civil forfeiture action under chapter 513, RSMo; or

(3) Order psychological evaluation and counseling of the defendant at the defendant's expense.

4. Nothing in this section shall be construed to prohibit generally accepted animal husbandry, farming and ranching practices or generally accepted veterinary medical practices.

5. For purposes of this section, the following terms mean:

(1) "Animal", every creature, either alive or dead, other than a human being;

(2) "Sexual conduct with an animal", any touching of an animal with the genitals or any touching of the genitals or anus of an animal for the purpose of arousing or gratifying the person's sexual desire.

MONTANA CODE ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 SESSION ***

*** [No legislation enacted in 2004] ***

TITLE 45 CRIMES
CHAPTER 5 OFFENSES AGAINST THE PERSON
PART 5 SEXUAL CRIMES

Montana Sexual Offenses

Mont. Code Anno., § 45-5-501 (2004)

45-5-501 Definition.

(1) As used in 45-5-503, the term “without consent” means:

- (a) the victim is compelled to submit by force against the victim or another; or
- (b) the victim is incapable of consent because the victim is:
 - (i) mentally defective or incapacitated;
 - (ii) physically helpless;
 - (iii) overcome by deception, coercion, or surprise;
 - (iv) less than 16 years old; or
 - (v) incarcerated in an adult or juvenile correctional, detention, or treatment facility and the perpetrator is an employee, contractor, or volunteer of the facility and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search.

(2) As used in subsection (1), the term “**force**” means:

- (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.

45-5-502 **Sexual assault.**

(1) A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed \$ 500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years, unless the judge makes a written finding that there is good cause to impose a

term of less than 4 years and imposes a term of less than 4 years, or more than 100 years and may be fined not more than \$ 50,000.

(4) An act “in the course of committing sexual assault” includes an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if:

(a) the victim is incarcerated in an adult or juvenile correctional, detention, or treatment facility and the perpetrator is an employee, contractor, or volunteer of the facility and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search; or

(b) the victim is less than 14 years old and the offender is 3 or more years older than the victim.

45-5-503 Sexual intercourse without consent.

(1) A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent. A person may not be convicted under this section based on the age of the person’s spouse, as provided in 45-5-501(1)(b)(iv).

(2) A person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than \$ 50,000, except as provided in 46-18-219 and 46-18-222.

(3) (a) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than \$ 50,000, except as provided in 46-18-219 and 46-18-222.

(b) If two or more persons are convicted of sexual intercourse without consent with the same victim in an incident in which each offender was present at the location where another offender’s offense occurred during a time period in which each offender could have reasonably known of the other’s offense, each offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 5 years or more than 100 years and may be fined not more than \$ 50,000, except as provided in 46-18-219 and 46-18-222.

(c) If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:

(i) punished by death as provided in 46-18-301 through 46-18-310, unless the offender is less than 18 years of age at the time of the commission of the offense; or

(ii) punished as provided in 46-18-219.

(d) If the victim was incarcerated in an adult or juvenile correctional, detention, or treatment facility at the time of the offense and the offender had supervisory or disciplinary authority over the victim, the offender shall be punished by imprisonment in the state prison for a term of not more than 5 years or fined an amount not to exceed \$ 50,000, or both.

(4) In addition to any sentence imposed under subsection (2) or (3), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable medical and counseling costs that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

(5) As used in subsection (3), an act "in the course of committing sexual intercourse without consent" includes an attempt to commit the offense or flight after the attempt or commission.

45-5-505 Deviate sexual conduct.

(1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed \$ 50,000, or both.

(3) The fact that a person seeks testing or receives treatment for the HIV-related virus or another sexually transmitted disease may not be used as a basis for a prosecution under this section and is not admissible in evidence in a prosecution under this section.

REVISED STATUTES OF NEBRASKA ANNOTATED
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*** ANNOTATIONS FOR STATE CASES CURRENT THROUGH OCTOBER 1, 2004 ***

CHAPTER 28. CRIMES AND PUNISHMENTS
ARTICLE 3. OFFENSES AGAINST THE PERSON
(a) GENERAL PROVISIONS

Nebraska Sexual Offenses

§ 28-318. Terms, defined

As used in sections 28-317 to 28-321, unless the context otherwise requires:

- (1) **Actor** means a person accused of sexual assault;
- (2) **Intimate parts** means the genital area, groin, inner thighs, buttocks, or breasts;
- (3) **Past sexual behavior** means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;
- (4) **Serious personal injury** means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
- (5) **Sexual contact** means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under section 28-320.01;
- (6) **Sexual penetration** means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen;
- (7) **Victim** means the person alleging to have been sexually assaulted;
- (8) **Without consent** means:

(a) (i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so; and

(9) **Force or threat of force means** (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

§ 28-319. **Sexual assault; first degree; penalty**

(1) Any person who subjects another person to sexual penetration (a) without consent of the victim, or (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

(2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence.

(3) Any person who is found guilty of sexual assault in the first degree for a second time when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

§ 28-320. **Sexual assault; second or third degree; penalty**

(1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim.

(3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

§ 28-320.01. **Sexual assault of a child; penalties**

(1) A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.

(2) Sexual assault of a child is a Class IIIA felony for the first offense.

(3) Any person who is found guilty of sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, or (c) in any other state or federal court under laws with essentially the same elements as this section or section 28-319 shall be guilty of a Class IC felony.

NEVADA REVISED STATUTES ANNOTATED
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*** NO LEGISLATION ENACTED IN 2004 ***
*** April 2004 Annotation Service ***

TITLE 15. CRIMES AND PUNISHMENTS
CHAPTER 201. CRIMES AGAINST PUBLIC DECENCY AND GOOD MORALS
BIGAMY, INCEST, SEXUAL ACTS IN PUBLIC AND CRIME AGAINST NATURE
INVOLVING MINOR

Nevada Sexual Offenses

§ 201.180. Incest: Definition; penalty

Persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$ 10,000.

§ 201.190. Commission of certain sexual acts in public: Definition; penalty

Except as otherwise provided in NRS 200.366 and 201.230, a person of full age who commits anal intercourse, cunnilingus or fellatio in public is guilty of a category D felony and shall be punished as provided in NRS 193.130.

§ 201.193 Crime against nature: Sexual penetration

Repealed by Acts 1993, ch. 236, § 5, p. 518, effective June 16, 1993.

§ 201.195. Solicitation of minor to engage in acts constituting crime against nature; penalties

1. A person who incites, entices or solicits a minor to engage in acts which constitute the infamous crime against nature:

(a) If the minor actually engaged in such acts as a result and:

(1) The minor was less than 14 years of age, is guilty of a category A felony and shall be punished by imprisonment in the state prison for life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served.

(2) The minor was 14 years of age or older, is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) If the minor did not engage in such acts:

(1) For the first offense, is guilty of a gross misdemeanor.

(2) For any subsequent offense, is guilty of a category D felony and shall be punished as provided in NRS 193.130.

2. As used in this section, the “infamous crime against nature” means anal intercourse, cunnilingus or fellatio between natural persons of the same sex. Any sexual penetration, however slight, is sufficient to complete the infamous crime against nature.

§ 200.364. Definitions

As used in this section and NRS 200.364 to 200.3774, inclusive, unless the context otherwise requires:

1. “Perpetrator” means a person who commits a sexual assault.

2. “Sexual penetration” means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person’s body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning.

3. “Statutory sexual seduction” means:

(a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or

(b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

4. “Victim” means a person who is subjected to a sexual assault.

§ 200.366. **Sexual assault: Definition; penalties**

1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

2. Except as otherwise provided in subsections 3 and 4, a person who commits a sexual assault is guilty of a category A felony and shall be punished:

(a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault, by imprisonment in the state prison:

- (1) For life without the possibility of parole;
- (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or
- (3) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

(b) If no substantial bodily harm to the victim results, by imprisonment in the state prison:

- (1) For life, with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
- (2) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

3. Except as otherwise provided in subsection 4, a person who commits a sexual assault against a child under the age of 16 years is guilty of a category A felony and shall be punished:

(a) If the crime results in substantial bodily harm to the child, by imprisonment in the state prison for life without the possibility of parole.

(b) Except as otherwise provided in paragraph (c), if the crime does not result in substantial bodily harm to the child, by imprisonment in the state prison:

- (1) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or
- (2) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

(c) If the crime is committed against a child under the age of 14 years and does not result in substantial bodily harm to the child, by imprisonment in the state prison

for life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served.

4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:

(a) A sexual assault pursuant to this section or any other sexual offense against a child; or

(b) An offense committed in another jurisdiction that, if committed in this state, would constitute a sexual assault pursuant to this section or any other sexual offense against a child,
is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.

5. For the purpose of this section, “other sexual offense against a child” means any act committed by an adult upon a child constituting:

- (a) Incest pursuant to NRS 201.180;
- (b) Lewdness with a child pursuant to NRS 201.230;
- (c) Sado-masochistic abuse pursuant to NRS 201.262; or
- (d) Luring a child using a computer, system or network pursuant to NRS 201.560, if punished as a felony.

§ 200.368. Statutory sexual seduction: Penalties

Except under circumstances where a greater penalty is provided in NRS 201.540, a person who commits statutory sexual seduction shall be punished:

- 1. If he is 21 years of age or older, for a category C felony as provided in NRS 193.130.
- 2. If he is under the age of 21 years, for a gross misdemeanor.

§ 200.373. Sexual assault of spouse by spouse

It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED
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*** STATUTES CURRENT THROUGH THE 2004 SESSION ***
*** ANNOTATIONS CURRENT THROUGH CASES DECIDED JULY 23, 2004 ***

TITLE LXII. CRIMINAL CODE
CHAPTER 632-A. SEXUAL ASSAULT AND RELATED OFFENSES

New Hampshire Sexual Offenses

§ 632-A:1. **Definitions** In this chapter:

I. "Actor" means a person accused of a crime of sexual assault.

I-a. "Affinity" means a relation which one spouse because of marriage has to blood relatives of the other spouse.

I-b. "Genital openings" means the internal or external genitalia including, but not limited to, the vagina, labia majora, labia minora, vulva, urethra or perineum.

I-c. "Pattern of sexual assault" means committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years.

II. "Retaliate" means to undertake action against the interests of the victim, including, but not limited to:

(a) Physical or mental torment or abuse. (b) Kidnapping, false imprisonment or extortion. (c) Public humiliation or disgrace.

III. "Serious personal injury" means extensive bodily injury or disfigurement, extreme mental anguish or trauma, disease or loss or impairment of a sexual or reproductive organ.

IV. "Sexual contact" means the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including breasts and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.

V. "Sexual penetration" means: (a) Sexual intercourse; or (b) Cunnilingus; or (c) Fellatio; or (d) Anal intercourse; or (e) Any intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into genital or anal openings of the victim's body; or (f) Any intrusion, however slight, of any part of the victim's body into genital or anal openings of the actor's body; (g) Any act which forces, coerces or intimidates the victim to perform any sexual penetration as defined in subparagraphs (a)-(f) on the actor, on another person, or on himself. (h) Emission is not required as an element of any form of sexual penetration.

VI. "Therapy" means the treatment of bodily, mental, or behavioral disorders by remedial agents or methods.

§ 632-A:2. **Aggravated Felonious Sexual Assault**

Paragraph I introductory paragraph effective until January 1, 2004; see also paragraph I introductory paragraph set out below.

I. A person is guilty of the felony of aggravated felonious sexual assault if he engages in sexual penetration with another person under any of the following circumstances:

Paragraph I introductory paragraph effective January 1, 2004; see also paragraph I introductory paragraph set out above.

I. A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances:

(a) When the actor overcomes the victim through the actual application of physical force, physical violence or superior physical strength.

(b) When the victim is physically helpless to resist.

(c) When the actor coerces the victim to submit by threatening to use physical violence or superior physical strength on the victim, and the victim believes that the actor has the present ability to execute these threats.

(d) When the actor coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim believes that the actor has the ability to execute these threats in the future.

(e) When the victim submits under circumstances involving false imprisonment, kidnapping or extortion.

(f) When the actor, without the prior knowledge or consent of the victim, administers or has knowledge of another person administering to the victim any intoxicating substance which mentally incapacitates the victim.

(g) When the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized as ethical or acceptable; or (2) Uses this position as such provider to coerce the victim to submit.

(h) When, except as between legally married spouses, the victim is mentally defective and the actor knows or has reason to know that the victim is mentally defective.

(i) When the actor through concealment or by the element of surprise is able to cause sexual penetration with the victim before the victim has an adequate chance to flee or resist.

(j) When, except as between legally married spouses, the victim is 13 years of age or older and under 16 years of age and: (1) the actor is a member of the same household as the victim; or (2) the actor is related by blood or affinity to the victim.

(k) When, except as between legally married spouses, the victim is 13 years of age or older and under 18 years of age and the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit.

(l) When the victim is less than 13 years of age.

(m) When at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act.

Subparagraph (n) effective until January 1, 2004; see also subparagraph (n) set out below.

(n) When the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit under any of the following circumstances:

(1) When the actor has supervisory authority over the victim by virtue of the victim being incarcerated in a correctional institution or juvenile detention facility; or

(2) When a probation or parole officer has supervisory authority over the victim while the victim is on parole or probation or under juvenile probation. Consent of the victim under any of the above circumstances in subparagraph (n) shall not be considered a defense.

Subparagraph (n) effective January 1, 2004; see also subparagraph (n) set out above.

(n) When the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit under any of the following circumstances:

(1) When the actor has direct supervisory or disciplinary authority over the victim by virtue of the victim being incarcerated in a correctional institution, the secure psychiatric unit, or juvenile detention facility where the actor is employed; or

(2) When the actor is a probation or parole officer or a juvenile probation and parole officer who has direct supervisory or disciplinary authority over the victim while the victim is on parole or probation or under juvenile probation.

Consent of the victim under any of the circumstances set forth in subparagraph (n) shall not be considered a defense.

II. A person is guilty of aggravated felonious sexual assault without penetration when he intentionally touches whether directly, through clothing, or otherwise, the genitalia of a person under the age of 13 under circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification.

III. A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

§ 632-A:3. **Felonious Sexual Assault**

Introductory paragraph effective until January 1, 2004; see also introductory paragraph set out below.

A person is guilty of a class B felony if he:

Introductory paragraph effective January 1, 2004; see also introductory paragraph set out above.

A person is guilty of a class B felony if such person:

I. Subjects a person to sexual contact and causes serious personal injury to the victim under any of the circumstances named in RSA 632-A:2; or

II. Engages in sexual penetration with a person other than his legal spouse who is 13 years of age or older and under 16 years of age; or

III. Engages in sexual contact with a person other than his legal spouse who is under 13 years of age.

Paragraph IV effective until January 1, 2004; see also paragraph IV set out below.

IV. Engages in sexual contact with the person when the actor is in a position of authority over the person and uses that authority to coerce the victim to submit under any of the following circumstances:

(a) When the actor has supervisory authority over the victim by virtue of the victim being incarcerated in a correctional institution or juvenile detention facility; or

(b) When a probation or parole officer has supervisory authority over the victim while the victim is on parole or probation or under juvenile probation.

Paragraph IV effective January 1, 2004; see also paragraph IV set out above.

IV. Engages in sexual contact with the person when the actor is in a position of authority over the person and uses that authority to coerce the victim to submit under any of the following circumstances:

(a) When the actor has direct supervisory or disciplinary authority over the victim by virtue of the victim being incarcerated in a correctional institution, the secure psychiatric unit, or juvenile detention facility where the actor is employed; or

(b) When the actor is a probation or parole officer or a juvenile probation and parole officer who has direct supervisory or disciplinary authority over the victim while the victim is on parole or probation or under juvenile probation.

Consent of the victim under any of the circumstances set forth in paragraph IV shall not be considered a defense.

§ 632-A:4. **Sexual Assault**

I. A person is guilty of a class A misdemeanor under any of the following circumstances:

(a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in RSA 632-A:2.

(b) In the absence of any of the circumstances set forth in RSA 632-A:2, when the actor engages in sexual penetration with a person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 3 years or less.

II. A person found guilty under subparagraph I(b) of this section shall not be required to register as a sexual offender under RSA 651-B.

III. A person is guilty of a misdemeanor if such person engages in sexual contact or sexual penetration with another person when the actor is in a position of authority over the person under any of the following circumstances:

(a) When the actor has direct supervisory or disciplinary authority over the victim by virtue of the victim being incarcerated in a correctional institution, the secure psychiatric unit, or juvenile detention facility where the actor is employed; or

(b) When the actor is a probation or parole officer or a juvenile probation and parole officer who has direct supervisory or disciplinary authority over the victim while the victim is on parole or probation or under juvenile probation.

Consent of the victim under any of the circumstances set forth in paragraph III shall not be considered a defense.

NEW JERSEY

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*** THIS DOCUMENT IS CURRENT THROUGH P.L. 2004 CHAPTER 13 ***

*** ANNOTATIONS CURRENT THROUGH JUNE 7, 2004 ***

TITLE 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE

SUBTITLE 2. SPECIFIC OFFENSES

PART 1. OFFENSES AGAINST THE PERSON

CHAPTER 14. SEXUAL OFFENSES

N.J. Stat. § 2C:14-1 (2004)

§ 2C:14-1. Definitions

The following definitions apply to this chapter:

- a. “**Actor**” means a person accused of an offense proscribed under this act;
- b. “**Victim**” means a person alleging to have been subjected to offenses proscribed by this act;
- c. “**Sexual penetration**” means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor’s instruction. The depth of insertion shall not be relevant as to the question of commission of the crime;
- d. “**Sexual contact**” means an intentional touching by the victim or actor, either directly or through clothing, of the victim’s or actor’s intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present;
- e. “**Intimate parts**” means the following body parts: sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person;
- f. “**Severe personal injury**” means severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain;
- g. “**Physically helpless**” means that condition in which a person is unconscious or is physically unable to flee or is physically unable to communicate unwillingness to act;
- h. “**Mentally defective**” means that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent;
- i. “**Mentally incapacitated**” means that condition in which a person is rendered temporarily incapable of understanding or controlling his conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without his prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or

controlling his conduct;

j. “**Coercion**” as used in this chapter shall refer to those acts which are defined as criminal coercion in section 2C:13-5(1), (2), (3), (4), (6) and (7).

§ 2C:14-2. **Sexual assault**

a. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

- (1) The victim is less than 13 years old;
- (2) The victim is at least 13 but less than 16 years old; and
 - (a) The actor is related to the victim by blood or affinity to the third degree, or
 - (b) The actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional, or occupational status, or
 - (c) The actor is a foster parent, a guardian, or stands in loco parentis within the household;
- (3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape;
- (4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;
- (5) The actor is aided or abetted by one or more other persons and the actor uses physical force or coercion;
- (6) The actor uses physical force or coercion and severe personal injury is sustained by the victim;
- (7) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated.

Aggravated sexual assault is a crime of the first degree.

b. An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.

c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

- (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
- (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional or occupational status;
- (3) The victim is at least 16 but less than 18 years old and:

- (a) The actor is related to the victim by blood or affinity to the third degree; or
 - (b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
 - (c) The actor is a foster parent, a guardian, or stands in loco parentis within the household;
- (4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.
Sexual assault is a crime of the second degree.

§ 2C:14-3. Aggravated criminal sexual contact; criminal sexual contact

- a. An actor is guilty of aggravated criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in 2C:14-2a. (2) through (7).
Aggravated criminal sexual contact is a crime of the third degree.
- b. An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through(4).

Criminal sexual contact is a crime of the fourth degree.

§ 2C:14-4. Lewdness

- a. A person commits a disorderly persons offense if he does any flagrantly lewd and offensive act which he knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed.
- b. A person commits a crime of the fourth degree if:
 - (1) He exposes his intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he is likely to be observed by a child who is less than 13 years of age where the actor is at least four years older than the child.
 - (2) He exposes his intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he is likely to be observed by a person who because of mental disease or defect is unable to understand the sexual nature of the actor's conduct.
- c. As used in this section:
“lewd acts” shall include the exposing of the genitals for the purpose of arousing or gratifying the sexual desire of the actor or of any other person.

§ 2C:14-5. Provisions generally applicable to Chapter 14

- a. The prosecutor shall not be required to offer proof that the victim resisted, or resisted to the utmost, or reasonably resisted the sexual assault in any offense proscribed by this chapter.
- b. No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim.
- c. It shall be no defense to a prosecution for a crime under this chapter that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable.

§ 2C:14-9. Invasion of privacy, degree of crime; defenses, privileges

- a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.
- b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.
- c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of [N.J.S. 2C:43-3](#), a fine not to exceed \$ 30,000 may be imposed for a violation of this subsection.
- d. It is an affirmative defense to a crime under this section that:
 - (1) the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c., and
 - (2) the actor acted with a lawful purpose.
- e. (1) It shall not be a violation of subsection a. or b. to observe another person in the access way, foyer or entrance to a fitting room or dressing room operated by a retail establishment or to photograph, film, videotape, record or otherwise reproduce

the image of such person, if the actor conspicuously posts at the entrance to the fitting room or dressing room prior notice of his intent to make the observations, photographs, films, videotapes, recordings or other reproductions.

(2) It shall be a violation of subsection c. to disclose in any manner any such photograph, film, videotape or recording of another person using a fitting room or dressing room except under the following circumstances:

(a) to law enforcement officers in connection with a criminal prosecution;

(b) pursuant to subpoena or court order for use in a legal proceeding; or

(c) to a co-worker, manager or supervisor acting within the scope of his employment.

f. It shall be a violation of subsection a. or b. to observe another person in a private dressing stall of a fitting room or dressing room operated by a retail establishment or to photograph, film, videotape, record or otherwise reproduce the image of another person in a private dressing stall of a fitting room or dressing room.

g. For purposes of this act, a law enforcement officer, or a corrections officer or guard in a correctional facility or jail, who is engaged in the official performance of his duties shall be deemed to be licensed or privileged to make and to disclose observations, photographs, films, videotapes, recordings or any other reproductions.

h. Notwithstanding the provisions of [N.J.S. 2C:1-8](#) or any other provisions of law, a conviction arising under subsection b. of this section shall not merge with a conviction under subsection c. of this section, nor shall a conviction under subsection c. merge with a conviction under subsection b.

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO
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*** ANNOTATIONS CURRENT THRU 2004-NMCA-022 AND 2004-NMSC-004

CHAPTER 30. CRIMINAL OFFENSES
ARTICLE 9. SEXUAL OFFENSES

N.M. Stat. Ann. § 30-9-2 (2004) **Enticement of child consists of:**

A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [[30-9-1](#) to [30-9-9 NMSA](#) 1978] of the Criminal Code; or

B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

§ 30-9-2. Prostitution

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.

