

# Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target

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*[T]he force used may vary depending on the relationship and familiarity, if any, between perpetrator and victim, but the essence of the offense remains the same -- sexual intercourse against the will of the victim.<sup>1</sup>*

## I. Introduction

The 2006 National Defense Authorization Act (NDAA)<sup>2</sup> answered the call for a much needed revision of the Uniform Code of Military Justice (UCMJ)<sup>3</sup> rape law. The media, military appellate courts, numerous study groups, and Congress itself voiced the need for reform of the military's rape law, which had remained virtually unchanged since the inception of the UCMJ.<sup>4</sup> The new statute, in many ways, takes a step forward in the military's struggle against sexual assault, but at the very heart of the statute, Congress missed the mark. The new law approaches rape and sexual assault as a crime of violence, placing a requirement for force at the center of the offense. This article will demonstrate that the core of the crime of sexual assault is not violence, but the violation of "sexual autonomy."<sup>5</sup> In order to provide a clear standard, prevent miscommunication, and "assist in maintaining good order and discipline,"<sup>6</sup> the military sexual assault statute should require affirmative consent from both parties before sexual penetration.

An examination of the legislative intent shows that the authors crafted the new statute in the belief that, "[r]ape is an act of violence, anger, and power, distinguished by its coercive and sometimes brutal nature. The essence of rape is the force or coercion used by the defendant, not the lack of consent of the victim."<sup>7</sup> This article will argue that the opposite is true. Violation of the sexual autonomy of the victim is the heart of the crime. Rape and sexual assault are criminal because the unwelcome penetration intrudes upon the sexual autonomy, trespasses against the "bodily integrity,"<sup>8</sup> and violates the privacy rights of the victim. A statutory definition of sexual assault that does not center upon lack of freely given and affirmatively expressed consent misses the fundamental nature of the crime.

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<sup>1</sup> United States v. Leak, 61 M.J. 234, 239 (2005).

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006).

<sup>3</sup> The Uniform Code of Military Justice is the military's legal code.

<sup>4</sup> See MAJ 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 TJAGLCS Library); MAJ Carl A. Johnson, Nonconsensual Sex Crimes and the UCMJ: A Proposal for Reform (2003) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with TJAGLCS Library).

<sup>5</sup> STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998). Schulhofer's book is considered by many to be one of the most important works on rape law. The terms "sexual autonomy" and "bodily integrity" are taken from Schulhofer and used throughout this article.

<sup>6</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2005) [hereinafter MCM] ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

<sup>7</sup> SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 103 (Feb. 2005), available at [http://www.dod.mil/dodgc/php/docs/subcommittee\\_reportMarkHarvey1-13-05.doc](http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc) [hereinafter SEX CRIMES AND THE UCMJ] (citing Christina Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1529 (1983)).

<sup>8</sup> SCHULHOFER, *supra* note 5 (Schulhofer uses the term "bodily integrity" throughout his book.).

Military law should be based upon the understanding of rape and sexual assault as a violation of sexual autonomy and bodily integrity. The current legal approach to rape and sexual assault is unique among contemporary jurisprudence. Nowhere else in the law is the victim shouldered with the burden of proving they did not consent.<sup>9</sup> Only in rape law is the victim expected to resist an attacker before the act becomes a crime.<sup>10</sup> Lastly, rape is the only crime in which the victim's silence is construed as consent.<sup>11</sup> The stark contrast of rape law to other laws is not arbitrary. There are both historical and practical reasons for the special treatment of the crime of rape.

Anthropologists and sociologists have conducted extensive research into the cultural history of rape and rape laws.<sup>12</sup> Feminist jurisprudence<sup>13</sup> on the crime of rape is vast and compelling.<sup>14</sup> Although this article will provide brief summaries of some of this research for background purposes, the article's focus is on what is in the best interest of the U.S. Armed Forces and those who serve, rather than the sociological or feminist perspective. Indeed, the primary goal of the statute proposed by this article is to protect potential victims and potential offenders equally, and deter allegations and the occurrence of sexual assault in the military.

Aside from the historical reasons for the treatment of rape under current law, there are also legitimate practical explanations. Sexual interaction is, by its nature, a private and complex issue. Proof issues and fear of wrongful conviction have played a large role in forming the legal framework for the crimes of rape and sexual assault.<sup>15</sup> Over time, case law has evolved to modernize the UCMJ rape statute, partially correcting inequities generated by these historical and practical obstacles. Military appellate courts have clarified the limits of the resistance requirement, developed the doctrine of constructive force, and attempted to clearly define "consent" and "force."<sup>16</sup> Lately, however, the courts have signaled that they have reached the extent of reform available to them, and have called for reform of the statute itself.<sup>17</sup> The media and several study groups have also appealed to Congress for change.<sup>18</sup>

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<sup>9</sup> See *Ex rel. M.T.S.*, 609 A.2d 1266, 1274 (N.J. 1992).

<sup>10</sup> See, e.g., *United States v. Bonano-Torres*, 31 M.J. 175, 178 (C.M.A. 1990) ("proof of resistance—or lack thereof—is highly significant in all rape cases where the victim has the capacity to resist.").

<sup>11</sup> In some circumstances, such as when an attacker is brandishing a weapon, silence is not viewed as consent. However, outside any extenuating circumstances, the default assumption is that silence equals consent. "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." MCM, *supra* note 6, pt. IV, ¶ 45 c(1)(b).

<sup>12</sup> See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

<sup>13</sup> Cornell Law School Legal Information Institute, *Feminine Jurisprudence: An Overview*, [http://www.law.cornell.edu/wex/index.php/Feminist\\_jurisprudence](http://www.law.cornell.edu/wex/index.php/Feminist_jurisprudence) (last visited Oct. 16, 2007)

Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes. As a field of legal scholarship, feminist jurisprudence began in 1960s. It now holds a significant place in U.S. law and legal thought and influences many debates on sexual and domestic violence, inequality in the workplace, and gender based discrimination. Through various approaches, feminists have identified gendered components and gendered implications of seemingly neutral laws and practices. Laws affecting employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefited from the analysis and insight of feminist jurisprudence.

*Id.*

<sup>14</sup> See, e.g., BROWNMILLER, *supra* note 12; MACKINNON, *supra* note 12.

<sup>15</sup> British Chief Justice Lord Hale is often quoted for his role in setting the tone of the law's approach to rape claims. 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." SCHULHOFER, *supra* note 5, at 18 (citing *United States v. Wiley*, 492 F.2d 547 (D.C. Cir. 1973)).

<sup>16</sup> See, e.g., *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990); *United States v. Simpson*, 58 M.J. 368 (2003); SEX CRIMES AND THE UCMJ, *supra* note 7, at 2.

<sup>17</sup> See *United States v. Leak*, 61 M.J. 234, 246 (2005); *United States v. Webster*, 37 M.J. 670, 675 (C.G.C.M.R. 1993); *infra* Part II.G.2 (discussing these cases and the courts' opinions that reform of the UCMJ rape statute is needed).

<sup>18</sup> See, e.g., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001) [hereinafter COX COMMISSION] (The Honorable Walter T. Cox, III, retired Senior Judge of the Court of Appeals for the Armed Services, chaired the commission.); REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES 31 (June 2005) [hereinafter ACADEMIES TASK FORCE]; TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 50–51, 57 (Apr. 2004) [hereinafter CARE FOR VICTIMS].

With the new statute,<sup>19</sup