As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission.

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

30-9-3. Patronizing prostitutes

Patronizing prostitutes consists of:

A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or

B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

As used in this section, "a sexual act" means sexual intercourse, cunnilingus,

fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or an anal opening of another whether or not there is any emission.

Whoever commits patronizing prostitutes is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

§ 30-9-4. Promoting prostitution

Promoting prostitution consists of any person, acting other than as a prostitute or patron of a prostitute:

A. knowingly establishing, owning, maintaining or managing a house of prostitution or a place where prostitution is practiced, encouraged or allowed, or participating in the establishment, ownership, maintenance or management thereof;

B. knowingly entering into any lease or rental agreement for any premises which a person partially or wholly owns or controls, knowing that such premises are intended for use as a house of prostitution or as a place where prostitution is practiced, encouraged or allowed;

C. knowingly procuring a prostitute for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed;

D. knowingly inducing another to become a prostitute;

E. knowingly soliciting a patron for a prostitute or for a house of prostitution or for any place where prostitution is practiced, encouraged or allowed;

F. knowingly procuring a prostitute for a patron and receiving compensation therefor;

G. knowingly procuring transportation for, paying for the transportation of or transporting a person within the state with the intention of promoting that person's engaging in prostitution;

H. knowingly procuring through promises, threats, duress or fraud any person to come into the state or causing a person to leave the state for the purpose of prostitution; or

I. under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution.

Whoever commits promoting prostitution is guilty of a fourth degree felony.

§ 30-9-4.1. Accepting earnings of a prostitute

Accepting the earnings of a prostitute consists of accepting, receiving, levying or appropriating money or anything of value, without consideration, from the proceeds of the earnings of a person engaged in prostitution with the knowledge that the person is engaged in prostitution and that the earnings are derived from engaging in prostitution, or knowingly owning or knowingly managing a house or other place

where prostitution is practiced or allowed and living or deriving support or maintenance, in whole or in part, from the earnings or proceeds of a person engaged in prostitution at that house or place.

Whoever commits accepting the earnings of a prostitute is guilty of a fourth degree felony.

§ 30-9-10. **Definitions**

As used in [Sections 30-9-10](#) through [30-9-16 NMSA](#) 1978:

A. **"force or coercion"** means:

- (1) the use of physical force or physical violence;
- (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
- (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
- (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
- (5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is not an element of force or coercion;

B. **"great mental anguish"** means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. **"patient"** means a person who seeks or obtains psychotherapy;

D. **"personal injury"** means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

E. **"position of authority"** means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child;

F. **"psychotherapist"** means a person who is or purports to be a:

- (1) licensed physician who practices psychotherapy;
- (2) licensed psychologist;
- (3) licensed social worker;
- (4) licensed nurse;
- (5) counselor;
- (6) substance abuse counselor;
- (7) psychiatric technician;
- (8) mental health worker;
- (9) marriage

and family therapist; (10) hypnotherapist; or (11) minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor;

G. "psychotherapy" means professional treatment or assessment of a mental or an emotional illness, symptom or condition;

H. "school" means any public or private school, including the New Mexico military institute, the New Mexico school for the visually handicapped, the New Mexico school for the deaf, the New Mexico boys' school, the New Mexico youth diagnostic and development center, the Los Lunas medical center, the Fort Stanton hospital, the Las Vegas medical center and the Carrie Tingley crippled children's hospital, that offers a program of instruction designed to educate a person in a particular place, manner and subject area. "School" does not include a college or university; and

I. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

§ 30-9-11. Criminal sexual penetration

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

(4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(5) in the commission of any other felony; or

(6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree, is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second

degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of [Section 31-18-15 NMSA](#) 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of [Sections 31-18-17](#), [31-18-25](#) and [31-18-26 NMSA](#) 1978.

E. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony. Whoever commits criminal sexual penetration in the third degree when the victim is a child who is thirteen to eighteen years of age is guilty of a third degree felony for a sexual offense against a child.

F. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

(1) not defined in Subsections C through E of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

§ 30-9-12. Criminal sexual contact

A. Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts.

B. Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

(1) inadvertent;

(2) casual social contact not intended to be sexual in nature; or

(3) generally recognized by mental health professionals as being a legitimate element of psychotherapy.

C. Criminal sexual contact in the fourth degree consists of all criminal sexual contact perpetrated:

(1) by the use of force or coercion that results in personal injury to the victim;

(2) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or

(3) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

D. Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion.

E. For the purposes of this section, “intimate parts” means the primary genital area, groin, buttocks, anus or breast.

§ 30-9-13. Criminal sexual contact of a minor

A. Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts. For the purposes of this section, “intimate parts” means the primary genital area, groin, buttocks, anus or breast.

B. Criminal sexual contact of a minor in the second degree consists of all criminal sexual contact of the unclothed intimate parts of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit;

(b) the perpetrator uses force or coercion that results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact of a minor in the second degree is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of [Section 31-18-15 NMSA](#) 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of [Sections 31-18-17, 31-18-25 and 31-18-26 NMSA](#) 1978.

C. Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(b) the perpetrator uses force or coercion which results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact of a minor in the third degree is guilty of a third degree felony for a sexual offense against a child.

D. Criminal sexual contact of a minor in the fourth degree consists of all criminal sexual contact:

(1) not defined in Subsection C of this section, of a child thirteen to eighteen years of age perpetrated with force or coercion; or

(2) of a minor perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

§ 30-9-14. Indecent exposure

A. Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view.

B. As used in this section, “primary genital area” means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits indecent exposure is guilty of a misdemeanor.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing indecent exposure to participate in and complete a program of professional counseling at his own expense.

§ 30-9-14.3. Aggravated indecent exposure

A. Aggravated indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view in a lewd and lascivious manner, with the intent to threaten or intimidate another person, while committing one or more of the following acts or criminal offenses:

(1) exposure to a child less than eighteen years of age;

(2) assault, as provided in [Section 30-3-1 NMSA](#) 1978;

(3) aggravated assault, as provided in [Section 30-3-2 NMSA](#) 1978;

(4) assault with intent to commit a violent felony, as provided in [Section 30-3-3 NMSA](#) 1978;

(5) battery, as provided in [Section 30-3-4 NMSA](#) 1978;

(6) aggravated battery, as provided in [Section 30-3-5 NMSA](#) 1978;

(7) criminal sexual penetration, as provided in [Section 30-9-11 NMSA](#) 1978; or

(8) abuse of a child, as provided in [Section 30-6-1 NMSA](#) 1978.

B. As used in this section, “primary genital area” means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits aggravated indecent exposure is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing aggravated indecent exposure to participate in and complete a program of professional counseling at his own expense.

§ 30-10-3. Incest

Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.

Whoever commits incest is guilty of a third degree felony.

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*** THIS SECTION IS CURRENT THROUGH CH. 70, 05/10/2004 ***
*** WITH THE EXCEPTION OF CHS. 1-3, 39, 41, 50, 51, 53-60 and 65 ***

PENAL LAW

PART THREE. SPECIFIC OFFENSES

TITLE H. OFFENSES AGAINST THE PERSON INVOLVING PHYSICAL
INJURY, SEXUAL CONDUCT, RESTRAINT AND INTIMIDATION

ARTICLE 130. SEX OFFENSES

NY CLS Penal § 130.00 (2004)

§ 130.00. Sex offenses; definitions of terms*

* See Editor's Note to this section.

The following definitions are applicable to this article:

1. "**Sexual intercourse**" has its ordinary meaning and occurs upon any penetration, however slight.
2. (Added, L 2003)
 - (a) "**Oral sexual conduct**" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.
 - (b) "**Anal sexual conduct**" means conduct between persons consisting of contact between the penis and anus.
3. "**Sexual contact**" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.
4. [fig 1] For the purposes of this article [fig 2] "**married**" means [fig 3] the existence of the relationship [fig 4] between the actor and the [fig 5] victim as spouses which is recognized by law at the time the actor commits an offense proscribed by this article [fig 6] against the [fig 7] victim.
5. "**Mentally [fig 1] disabled**" means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.
6. "**Mentally incapacitated**" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.
7. "**Physically helpless**" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

8. "**Forcible compulsion**" means to compel by either:
 - a. use of physical force; or
 - b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.
9. "**Foreign object**" means any instrument or article which, when inserted in the vagina, urethra, penis or rectum, is capable of causing physical injury.
10. "**Sexual conduct**" means sexual intercourse, [fig 1] oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact.
11. "**Aggravated sexual contact**" means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis or rectum of a child, thereby causing physical injury to such child.
12. (Added, L 2000) "**Health care provider**" means any person who is, or is required to be, licensed or registered or holds himself or herself out to be licensed or registered, or provides services as if he or she were licensed or registered in the profession of medicine, chiropractic, dentistry or podiatry under any of the following: article one hundred thirty-one, one hundred thirty-two, one hundred thirty-three, or one hundred forty-one of the education law.
13. (Added, L 2000) "**Mental health care provider**" means any person who is, or is required to be, licensed or registered, or holds himself or herself out to be licensed or registered, or provides mental health services as if he or she were licensed or registered in the profession of medicine, psychology or social work under any of the following: article one hundred thirty-one, one hundred fifty-three, or one hundred fifty-four of the education law.

§ 130.05. **Sex offenses; lack of consent**

1. Whether or not specifically stated, it is an element of every offense defined in this article [fig 1] that the sexual act was committed without consent of the victim.
2. Lack of consent results from:
 - (a) Forcible compulsion; or
 - (b) Incapacity to consent; or
 - (c) Where the offense charged is sexual abuse or forcible touching, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct; or
 - (d) Where the offense charged is rape in the third degree as defined in subdivision three of section 130.25, or criminal sexual act in the third degree as defined in subdivision three of section 130.40, in addition to forcible compulsion, circumstances under which, at the time of the act of intercourse, oral sexual conduct or [fig 1] anal sexual [fig 2] conduct, the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of

consent to such act under all the circumstances.

3. A person is deemed incapable of consent when he or she is:

(a) less than seventeen years old; or

(b) mentally [fig 1] disabled; or

(c) mentally incapacitated; or

(d) physically helpless; or

(e) committed to the care and custody of the state department of correctional services or a hospital, as such term is defined in subdivision two of section four hundred of the correction law, and the actor is an employee, not married to such person, who knows or reasonably should know that such person is committed to the care and custody of such department or hospital. For purposes of this paragraph, “employee” means

(i) an employee of the state department of correctional services who performs professional duties in a state correctional facility consisting of providing custody, medical or mental health services, counseling services, educational programs, or vocational training for inmates;

(ii) an employee of the division of parole who performs professional duties in a state correctional facility and who provides institutional parole services pursuant to section two hundred fifty-nine-e of the executive law; or

(iii) an employee of the office of mental health who performs professional duties in a state correctional facility or hospital, as such term is defined in subdivision two of section four hundred of the correction law, consisting of providing custody, or medical or mental health services for such inmates; or

(f) committed to the care and custody of a local correctional facility, as such term is defined in subdivision two of section forty of the correction law, and the actor is an employee, not married to such person, who knows or reasonably should know that such person is committed to the care and custody of such facility. For purposes of this paragraph, “employee” means an employee of the local correctional facility where the person is committed who performs professional duties consisting of providing custody, medical or mental health services, counseling services, educational services, or vocational training for inmates [fig 1] ; or

(g) (Added, L 2000) committed to or placed with the office of children and family services and in residential care, and the actor is an employee, not married to such person, who knows or reasonably should know that such person is committed to or placed with such office of children and family services and in residential care. For purposes of this paragraph, “employee” means an employee of the office of children and family services or of a residential facility who performs duties consisting of providing custody, medical or mental health services, counseling services, educational services, or vocational training for persons committed to or placed with the office of children and family services and in residential care; or

(h) a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree as defined in section 130.25, [fig 1] criminal sexual act in the third degree as defined in section 130.40, aggravated sexual

abuse in the fourth degree as defined in section 130.65-a, or sexual abuse in the third degree as defined in section 130.55, and the act of sexual conduct occurs during a treatment session, consultation, interview, or examination.

§ 130.10. [.] *Sex offenses; limitation; defenses

* The bracketed punctuation has been inserted by the Publisher.

1. In any prosecution under this article in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally [fig 1] disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.
2. (Added, L 2000) Conduct performed for a valid medical or mental health care purpose shall not constitute a violation of any section of this article in which incapacity to consent is based on the circumstances set forth in paragraph (h) of subdivision three of section 130.05 of this article.
3. In any prosecution for the crime of rape in the third degree as defined in section 130.25, [fig 1] criminal sexual act in the third degree as defined in section 130.40, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, or sexual abuse in the third degree as defined in section 130.55 in which incapacity to consent is based on the circumstances set forth in paragraph (h) of subdivision three of section 130.05 of this article it shall be an affirmative defense that the client or patient consented to such conduct charged after having been expressly advised by the health care or mental health care provider that such conduct was not performed for a valid medical purpose.
4. (Added, L 2003) In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, or a client or patient and the actor is a health care provider, it shall be a defense that the defendant was married to the victim as defined in subdivision four of section 130.00 of this article.

§ 130.20. [.] *Sexual misconduct

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of sexual misconduct when:

1. [fig 1] He or she engages in sexual intercourse with [fig 2] another person without [fig 3] such person's consent; or
 2. He or she engages in [fig 1] oral sexual conduct or anal sexual conduct with another person without such person's consent; or
 3. He or she engages in sexual conduct with an animal or a dead human body.
- Sexual misconduct is a class A misdemeanor.

§ 130.25. [.] *Rape in the third degree

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of rape in the third degree when:

1. He or she engages in sexual intercourse with another person [fig 1] who is incapable of consent by reason of some factor other than being less than seventeen years old; [fig 2]
2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person [fig 1] less than seventeen years old [fig 2] ; or
3. (Added, L 2000) He or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.

Rape in the third degree is a class E felony.

§ 130.30. [.] *Rape in the second degree

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of rape in the second degree when [fig 1] :

1. being eighteen years old or more, he or she engages in sexual intercourse with another person [fig 1] less than [fig 2] fifteen years old [fig 3] ; or
2. (Added, L 2000) he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated. (Added, L 2000) It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim at the time of the act.

Rape in the second degree is a class D felony.

§ 130.35. [.] *Rape in the first degree*

* The bracketed punctuation has been inserted by the Publisher.

* See Editor's Note to this section.

A [fig 1] person is guilty of rape in the first degree when he or she engages in sexual intercourse with [fig 2] another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old [fig 1] ; or
4. (Added, L 2000) Who is less than thirteen years old and the actor is eighteen years old or more.

Rape in the first degree is a class B felony.

§ 130.45. [.] *Criminal sexual act [fig 1] in the second degree

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of [fig 1] criminal sexual act in the second degree when:

1. being eighteen years old or more, he or she engages in [fig 1] oral sexual conduct or anal sexual conduct with another person less than fifteen years old; or
2. he or she engages in [fig 1] oral sexual conduct or anal sexual conduct with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

It shall be an affirmative defense to the crime of [fig 1] criminal sexual act in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim at the time of the act.

[fig 1] Criminal sexual act in the second degree is a class D felony.

§ 130.50. [.] *Criminal sexual act [fig 1] in the first degree*

* The bracketed punctuation has been inserted by the Publisher.

* See the Editor's Note to this section.

A person is guilty of [fig 1] criminal sexual act in the first degree when he or she engages in [fig 2] oral sexual conduct or anal sexual conduct with another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

[fig 1] Criminal sexual act in the first degree is a class B felony.

§ 130.52. [.] *Forcible touching

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person [fig 1] for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire.

For the purposes of this section, forcible touching includes [fig 1] squeezing, grabbing or pinching [fig 2] .

Forcible touching is a class A misdemeanor.

§ 130.55. [.] *Sexual abuse in the third degree

* The bracketed punctuation has been inserted by the Publisher.

A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor.

§ 130.60. Sexual abuse in the second degree

A person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor.

§ 130.65. Sexual abuse in the first degree

A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact:

1. By forcible compulsion; or
2. When the other person is incapable of consent by reason of being physically helpless; or
3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony.

§ 130.65-a. [.] *Aggravated sexual abuse in the fourth degree

* The bracketed punctuation has been inserted by the Publisher.

1. A person is guilty of aggravated sexual abuse in the fourth degree when:
 - (a) He or she inserts a foreign object in the vagina, urethra, penis or rectum of another person and the other person is incapable of consent by reason of some factor other than being less than seventeen years old; or
 - (b) He or she inserts a finger in the vagina, urethra, penis or rectum of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than seventeen years old.
2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the fourth degree is a class E felony.

§ 130.66. Aggravated sexual abuse in the third degree

1. A person is guilty of aggravated sexual abuse in the third degree when he inserts a foreign object in the vagina, urethra, penis or rectum of another person:

- (a) By forcible compulsion; or
- (b) When the other person is incapable of consent by reason of being physically helpless; or
- (c) When the other person is less than eleven years old.

2. (Added, L 2000) A person is guilty of aggravated sexual abuse in the third degree when he or she inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person and such person is incapable of consent by reason of being mentally disabled or mentally incapacitated.

3. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the third degree is a class D felony.

§ 130.67. Aggravated sexual abuse in the second degree

1. A person is guilty of aggravated sexual abuse in the second degree when he inserts a finger in the vagina, urethra, penis, or rectum of another person causing physical injury to such person:

(a) By forcible compulsion; or

(b) When the other person is incapable of consent by reason of being physically helpless; or

(c) When the other person is less than eleven years old.

2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the second degree is a class C felony.

§ 130.70. Aggravated sexual abuse in the first degree

1. A person is guilty of aggravated sexual abuse in the first degree when he inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person:

(a) By forcible compulsion; or

(b) When the other person is incapable of consent by reason of being physically helpless; or

(c) When the other person is less than eleven years old.

2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the first degree is a class B felony.

*** STATUTES CURRENT THROUGH THE 2004 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH MAY 31, 2004 ***

CHAPTER 14. CRIMINAL LAW
SUBCHAPTER 03 . OFFENSES AGAINST THE PERSON
ARTICLE 7A. RAPE AND OTHER SEX OFFENSES

North Carolina Sexual Offenses

14-27.1. Definitions

As used in this Article, unless the context requires otherwise:

(1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

(5) "Sexual contact" means (i) touching the sexual organ, anus, breast, groin, or buttocks of any person, or (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks.

(6) "Touching" as used in subdivision (5) of this section, means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.

§ 14-27.2. First-degree rape

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:
a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

§ 14-27.3. **Second-degree rape**

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

§ 14-27.4. **First-degree sexual offense**

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:
a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

§ 14-27.5. **Second-degree sexual offense**

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; or
(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

§ 14-27.5A. **Sexual battery**

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person; or
(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class A1 misdemeanor.

§ 14-27.7. **Intercourse and sexual offenses with certain victims; consent no defense**

(a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

(b) If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony, except when the defendant is lawfully married to the student. The term "same school" means a school at which the student is enrolled and the defendant is employed, assigned, or volunteers. A defendant who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a victim who is a student, is guilty of a Class A1 misdemeanor. This subsection shall apply unless the conduct is covered under some other provision of law providing for greater punishment. Consent is not a defense to a charge under this section. For purposes of this subsection, the terms

“school”, “school personnel”, and “student” shall have the same meaning as in G.S. 14-202.4(d). For purposes of this subsection, the term “school safety officer” shall include a school resource officer or any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools.

§ 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person.

: *** THIS DOCUMENT IS CURRENT THROUGH THE 2003 SESSION ***
*** NO LEGISLATION ENACTED IN 2004 *** ** ANNOTATIONS CURRENT THROUGH
SEPTEMBER 10, 2004 ***

TITLE 12.1. CRIMINAL CODE
CHAPTER 12.1-20. SEX OFFENSES

North Dakota Sexual Offenses

§ 12.1-20-01. **General provisions**

In sections 12.1-20-03 through 12.1-20-08:

1. When the criminality of conduct depends on a child's being below the age of fifteen, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than fourteen.
2. When criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult.

§ 12.1-20-02. **Definitions**

In sections 12.1-20-03 through 12.1-20-12:

1. "Deviate sexual act" means any form of sexual contact with an animal, bird, or dead person.
2. "Object" means anything used in commission of a sexual act other than the person of the actor.
3. "Sexual act" means sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any other portion of the human body and the penis, anus, or vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis. For the purposes of this subsection, sexual contact between the penis and the vulva, the penis and the anus, any other portion of the human body and the anus or vulva, or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required.
4. "Sexual contact" means any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.

§ 12.1-20-03. **Gross sexual imposition**

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:
 - a. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being;
 - b. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means with intent to prevent resistance;
 - c. He knows that the victim is unaware that a sexual act is being committed upon him or her;
 - d. The victim is less than fifteen years old; or
 - e. He knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.
2. A person who engages in sexual contact with another, or who causes another to engage in sexual contact, is guilty of an offense if:
 - a. The victim is less than fifteen years old; or
 - b. He compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being.
3. An offense under this section is a class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim or if his conduct violates subdivision a or d of subsection 1. Otherwise the offense is a class B felony.

§ 12.1-20-04. **Sexual imposition**

A person who engages in a sexual act or sexual contact with another, or who causes another to engage in a sexual act or sexual contact, is guilty of a class B felony if the actor:

1. Compels the other person to submit by any threat that would render a person of reasonable firmness incapable of resisting; or
2. Engages in a sexual act or sexual contact with another, whether consensual or not, as part of an induction, initiation, ceremony, pledge, hazing, or qualification to become a member or an associate of any criminal street gang as defined in section 12.1-06.2-01.

§ 12.1-20-06. Sexual abuse of wards

A person who engages in a sexual act with another person, or any person who causes another to engage in a sexual act is guilty of a class C felony if the other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over the other person.

§ 12.1-20-07. **Sexual assault**

1. A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if:

a. That person knows or has reasonable cause to believe that the contact is offensive to the other person;

b. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders that other person incapable of understanding the nature of that other person's conduct;

c. That person or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct, by administering or employing without the victim's knowledge intoxicants, a controlled substance as defined in chapter 19-03.1, or other means for the purpose of preventing resistance;

d. The other person is in official custody or detained in a hospital, prison, or other institution and the actor has supervisory or disciplinary authority over that other person;

e. The other person is a minor, fifteen years of age or older, and the actor is the other person's parent, guardian, or is otherwise responsible for general supervision of the other person's welfare; or

f. The other person is a minor, fifteen years of age or older, and the actor is an adult.

2. The offense is a class C felony if the actor's conduct violates subdivision b, c, d, or e of subsection 1, or subdivision f of subsection 1 if the adult is at least twenty-two years of age, a class A misdemeanor if the actor's conduct violates subdivision f of subsection 1 if the adult is at least eighteen years of age and not twenty-two years of age or older, or a class B misdemeanor if the actor's conduct violates subdivision a of subsection 1.

§ 12.1-20-12. **Deviate sexual act**

A person who performs a deviate sexual act with the intent to arouse or gratify his sexual desire is guilty of a class A misdemeanor.

Ohio Sexual Offenses

PAGE'S OHIO REVISED CODE ANNOTATED
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*** CURRENT THROUGH LEGISLATION APPROVED THROUGH NOVEMBER 30, 2004 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2004 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2907. SEX OFFENSES
IN GENERAL

§ 2907.01. Definitions

As used in [sections 2907.01](#) to [2907.37 of the Revised Code](#):

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) "Harmful to juveniles" means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

(1) The material or performance, when considered as a whole, appeals to the prurient interest in sex of juveniles.

(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by [section 3103.06 of the Revised Code](#);

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;

(3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.

(M) "Minor" means a person under the age of eighteen.

(N) "Mental health client or patient" has the same meaning as in [section 2305.51 of the Revised Code](#).

(O) "Mental health professional" has the same meaning as in [section 2305.115 of the Revised Code](#).

(P) "Sado-masochistic abuse" means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.

§ 2907.02. **Rape**

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in *section 3719.41 of the Revised Code* to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in *section 2929.14 of the Revised Code* that is not less than five years. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force or if the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life. If the offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating a law of another state or the United States that is substantially similar to division (A)(1)(b) of this section or if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, whoever violates division (A)(1)(b) of this section shall be imprisoned for life or life without parole.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

§ 2907.03. **Sexual battery**

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

(4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse.

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.

(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.

(7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of *section 3301.07 of the Revised Code*, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

(8) The other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.

(9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

(10) The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.

(11) The other person is confined in a detention facility, and the offender is an employee of that detention facility.

(B) Whoever violates this section is guilty of sexual battery, a felony of the third degree.

(C) As used in this section:

(1) "Detention facility" has the same meaning as in *section 2921.01 of the Revised Code*.

(2) "Institution of higher education" means a state institution of higher education defined in *section 3345.011 [3345.01.1] of the Revised Code*, a private nonprofit college or university located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code, or a school certified under Chapter 3332. of the Revised Code.

§ 2907.04. **Unlawful sexual conduct with minor**

(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

(1) Except as otherwise provided in divisions (B)(2), (3), and (4) of this section, unlawful sexual conduct with a minor is a felony of the fourth degree.

(2) Except as otherwise provided in division (B)(4) of this section, if the offender is less than four years older than the other person, unlawful sexual conduct with a minor is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree.

(4) If the offender previously has been convicted of or pleaded guilty to a violation of *section 2907.02, 2907.03, or 2907.04 of the Revised Code* or a violation of former *section 2907.12 of the Revised Code*, unlawful sexual conduct with a minor is a felony of the second degree.

§ 2907.05. **Gross sexual imposition**

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) Whoever violates this section is guilty of gross sexual imposition. Except as otherwise provided in this section, a violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in *section 3719.41 of the Revised Code* to the person surreptitiously or by force, threat of force, or deception, a violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of

the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

§ 2907.06. **Sexual imposition**

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence. (C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree. If the offender previously has been convicted of a violation of this section or of section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.12* of the Revised Code, a violation of this section is a misdemeanor of the first degree.

Oklahoma Sexual Offenses

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***

*** November 2004 Annotation Service ***

TITLE 21. CRIMES AND PUNISHMENTS

PART IV. CRIMES AGAINST PUBLIC DECENCY AND MORALITY

CHAPTER 45. RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN AND SEDUCTION

§ 1111. Rape defined

A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:

1. Where the victim is under sixteen (16) years of age;
2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;
3. Where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person;
4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit;
5. Where the victim is at the time unconscious of the nature of the act and this fact is known to the accused;
6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused or by the accused in collusion with the spouse with intent to induce that belief. In all cases of collusion between the accused and the spouse to accomplish such act, both the spouse and the accused, upon conviction, shall be deemed guilty of rape;
7. Where the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim; or
8. Where the victim is at least sixteen (16) years of age and is less than eighteen (18) years of age and is a student, or under the legal custody or supervision of any public or private elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system.

B. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse

of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.

§ 1114. Rape in first degree--Second degree

A. Rape in the first degree shall include:

1. rape committed by a person over eighteen (18) years of age upon a person under fourteen (14) years of age; or

2. rape committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or

3. rape accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the person committing the crime; or

4. rape by instrumentation resulting in bodily harm is rape by instrumentation in the first degree regardless of the age of the person committing the crime; or

5. rape by instrumentation committed upon a person under fourteen (14) years of age.

B. In all other cases, rape or rape by instrumentation is rape in the second degree.

§ 1123. Lewd or indecent proposals or acts as to child under 16 or person believed to be under 16--Sexual battery

A. Any person who shall knowingly and intentionally:

1. Make any oral, written or electronically or computer-generated lewd or indecent proposal to any child under sixteen (16) years of age for the child to have unlawful sexual relations or sexual intercourse with any person; or

2. Look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; or

3. Ask, invite, entice, or persuade any child under sixteen (16) years of age to go alone with any person to a secluded, remote, or secret place, with the unlawful and willful intent and purpose then and there to commit any crime against public decency and morality, as defined by law, with the child; or

4. In any manner lewdly or lasciviously look upon, touch, maul, or feel the body or private parts of any child under sixteen (16) years of age in any indecent manner or in any manner relating to sexual matters or sexual interest; or

5. In a lewd and lascivious manner and for the purpose of sexual gratification, urinate or defecate upon a child under sixteen (16) years of age or ejaculate upon or in the presence of a child, or force or require a child to look upon the body or private parts of another person or upon sexual acts performed in the presence of the child or force or require a child to touch or feel the body or private parts of said child or another person,

upon conviction, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not less than one (1) year nor more than twenty (20) years, except as provided in Section 3 of this act. The provisions of this section shall not apply unless the accused is at least three (3) years older than the victim. Any person convicted of a second or subsequent violation of subsection A of this section shall be guilty of a felony and shall not be eligible for probation, suspended or deferred sentence. Any person convicted of a third or subsequent violation of subsection A of this section shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a term of life or life without parole, in the discretion of the jury, or in case the jury fails or refuses to fix punishment then the same shall be pronounced by the court.

B. No person shall commit sexual battery on any other person. "Sexual battery" shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner and without the consent of that person or when committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state.

C. Any person convicted of any violation of this subsection shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary for not more than five (5) years.

OREGON REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 REGULAR SESSION OF THE 72ND
LEGISLATIVE ASSEMBLY ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 30, 2004 ***

TITLE 16. CRIMES AND PUNISHMENTS
CHAPTER 163. OFFENSES AGAINST PERSONS
SEXUAL OFFENSES

Oregon Sexual Offenses

ORS § 163.305 (2003). Definitions.

As used in chapter 743, Oregon Laws 1971, unless the context requires otherwise:

- (1) “**Deviate sexual intercourse**” means sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another.
- (2) “**Forcible compulsion**” means to compel by:
 - (a) **Physical force**; or
 - (b) A threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.
- (3) “**Mentally defective**” means that a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.
- (4) “**Mentally incapacitated**” means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense because of the influence of a controlled or other intoxicating substance administered to the person without the consent of the person or because of any other act committed upon the person without the consent of the person.
- (5) “**Physically helpless**” means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
- (6) “**Sexual contact**” means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.
- (7) “**Sexual intercourse**” has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

163.355. Rape in the third degree.

- (1) A person commits the crime of rape in the third degree if the person has sexual intercourse with another person under 16 years of age.
- (2) Rape in the third degree is a Class C felony.

163.365. Rape in the second degree.

- (1) A person who has sexual intercourse with another person commits the crime of rape in the second degree if the other person is under 14 years of age.

(2) Rape in the second degree is a Class B felony.

163.375. Rape in the first degree.

(1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:

- (a) The victim is subjected to forcible compulsion by the person;
- (b) The victim is under 12 years of age;
- (c) The victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or
- (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

(2) Rape in the first degree is a Class A felony.

163.385. Sodomy in the third degree.

(1) A person commits the crime of sodomy in the third degree if the person engages in deviate sexual intercourse with another person under 16 years of age or causes that person to engage in deviate sexual intercourse.

(2) Sodomy in the third degree is a Class C felony.

163.395. Sodomy in the second degree.

(1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the second degree if the victim is under 14 years of age.

(2) Sodomy in the second degree is a Class B felony.

163.405. Sodomy in the first degree.

(1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

- (a) The victim is subjected to forcible compulsion by the actor;
- (b) The victim is under 12 years of age;
- (c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse; or
- (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

(2) Sodomy in the first degree is a Class A felony.

163.408. Unlawful sexual penetration in the second degree.

(1) Except as permitted under ORS 163.412, a person commits the crime of unlawful sexual penetration in the second degree if the person penetrates the vagina, anus or penis of another with any object other than the penis or mouth of the actor and the victim is under 14 years of age.

(2) Unlawful sexual penetration in the second degree is a Class B felony.

163.411. Unlawful sexual penetration in the first degree.

(1) Except as permitted under ORS 163.412, a person commits the crime of unlawful sexual penetration in the first degree if the person penetrates the vagina, anus or penis of another with any object other than the penis or mouth of the actor and:

- (a) The victim is subjected to forcible compulsion;
- (b) The victim is under 12 years of age; or
- (c) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

(2) Unlawful sexual penetration in the first degree is a Class A felony.

163.415. Sexual abuse in the third degree.

(1) A person commits the crime of sexual abuse in the third degree if the person subjects another person to sexual contact and:

- (a) The victim does not consent to the sexual contact; or
- (b) The victim is incapable of consent by reason of being under 18 years of age.

(2) Sexual abuse in the third degree is a Class A misdemeanor.

163.425. Sexual abuse in the second degree.

(1) A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate Ysexual intercourse or, except as provided in ORS 163.412, penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto.

(2) Sexual abuse in the second degree is a Class C felony.

163.427. Sexual abuse in the first degree.

(1) A person commits the crime of sexual abuse in the first degree when that person:

- (a) Subjects another person to sexual contact and:
 - (A) The victim is less than 14 years of age;
 - (B) The victim is subjected to forcible compulsion by the actor; or
 - (C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or
- (b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.

(2) Sexual abuse in the first degree is a Class B felony.

163.445. Sexual misconduct.

(1) A person commits the crime of sexual misconduct if the person engages in sexual intercourse or deviate sexual intercourse with an unmarried person under 18 years of age.

(2) Sexual misconduct is a Class C misdemeanor.

PENNSYLVANIA STATUTES
ANNOTATED BY LEXISNEXIS(TM)

* THIS SECTION IS CURRENT THROUGH ACT 35 OF THE 2004 LEGISLATIVE
SESSION *

*** JUNE 2004 ANNOTATION SERVICE ***
PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 18. CRIMES AND OFFENSES
PART II. DEFINITION OF SPECIFIC OFFENSES
ARTICLE B. OFFENSES INVOLVING DANGER TO THE PERSON
CHAPTER 31. SEXUAL OFFENSES
SUBCHAPTER A. GENERAL PROVISIONS

§ 2301. Definitions

Subject to additional definitions contained in subsequent provisions of this article which are applicable to specific chapters or other provisions of this article, the following words and phrases, when used in this article shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

”BODILY INJURY.” Impairment of physical condition or substantial pain.

”DEADLY WEAPON.” Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.

”SERIOUS BODILY INJURY.” Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

”SERIOUS PROVOCATION.” Conduct sufficient to excite an intense passion in a reasonable person.

§ 3101. Definitions

Subject to additional definitions contained in subsequent provisions of this chapter which are applicable to specific provisions of this chapter, the following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

”COMPLAINANT.” An alleged victim of a crime under this chapter.

”DEVIATE SEXUAL INTERCOURSE.” Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

”FORCIBLE COMPULSION.” Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but

is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after sexual intercourse.

"FOREIGN OBJECT." Includes any physical object not a part of the actor's body.

"INDECENT CONTACT." Any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.

"SERIOUS BODILY INJURY." As defined in section 2301 (relating to definitions).

"SEXUAL INTERCOURSE." In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

§ 3102. Mistake as to age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

§ 3104. Evidence of victim's sexual conduct

(a) GENERAL RULE. --Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) EVIDENTIARY PROCEEDINGS. --A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

§ 3105. Prompt complaint

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to

promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

§ 3106. Testimony of complainants

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed.

§ 3107. Resistance not required

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

§ 3121. Rape

(a) OFFENSE DEFINED.-- A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

- (1) By forcible compulsion.
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
- (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
- (4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.
- (5) Who suffers from a mental disability which renders the complainant incapable of consent.

(6) Deleted by 2002, Dec. 9, P.L. 1350, No. 162, § 2, effective in 60 days.

(b) ADDITIONAL PENALTIES.-- In addition to the penalty provided for by subsection (a), a person may be sentenced to an additional term not to exceed ten years' confinement and an additional amount not to exceed \$ 100,000 where the person engages in sexual intercourse with a complainant and has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance.

(c) RAPE OF A CHILD.-- A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

(c) RAPE OF A CHILD.-- A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

(d) RAPE OF A CHILD WITH SERIOUS BODILY INJURY.-- A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant who is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense.

(d) RAPE OF A CHILD WITH SERIOUS BODILY INJURY.-- A person commits the offense of rape of a child resulting in serious bodily injury, a felony of the first degree, when the person violates this section and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense.

(e) SENTENCES.-- Notwithstanding the provisions of section 1103 (relating to sentence of imprisonment for felony), a person convicted of an offense under:

(1) Subsection (c) shall be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years.

(2) Subsection (d) shall be sentenced up to a maximum term of life imprisonment.

3122.1. Statutory sexual assault

Except as provided in section 3121 (relating to rape), a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other.

§ 3123. Involuntary deviate sexual intercourse

(a) OFFENSE DEFINED.-- A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;

(3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;

(4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;

(5) who suffers from a mental disability which renders him or her incapable of consent;

or

(6) Deleted by 2002, Dec. 9, P.L. 1350, No. 162, § 2, effective in 60 days.

(7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.

(b) INVOLUNTARY DEVIATE SEXUAL INTERCOURSE WITH A CHILD.-- A person commits a felony of the first degree when the person engages in deviate sexual

intercourse with a complainant who is less than 13 years of age.

(b) INVOLUNTARY DEVIATE SEXUAL INTERCOURSE WITH A CHILD.-- A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

(c) INVOLUNTARY DEVIATE SEXUAL INTERCOURSE WITH A CHILD WITH SERIOUS BODILY INJURY.-- A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense.

(c) INVOLUNTARY DEVIATE SEXUAL INTERCOURSE WITH A CHILD WITH SERIOUS BODILY INJURY.-- A person commits an offense under this section with a child resulting in serious bodily injury, a felony of the first degree, when the person violates this section and the complainant is less than 13 years of age and the complainant suffers serious bodily injury in the course of the offense.

(d) SENTENCES.-- Notwithstanding the provisions of section 1103 (relating to sentence of imprisonment for felony), a person convicted of an offense under:

(1) Subsection (b) shall be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years.

(2) Subsection (c) shall be sentenced up to a maximum term of life imprisonment.

(e) DEFINITION.-- As used in this section, the term “forcible compulsion” includes, but is not limited to, compulsion resulting in another person’s death, whether the death occurred before, during or after the sexual intercourse.

§ 3124.1. Sexual assault

Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent.

§ 3124.2. Institutional sexual assault

(a) GENERAL RULE.-- Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse), 3124.1 (relating to sexual assault) and 3125 (relating to aggravated indecent assault), a person who is an employee or agent of the Department of Corrections or a county correctional authority, youth development center, youth forestry camp, State or county juvenile detention facility, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution commits a felony of the third degree when that person engages in sexual intercourse, deviate sexual intercourse or indecent contact with an inmate, detainee, patient or resident.

(b) DEFINITION.-- As used in this section, the term “agent” means a person who

is assigned to work in a State or county correctional or juvenile detention facility, a youth development center, youth forestry camp, other licensed residential facility serving children and youth, or mental health or mental retardation facility or institution who is employed by any State or county agency or any person employed by an entity providing contract services to the agency.

§ 3125. Aggravated indecent assault

(a) OFFENSES DEFINED.-- Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

- (1) the person does so without the complainant's consent;
- (2) the person does so by forcible compulsion;
- (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;
- (5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
- (6) the complainant suffers from a mental disability which renders him or her incapable of consent;
- (7) the complainant is less than 13 years of age; or
- (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

(b) AGGRAVATED INDECENT ASSAULT OF A CHILD.-- A person commits aggravated indecent assault of a child when the person violates subsection (a)(1), (2), (3), (4), (5) or (6) and the complainant is less than 13 years of age.

(c) GRADING AND SENTENCES.--

- (1) An offense under subsection (a) is a felony of the second degree.
- (2) An offense under subsection (b) is a felony of the first degree.

§ 3126. Indecent assault

(a) OFFENSE DEFINED.-- A person who has indecent contact with the complainant or causes the complainant to have indecent contact with the person is guilty of indecent assault if:

- (1) the person does so without the complainant's consent;
- (2) the person does so by forcible compulsion;
- (3) the person does so by threat of forcible compulsion that would

prevent resistance by a person of reasonable resolution;

(4) the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;

(5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;

(6) the complainant suffers from a mental disability which renders him or her incapable of consent;

(7) the complainant is less than 13 years of age; or

(8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

(b) GRADING.-- Indecent assault under subsection (a) (7) is a misdemeanor of the first degree. Otherwise, indecent assault is a misdemeanor of the second degree.

§ 3127. Indecent exposure

(a) OFFENSE DEFINED.-- A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

(b) GRADING.-- If the person knows or should have known that any of the persons present are less than 16 years of age, indecent exposure under subsection (a) is a misdemeanor of the first degree. Otherwise, indecent exposure under subsection (a) is a misdemeanor of the second degree.

§ 3129. Sexual intercourse with animal

A person who engages in any form of sexual intercourse with an animal commits a misdemeanor of the second degree.

§ 4302. Incest

A person is guilty of incest, a felony of the second degree, if that person knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood. The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

§ 6312. Sexual abuse of children

(a) DEFINITION.-- As used in this section, “prohibited sexual act” means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.

(b) PHOTOGRAPHING, VIDEOTAPING, DEPICTING ON COMPUTER OR FILMING SEXUAL ACTS.-- Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree.

(c) DISSEMINATION OF PHOTOGRAPHS, VIDEOTAPES, COMPUTER DEPICTIONS AND FILMS.--

(1) Any person who knowingly sells, distributes, delivers, disseminates, transfers, displays or exhibits to others, or who possesses for the purpose of sale, distribution, delivery, dissemination, transfer, display or exhibition to others, any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(d) POSSESSION OF CHILD PORNOGRAPHY.--

(1) Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

(2) A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.

(e) EVIDENCE OF AGE.-- In the event a person involved in a prohibited sexual act is alleged to be a child under the age of 18 years, competent expert testimony shall be sufficient to establish the age of said person.

(E.1) MISTAKE AS TO AGE.-- Under subsection (b) only, it is no defense that the defendant did not know the age of the child. Neither a misrepresentation of age by the child nor a bona fide belief that the person is over the specified age shall be a defense.

(f) EXCEPTIONS.-- This section does not apply to any material that is possessed, controlled, brought or caused to be brought into this Commonwealth, or presented for a bona fide educational, scientific, governmental or judicial purpose.

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*** CURRENT THROUGH THE JANUARY 2004 SESSION ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 11, 2004 ***

TITLE 11. CRIMINAL OFFENSES
CHAPTER 37. SEXUAL ASSAULT

Rhode Island Sexual Offenses

§ 11-37-1. **Definitions**

The following words and phrases, when used in this chapter, have the following meanings:

- (1) "Accused" means a person accused of a sexual assault.
- (2) "Force or coercion" means when the accused does any of the following:
 - (i) Uses or threatens to use a weapon, or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
 - (ii) Overcomes the victim through the application of physical force or physical violence.
 - (iii) Coerces the victim to submit by threatening to use force or violence on the victim and the victim reasonably believes that the accused has the present ability to execute these threats.
 - (iv) Coerces the victim to submit by threatening to at some time in the future murder, inflict serious bodily injury upon or kidnap the victim or any other person and the victim reasonably believes that the accused has the ability to execute this threat.
- (3) "Intimate parts" means the genital or anal areas, groin, inner thigh, or buttock of any person or the breast of a female.
- (4) "Mentally disabled" means a person who has a mental impairment which renders that person incapable of appraising the nature of the act.
- (5) "Mentally incapacitated" means a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or who is mentally unable to communicate unwillingness to engage in the act.
- (6) "Physically helpless" means a person who is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Sexual contact" means the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification, or assault.

(8) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body, or the victim's own body upon the accused's instruction, but emission of semen is not required.

(9) "Spouse" means a person married to the accused at the time of the alleged sexual assault, except that such persons shall not be considered the spouse if the couple are living apart and a decision for divorce has been granted, whether or not a final decree has been entered.

(10) "Victim" means the person alleging to have been subjected to sexual assault.

§ 11-37-2. **First degree sexual assault**

A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if any of the following circumstances exist:

(1) The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.

(2) The accused uses force or coercion.

(3) The accused, through concealment or by the element of surprise, is able to overcome the victim.

(4) The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation.

§ 11-37-4. **Second degree sexual assault**

A person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person and if any of the following circumstances exist:

(1) The accused knows or has reason to know that the victim is mentally incapacitated, mentally disabled or physically helpless.

(2) The accused uses force or coercion.

(3) The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification or stimulation.

§ 11-37-6. **Third degree sexual assault**

A person is guilty of third degree sexual assault if he or she is over the age of eighteen (18) years and engaged in sexual penetration with another person over the age of fourteen (14) years and under the age of consent, sixteen (16) years of age.

§ 11-37-8.1. **First degree child molestation sexual assault**

A person is guilty of first degree child molestation sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under.

§ 11-37-8.3. **Second degree child molestation sexual assault**

A person is guilty of a second degree child molestation sexual assault if he or she engages in sexual contact with another person fourteen (14) years of age or under.

South Carolina Sexual Offenses

LEXISNEXIS (R) SOUTH CAROLINA ANNOTATED STATUTES
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*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 SESSION (2003 SUPPLEMENT) ***
***ANNOTATIONS CURRENT THROUGH OCTOBER 25, 2004 ***

TITLE 16. CRIMES AND OFFENSES CHAPTER 3. OFFENSES AGAINST THE PERSON ARTICLE 7. ASSAULT AND CRIMINAL SEXUAL CONDUCT

§ 16-3-651. Criminal sexual conduct: **definitions.**

For the purposes of §§ [16-3-651](#) to [16-3-659](#).1:

- (a) "Actor" means a person accused of criminal sexual conduct.
- (b) "Aggravated coercion" means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.
- (c) "Aggravated force" means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.
- (d) "Intimate parts" includes the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being.
- (e) "Mentally defective" means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.
- (f) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.
- (g) "Physically helpless" means that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.
- (h) "Sexual battery" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.
- (i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

§ 16-3-652. **Criminal sexual conduct in the first degree.**

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court.

§ 16-3-653. Criminal sexual conduct in the second degree.

(1) A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than twenty years according to the discretion of the court.

§ 16-3-654. Criminal sexual conduct in the third degree.

(1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than ten years, according to the discretion of the court.

§ 16-3-655. Criminal sexual conduct with minors.

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age.

(2) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.

(3) A person is guilty of criminal sexual conduct in the second degree if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

§ 16-3-656. **Criminal sexual conduct: assaults with intent to commit.**

Assault with intent to commit criminal sexual conduct described in the above sections shall be punishable as if the criminal sexual conduct was committed.

§ 16-3-615. **Spousal sexual battery.**

(A) Sexual battery, as defined in Section 16-3-651(h), when accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together, constitutes the felony of spousal sexual battery and, upon conviction, a person must be imprisoned not more than ten years.

(B) The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense.

(C) The provisions of Section 16-3-659.1 apply to any trial brought under this section.

(D) This section is not applicable to a purported marriage entered into by a male under the age of sixteen or a female under the age of fourteen.

South Dakota Sexual Offenses

S.D. Codified Laws § 22-1-2
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*** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***
TITLE 22. CRIMES

§ 22-22-1. “Rape” defined -- Degrees -- Felony

Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:

- (1) If the victim is less than ten years of age; or
- (2) Through the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim’s presence, accompanied by apparent power of execution; or
- (3) If the victim is incapable, because of physical or mental incapacity, of giving consent to such act; or
- (4) If the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis; or
- (5) If the victim is ten years of age, but less than sixteen years of age, and the perpetrator is at least three years older than the victim; or
- (6) If persons who are not legally married and who are within degrees of consanguinity within which marriages are by the laws of this state declared void pursuant to § 25-1-6, which is also defined as incest; or
- (7) If the victim is ten years of age but less than eighteen years of age and is the child of a spouse or former spouse of the perpetrator.

A violation of subdivision (1) of this section is rape in the first degree, which is a Class 1 felony. A violation of subdivision (2), (3), or (4) of this section is rape in the second degree, which is a Class 2 felony. A violation of subdivision (5), (6), or (7) of this section is rape in the third degree, which is a Class 3 felony. Notwithstanding § 23A-42-2 a charge brought pursuant to this section may be commenced at any time prior to the time the victim becomes age twenty-five or within seven years of the commission of the crime, whichever is longer.

§ 22-22-7. Sexual contact with child under sixteen -- Felony or misdemeanor

Any person, sixteen years of age or older, who knowingly engages in sexual contact with another person, other than that person’s spouse if the other person is under the age of sixteen years is guilty of a Class 3 felony. If the actor is less than three years older than the other person, the actor is guilty of a Class 1 misdemeanor. Notwithstanding § 23A-42-2, a charge brought pursuant to this section may be commenced at any time before the victim becomes age twenty-five or within seven years of the commission of the crime, whichever is longer.

§ 22-22-7.2. Sexual contact with person incapable of consenting -- Felony

Any person, fifteen years of age or older, who knowingly engages in sexual contact with another person, other than his spouse if the other person is sixteen years of age or older and the other person is incapable, because of physical or mental incapacity, of consenting to sexual contact, is guilty of a Class 4 felony.

§ 22-22-7.3. Sexual contact with child under sixteen years of age -- Violation as misdemeanor

Any person, younger than sixteen years of age, who knowingly engages in sexual contact with another person, other than his spouse, when such other person is younger than sixteen years of age, is guilty of a Class 1 misdemeanor.

§ 22-22-7.4. Sexual contact without consent with person capable of consenting as misdemeanor

No person fifteen years of age or older may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact. A violation of this section is a Class 1 misdemeanor.

§ 22-22-7.6. Sexual acts between jail employees and detainees -- Felony -- Juvenile correctional facility defined

Any person employed at any jail or juvenile correctional facility, who knowingly engages in an act of sexual contact or sexual penetration with another person who is in detention and under the custodial, supervisory, or disciplinary authority of the person so engaging, and which act of sexual contact or sexual penetration does not otherwise constitute a felony pursuant to the provisions of chapter 22-22, is guilty of a Class 6 felony.

A juvenile correctional facility pursuant to this section is a juvenile detention facility as defined in subdivision 26-7A-1 (16) or a juvenile facility operated by the Department of Corrections under § 1-15-1.4.

Tennessee Sexual Offenses

TENNESSEE CODE ANNOTATED
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*** CURRENT THROUGH THE 2004 SESSION ***
*** ANNOTATIONS CURRENT THROUGH APRIL 16, 2004 ***

TITLE 39. CRIMINAL OFFENSES CHAPTER 13. OFFENSES AGAINST PERSON PART 5. SEXUAL OFFENSES

39-13-501. **Definitions**

As used in §§ 39-13-501 -- 39-13-511, except as specifically provided in § 39-13-505, unless the context otherwise requires:

(1) "Coercion" means threat of kidnapping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age;

(2) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock or breast of a human being;

(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of such person's conduct;

(4) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling the person's conduct due to the influence of a narcotic, anesthetic or other substance administered to that person without the person's consent, or due to any other act committed upon that person without the person's consent;

(5) "Physically helpless" means that a person is unconscious, asleep or for any other reason physically or verbally unable to communicate unwillingness to do an act;

(6) "Sexual contact" includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification;

(7) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required; and

(8) "Victim" means the person alleged to have been subjected to criminal sexual conduct.

39-13-502. **Aggravated rape**

(a) Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;

(2) The defendant causes bodily injury to the victim;

(3) The defendant is aided or abetted by one (1) or more other persons; and

(A) Force or coercion is used to accomplish the act; or

(B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(b) Aggravated rape is a Class A felony.

39-13-503. **Rape**

(a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act;

(2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;

(3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The sexual penetration is accomplished by fraud.

(b) Rape is a Class B felony.

(c) When imposing sentence under the provisions of title 40, chapter 35, for a conviction under this section, the court shall consider as an enhancement factor that the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance.

39-13-504. **Aggravated sexual battery**

(a) Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;

(2) The defendant causes bodily injury to the victim;

(3) The defendant is aided or abetted by one (1) or more other persons; and

(A) Force or coercion is used to accomplish the act; or

(B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The victim is less than thirteen (13) years of age.

(b) Aggravated sexual battery is a Class B felony.

39-13-505. **Sexual battery**

(a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act;

(2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;

(3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The sexual contact is accomplished by fraud.

(b) As used in this section, “coercion” means the threat of kidnapping, extortion, force or violence to be performed immediately or in the future.

(c) Sexual battery is a Class E felony.

(d) When imposing sentence under the provisions of title 40, chapter 35, for a conviction under this section, the court shall consider as an enhancement factor that the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance.

39-13-506. **Statutory rape**

(a) Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim.

(b) If the person accused of statutory rape is under eighteen (18) years of age, such a defendant shall be tried as a juvenile and shall not be transferred for trial as an adult.

(c) Statutory rape is a Class E felony.

39-13-522. **Rape of a child**

(a) Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age.

(b) Rape of a child is a Class A felony.

(c) When imposing sentence under the provisions of title 40, chapter 35, for a conviction under this section, the court shall consider as an enhancement factor that

the defendant caused the victim to be mentally incapacitated or physically helpless by use of a controlled substance.

39-13-527. Sexual battery by an authority figure

(a) Sexual battery by an authority figure is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by the following circumstances:

(1) The victim was, at the time of the offense, thirteen (13) years of age or older but less than eighteen (18) years of age; and either

(A) The defendant had, at the time of the offense, supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional or occupational status and used such power to accomplish the sexual contact; or

(B) The defendant had, at the time of the offense, parental or custodial authority over the victim and used such authority to accomplish the sexual contact.

(b) Sexual battery by an authority figure is a Class C felony.

TEXAS STATUTES AND CODES
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*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***

*** June 2004 Annotation Service ***

PENAL CODE

TITLE 5. OFFENSES AGAINST THE PERSON

CHAPTER 21. SEXUAL OFFENSES

§ 21.01. Definitions

In this chapter:

(1) “Deviate sexual intercourse” means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(B) the penetration of the genitals or the anus of another person with an object.

(2) “Sexual contact” means, except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

(3) “Sexual intercourse” means any penetration of the female sex organ by the male sex organ.

§ 21.06. Homosexual Conduct

(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class C misdemeanor.

Decision upholding Tex. [Penal Code Ann. § 21.06](#) making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was overruled where petitioners were consenting adults who were entitled to respect for their private lives. *Lawrence v. Texas*, 539 U.S. 558 (2003).

§ 21.07. Public Lewdness

(a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:

(1) act of sexual intercourse;

(2) act of deviate sexual intercourse;

(3) act of sexual contact; or

(4) act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl.

(b) An offense under this section is a Class A misdemeanor.

§ 21.08. Indecent Exposure

(a) A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act.

(b) An offense under this section is a Class B misdemeanor.

§ 21.11. Indecency With a Child

(a) A person commits an offense if, with a child younger than 17 years and not the person's spouse, whether the child is of the same or opposite sex, the person:

(1) engages in sexual contact with the child or causes the child to engage in sexual contact; or

(2) with intent to arouse or gratify the sexual desire of any person:

(A) exposes the person's anus or any part of the person's genitals, knowing the child is present; or

(B) causes the child to expose the child's anus or any part of the child's genitals.

(b) It is an affirmative defense to prosecution under this section that the actor:

(1) was not more than three years older than the victim and of the opposite sex;

(2) did not use duress, force, or a threat against the victim at the time of the offense; and

(3) at the time of the offense:

(A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or

(B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

(c) In this section, "sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or

(2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(d) An offense under Subsection (a)(1) is a felony of the second degree and an offense under Subsection (a)(2) is a felony of the third degree.

§ 21.12. Improper Relationship Between Educator and Student

(a) An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse.

(b) An offense under this section is a felony of the second degree.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or both sections.

§ 21.15. Improper Photography or Visual Recording

(a) In this section, "promote" has the meaning assigned by Section 43.21.

(b) A person commits an offense if the person:

(1) photographs or by videotape or other electronic means visually records another:

(A) without the other person's consent; and

(B) with intent to arouse or gratify the sexual desire of any person;

or

(2) knowing the character and content of the photograph or recording, promotes a photograph or visual recording described by Subdivision (1).

(c) An offense under this section is a state jail felony.

(d) If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section or the other law.

§ 22.011. Sexual Assault

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(2) intentionally or knowingly:

(A) causes the penetration of the anus or sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor;

(10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser; or

(11) the actor is an employee of a facility where the other person is a resident, unless the employee and resident are formally or informally married to each other under Chapter 2, Family Code.

(c) In this section:

(1) "Child" means a person younger than 17 years of age who is not the

spouse of the actor.

(2) "Spouse" means a person who is legally married to another.

NOTICE: FIRST OF TWO VERSIONS OF SUBD. (c)(3)

Effective until February 1, 2004

(3) "Health care services provider" means:

(A) a physician licensed under Subtitle B, Title 3, Occupations Code;

(B) a chiropractor licensed under Chapter 201, Occupations Code;

(C) a licensed vocational nurse licensed under Chapter 302, Occupations Code;

(D) a physical therapist licensed under Chapter 453, Occupations Code;

(E) a physician assistant licensed under Chapter 204, Occupations Code; or

(F) a registered nurse or an advanced practice nurse licensed under Chapter 301, Occupations Code.

NOTICE: SECOND OF TWO VERSIONS OF SUBD. (c)(3)

Effective February 1, 2004

(3) "Health care services provider" means:

(A) a physician licensed under Subtitle B, Title 3, Occupations Code;

(B) a chiropractor licensed under Chapter 201, Occupations Code;

(C) a physical therapist licensed under Chapter 453, Occupations Code;

(D) a physician assistant licensed under Chapter 204, Occupations Code; or

(E) a registered nurse, a vocational nurse, or an advanced practice nurse licensed under Chapter 301, Occupations Code.

(4) "Mental health services provider" means an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a:

(A) licensed social worker as defined by Section 505.002, Occupations Code;

(B) chemical dependency counselor as defined by Section 504.001, Occupations Code;

(C) licensed professional counselor as defined by Section 503.002, Occupations Code;

(D) licensed marriage and family therapist as defined by Section 502.002, Occupations Code;

(E) member of the clergy;

(F) psychologist offering psychological services as defined by [Section 501.003, Occupations Code](#); or

(G) special officer for mental health assignment certified under [Section 1701.404, Occupations Code](#).

(5) “Employee of a facility” means a person who is an employee of a facility defined by [Section 250.001, Health and Safety Code](#), or any other person who provides services for a facility for compensation, including a contract laborer.

(d) It is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party.

(e) It is an affirmative defense to prosecution under Subsection (a)(2) that:

(1) the actor was not more than three years older than the victim and at the time of the offense:

(A) was not required under Chapter 62, Code of Criminal Procedure, as added by Chapter 668, Acts of the 75th Legislature, Regular Session, 1997, to register for life as a sex offender; or

(B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section; and

(2) the victim was a child of 14 years of age or older.

(f) An offense under this section is a felony of the second degree.

§ 22.021. Aggravated Sexual Assault

(a) A person commits an offense:

(1) if the person:

(A) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of another person by any means, without that person’s consent;

(ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person’s consent; or

(iii) causes the sexual organ of another person, without that person’s consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(B) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor;

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

(2) if:

(A) the person:

(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;

(ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;

(iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person;

(iv) uses or exhibits a deadly weapon in the course of the same criminal episode;

(v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or

(vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense;

(B) the victim is younger than 14 years of age; or

(C) the victim is an elderly individual or a disabled individual.

(b) In this section:

(1) “Child” has the meaning assigned by Section 22.011(c).

(2) “Elderly individual” and “disabled individual” have the meanings assigned by Section 22.04(c).

(c) An aggravated sexual assault under this section is without the consent of the other person if the aggravated sexual assault occurs under the same circumstances listed in Section 22.011(b).

(d) The defense provided by Section 22.011(d) applies to this section.

(e) An offense under this section is a felony of the first degree.

25.02. Prohibited Sexual Conduct

(a) An individual commits an offense if he engages in sexual intercourse or deviate sexual intercourse with a person he knows to be, without regard to legitimacy:

(1) his ancestor or descendant by blood or adoption;

(2) his stepchild or stepparent, while the marriage creating that relationship exists;

(3) his parent’s brother or sister of the whole or half blood;

(4) his brother or sister of the whole or half blood or by adoption; or
(5) the children of his brother or sister of the whole or half blood or by adoption.

(b) For purposes of this section:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person with intent to arouse or gratify the sexual desire of any person.

(2) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(c) An offense under this section is a felony of the third degree.

§ 43.01. Definitions

In this subchapter:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(2) "Prostitution" means the offense defined in Section 43.02.

(3) "Sexual contact" means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual conduct" includes deviate sexual intercourse, sexual contact, and sexual intercourse.

(5) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

§ 43.02. Prostitution

(a) A person commits an offense if he knowingly:

(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or

(2) solicits another in a public place to engage with him in sexual conduct for hire.

(b) An offense is established under Subsection (a)(1) whether the actor is to receive or pay a fee. An offense is established under Subsection (a)(2) whether the actor solicits a person to hire him or offers to hire the person solicited.

(c) An offense under this section is a Class B misdemeanor, unless the actor has previously been convicted one or two times of an offense under this section, in which event it is a Class A misdemeanor. If the actor has previously been convicted three or more times of an offense under this section, the offense is a state jail felony.

§ 43.03. Promotion of Prostitution

(a) A person commits an offense if, acting other than as a prostitute receiving

compensation for personally rendered prostitution services, he or she knowingly:

- (1) receives money or other property pursuant to an agreement to participate in the proceeds of prostitution; or
 - (2) solicits another to engage in sexual conduct with another person for compensation.
- (b) An offense under this section is a Class A misdemeanor.

§ 43.04. Aggravated Promotion of Prostitution

(a) A person commits an offense if he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.

- (b) An offense under this section is a felony of the third degree.

§ 43.05. Compelling Prostitution

(a) A person commits an offense if he knowingly:

- (1) causes another by force, threat, or fraud to commit prostitution;
- or
- (2) causes by any means a person younger than 17 years to commit prostitution.

- (b) An offense under this section is a felony of the second degree.

Utah Sexual Offenses

UTAH CODE ANNOTATED

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*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION

*** ANNOTATIONS CURRENT THROUGH 2004 UT 29, 2004 UT APP 268 ***

*** AND JULY 25, 2004 (FEDERAL CASES) ***

TITLE 76. UTAH CRIMINAL CODE

CHAPTER 5. OFFENSES AGAINST THE PERSON

PART 4. SEXUAL OFFENSES

§ 76-5-401. Unlawful sexual activity with a minor -- Elements -- Penalties -- Evidence of age raised by defendant

(1) For purposes of this section “minor” is a person who is 14 years of age or older, but younger than 16 years of age, at the time the sexual activity described in this section occurred.

(2) A person commits unlawful sexual activity with a minor if, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section 76-5-405, the actor:

(a) has sexual intercourse with the minor;

(b) engages in any sexual act with the minor involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or

(c) causes the penetration, however slight, of the genital or anal opening of the minor by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant.

(3) A violation of Subsection (2) is a third degree felony unless the defendant establishes by a preponderance of the evidence the mitigating factor that the defendant is less than four years older than the minor at the time the sexual activity occurred, in which case it is a class B misdemeanor.

§ 76-5-401.1. Sexual abuse of a minor

(1) For purposes of this section “minor” is a person who is 14 years of age or older, but younger than 16 years of age, at the time the sexual activity described in this section occurred.

(2) A person commits sexual abuse of a minor if the person is seven years or more older than the minor and, under circumstances not amounting to rape, in

violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, aggravated sexual assault, in violation of Section 76-5-405, unlawful sexual activity with a minor, in violation of Section 76-5-401, or an attempt to commit any of those offenses, the person touches the anus, buttocks, or any part of the genitals of the minor, or touches the breast of a female minor, or otherwise takes indecent liberties with the minor, or causes a minor to take indecent liberties with the actor or another person, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(3) A violation of this section is a class A misdemeanor.

§ 76-5-401.2. **Unlawful sexual conduct with a 16 or 17 year old**

(1) For purposes of this section “minor” means a person who is 16 years of age or older, but younger than 18 years of age, at the time the sexual conduct described in this section occurred.

(2) A person commits unlawful sexual conduct with a minor if, under circumstances not amounting to rape, in violation of Section 76-5-402, object rape, in violation of Section 76-5-402.2, forcible sodomy, in violation of Section 76-5-403, or aggravated sexual assault, in violation of Section 76-5-405, the actor who is ten or more years older than the minor at the time of the sexual conduct:

(a) has sexual intercourse with the minor;

(b) engages in any sexual act with the minor involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or

(c) causes the penetration, however slight, of the genital or anal opening of the minor by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant.

(3) A violation of Subsection (2) is a third degree felony.

§ 76-5-402. **Rape**

(1) A person commits rape when the actor has sexual intercourse with another person without the victim’s consent.

(2) This section applies whether or not the actor is married to the victim.

(3) Rape is a felony of the first degree.

§ 76-5-402.1. **Rape of a child**

(1) A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.

(2) Rape of a child is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

§ 76-5-402.2. **Object rape**

A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is punishable as a felony of the first degree.

§ 76-5-402.3. **Object rape of a child -- Penalty**

(1) A person commits object rape of a child when the person causes the penetration or touching, however slight, of the genital or anal opening of a child who is under the age of 14 by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse or gratify the sexual desire of any person.

(2) (a) Object rape of a child is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life.

(b) Imprisonment is mandatory in accordance with Section 76-3-406.

§ 76-5-403. **Sodomy -- Forcible sodomy**

(1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.

(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

(3) Sodomy is a class B misdemeanor. Forcible sodomy is a felony of the first degree.

§ 76-5-403.1. **Sodomy on a child**

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

(2) Sodomy upon a child is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

§ 76-5-404. **Forcible sexual abuse**

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is a felony of the second degree.

§ 76-5-404.1. **Sexual abuse of a child -- Aggravated sexual abuse of a child**

(1) As used in this section, “child” means a person under the age of 14.

(2) A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(3) Sexual abuse of a child is punishable as a second degree felony.

(4) A person commits aggravated sexual abuse of a child when in conjunction with the offense described in Subsection (2) any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) the offense was committed by the use of a dangerous weapon as defined in Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnaping;

(b) the accused caused bodily injury or severe psychological injury to the victim during or as a result of the offense;

(c) the accused was a stranger to the victim or made friends with the victim for the purpose of committing the offense;

(d) the accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;

(e) the accused, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;

(f) the accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

(g) the accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

(h) the offense was committed by a person who occupied a position of special trust in relation to the victim; "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, babysitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent;

(i) the accused encouraged, aided, allowed, or benefited from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person; or

(j) the accused caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

(5) Aggravated sexual abuse of a child is a first degree felony punishable by imprisonment for an indeterminate term of not less than five years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

§ 76-5-405. Aggravated sexual assault -- Penalty

(1) A person commits aggravated sexual assault if in the course of a rape or attempted rape, object rape or attempted object rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse the actor:

(a) causes bodily injury to the victim;

(b) uses or threatens the victim with use of a dangerous weapon as defined in Section 76-1-601;

(c) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(d) is aided or abetted by one or more persons.

(2) Aggravated sexual assault is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

§ 76-5-406. Sexual offenses against the victim without consent of victim -- Circumstances

An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy upon a child, attempted sodomy upon a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

- (1) the victim expresses lack of consent through words or conduct;
- (2) the actor overcomes the victim through the actual application of physical force or violence;
- (3) the actor is able to overcome the victim through concealment or by the element of surprise;
- (4) (a) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or
(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;
- (b) as used in this Subsection (4) “to retaliate” includes but is not limited to threats of physical force, kidnaping, or extortion;
- (5) the victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist;
- (6) the actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it;
- (7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim’s spouse;
- (8) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim’s knowledge;
- (9) the victim is younger than 14 years of age;
- (10) the victim is younger than 18 years of age and at the time of the offense the actor was the victim’s parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Subsection 76-5-404.1(4)(h);
- (11) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4); or
- (12) the actor is a health professional or religious counselor, as those terms are defined in this Subsection (12), the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim

reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested. For purposes of this Subsection (12):

(a) “health professional” means an individual who is licensed or who holds himself out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling including, but not limited to, a physician, osteopathic physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor; and

(b) “religious counselor” means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

§ 76-5-412. Custodial sexual relations -- Custodial sexual misconduct -- Definitions -- Penalties – Defenses

(1) As used in this section:

(a) “Actor” means:

(i) a correctional officer, as defined in Section 53-13-104;

(ii) a law enforcement officer, as defined in Section 53-13-103; or

(iii) an employee of, or private provider or contractor for, the Department of Corrections or a county jail.

(b) “Person in custody” means a person, either an adult 18 years of age or older, or a minor younger than 18 years of age, who is:

(i) a prisoner, as defined in Section 76-5-101, and includes a prisoner who is in the custody of the Department of Corrections created under Section 64-13-2, but who is being housed at the Utah State Hospital established under Section 62A-15-601 or other medical facility;

(ii) under correctional supervision, such as at a work release facility or as a parolee or probationer; or

(iii) under lawful or unlawful arrest, either with or without a warrant.

(c) “Private provider or contractor” means any person or entity that contracts with the Department of Corrections or with a county jail to provide services or functions that are part of the operation of the Department of Corrections or a county jail under state or local law.

(2) (a) An actor commits custodial sexual relations if the actor commits any of the acts under Subsection (3):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a person in custody; or

(B) a reasonable person in the actor’s position should have known under the circumstances that the individual was a person in custody.

(b) A violation of Subsection (2)(a) is a third degree felony, but if the person in custody is younger than 18 years of age, a violation of Subsection (2)(a) is a second degree felony.

(c) If the act committed under this Subsection (2) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (2), this Subsection (2) does not prohibit prosecution and sentencing for the more serious offense.

(3) Acts referred to in Subsection (2)(a) are:

(a) having sexual intercourse with a person in custody;

(b) engaging in any sexual act with a person in custody involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or

(c) causing the penetration, however slight, of the genital or anal opening of a person in custody by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person, regardless of the sex of any participant.

(4) (a) An actor commits custodial sexual misconduct if the actor commits any of the acts under Subsection (5):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a person in custody; or

(B) a reasonable person in the actor's position should have known under the circumstances that the individual was a person in custody.

(b) A violation of Subsection (4)(a) is a class A misdemeanor, but if the person in custody is younger than 18 years of age, a violation of Subsection (4)(a) is a third degree felony.

(c) If the act committed under this Subsection (4) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (4), this Subsection (4) does not prohibit prosecution and sentencing for the more serious offense.

(5) Acts referred to in Subsection (4)(a) are the following acts when committed with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant:

(a) touching the anus, buttocks, or any part of the genitals of a person in custody;

(b) touching the breast of a female person in custody;

(c) otherwise taking indecent liberties with a person in custody; or

(d) causing a person in custody to take indecent liberties with the actor or another person.

(6) The offenses referred to in Subsections (2)(a)(i) and (4)(a)(i) are:

(a) Section 76-5-401, unlawful sexual activity with a minor;

(b) Section 76-5-402, rape;

- (c) Section 76-5-402.1, rape of a child;
- (d) Section 76-5-402.2, object rape;
- (e) Section 76-5-402.3, object rape of a child;
- (f) Section 76-5-403, forcible sodomy;
- (g) Section 76-5-403.1, sodomy on a child;
- (h) Section 76-5-404, forcible sexual abuse;
- (i) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child; or
- (j) Section 76-5-405, aggravated sexual assault.

(7) (a) It is not a defense to the commission of the offense of custodial sexual relations under Subsection (2) or custodial sexual misconduct under Subsection (4), or an attempt to commit either of these offenses, if the person in custody is younger than 18 years of age, that the actor:

(i) mistakenly believed the person in custody to be 18 years of age or older at the time of the alleged offense; or

(ii) was unaware of the true age of the person in custody.

(b) Consent of the person in custody is not a defense to any violation or attempted violation of Subsection (2) or (4).

(8) It is a defense that the commission by the actor of an act under Subsection (2) or (4) is the result of compulsion, as the defense is described in Subsection 76-2-302(1).

§ 76-5-413. Custodial sexual relations or misconduct with youth receiving state services -- Definitions -- Penalties -- Defenses

(1) As used in this section:

(a) “Actor” means:

(i) a person employed by the Department of Human Services, as created in Section 62A-1-102, or an employee of a private provider or contractor; or

(ii) a person employed by the juvenile court of the state, or an employee of a private provider or contractor.

(b) “Department” means the Department of Human Services created in Section 62A-1-102.

(c) “Juvenile court” means the juvenile court of the state created in Section 78-3a-102.

(d) “Private provider or contractor” means any person or entity that contracts with the:

(i) department to provide services or functions that are part of the operation of the department; or

(ii) juvenile court to provide services or functions that are part of the operation of the juvenile court.

(e) “Youth receiving state services” means a person:

(i) younger than 18 years of age, except as provided under Subsection (1)(e)(ii), who is:

(A) in the custody of the department under Subsection 78-3a-118(2)(c)(ii);

or

(B) receiving services from any division of the department if any portion of the costs of these services is covered by public monies as defined in Section 76-8-401; or

(ii) younger than 21 years of age who is:

(A) in the custody of the Division of Juvenile Justice Services, or the Division of Child and Family Services; or

(B) under the jurisdiction of the juvenile court.

(2) (a) An actor commits custodial sexual relations with a youth receiving state services if the actor commits any of the acts under Subsection (3):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a youth receiving state services; or

(B) a reasonable person in the actor's position should have known under the circumstances that the individual was a youth receiving state services.

(b) A violation of Subsection (2)(a) is a third degree felony, but if the youth receiving state services is younger than 18 years of age, a violation of Subsection (2)(a) is a second degree felony.

(c) If the act committed under this Subsection (2) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (2), this Subsection (2) does not prohibit prosecution and sentencing for the more serious offense.

(3) Acts referred to in Subsection (2)(a) are:

(a) having sexual intercourse with a youth receiving state services;

(b) engaging in any sexual act with a youth receiving state services involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or

(c) causing the penetration, however slight, of the genital or anal opening of a youth receiving state services by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person, regardless of the sex of any participant or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant.

(4) (a) An actor commits custodial sexual misconduct with a youth receiving state services if the actor commits any of the acts under Subsection (5):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a youth receiving state services; or

(B) a reasonable person in the actor's position should have known under the circumstances that the individual was a youth receiving state services.

(b) A violation of Subsection (4)(a) is a class A misdemeanor, but if the youth receiving state services is younger than 18 years of age, a violation of Subsection (4)(a) is a third degree felony.

(c) If the act committed under this Subsection (4) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (4), this Subsection (4) does not prohibit prosecution and sentencing for the more serious offense.

(5) Acts referred to in Subsection (4)(a) are the following acts when committed with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant:

(a) touching the anus, buttocks, or any part of the genitals of a youth receiving state services;

(b) touching the breast of a female youth receiving state services;

(c) otherwise taking indecent liberties with a youth receiving state services; or

(d) causing a youth receiving state services to take indecent liberties with the actor or another person.

(6) The offenses referred to in Subsections (2)(a)(i) and (4)(a)(i) are:

(a) Section 76-5-401, unlawful sexual activity with a minor;

(b) Section 76-5-402, rape;

(c) Section 76-5-402.1, rape of a child;

(d) Section 76-5-402.2, object rape;

(e) Section 76-5-402.3, object rape of a child;

(f) Section 76-5-403, forcible sodomy;

(g) Section 76-5-403.1, sodomy on a child;

(h) Section 76-5-404, forcible sexual abuse;

(i) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child; or

(j) Section 76-5-405, aggravated sexual assault.

(7) (a) It is not a defense to the commission of the offense of custodial sexual relations with a youth receiving state services under Subsection (2) or custodial sexual misconduct with a youth receiving state services under Subsection (4), or an attempt to commit either of these offenses, if the youth receiving state services is younger than 18 years of age, that the actor:

(i) mistakenly believed the youth receiving state services to be 18 years of age or older at the time of the alleged offense; or

(ii) was unaware of the true age of the youth receiving state services.

(b) Consent of the youth receiving state services is not a defense to any violation or attempted violation of Subsection (2) or (4).

(8) It is a defense that the commission by the actor of an act under Subsection (2) or (4) is the result of compulsion, as the defense is described in Subsection 76-2-302(1).

Vermont Sexual Offenses

VERMONT STATUTES ANNOTATED
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FOR THE STATE OF VERMONT

*** CURRENT THROUGH THE 2003 ADJOURNED SESSION ***
*** ANNOTATIONS OF DECISIONS FROM THE VERMONT SUPREME COURT
THROUGH SEPTEMBER 30, 2003 (175 VT. REPORTS) ***

TITLE THIRTEEN. CRIMES AND CRIMINAL PROCEDURE
PART 1. CRIMES
CHAPTER 72. SEXUAL ASSAULT

§ 3251. **Definitions**

As used in this chapter:

(1) A "sexual act" means conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another.

(2) "Sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual acts, use of contraceptives, living arrangement and mode of living.

(3) "Consent" means words or actions by a person indicating a voluntary agreement to engage in a sexual act.

(4) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes substantial loss or impairment of the function of any bodily member or organ, or substantial impairment of health, or substantial disfigurement.

(5) "Bodily injury" means physical pain, illness or any impairment of physical condition.

(6) "Actor" means a person charged with sexual assault or aggravated sexual assault.

(7) "Deadly force" means physical force which a person uses with the intent of causing, or which the person knows or should have known would create a substantial risk of causing, death or serious bodily injury.

(8) "Deadly weapon" means

(A) any firearm; or

(B) any weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.

§ 3252. **Sexual assault**

(a) A person who engages in a sexual act with another person and

- (1) Compels the other person to participate in a sexual act:
 - (A) Without the consent of the other person; or
 - (B) By threatening or coercing the other person; or
 - (C) By placing the other person in fear that any person will suffer imminent bodily injury; or
 - (2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person; or
 - (3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual; or
 - (4) The other person is under the age of 18 and is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child or step-child;
shall be imprisoned for not more than 20 years, or fined not more than \$ 10,000.00, or both.
- (b) A person who engages in a sexual act with another person under the age of 16 and
 - (1) the victim is entrusted to the actor's care by authority of law or is the actor's child, grandchild, foster child, adopted child or step-child; or
 - (2) the actor is at least 18 years of age, resides in the victim's household and serves in a parental role with respect to the victim;
shall be imprisoned for not more than 35 years, or fined not more than \$ 25,000.00, or both.

§ 3253. **Aggravated sexual assault**

- (a) A person commits the crime of aggravated sexual assault if the person commits sexual assault under any one of the following circumstances:
 - (1) At the time of the sexual assault, the actor causes serious bodily injury to the victim or to another.
 - (2) The actor is joined or assisted by one or more persons in physically restraining, assaulting or sexually assaulting the victim.
 - (3) The actor commits the sexual act under circumstances which constitute the crime of kidnapping.
 - (4) The actor has previously been convicted in this state of sexual assault under subdivision 3252(a)(1) or (2) of this title or aggravated sexual assault or has been convicted in any jurisdiction in the United States or territories of an offense which would constitute sexual assault under subdivision 3252(a)(1) or (2) of this title or aggravated sexual assault if committed in this state.
 - (5) At the time of the sexual assault, the actor is armed with a deadly weapon and uses or threatens to use the deadly weapon on the victim or on another.
 - (6) At the time of the sexual assault, the actor threatens to cause imminent serious bodily injury to the victim or to another and the victim reasonably believes that the actor has the present ability to carry out the threat.

(7) At the time of the sexual assault, the actor applies deadly force to the victim.

(8) The victim is under the age of 10 and the actor is at least 18 years of age.

(9) The victim is subjected by the actor to repeated nonconsensual sexual acts as part of the same occurrence or the victim is subjected to repeated nonconsensual sexual acts as part of the actor's common scheme and plan.

(b) A person who commits the crime of aggravated sexual assault shall be punishable by a maximum sentence of life imprisonment or a fine of not more than \$ 50,000.00, or both.

Virginia Sexual Offenses
CODE OF VIRGINIA

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***THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***

*** ANNOTATIONS CURRENT THROUGH OCTOBER 12, 2004 ***

TITLE 18.2. CRIMES AND OFFENSES GENERALLY
CHAPTER 4. CRIMES AGAINST THE PERSON
ARTICLE 7. CRIMINAL SEXUAL ASSAULT

§ 18.2-61. **Rape**

A. If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the complaining witness's mental incapacity or physical helplessness, or (iii) with a child under age thirteen as the victim, he or she shall be guilty of rape.

B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

C. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years. There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 12, does not possess the physical capacity to commit a violation of this section. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after

consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-63. Carnal knowledge of child between thirteen and fifteen years of age

If any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

However, if such child is thirteen years of age or older but under fifteen years of age and consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused's junior, the accused shall be guilty of a Class 6 felony. If such consenting child is less than three years the accused's junior, the accused shall be guilty of a Class 4 misdemeanor.

In calculating whether such child is three years or more a junior of the accused minor, the actual dates of birth of the child and the accused, respectively, shall be used.

For the purposes of this section, (i) a child under the age of thirteen years shall not be considered a consenting child and (ii) "*carnal knowledge*" includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration.

§ 18.2-64.1. Carnal knowledge of certain minors

If any person providing services, paid or unpaid, to juveniles under the purview of the Juvenile and Domestic Relations District Court Law, or to juveniles who have been committed to the custody of the State Department of Juvenile Justice, carnally knows, without the use of force, any minor fifteen years of age or older, when such minor is confined or detained in jail, is detained in any facility mentioned in § 16.1-249, or has been committed to the custody of the Department of Juvenile Justice pursuant to § 16.1-278.8, knowing or having good reason to believe that (i) such minor is in such confinement or detention status, (ii) such minor is a ward of the Department of Juvenile Justice, or (iii) such minor is on probation, furlough, or leave from or has escaped or absconded from such confinement, detention, or custody, he shall be guilty of a Class 6 felony.

For the purposes of this section, "*carnal knowledge*" includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse, and animate and inanimate object sexual penetration.

§ 18.2-64.2. Carnal knowledge of an inmate, parolee, probationer, detainee or pretrial or posttrial offender; penalty

An accused shall be guilty of carnal knowledge of an inmate, parolee, probationer, detainee, or pretrial or posttrial offender if he or she is an employee or contractual employee of, or a volunteer with, a state or local correctional facility or regional jail,

the Department of Corrections, the Department of Juvenile Justice, a secure facility or detention home, as defined in § 16.1-228, a state or local court services unit, as defined in § 16.1-235, a local community-based probation program or a pretrial services program; is in a position of authority over the inmate, probationer, parolee, detainee, or a pretrial or posttrial offender; knows that the inmate, probationer, parolee, detainee, or pretrial or posttrial offender is under the jurisdiction of the state or local correctional facility, a regional jail, the Department of Corrections, the Department of Juvenile Justice, a secure facility or detention home, as defined in § 16.1-228, a state or local court services unit, as defined in § 16.1-235, a local community-based probation program, or a pretrial services program; and carnally knows, without the use of force, threat or intimidation (i) an inmate who has been committed to jail or convicted and sentenced to confinement in a state or local correctional facility or regional jail or (ii) a probationer, parolee, detainee, or a pretrial or posttrial offender under the jurisdiction of the Department of Corrections, the Department of Juvenile Justice, a secure facility or detention home, as defined in § 16.1-228, a state or local court services unit, as defined in § 16.1-235, a local community-based probation program, a pretrial services program, a local or regional jail for the purposes of imprisonment, a work program or any other parole/probationary or pretrial services program. Such offense is a Class 6 felony.

For the purposes of this section, “*carnal knowledge*” includes the acts of sexual intercourse, cunnilingus, fellatio, anallingus, anal intercourse and animate or inanimate object sexual penetration.

§ 18.2-67.1. **Forcible sodomy**

A. An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with a complaining witness who is not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person, and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness’s mental incapacity or physical helplessness.

B. An accused shall be guilty of forcible sodomy if (i) he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with his or her spouse, and (ii) such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused bodily injury to the spouse by the use of force or violence.

C. Forcible sodomy is a felony punishable by confinement in a state correctional facility for life or for any term not less than five years. In any case deemed appropriate

by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-67.2. **Object sexual penetration; penalty**

A. An accused shall be guilty of inanimate or animate object sexual penetration if he or she penetrates the labia majora or anus of a complaining witness who is not his or her spouse with any object, other than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own body with an object or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated by, an animal, and

1. The complaining witness is less than thirteen years of age, or
2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of inanimate or animate object sexual penetration if (i) he or she penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object and (ii) such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart or (ii) the defendant caused bodily injury to the spouse by the use of force or violence.

C. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state correctional facility for life or for any term not less than five years. In any case deemed appropriate by the court, all or part of any sentence imposed

for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-67.2:1. **Marital sexual assault**

A. An accused shall be guilty of marital sexual assault if (i) he or she engages in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse, or penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object, and (ii) such act is accomplished against the spouse's will by force or a present threat of force or intimidation of or against the spouse or another person.

B. A violation of this section shall be punishable by confinement in a state correctional facility for a term of not less than one year nor more than twenty years or, in the discretion of the court or jury, by confinement in jail for not more than twelve months and a fine of not more than \$ 1,000, either or both. In any case deemed appropriate by the court, all or part of any sentence may be suspended upon the defendant's completion of counseling or therapy if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

C. Upon a finding of guilt under this section in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court

may enter an adjudication of guilt and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

D. A violation of this section shall constitute a lesser, included offense of the respective violation set forth in §§ 18.2-61 B, 18.2-67.1 B or § 18.2-67.2 B.

§ 18.2-67.3. **Aggravated sexual battery**

A. An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and

1. The complaining witness is less than 13 years of age, or
2. The act is accomplished through the use of the complaining witness's mental incapacity, or
3. The act is accomplished against the will of the complaining witness by force, threat or intimidation or through the use of the complaining witness's physical helplessness, and
 - a. The complaining witness is at least 13 but less than 15 years of age, or
 - b. The accused causes serious bodily or mental injury to the complaining witness, or
 - c. The accused uses or threatens to use a dangerous weapon.

B. Aggravated sexual battery is a felony punishable by confinement in a state correctional facility for a term of not less than one nor more than 20 years and by a fine of not more than \$ 100,000.

§ 18.2-67.4. **Sexual battery**

A. An accused shall be guilty of sexual battery if he or she sexually abuses, as defined in § 18.2-67.10, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation or ruse, or through the use of the complaining witness's mental incapacity or physical helplessness, or (ii) an inmate who has been committed to jail or convicted and sentenced to confinement in a state or local correctional facility or regional jail, and the accused is an employee or contractual employee of, or a volunteer with, the state or local correctional facility or regional jail; is in a position of authority over the inmate; and knows that the inmate is under the jurisdiction of the state or local correctional facility or regional jail, or (iii) a probationer, parolee, or a pretrial or posttrial offender under the jurisdiction of the Department of Corrections, a local community-based probation program, a pretrial services program, a local or regional jail for the purposes of imprisonment, a work program or any other parole/probationary or pretrial services program and the accused is an employee or contractual employee of, or a volunteer with, the Department of

Corrections, a local community-based probation program, a pretrial services program or a local or regional jail; is in a position of authority over an offender; and knows that the offender is under the jurisdiction of the Department of Corrections, a local community-based probation program, a pretrial services program or a local or regional jail.

B. Sexual battery is a Class 1 misdemeanor.

§ 18.2-67.4:1. **Infected sexual battery; penalty**

A. Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.

B. Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.

C. “*HIV*” means the human immunodeficiency virus or any other related virus that causes acquired immunodeficiency syndrome (AIDS).

Nothing in this section shall prevent the prosecution of any other crime against persons under Chapter 4 (§ 18.2-30 et seq.) of this title. Any person charged with a violation of this section alleging he is infected with HIV shall be subject to the testing provisions of § 18.2-62.

§ 18.2-67.5. **Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery**

A. An attempt to commit rape, forcible sodomy, or inanimate or animate object sexual penetration shall be punishable as a Class 4 felony.

B. An attempt to commit aggravated sexual battery shall be a felony punishable as a Class 6 felony.

C. An attempt to commit sexual battery is a Class 1 misdemeanor.

Washington Sexual Offenses

ANNOTATED REVISED CODE OF WASHINGTON
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*** STATUTES CURRENT THROUGH 2004 REGULAR SESSION ***

*** ANNOTATIONS CURRENT THROUGH JULY 2004 ANNOTATION SERVICE ***

TITLE 9A. WASHINGTON CRIMINAL CODE
CHAPTER 9A.44. SEX OFFENSES

Rev. Code Wash. (ARCW) § 9A.44.010 (2004) **Definitions**

As used in this chapter:

(1) “**Sexual intercourse**” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) “**Sexual contact**” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) “**Married**” means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) “**Mental incapacity**” is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) “**Physically helpless**” means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) “**Forcible compulsion**” means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) “**Consent**” means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) “**Significant relationship**” means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to

provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) “**Abuse of a supervisory position**” means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor.

(10) “**Developmentally disabled**,” for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) “**Person with supervisory authority**,” for purposes of RCW 9A.44.050(1) (c) or (e) and 9A.44.100(1) (c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) “**Mentally disordered person**” for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a “mental disorder” as defined in RCW 71.05.020.

(13) “**Chemically dependent person**” for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is “chemically dependent” as defined in RCW 70.96A.020(4).

(14) “**Health care provider**” for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) “**Treatment**” for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) “**Frail elder or vulnerable adult**” means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. “Frail elder or vulnerable adult” also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

§ 9A.44.040. Rape in the first degree

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or (b) Kidnaps the victim; or (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or (d) Feloniously enters into the building or vehicle where the victim is situated.(2) Rape in the first degree is a class A felony.

§ 9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion; (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; (c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim; (d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment; (e) When the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who has a significant relationship with the victim. (2) Rape in the second degree is a class A felony.

§ 9A.44.060. Rape in the third degree

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator: (a) Where the victim did not consent as defined in *RCW 9A.44.010(7)*, to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or (b) Where there is threat of substantial unlawful harm to property rights of the victim.(2) Rape in the third degree is a class C felony.

§ 9A.44.073. Rape of a child in the first degree

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the

perpetrator and the perpetrator is at least twenty-four months older than the victim. (2) Rape of a child in the first degree is a class A felony.

§ 9A.44.076. **Rape of a child in the second degree**

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. (2) Rape of a child in the second degree is a class A felony.

§ 9A.44.079. **Rape of a child in the third degree**

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. (2) Rape of a child in the third degree is a class C felony.

§ 9A.44.083. **Child molestation in the first degree**

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. (2) Child molestation in the first degree is a class A felony.

§ 9A.44.086. **Child molestation in the second degree**

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. (2) Child molestation in the second degree is a class B felony.

§ 9A.44.089. **Child molestation in the third degree**

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. (2) Child molestation in the third degree is a class C felony.

§ 9A.44.093. **Sexual misconduct with a minor in the first degree**

(1) A person is guilty of sexual misconduct with a minor in the first degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; or (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student. (2) Sexual misconduct with a minor in the first degree is a class C felony. (3) For the purposes of this section, “school employee” means an employee of a common school defined in *RCW 28A.150.020*, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

§ 9A.44.096. **Sexual misconduct with a minor in the second degree**

(1) A person is guilty of sexual misconduct with a minor in the second degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual contact with the victim; or (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student. (2) Sexual misconduct with a minor in the second degree is a gross misdemeanor. (3) For the purposes of this section, “school employee” means an employee of a common school defined in *RCW 28A.150.020*, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

§ 9A.44.100. **Indecent liberties.**

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another: (a) By forcible compulsion; (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless; (c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim; (d) When the perpetrator

is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment; (e) When the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who has a significant relationship with the victim. (2) (a) Except as provided in (b) of this subsection, indecent liberties is a class B felony. (b) Indecent liberties by forcible compulsion is a class A felony.

§ 9A.44.105. Sexually violating human remains

(1) Any person who has sexual intercourse or sexual contact with a dead human body is guilty of a class C felony. (2) As used in this section: (a) “Sexual intercourse” (i) has its ordinary meaning and occurs upon any penetration, however slight; and (ii) also means any penetration of the vagina or anus however slight, by an object, when committed on a dead human body, except when such penetration is accomplished as part of a procedure authorized or required under chapter 68.50 RCW or other law; and (iii) also means any act of sexual contact between the sex organs of a person and the mouth or anus of a dead human body. (b) “Sexual contact” means any touching by a person of the sexual or other intimate parts of a dead human body done for the purpose of gratifying the sexual desire of the person.

9A.44.160. Custodial sexual misconduct in the first degree

(1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision; or

(b) When the victim is being detained, under arrest[,] or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.

(2) Consent of the victim is not a defense to a prosecution under this section.

(3) Custodial sexual misconduct in the first degree is a class C felony.

§ 9A.44.170. Custodial sexual misconduct in the second degree

(1) A person is guilty of custodial sexual misconduct in the second degree when the person has sexual contact with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision; or

(b) When the victim is being detained, under arrest, or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.

(2) Consent of the victim is not a defense to a prosecution under this section.

(3) Custodial sexual misconduct in the second degree is a gross misdemeanor.

West Virginia Sexual Offenses

WEST VIRGINIA CODE ANNOTATED
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(CURRENT THROUGH 2004 SECOND EXTRAORDINARY SESSION)
ANNOTATIONS CURRENT THROUGH AUGUST 27, 2004
CHAPTER 61. CRIMES AND THEIR PUNISHMENT
ARTICLE 8B. SEXUAL OFFENSES

§ 61-8B-1. **Definition of terms.**

In this article, unless a different meaning plainly is required:

(1) "Forcible compulsion" means:

(a) Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(b) Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped; or

(c) Fear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is at least four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

(2) "Married", for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship.

(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.

(4) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.

(5) "Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.

(6) "Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

(7) "Sexual intercourse" means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

(8) "Sexual intrusion" means any act between persons involving penetration, however

slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.

(9) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition.

(10) "Serious bodily injury" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.

(11) "Deadly weapon" means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.

(12) "Forensic medical examination" means an examination provided to a possible victim of a violation of the provisions of this article by medical personnel qualified to gather evidence of the violation in a manner suitable for use in a court of law, to include: An examination for physical trauma; a determination of penetration or force; a patient interview; and the collection and evaluation of other evidence that is potentially relevant to the determination that a violation of the provisions of this article occurred and to the determination of the identity of the assailant.

§ 61-8B-2. **Lack of consent.**

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.

(b) Lack of consent results from:

(1) Forcible compulsion; or

(2) Incapacity to consent; or

(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(c) A person is deemed incapable of consent when such person is:

(1) Less than sixteen years old; or

(2) Mentally defective; or

(3) Mentally incapacitated; or

(4) Physically helpless.

§ 61-8B-3. **Sexual assault in the first degree**

(a) A person is guilty of sexual assault in the first degree when:

(1) The person engages in sexual intercourse or sexual intrusion with another person and, in so doing:

(i) Inflicts serious bodily injury upon anyone; or

(ii) Employs a deadly weapon in the commission of the act; or

(2) The person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less and is not married to that person.

(b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than fifteen nor more than thirty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in a state correctional facility not less than fifteen nor more than thirty-five years.

§ 61-8B-4. Sexual assault in the second degree

(a) A person is guilty of sexual assault in the second degree when:

(1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion; or

(2) Such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty-five years.

§ 61-8B-5. Sexual assault in the third degree

(a) A person is guilty of sexual assault in the third degree when:

(1) The person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated; or

(2) The person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant and is not married to the defendant.

(b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

§ 61-8B-7. Sexual abuse in the first degree

(a) A person is guilty of sexual abuse in the first degree when:

(1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or

(2) Such person subjects another person to sexual contact who is physically helpless; or

(3) Such person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in the penitentiary not less than one year nor more than five years.

§ 61-8B-8. Sexual abuse in the second degree

(a) A person is guilty of sexual abuse in the second degree when such person subjects another person to sexual contact who is mentally defective or mentally incapacitated.

(b) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than twelve months, or fined not more than five hundred dollars and confined in the county jail not more than twelve months.

§ 61-8B-9. Sexual abuse in the third degree

(a) A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to the victim's incapacity to consent by reason of being less than sixteen years old.

(b) In any prosecution under this section it is a defense that:

(1) The defendant was less than sixteen years old; or

(2) The defendant was less than four years older than the victim.

(c) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than ninety days, or fined not more than five hundred dollars and confined in the county jail not more than ninety days.

§ 61-8B-10. Imposition of sexual intercourse or sexual intrusion on incarcerated persons; penalties

(a) Any person employed by the division of corrections, any person working at a correctional facility managed by the commissioner of corrections pursuant to contract or as an employee of a state agency, any person working at a correctional facility managed by the division of juvenile services pursuant to contract or as an employee of a state agency, any person employed by a county jail or by the regional jail and correctional facility authority or any person working at a facility managed by the regional jail and correctional facility authority or a county jail who engages in sexual intercourse or sexual intrusion with a person who is incarcerated in this

state is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility under the control of the commissioner of corrections for not less than one nor more than five years or fined not more than five thousand dollars.

(b) Any person employed by the division of corrections as a parole officer or by the West Virginia supreme court of appeals as an adult or juvenile probation officer who engages in sexual intercourse or sexual intrusion with a person said parole officer or probation officer is charged as part of his or her employment with supervising, is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility under the control of the commissioner of corrections for not less than one nor more than five years or fined not more than five thousand dollars, or both.

§ 61-8B-10. Imposition of sexual intercourse or sexual intrusion on incarcerated persons; penalties.

(a) Any person employed by the division of corrections, any person working at a correctional facility managed by the commissioner of corrections pursuant to contract or as an employee of a state agency, any person working at a correctional facility managed by the division of juvenile services pursuant to contract or as an employee of a state agency, any person employed by a county jail or by the regional jail and correctional facility authority or any person working at a facility managed by the regional jail and correctional facility authority or a county jail who engages in sexual intercourse or sexual intrusion with a person who is incarcerated in this state is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility under the control of the commissioner of corrections for not less than one nor more than five years or fined not more than five thousand dollars.

(b) Any person employed by the division of corrections as a parole officer or by the West Virginia supreme court of appeals as an adult or juvenile probation officer who engages in sexual intercourse or sexual intrusion with a person said parole officer or probation officer is charged as part of his or her employment with supervising, is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility under the control of the commissioner of corrections for not less than one nor more than five years or fined not more than five thousand dollars, or both.

Wisconsin Sexual Offenses

LEXISNEXIS (R) WISCONSIN ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***
*** AUGUST 2004 ANNOTATION SERVICE ***

CRIMINAL CODE
CHAPTER 940. CRIMES AGAINST LIFE AND BODILY SECURITY
SUBCHAPTER II BODILY SECURITY

940.225. **Sexual assault.**

(1) **FIRST DEGREE SEXUAL ASSAULT.** Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(2) **SECOND DEGREE SEXUAL ASSAULT.** Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the persons conduct, and the defendant knows of such condition.

(cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the persons conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(f) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without the consent of that person.

(g) Is an employee of a facility or program under *s. 940.295 (2) (b), (c), (h) or (k)* and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program.

(h) Has sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(i) Has sexual contact or sexual intercourse with an individual who is on probation, parole, or extended supervision if the actor is a probation, parole, or extended supervision agent who supervises the individual, either directly or through a subordinate, in his or her capacity as a probation, parole, or extended supervision agent or who has influenced or has attempted to influence another probation, parole, or extended supervision agents supervision of the individual. This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

(3) **THIRD DEGREE SEXUAL ASSAULT.** Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony. Whoever has sexual contact in the manner described in sub. (5) (b) 2. with a person without the consent of that person is guilty of a Class G felony.

(3m) **FOURTH DEGREE SEXUAL ASSAULT.** Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) **CONSENT.** “Consent”, as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of sub. (2) (c), (cm), (d), (g), (h), and (i) The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of *s. 972.11 (2)*:

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) **DEFINITIONS.** In this section:

(ab) “Correctional institution” means a jail or correctional facility, as defined in *s. 961.01 (12m)*, a secured correctional facility, as defined in *s. 938.02 (15m)*, or a secure detention facility, as defined in *s. 938.02 (16)*

(ad) “Correctional staff member” means an individual who works at a correctional institution, including a volunteer.

(ag) “Inpatient facility” has the meaning designated in *s. 51.01 (10)*

(ai) “Intoxicant” means any controlled substance, controlled substance analog or other drug, any combination of a controlled substance, controlled substance analog or other drug or any combination of an alcohol beverage and a controlled substance, controlled substance analog or other drug. “Intoxicant” does not include any alcohol beverage.

(am) "Patient" means any person who does any of the following:

1. Receives care or treatment from a facility or program under *s. 940.295 (2) (b)*, (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under *s. 940.295 (2) (b)*, (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under *s. 940.295 (2) (b)*, (c), (h) or (k), from an employee of a facility or program under *s. 940.295 (2) (b)*, (c), (h) or (k), or from a person providing services under contract with a facility or program under *s. 940.295 (2) (b)*, (c), (h) or (k)

(ar) "Resident" means any person who resides in a facility under *s. 940.295 (2) (b)*, (c), (h) or (k)

(b) "Sexual contact" means any of the following:

1. Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainants or defendants intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under *s. 940.19 (1)*

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

(c) "Sexual intercourse" includes the meaning assigned under *s. 939.22 (36)* as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a persons body or of any object into the genital or anal opening either by the defendant or upon the defendants instruction. The emission of semen is not required.

(d) "State treatment facility" has the meaning designated in *s. 51.01 (15)*

(6) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(7) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

940.22. Sexual exploitation by therapist; duty to report.

(1) DEFINITIONS. In this section:

(a) "Department" means the department of regulation and licensing.

(b) "Physician" has the meaning designated in *s. 448.01 (5)*

(c) "Psychologist" means a person who practices psychology, as described in *s. 455.01 (5)*

(d) "Psychotherapy" has the meaning designated in *s. 455.01 (6)*

(e) "Record" means any document relating to the investigation, assessment and disposition of a report under this section.

(f) "Reporter" means a therapist who reports suspected sexual contact between his or her patient or client and another therapist.

(g) "Sexual contact" has the meaning designated in *s. 940.225 (5) (b)*

(h) "Subject" means the therapist named in a report or record as being suspected of having sexual contact with a patient or client or who has been determined to have engaged in sexual contact with a patient or client.

(i) "Therapist" means a physician, psychologist, social worker, marriage and family therapist, professional counselor, nurse, chemical dependency counselor, member of the clergy or other person, whether or not licensed or certified by the state, who performs or purports to perform psychotherapy.

(2) **SEXUAL CONTACT PROHIBITED.** Any person who is or who holds himself or herself out to be a therapist and who intentionally has sexual contact with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination, is guilty of a Class F felony. Consent is not an issue in an action under this subsection.

(3) **REPORTS OF SEXUAL CONTACT.**

(a) If a therapist has reasonable cause to suspect that a patient or client he or she has seen in the course of professional duties is a victim of sexual contact by another therapist or a person who holds himself or herself out to be a therapist in violation of sub. (2), as soon thereafter as practicable the therapist shall ask the patient or client if he or she wants the therapist to make a report under this subsection. The therapist shall explain that the report need not identify the patient or client as the victim. If the patient or client wants the therapist to make the report, the patient or client shall provide the therapist with a written consent to the report and shall specify whether the patients or clients identity will be included in the report.

(b) Within 30 days after a patient or client consents under par. (a) to a report, the therapist shall report the suspicion to:

1. The department, if the reporter believes the subject of the report is licensed by the state. The department shall promptly communicate the information to the appropriate examining board or affiliated credentialing board.

2. The district attorney for the county in which the sexual contact is likely, in the opinion of the reporter, to have occurred, if subd. 1. is not applicable.

(c) A report under this subsection shall contain only information that is necessary to identify the reporter and subject and to express the suspicion that sexual contact has occurred in violation of sub. (2) The report shall not contain information as to the identity of the alleged victim of sexual contact unless the patient or client requests under par. (a) that this information be included.

(d) Whoever intentionally violates this subsection by failing to report as required under pars. (a) to (c) is guilty of a Class A misdemeanor.

(4) **CONFIDENTIALITY OF REPORTS AND RECORDS.**

(a) All reports and records made from reports under sub. (3) and maintained by the department, examining boards, affiliated credentialing boards, district attorneys and other persons, officials and institutions shall be confidential and are exempt from disclosure under *s. 19.35 (1)* Information regarding the identity of a victim or alleged victim of sexual contact by a therapist shall not be disclosed by a reporter or by persons who have received or have access to a report or record unless disclosure is consented to in writing by the victim or alleged victim. The report of information under sub. (3) and the disclosure of a report or record under this subsection does not violate any persons responsibility for maintaining the confidentiality of patient health care records, as defined in *s. 146.81 (4)* and as required under *s. 146.82* Reports and records may be disclosed only to appropriate staff of a district attorney or a law enforcement agency within this state for purposes of investigation or prosecution.

(b) 1. The department, a district attorney, an examining board or an affiliated credentialing board within this state may exchange information from a report or record on the same subject.

2. If the department receives 2 or more reports under sub. (3) regarding the same subject, the department shall communicate information from the reports to the appropriate district attorneys and may inform the applicable reporters that another report has been received regarding the same subject.

3. If a district attorney receives 2 or more reports under sub. (3) regarding the same subject, the district attorney may inform the applicable reporters that another report has been received regarding the same subject.

4. After reporters receive the information under subd. 2. or 3., they may inform the applicable patients or clients that another report was received regarding the same subject.

(c) A person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section.

(d) Whoever intentionally violates this subsection, or permits or encourages the unauthorized dissemination or use of information contained in reports and records made under this section, is guilty of a Class A misdemeanor.

(5) IMMUNITY FROM LIABILITY. Any person or institution participating in good faith in the making of a report or record under this section is immune from any civil or criminal liability that results by reason of the action. For the purpose of any civil or criminal action or proceeding, any person reporting under this section is presumed to be acting in good faith. The immunity provided under this subsection does not apply to liability resulting from sexual contact by a therapist with a patient or client.

948.02. Sexual assault of a child.

(1) **FIRST DEGREE SEXUAL ASSAULT.** Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) **SECOND DEGREE SEXUAL ASSAULT.** Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) **FAILURE TO ACT.** A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class F felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) **MARRIAGE NOT A BAR TO PROSECUTION.** A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) **DEATH OF VICTIM.** This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

948.025. Engaging in repeated acts of sexual assault of the same child.

(1) Whoever commits 3 or more violations under *s. 948.02 (1)* or (2) within a specified period of time involving the same child is guilty of:

(a) A Class B felony if at least 3 of the violations were violations of *s. 948.02 (1)*

(b) A Class C felony if fewer than 3 of the violations were violations of *s. 948.02 (1)*

(2) (a) If an action under sub. (1) (a) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of *s. 948.02 (1)* occurred within the specified period of time but need not agree on which acts constitute the requisite number.

(b) If an action under sub. (1) (b) is tried to a jury, in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations of *s. 948.02 (1)* or (2) occurred within the specified period of time but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of *s. 948.02 (1)* or (2)

(3) The state may not charge in the same action a defendant with a violation of this section and with a felony violation involving the same child under ch. 944 or a violation involving the same child under *s. 948.02, 948.05, 948.06, 948.07, 948.075, 948.08, 948.10, 948.11, or 948.12*, unless the other violation occurred outside of the time period applicable under sub. (1) This subsection does not prohibit a conviction

for an included crime under *s. 939.66* when the defendant is charged with a violation of this section.

948.09. Sexual intercourse with a child age 16 or older.

Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.

948.095. Sexual assault of a student by a school instructional staff person.

(1) In this section:

(a) "School" means a public or private elementary or secondary school.

(b) "School staff" means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.

(2) Whoever has sexual contact or sexual intercourse with a child who has attained the age of 16 years and who is not the defendant's spouse is guilty of a Class H felony if all of the following apply:

(a) The child is enrolled as a student in a school or a school district.

(b) The defendant is a member of the school staff of the school or school district in which the child is enrolled as a student.

948.05. Sexual exploitation of a child.

(1) Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child is guilty of a Class F felony:

(a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.

(b) Records or displays in any way a child engaged in sexually explicit conduct.

(1m) Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct is guilty of a Class F felony if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.

(2) A person responsible for a child's welfare who knowingly permits, allows or encourages the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1) (a) or (b) or (1m) is guilty of a Class F felony.

(3) It is an affirmative defense to prosecution for violation of sub. (1) (a) or (b) or (2) if the defendant had reasonable cause to believe that the child had attained the

age of 18 years. A defendant who raises this affirmative defense has the burden of proving this defense by a preponderance of the evidence.

948.055. Causing a child to view or listen to sexual activity.

(1) Whoever intentionally causes a child who has not attained 18 years of age to view or listen to sexually explicit conduct may be penalized as provided in sub. (2) if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.

(2) Whoever violates sub. (1) is guilty of:

(a) A Class F felony if the child has not attained the age of 13 years.

(b) A Class H felony if the child has attained the age of 13 years but has not attained the age of 18 years.

Wyoming Sexual Offenses

WYOMING STATUTES ANNOTATED
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*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SPECIAL SESSION ***
*** ANNOTATIONS CURRENT THROUGH MARCH 25, 2004 ***

TITLE 6. CRIMES AND OFFENSES
CHAPTER 2. OFFENSES AGAINST THE PERSON
ARTICLE 3. SEXUAL ASSAULT

Wyo. Stat. § 6-2-301 (2004). **Definitions.**

(a) As used in this article:

(i) “**Actor**” means the person accused of criminal assault;

(ii) “**Intimate parts**” means the external genitalia, perineum, anus or pubes of any person or the breast of a female person;

(iii) “**Physically helpless**” means unconscious, asleep or otherwise physically unable to communicate unwillingness to act;

(iv) “**Position of authority**” means that position occupied by a parent, guardian, relative, household member, teacher, employer, custodian or any other person who, by reason of his position, is able to exercise significant influence over a person;

(v) “**Sexual assault**” means any act made criminal pursuant to W.S. 6-2-302 through 6-2-304;

(vi) “**Sexual contact**” means touching, with the intention of sexual arousal, gratification or abuse, of the victim’s intimate parts by the actor, or of the actor’s intimate parts by the victim, or of the clothing covering the immediate area of the victim’s or actor’s intimate parts;

(vii) “**Sexual intrusion**” means:

(A) Any intrusion, however slight, by any object or any part of a person’s body, except the mouth, tongue or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse; or

(B) Sexual intercourse, cunnilingus, fellatio, analingus or anal intercourse with or without emission.

(viii) “**Victim**” means the person alleged to have been subjected to sexual assault;

(ix) “This article” means W.S. 6-2-301 through 6-2-313.

§ 6-2-302. **Sexual assault in the first degree**

(a) Any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if:

(i) The actor causes submission of the victim through the actual application, reasonably calculated to cause submission of the victim, of physical force or forcible confinement;

(ii) The actor causes submission of the victim by threat of death, serious bodily injury, extreme physical pain or kidnapping to be inflicted on anyone and the victim reasonably believes that the actor has the present ability to execute these threats;

(iii) The victim is physically helpless, and the actor knows or reasonably should know that the victim is physically helpless and that the victim has not consented; or

(iv) The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct.

§ 6-2-303. **Sexual assault in the second degree**

(a) Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree:

(i) The actor causes submission of the victim by threatening to retaliate in the future against the victim or the victim's spouse, parents, brothers, sisters or children, and the victim reasonably believes the actor will execute this threat. "To retaliate" includes threats of kidnapping, death, serious bodily injury or extreme physical pain;

(ii) The actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution; (iii) The actor administers, or knows that someone else administered to the victim, without the prior knowledge or consent of the victim, any substance which substantially impairs the victim's power to appraise or control his conduct; (iv) The actor knows or should reasonably know that the victim submits erroneously believing the actor to be the victim's spouse; (v) At the time of the commission of the act the victim is less than twelve (12) years of age and the actor is at least four (4) years older than the victim; (vi) The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit; or (vii) The actor inflicts sexual intrusion in treatment or examination of a victim for purposes or in a manner substantially inconsistent with reasonable medical practices.

(b) A person is guilty of sexual assault in the second degree if he subjects another person to sexual contact and causes serious bodily injury to the victim under any of the circumstances listed in W.S. 6-2-302(a)(i) through (iv) or paragraphs (a)(i) through (vi) of this section.

(c) Repealed by Laws 1997, ch. 135, § 2.

§ 6-2-304. **Sexual assault in the third degree**

(a) An actor commits sexual assault in the third degree if, under circumstances not constituting sexual assault in the first or second degree:

(i) The actor is at least four (4) years older than the victim and inflicts sexual intrusion on a victim under the age of sixteen (16) years; or

(ii) The actor is an adult and subjects a victim under the age of fourteen (14) years to sexual contact without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim;

(iii) The actor subjects a victim to sexual contact under any of the circumstances of W.S. 6-2-302(a)(i) through (iv) or 6-2-303(a)(i) through (vi) without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim.

§ 6-2-313. **Sexual battery**

(a) Except under circumstances constituting a violation of W.S. 6-2-302 through 6-2-304, 6-2-502 or 14-3-105, an actor who unlawfully subjects another person to any sexual contact is guilty of sexual battery.

(b) Sexual battery is a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than one thousand dollars (\$ 1,000.00), or both.

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A.C.A. § 5-14-101

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*** THIS SECTION IS CURRENT THROUGH THE 2003 LEGISLATIVE SESSION

*** ANNOTATIONS CURRENT THROUGH JANUARY 14, 2004 ***

TITLE 5. CRIMINAL OFFENSES
SUBTITLE 2. OFFENSES AGAINST THE PERSON
CHAPTER 14. SEXUAL OFFENSES
SUBCHAPTER 1. GENERAL PROVISIONS

◆ A.C.A. § 5-14-101 (2003)

§ 5-14-101. Definitions

As used in this chapter, unless the context otherwise requires:

- (1) "Deviate sexual activity" means any act of sexual gratification involving:
 - (A) The penetration, however slight, of the anus or mouth of one person by the penis of another person; or
 - (B) The penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person;
- (2) "Forcible compulsion" means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person;
- (3) "Guardian" means a parent, stepparent, legal guardian, legal custodian, foster parent, or anyone who by virtue of a living arrangement is placed in an apparent position of power or authority over a minor.
- (4) (A) "Mentally defective" means that a person suffers from a mental disease or defect which renders the person:
 - (i) Incapable of understanding the nature and consequences of sexual acts; or
 - (ii) Unaware the sexual act is occurring.

(B) A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient;
- (5) "Mentally incapacitated" means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance:
 - (A) Administered to the person without the person's consent; or
 - (B) Which renders the person unaware the sexual act is occurring;
- (6) "Physically helpless" means that a person is:
 - (A) (i) Unconscious; or

- (ii) Physically unable to communicate lack of consent; or
- (B) Rendered unaware the sexual act is occurring;
- (7) "Public place" means a publicly or privately owned place to which the public or substantial numbers of people have access;
- (8) "Public view" means observable or likely to be observed by a person in a public place;
- (9) "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female; and
- (10) "Sexual intercourse" means penetration, however slight, of the labia majora by a penis.

ALABAMA

§ 13A-6-68. Indecent exposure

- (a) A person commits the crime of indecent exposure if, with intent to arouse or gratify sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm in any public place or on the private premises of another or so near thereto as to be seen from such private premises.
- (b) Indecent exposure is a Class A misdemeanor.

ALASKA

Sec. 11.41.458. Indecent exposure in the first degree

- (a) An offender commits the crime of indecent exposure in the first degree if
 - (1) the offender violates AS 11.41.460(a);
 - (2) while committing the act constituting the offense, the offender knowingly masturbates; and
 - (3) the offense occurs within the observation of a person under 16 years of age.

Sec. 11.41.460. Indecent exposure in the second degree

- (a) An offender commits the crime of indecent exposure in the second degree if the offender knowingly exposes the offender's genitals in the presence of another person with reckless disregard for the offensive, insulting, or frightening effect the act may have.

A.C.A. § 5-14-111

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*** THIS SECTION IS CURRENT THROUGH THE 2003 LEGISLATIVE SESSION

*** ANNOTATIONS CURRENT THROUGH JANUARY 14, 2004 ***

TITLE 5. CRIMINAL OFFENSES
SUBTITLE 2. OFFENSES AGAINST THE PERSON
CHAPTER 14. SEXUAL OFFENSES
SUBCHAPTER 1. GENERAL PROVISIONS

A.C.A. § 5-14-111 (2003)

§ 5-14-111. Public sexual indecency

(a) A person commits public sexual indecency if he engages in any of the following acts in a public place or public view:

- (1) An act of sexual intercourse; or
- (2) An act of deviate sexual activity; or
- (3) An act of sexual contact.

Cal Pen Code § 314

DEERING'S CALIFORNIA CODES ANNOTATED

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SUPPLEMENT ***
INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH. 954,
9/30/04

PENAL CODE
PART 1. Crimes and Punishments
TITLE 9. Of Crimes Against the Person Involving Sexual Assault, and Crimes
Against Public Decency and Good Morals
CHAPTER 8. Indecent Exposure, Obscene Exhibitions, and Bawdy and Other
Disorderly Houses

Cal Pen Code § 314 (2004)

§ 314. Indecent exposure

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

Conn. Gen. Stat. § 53a-186

LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

* THIS DOCUMENT IS CURRENT THROUGH THE JAN. 6, 2003 SPECIAL SESSION *

TITLE 53a. PENAL CODE
CHAPTER 952 PENAL CODE: OFFENSES
PART XVI LOITERING IN OR ABOUT SCHOOL GROUNDS. PUBLIC INDECENCY

Conn. Gen. Stat. § 53a-186 (2003)

§ 53a-186. Public indecency: Class B misdemeanor.

(a) A person is guilty of public indecency when he performs any of the following acts in a public place: (1) An act of sexual intercourse as defined in subdivision (2) of section 53a-65; or (2) a lewd exposure of the body with intent to arouse or to satisfy the sexual desire of the person; or (3) a lewd fondling or caress of the body of another person. For the purposes of this section, "public place" means any place where the conduct may reasonably be expected to be viewed by others.

(b) Public indecency is a class B misdemeanor.

DELAWARE

§ 764. Indecent exposure in the second degree; unclassified misdemeanor

(a) A male is guilty of indecent exposure in the second degree if he exposes his genitals or buttocks under circumstances in which he knows his conduct is likely to cause affront or alarm to another person.

(b) A female is guilty of indecent exposure in the second degree if she exposes her genitals, breast or buttocks under circumstances in which she knows her conduct is likely to cause affront or alarm to another person.

§ 765. Indecent exposure in the first degree; class A misdemeanor

(a) A male is guilty of indecent exposure in the first degree if he exposes his genitals or buttocks to a person who is less than 16 years of age under circumstances in which he knows his conduct is likely to cause affront or alarm.

(b) A female is guilty of indecent exposure in the first degree if she exposes her genitals, breast or buttocks to a person who is less than 16 years of age under circumstances in which she knows her conduct is likely to cause affront or alarm.

District of Columbia Code § 22-1312 (2004)

§ 22-1312. Lewd, indecent, or obscene acts [Formerly § 22-1112]

(a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than \$ 300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.

(b) Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed \$ 1,000, or both, for each and every such offense.

O.C.G.A. § 16-1-3

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*** CURRENT THROUGH THE 2004 REGULAR AND EXTRAORDINARY
SESSION ***** ANNOTATIONS CURRENT THROUGH JANUARY 16, 2004 ***

TITLE 16. CRIMES AND OFFENSES
CHAPTER 1. GENERAL PROVISIONS

◆ O.C.G.A. § 16-1-3 (2004)

§ 16-1-3. Definitions

As used in this title, the term:

(1) "Affirmative defense" means, with respect to any affirmative defense authorized in this title, unless the state's evidence raises the issue invoking the alleged defense, the defendant must present evidence thereon to raise the issue. The enumeration in this title of some affirmative defenses shall not be construed as excluding the existence of others.

(2) "Agency" means:

(A) When used with respect to the state government, any department, commission, committee, authority, board, or bureau thereof; and

(B) When used with respect to any political subdivision of the state government, any department, commission, committee, authority, board, or bureau thereof.

(3) "Another" means a person or persons other than the accused.

(4) "Conviction" includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty.

(5) "Felony" means a crime punishable by death, by imprisonment for life, or by imprisonment for more than 12 months.

(6) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any person.

(7) "Forcible misdemeanor" means any misdemeanor which involves the use or threat of physical force or violence against any person.

(8) "Government" means the United States, the state, any political subdivision thereof, or any agency of the foregoing.

(9) "Misdemeanor" and "misdemeanor of a high and aggravated nature" mean any crime other than a felony.

(10) "Owner" means a person who has a right to possession of property which is superior to that of a person who takes, uses, obtains, or withholds it from him and which the person taking, using, obtaining, or withholding is not privileged to infringe.

(11) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all crimes or is limited to specific offenses.

(12) "Person" means an individual, a public or private corporation, an incorporated association, government, government agency, partnership, or unincorporated association.

(13) "Property" means anything of value, including but not limited to real estate,

tangible and intangible personal property, contract rights, services, choses in action, and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power.

(14) "Prosecution" means all legal proceedings by which a person's liability for a crime is determined, commencing with the return of the indictment or the filing of the accusation, and including the final disposition of the case upon appeal.

(15) "Public place" means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household.

(16) "Reasonable belief" means that the person concerned, acting as a reasonable man, believes that the described facts exist.

(17) "State" means the State of Georgia, all land and water in respect to which this state has either exclusive or concurrent jurisdiction, and the airspace above such land and water.

(18) "Without authority" means without legal right or privilege or without permission of a person legally entitled to withhold the right.

(19) "Without his consent" means that a person whose concurrence is required has not, with knowledge of the essential facts, voluntarily yielded to the proposal of the accused or of another.

O.C.G.A. § 16-6-8

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*** CURRENT THROUGH THE 2004 REGULAR AND EXTRAORDINARY
SESSION ***** ANNOTATIONS CURRENT THROUGH JANUARY 16, 2004 ***

TITLE 16. CRIMES AND OFFENSES
CHAPTER 6. SEXUAL OFFENSES

◆ O.C.G.A. § 16-6-8 (2004)

§ 16-6-8. Public indecency

(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:

- (1) An act of sexual intercourse;
- (2) A lewd exposure of the sexual organs;
- (3) A lewd appearance in a state of partial or complete nudity; or
- (4) A lewd caress or indecent fondling of the body of another person.

(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.

(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(d) For the purposes of this Code section only, "public place" shall include jails and penal and correctional institutions of the state and its political subdivisions.

(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

HRS § 712-1217

MICHIE'S HAWAII REVISED STATUTES ANNOTATED

*** STATUTES CURRENT THRU THE 2003 REGULAR AND SPECIAL SESSIONS ***

*** ANNOTATIONS CURRENT THRU DECEMBER 17, 2003 ***

DIVISION 5. CRIMES AND CRIMINAL PROCEEDINGS
TITLE 37. HAWAII PENAL CODE
CHAPTER 712. OFFENSES AGAINST PUBLIC HEALTH AND MORALS
PART II. OFFENSES RELATED TO OBSCENITY

HRS § 712-1217 (2003)

§ 712-1217. Open lewdness

(1) A person commits the offense of open lewdness if in a public place the person does any lewd act which is likely to be observed by others who would be affronted or alarmed.

(2) Open lewdness is a petty misdemeanor.

720 ILCS 5/11-9

ILLINOIS COMPILED STATUTES ANNOTATED

ILLINOIS COMPILED STATUTES ANNOTATED

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*** THIS SECTION IS CURRENT THROUGH PUBLIC ACT 93-1047 ***
*** NOVEMBER 1, 2004 ANNOTATION SERVICE ***

CHAPTER 720. CRIMINAL OFFENSES
CRIMINAL CODE
CRIMINAL CODE OF 1961
TITLE III. SPECIFIC OFFENSES
PART B. OFFENSES DIRECTED AGAINST THE PERSON
ARTICLE 11. SEX OFFENSES

720 ILCS 5/11-9 (2004) [Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 38, para. 11-9]

§ 720 ILCS 5/11-9. Public indecency

Sec. 11-9. Public indecency. (a) Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency:

(1) An act of sexual penetration or sexual conduct as defined in Section 12-12 of this Code [720 ILCS 5/12-12]; or

(2) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person.

Breast-feeding of infants is not an act of public indecency.

(b) "Public place" for purposes of this Section means any place where the conduct may reasonably be expected to be viewed by others.

(c) Sentence.

Public indecency is a Class A misdemeanor. A person convicted of a third or subsequent violation for public indecency is guilty of a Class 4 felony.

Burns Ind. Code Ann. § 35-45-4-1

BURNS INDIANA STATUTES ANNOTATED

*** (STATUTES CURRENT THROUGH 2004 REGULAR SESSION) ***

*** ANNOTATIONS CURRENT THROUGH JULY 22, 2004 ***

TITLE 35. CRIMINAL LAW AND PROCEDURE
ARTICLE 45. OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY

CHAPTER 4. PUBLIC INDECENCY -- PROSTITUTION

♦ Burns Ind. Code Ann. § 35-45-4-1 (2004)

§ 35-45-4-1. Public indecency -- Indecent exposure

(a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity with the intent to arouse the sexual desires of the person or another person; or

(4) fondles the person's genitals or the genitals of another person; commits public indecency, a Class A misdemeanor.

(b) A person at least eighteen (18) years of age who knowingly or intentionally, in a public place, appears in a state of nudity with the intent to be seen by a child less than sixteen (16) years of age commits public indecency, a Class A misdemeanor.

(c) However, the offense under subsection (a) or subsection (b) is a Class D felony if the person who commits the offense has a prior unrelated conviction:

(1) under subsection (a) or (b); or

(2) in another jurisdiction, including a military court, that is substantially equivalent to an offense described in subsection (a) or (b).

(d) As used in this section, "nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

(e) A person who, in a place other than a public place, with the intent to be seen by persons other than invitees and occupants of that place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) fondles the person's genitals or the genitals of another person; or

(4) appears in a state of nudity;

where the person can be seen by persons other than invitees and occupants of that place commits indecent exposure, a Class C misdemeanor.

KRS § 525.010

KENTUCKY REVISED STATUTES ANNOTATED

*** CURRENT THROUGH THE 2004 REGULAR SESSION ***

*** ANNOTATIONS CURRENT THROUGH JULY 16, 2004 ***

TITLE L. KENTUCKY PENAL CODE

CHAPTER 525. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

KRS § 525.010 (2004)

§ 525.010. Definitions for chapter

The following definitions apply in this chapter unless the context otherwise requires:

(1) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.

(2) "Public" means affecting or likely to affect a substantial group of persons.

(3) "Public place" means a place to which the public or a substantial group of persons has access and includes but is not limited to highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.

(4) "Transportation facility" means any conveyance, premises, or place used for or in connection with public passenger transportation by air, railroad, motor vehicle, or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad, and bus terminals and stations and all appurtenances thereto.

(5) "Riot" means a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.

(6) "Service animal" includes a:

(a) "Bomb detection dog," which means a dog that is trained to locate bombs or explosives by scent;

(b) "Narcotic detection dog," which means a dog that is trained to locate narcotics by scent;

(c) "Patrol dog," which means a dog that is trained to protect a peace officer and to apprehend a person;

(d) "Tracking dog," which means a dog that is trained to track and find a missing person, escaped inmate, or fleeing felon;

(e) "Search and rescue dog," which means a dog that is trained to locate lost or missing persons, victims of natural or man-made disasters, and human bodies;

(f) "Accelerant detection dog," which means a dog that is trained for accelerant detection, commonly referred to as arson canines;

(g) "Cadaver dog," which means a dog that is trained to find human remains;

(h) "Assistance dog," which means any dog that is trained to meet the requirements of KRS 258.500;

(i) Any dog that is trained in more than one (1) of the disciplines specified in paragraphs (a) to (h) of this subsection; or

(j) "Police horse," which means any horse that is owned, or the service of which

is employed, by a law enforcement agency for the principal purpose of aiding in detection of criminal activity, enforcement of laws, and apprehension of offenders.

La. R.S. 14:106

LOUISIANA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 FIRST EXTRA.
SESSION ***

*** October 2004 Annotation Service ***

LOUISIANA REVISED STATUTES

TITLE 14. CRIMINAL LAW

CHAPTER 1. CRIMINAL CODE

PART VI. OFFENSES AFFECTING THE PUBLIC GENERALLY

SUBPART C. OFFENSES AFFECTING THE GENERAL PEACE AND ORDER

◆ *La. R.S. 14:106 (2004)*

§ 106 Obscenity

A. The crime of obscenity is the intentional:

(1) Exposure of the genitals, pubic hair, anus, vulva, or female breast nipples in any public place or place open to the public view, or in any prison or jail, with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.

(2)(a) Participation or engagement in, or management, operation, production, presentation, performance, promotion, exhibition, advertisement, sponsorship, electronic communication, or display of, hard core sexual conduct when the trier of fact determines that the average person applying contemporary community standards would find that the conduct, taken as a whole, appeals to the prurient interest; and the hard core sexual conduct, as specifically defined herein, is presented in a patently offensive way; and the conduct taken as a whole lacks serious literary, artistic, political, or scientific value.

(b) Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:

(i) Ultimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being; or

(ii) Masturbation, excretory functions or lewd exhibition, actual, simulated, or animated, of the genitals, pubic hair, anus, vulva, or female breast nipples; or

(iii) Sadomasochistic abuse, meaning actual, simulated or animated, flagellation, or torture by or upon a person who is nude or clad in undergarments or in a costume that reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the

condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or

(iv) Actual, simulated, or animated touching, caressing, or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or

(v) Actual, simulated, or animated stimulation of a human genital organ by any device whether or not the device is designed, manufactured, or marketed for such purpose.

(3)(a) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, electronic communication, or display of obscene material, or the preparation, manufacture, publication, electronic communication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, electronic communication, or display.

(b) Obscene material is any tangible work or thing which the trier of fact determines that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and which depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) of this Subsection, and the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

(4) Requiring as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication to a purchaser or consignee that such purchaser or consignee also receive or accept any obscene material, as defined in Paragraph (3) of this Subsection, for resale, distribution, display, advertisement, electronic communication, or exhibition purposes; or, denying or threatening to deny a franchise to, or imposing a penalty, on or against, a person by reason of his refusal to accept, or his return of, such obscene material.

(5) Solicitation or enticement of an unmarried person under the age of seventeen years to commit any act prohibited by Paragraphs (1), (2), or (3) above.

(6) Advertisement, exhibition, electronic communication, or display of sexually violent material. "Violent material" is any tangible work or thing which the trier of facts determines depicts actual or simulated patently offensive acts of violence, including but not limited to, acts depicting sadistic conduct, whippings, beatings, torture, and mutilation of the human body, as described in Item (2)(b)(iii) of Subsection.

(7)(a) No person, knowing the content of an advertisement to be sexually explicit as defined in this Paragraph shall transmit or cause to be transmitted an unsolicited advertisement in an electronic communication to one or more persons within this state that contains sexually explicit materials without including in the advertisement the term "ADV-ADULT" at the beginning of the subject line of the advertisement. A "subject line" is the area of an electronic communication that contains a summary description of the content of the message.

(b) As used in this Paragraph, "sexually explicit" means the graphic depiction of

sex, including but not limited to sexual audio, text, or images; depiction of sexual activity; nudity; or sexually oriented language.

B. Lack of knowledge of age or marital status shall not constitute a defense.

C. If any employee of a theatre or bookstore acting in the course or scope of his employment, is arrested for an offense designated in this Section, the employer shall reimburse the employee for all attorney's fees and other costs of defense of such employee. Such fees and expenses may be fixed by the court exercising criminal jurisdiction after contradictory hearing or by ordinary civil process.

D. (1) The provisions of this Section do not apply to recognized and established schools, churches, museums, medical clinics, hospitals, physicians, public libraries, governmental agencies, quasi-governmental sponsored organizations and persons acting in their capacity as employees or agents of such organizations, or a person solely employed to operate a movie projector in a duly licensed theatre.

(2) For the purpose of this Paragraph, the following words and terms shall have the respective meanings defined as follows:

(a) "Recognized and established schools" means schools having a full time faculty and pupils, gathered together for instruction in a diversified curriculum.

(b) "Churches" means any church, affiliated with a national or regional denomination.

(c) "Physicians" means any licensed physician or psychiatrist.

(d) "Medical clinics and hospitals" means any clinic or hospital of licensed physicians or psychiatrists used for the reception and care of the sick, wounded or infirm.

E. This Section does not preempt, nor shall anything in this Section be construed to preempt, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments; however, in order to promote uniform obscenity legislation throughout the state, the regulation of obscenity by municipalities, parishes, and consolidated city-parish governments shall not exceed the scope of the regulatory prohibitions contained in the provisions of this Section.

F. (1) Except for those motion pictures, printed materials, electronic communication and photographic materials showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, close-up depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts, no person, firm, or corporation shall be arrested, charged, or indicted for any violations of a provision of this Section until such time as the material involved has first been the subject of an adversarial hearing under the provisions of this Section, wherein such person, firm, or corporation is made a defendant and, after such material is declared by the court to be obscene, such person, firm, or corporation continues to engage in the conduct prohibited by this Section. The sole issue at the hearing shall be whether the material is obscene.

(2) The hearing shall be held before the district court having jurisdiction over the proceedings within seventy-two hours after receipt of notice by the person, firm, or corporation. The person, firm, or corporation shall be given notice of the hearing by

registered mail or by personal service on the owner, manager, or other person having a financial interest in the material; provided, if there is no such person on the premises, then notice may be given by personal service on any employee of the person, firm, or corporation on such premises. The notice shall state the nature of the violation, the date, place, and time of the hearing, and the right to present and cross-examine witnesses.

(3) The state or any defendant may appeal from a judgment. Such appeal shall not stay the judgment. Any defendant engaging in conduct prohibited by this Section subsequent to notice of the judgment, finding the material to be obscene, shall be subject to criminal prosecution notwithstanding the appeal from the judgment.

(4) No determination by the district court pursuant to this Section shall be of any force and effect outside the judicial district in which made and no such determination shall be res judicata in any proceeding in any other judicial district. In addition, evidence of any hearing held pursuant to this Section shall not be competent or admissible in any criminal action for the violation of any other Section of this Title; provided, however, that in any criminal action, charging the violation of any other Section of this Title, against any person, firm, or corporation that was a defendant in such hearing, involving the same material declared to be obscene under the provisions of this Section, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

G. (1) On a first conviction, whoever commits the crime of obscenity shall be fined not less than one thousand dollars nor more than two thousand five hundred dollars, or imprisoned, with or without hard labor, for not less than six months nor more than three years, or both.

(2)(a) On a second conviction, the offender shall be imprisoned, with or without hard labor for not less than six months nor more than three years, and in addition may be fined not less than two thousand five hundred dollars nor more than five thousand dollars.

(b) The imprisonment provided for in Subparagraph (a), may be imposed at court discretion if the court determines that the offender, due to his employment, could not avoid engagement in the offense. This Subparagraph (b) shall not apply to the manager or other person in charge of an establishment selling or exhibiting obscene material.

(3) On a third or subsequent conviction, the offender shall be imprisoned with or without hard labor for not less than two years nor more than five years, and in addition may be fined not less than five thousand dollars nor more than ten thousand dollars.

(4) When a violation of Paragraph (1), (2), or (3) of Subsection A of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than ten thousand dollars and shall be imprisoned, with or without hard labor, for not less than two years nor more than five years, without benefit of parole, probation, or suspension of sentence.

H. (1) When a corporation is charged with violating this Section, the corporation,

the president, the vice president, the secretary, and the treasurer may all be named as defendants. Upon conviction for a violation of this Section, a corporation shall be sentenced in accordance with Subsection G hereof. All corporate officers who are named as defendants shall be subject to the penalty provisions of this Section as set forth in Subsection G.

(2) If the corporation is domiciled in this state, upon indictment or information filed against the corporation, a notice of arraignment shall be served upon the corporation, or its designated agent for service of process, which then must appear before the district court in which the prosecution is pending to plead to the charge within fifteen days of service. If no appearance is made within fifteen days, an attorney shall be appointed by the court to represent the defendant corporation with respect to the charge or to show cause why the corporation should not be enjoined from continuing in business during the pendency of the criminal proceedings. Appearance for arraignment may be made through private counsel.

(3) If the corporation is domiciled out of state and is registered to do business in Louisiana, notice of arraignment shall be served upon the corporate agent for service of process or the secretary of state, who shall then notify the corporation charged by indictment or information to appear before the district court in which the prosecution is pending for arraignment within sixty days after the notice is mailed by the secretary of state. If no appearance is made within sixty days the court shall appoint an attorney to represent the defendant corporation with respect to the charge or to show cause why the corporation should not be enjoined from continuing in business during the pendency of the criminal proceedings. Appearance for arraignment may be made by private counsel.

(4) If the corporation is domiciled out of state and is not registered to do business in Louisiana, notice of arraignment of the corporation shall be served upon the secretary of state and an employee, officer, or agent for service of process of the corporation found within the parish where the violation of this Section has allegedly occurred. Such notice shall act as a bar to that corporation registering to do business in Louisiana until it appears before the district court in which the prosecution is pending to answer the charge.

ALM GL ch. 272, § 16

ANNOTATED LAWS OF MASSACHUSETTS

*** THIS DOCUMENT IS CURRENT THROUGH CHAPTER 390, 11/02/04 ***

PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

TITLE I. CRIMES AND PUNISHMENTS

CHAPTER 272. CRIMES AGAINST CHASTITY, MORALITY, DECENCY AND
GOOD ORDER

ALM GL ch. 272, § 16 (2004)

§ 16. Lascivious Cohabitation and Lewdness.

A man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars.

§ 35. Unnatural and Lascivious Acts.

Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years.

§ 53. Common Night Walkers, Common Railers and Brawlers, etc.

Common night walkers, common street walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, disturbers of the peace, keepers of noisy and disorderly houses, and persons guilty of indecent exposure may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

MCLS § 750.335a

MICHIGAN COMPILED LAWS SERVICE
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*** WITH THE EXCEPTION OF P.A. 359 ***

CHAPTER 750 MICHIGAN PENAL CODE
THE MICHIGAN PENAL CODE
CHAPTER XLVIII. INDECENCY AND IMMORALITY

MCLS § 750.335a (2004)

MCL § 750.335a

§ 750.335a. Indecent exposure.

Sec. 335a. Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than \$1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

§ 750.338. Gross indecency; between male persons.

Sec. 338. Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than \$2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

§ 750.338a. Gross indecency; female persons.

Sec. 338a. Any female person who, in public or in private, commits or is a party to the commission of, or any person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than \$2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

§ 750.338b. Gross indecency; between male and female persons.

Sec. 338b. Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section. Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not

more than 5 years, or by a fine of not more than \$2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

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OBSCENITY
PART 3. PARTICULAR MATTERS AND ACTIVITIES

Dunnell Minn. Digest OBSCENITY § 3.05 (4th ed.)

§ 3.05 Indecent exposure

a. Exposure to public; statute

A person is guilty of a misdemeanor who in any public place, or in any place where others are present: (1) willfully and lewdly exposes the person's body, or the private parts thereof; (2) procures another to expose private parts; or (3) engages in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in (1) and (2) above. Minnesota courts define "public place" as an area in which a person has no reasonable expectation of privacy. A person is guilty of a gross misdemeanor if: (1) the person commits indecent exposure in the presence of a minor under the age of sixteen; or (2) the person violates the indecent exposure statute, or [Minnesota Statutes sections 609.342 to 609.3451](#), or a statute from another state in conformity with any of those sections.

A complaint for indecent exposure on a designated public street "in the presence of citizens and travelers then and there being and passing" has been held sufficient under an ordinance prohibiting indecent exposure on any street or public place, for it is unnecessary to allege that the exposure was before a particular person.

b. Intent

It has been held that before the offense of indecent exposure can be established, evidence must be sufficient to sustain a finding that the misconduct complained of was committed with the deliberate intent of being indecent or lewd. Ordinary acts or conduct involving exposure of the person as the result of carelessness or thoughtlessness do not in themselves establish the offense.

The indecent exposure statute requires only a willful and lewd exposure, occurring in a public place where others are present, and an intent to offend the sensibilities of the observers is not an element of the indecent exposure offense.

Construing the indecent exposure statute to require proof of willful lewdness, not a specific intent to offend an unwilling audience, is not an unconstitutional, retroactive application of the law, because the cases interpreting the statute have never applied an intent-to-offend

standard.

To establish intent where the act does not occur in a public place or where it is otherwise certain to be observed, some evidence further than the act itself must be presented. Ordinarily, intent is established by evidence of motions, signals, sounds, or other acts by the accused designed to attract attention to his exposed condition or by his display in a place so public and open that it must be reasonably presumed that it was intended to be witnessed. For example, the evidence supported the indecent exposure conviction of a defendant for standing completely naked in the doorway of his home and attracting the attention of three passing high school girls by saying, "Hi, girls."

NEVADA REVISED STATUTES ANNOTATED
*** STATUTES CURRENT THRU ALL 2003 LEGISLATION ***
*** (ANNOTATIONS CURRENT FROM CASES POSTED ON LEXIS.COM
THROUGH APRIL 25, 2004) ***
TITLE 15. CRIMES AND PUNISHMENTS
CHAPTER 201. CRIMES AGAINST PUBLIC DECENCY AND GOOD MORALS
LEWDNESS AND INDECENT EXPOSURE

§ 201.210 (2004). Open or gross lewdness; penalty

1. A person who commits any act of open or gross lewdness is guilty:

(a) For the first offense, of a gross misdemeanor.

(b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.

2. For the purposes of this section, the breast feeding of a child by the mother of the child does not constitute an act of open or gross lewdness.

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO

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*** ANNOTATIONS CURRENT THRU 2004-NMCA-077 and 2004-NMSC-025 ***

CHAPTER 30. CRIMINAL OFFENSES

ARTICLE 9. SEXUAL OFFENSES

N.M. Stat. Ann. § 30-9-14 (2004). **Indecent exposure**

A. Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view.

B. As used in this section, "primary genital area" means the mons pubis, penis,

testicles, mons veneris, vulva or vagina.

C. Whoever commits indecent exposure is guilty of a misdemeanor.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing indecent exposure to participate in and complete a program of professional counseling at his own expense.

NY CLS Penal § 240.00

NEW YORK CONSOLIDATED LAW SERVICE

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PENAL LAW

PART THREE. SPECIFIC OFFENSES

TITLE N. OFFENSES AGAINST PUBLIC ORDER, PUBLIC SENSIBILITIES AND
THE RIGHT TO PRIVACY

ARTICLE 240. OFFENSES AGAINST PUBLIC ORDER

NY CLS Penal § 240.00 (2004)

§ 240.00. Offenses against public order; definitions of terms

The following definitions are applicable to this article:

1. "Public place" means a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.
2. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, school buses as defined in section one hundred forty-two of the vehicle and traffic law, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.
3. "School grounds" means in or on or within any building, structure, school bus as defined in section one hundred forty-two of the vehicle and traffic law, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational or high school.
4. "Hazardous substance" shall mean any physical, chemical, microbiological or radiological substance or matter which, because of its quantity, concentration, or

physical, chemical or infectious characteristics, may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health.

5. "Age" means sixty years old or more.

6. "Disability" means a physical or mental impairment that substantially limits a major life activity.

§ 245.00. Public lewdness

A person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed.

Public lewdness is a class B misdemeanor.

N.C. Gen. Stat. § 14-190.9

GENERAL STATUTES OF NORTH CAROLINA
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*** STATUTES CURRENT THROUGH THE 2003 REGULAR AND FIRST AND
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*** ANNOTATIONS CURRENT THROUGH MAY 12, 2004 ***

CHAPTER 14. CRIMINAL LAW

SUBCHAPTER 07 . OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

ARTICLE 26. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

N.C. Gen. Stat. § 14-190.9 (2004). **Indecent exposure**

(a) Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding.

(c) Notwithstanding any other provision of law, a local government may regulate the

location and operation of sexually oriented businesses. Such local regulation may restrict or prohibit nude, seminude, or topless dancing to the extent consistent with the constitutional protection afforded free speech.

21 Okl. St. § 1021 (2004)

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)
***** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION *****
***** November 2004 Annotation Service *****
TITLE 21. CRIMES AND PUNISHMENTS
PART IV. CRIMES AGAINST PUBLIC DECENCY AND MORALITY
CHAPTER 39. OKLAHOMA LAW ON OBSCENITY AND CHILD
PORNOGRAPHY

21 Okl. St. § 1021 (2004) (2004)

§ 1021. Indecent exposure--Indecent exhibitions--Obscene material or child pornography--Solicitation of minors

A. Every person who willfully and knowingly either:

1. Lewdly exposes his person or genitals in any public place, or in any place where there are present other persons to be offended or annoyed thereby;

2. Procures, counsels, or assists any person to expose such person, or to make any other exhibition of such person to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer;

3. Writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, knowingly downloads on a computer, or exhibits any obscene material or child pornography; or

4. Makes, prepares, cuts, sells, gives, loans, distributes, keeps for sale, or exhibits any disc record, metal, plastic, or wax, wire or tape recording, or any type of obscene material or child pornography,
shall be guilty, upon conviction, of a felony and shall be punished by the imposition of a fine of not less than Five Hundred Dollars (\$ 500.00) nor more than Twenty Thousand Dollars (\$ 20,000.00) or by imprisonment for not less than thirty (30) days nor more than ten (10) years, or by both such fine and imprisonment.

B. Every person who:

1. Willfully solicits or aids a minor child to perform; or

2. Shows, exhibits, loans, or distributes to a minor child any obscene material or child pornography for the purpose of inducing said minor to participate in, any act specified in paragraphs 1, 2, 3 or 4 of subsection A of this section shall be guilty,

upon conviction, of a felony and shall be punished by imprisonment in a state correctional institution for not less than ten (10) years nor more than thirty (30) years.

C. Persons convicted under this section shall not be eligible for a deferred sentence.

D. For purposes of this section, "downloading on a computer" means electronically transferring an electronic file from one computer or electronic media to another computer or electronic media.

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)
TITLE 21. CRIMES AND PUNISHMENTS
PART I. IN GENERAL
CHAPTER 2. GENERAL PROVISIONS
MISCELLANEOUS PROVISIONS
21 Okl. St. § 22 (2004)

§ 22. **Gross injuries--Grossly disturbing peace--Openly outraging public decency--Injurious acts not expressly forbidden**

Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor.

ORS § 161.015

OREGON REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2003 REGULAR SESSION
OF THE 72ND LEGISLATIVE ASSEMBLY ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 30, 2004 ***

TITLE 16. CRIMES AND PUNISHMENTS
CHAPTER 161. GENERAL PROVISIONS
PRINCIPLES

◆ORS § 161.015 (2003)

161.015. General definitions.

As used in chapter 743, Oregon Laws 1971, and ORS 166.635, unless the context requires otherwise:

(1) "Dangerous weapon" means any weapon, device, instrument, material or

- substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury.
- (2) "Deadly weapon" means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.
- (3) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.
- (4) "Peace officer" means a sheriff, constable, marshal, municipal police officer, member of the Oregon State Police, investigator of the Criminal Justice Division of the Department of Justice or investigator of a district attorney's office and such other persons as may be designated by law.
- (5) "Person" means a human being and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.
- (6) "Physical force" includes, but is not limited to, the use of an electrical stun gun, tear gas or mace.
- (7) "Physical injury" means impairment of physical condition or substantial pain.
- (8) "Serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.
- (9) "Possess" means to have physical possession or otherwise to exercise dominion or control over property.
- (10) "Public place" means a place to which the general public has access and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation.

TITLE 16. CRIMES AND PUNISHMENTS
CHAPTER 163. OFFENSES AGAINST PERSONS
SEXUAL OFFENSES

ORS § 163.465 (2003). **Public indecency.**

(1) A person commits the crime of public indecency if while in, or in view of, a public place the person performs:

- (a) An act of sexual intercourse;
- (b) An act of deviate sexual intercourse; or
- (c) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.

(2)(a) Public indecency is a Class A misdemeanor.

(b) Notwithstanding paragraph (a) of this subsection, public indecency is a Class C

felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 to 163.445.

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)
* THIS SECTION IS CURRENT THROUGH ACT 68 OF THE 2004 LEGISLATIVE
SESSION *

*** With exceptions as detailed in the Online Product Guide ***
*** OCTOBER 2004 ANNOTATION SERVICE ***
PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 18. CRIMES AND OFFENSES
PART II. DEFINITION OF SPECIFIC OFFENSES
ARTICLE B. OFFENSES INVOLVING DANGER TO THE PERSON
CHAPTER 31. SEXUAL OFFENSES
SUBCHAPTER B. DEFINITION OF OFFENSES

18 Pa.C.S. § 3127 (2004). **Indecent exposure**

(a) OFFENSE DEFINED.-- A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

(b) GRADING.-- If the person knows or should have known that any of the persons present are less than 16 years of age, indecent exposure under subsection (a) is a misdemeanor of the first degree. Otherwise, indecent exposure under subsection (a) is a misdemeanor of the second degree.

TEXAS

Tex. Penal Code § 1.07 (2004)

§ 1.07. Definitions

(a) In this code:

(1) "Act" means a bodily movement, whether voluntary or involuntary, and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action. Whenever the term "suspect" is used in this code, it means "actor."

(3) "Agency" includes authority, board, bureau, commission, committee, council, department, district, division, and office.

(4) "Alcoholic beverage" has the meaning assigned by Section 1.04, Alcoholic Beverage Code.

(5) "Another" means a person other than the actor.

(6) "Association" means a government or governmental subdivision or agency,

trust, partnership, or two or more persons having a joint or common economic interest.

(7) "Benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

(8) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(9) "Coercion" means a threat, however communicated:

(A) to commit an offense;

(B) to inflict bodily injury in the future on the person threatened or another;

(C) to accuse a person of any offense;

(D) to expose a person to hatred, contempt, or ridicule;

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

(10) "Conduct" means an act or omission and its accompanying mental state.

(11) "Consent" means assent in fact, whether express or apparent.

(12) "Controlled substance" has the meaning assigned by Section 481.002, Health and Safety Code.

(13) "Corporation" includes nonprofit corporations, professional associations created pursuant to statute, and joint stock companies.

(14) "Correctional facility" means a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes:

(A) a municipal or county jail; (B) a confinement facility operated by the Texas Department of Criminal Justice; (C) a confinement facility operated under contract with any division

of the Texas Department of Criminal Justice; and (D) a community corrections facility operated by a community supervision and corrections department.

(15) "Criminal negligence" is defined in Section 6.03 (Culpable Mental States).

(16) "Dangerous drug" has the meaning assigned by Section 483.001, Health and Safety Code.

(17) "Deadly weapon" means: (A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

(18) "Drug" has the meaning assigned by Section 481.002, Health and Safety Code.

(19) "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:

(A) induced by force, threat, or fraud;

(B) given by a person the actor knows is not legally authorized to act for the owner;

(C) given by a person who by reason of youth, mental disease or defect, or

intoxication is known by the actor to be unable to make reasonable decisions; or

(D) given solely to detect the commission of an offense.

(20) "Electric generating plant" means a facility that generates electric energy for distribution to the public.

(21) "Electric utility substation" means a facility used to switch or change voltage in connection with the transmission of electric energy for distribution to the public.

(22) "Element of offense" means: (A) the forbidden conduct; (B) the required culpability;

(C) any required result; and (D) the negation of any exception to the offense.

(23) "Felony" means an offense so designated by law or punishable by death or confinement in a penitentiary.

(24) "Government" means: (A) the state; (B) a county, municipality, or political subdivision of the state; or (C) any branch or agency of the state, a county, municipality, or political subdivision.

(25) "Harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

(26) "Individual" means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

(27) "Institutional division" means the institutional division of the Texas Department of Criminal Justice.

(28) "Intentional" is defined in Section 6.03 (Culpable Mental States).

(29) "Knowing" is defined in Section 6.03 (Culpable Mental States).

(30) "Law" means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.

(31) "Misdemeanor" means an offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail.

(32) "Oath" includes affirmation.

(33) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(34) "Omission" means failure to act.

(35) "Owner" means a person who: (A) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; or (B) is a holder in due course of a negotiable instrument.

(36) "Peace officer" means a person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, Section 51.212 or 51.214, Education Code, or other law.

(37) "Penal institution" means a place designated by law for confinement of persons arrested for, charged with, or convicted of an offense.

(38) "Person" means an individual, corporation, or association.

(39) "Possession" means actual care, custody, control, or management.

(40) "Public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the

common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(41) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties: (A) an officer, employee, or agent of government; (B) a juror or grand juror; or (C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or (D) an attorney at law or notary public when participating in the performance of a governmental function; or (E) a candidate for nomination or election to public office; or (F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

(42) "Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.

(43) "Reckless" is defined in Section 6.03 (Culpable Mental States).

(44) "Rule" includes regulation.

(45) "Secure correctional facility" means: (A) a municipal or county jail; or (B) a confinement facility operated by or under a contract with any division of the Texas Department of Criminal Justice.

(46) "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(47) "Swear" includes affirm.

(48) "Unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

(49) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(b) The definition of a term in this code applies to each grammatical variation of the term.

Tex. Penal Code § 21.07

TEXAS STATUTES AND CODES ANNOTATED BY LEXISNEXIS(R)

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2003 LEGISLATION ***

*** August 2004 Annotation Service ***

PENAL CODE

TITLE 5. OFFENSES AGAINST THE PERSON

CHAPTER 21. SEXUAL OFFENSES

Tex. Penal Code § 21.07 (2004)

§ 21.07. Public Lewdness

(a) A person commits an offense if he knowingly engages in any of the following

acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:

- (1) act of sexual intercourse;
- (2) act of deviate sexual intercourse;
- (3) act of sexual contact; or
- (4) act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl.

(b) An offense under this section is a Class A misdemeanor.

5-125 Texas Criminal Practice Guide § 125.51

Texas Criminal Practice Guide
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Division XIII SUBSTANTIVE LAW

Chapter 125 ASSAULT, KIDNAPPING, AND SEXUAL OFFENSES

II PRACTICE GUIDE

5-125 Texas Criminal Practice Guide § 125.51

§ 125.51 Elements of Sexual Offenses

NOTE: See note following § 125.50.

(1) Sexual assault includes the following elements [Pen. C. § 22.011(a)(1); see ♦ § 125.10[1]]:

(a) Intentionally or knowingly.

(b) Without consent of other person.

(c) Does any of following:

- (i) Causes penetration of anus or female sexual organ of other person;
- (ii) Causes penetration of mouth of other person by sexual organ of actor; or
- (iii) Causes sexual organ of other person to contact or penetrate mouth, anus, or sexual organ of another person, including actor.

(2) Sexual assault of a child includes the following elements [Pen. C. § 22.011(a)(2); see ♦ § 125.10[4][a]]:

- (a) Intentionally or knowingly.
- (b) With person younger than 17.
- (c) Does any of following:
 - (i) Causes penetration of anus or female sexual organ of child by any means;
 - (ii) Causes penetration of mouth of child by sexual organ of actor;
 - (iii) Causes sexual organ of child to contact or penetrate mouth, anus, or sexual organ of another person, including actor;
 - (iv) Causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor;
 - (v) Causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.
- (3) Aggravated sexual assault [Pen. C. § 22.011(a)(2); see ♦ § 125.11[1]] includes all elements of sexual assault plus any of following factors:
 - (a) Causes serious bodily injury or attempts to cause death to victim or another in same criminal episode.
 - (b) Places victim in fear of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.
 - (c) In presence of victim, threatens to cause death, serious bodily injury, or kidnapping to be inflicted on anyone.
 - (d) Uses or exhibits deadly weapon in course of same criminal episode.
 - (e) Victim is younger than 14.
 - (f) Victim is 65 or over.
 - (g) Acts in concert with another who engages in conduct described by Penal Code Section 22.021(a)(1) directed toward same victim and occurring during course of same criminal episode.
- (4) Indecency with child includes either of the following [Pen.C. § 21.11(a); see ♦ § 125.13[1]]:
 - (a) Engages in sexual contact:
 - (i) With child under 17, regardless of sex.
 - (ii) Not a spouse.
 - (b) Exposes anus or genitals:
 - (i) Knowing child under 17 is present.
 - (ii) With intent to arouse or gratify sexual desire of any person.
- (5) Public lewdness [Pen. C. § 21.07(a); see ♦ § 125.14[1][a]].
 - (a) Public lewdness in public place includes the following elements:
 - (i) Knowingly engages in any of the following:
 - (A) Sexual intercourse;
 - (B) Deviate sexual intercourse;
 - (C) Sexual contact; or
 - (D) Act involving contact between person's mouth or genitals and anus or genitals of animal or fowl.

(ii) In a public place.

(b) Public lewdness in private place includes the following elements:

(i) Knowingly engages in any of the following:

(A) Sexual intercourse;

(B) Deviate sexual intercourse;

(C) Sexual contact; or

(D) Act involving contact between person's mouth or genitals and anus or genitals of animal or fowl.

(ii) Is reckless about whether another is present.

(iii) Who will be offended or alarmed.

(6) Indecent exposure includes the following elements [Pen. C. § 21.08(a); see ♦ § 125.14[2]]:

(a) Exposes anus or genitals.

(b) With intent to arouse or gratify sexual desire of any person.

(c) Is reckless about presence of another.

(d) Who will be offended or alarmed.

**Report of the
Commission on the 50th Anniversary of the
Uniform Code of Military Justice
May 2001**

(Open Attached Adobe File)



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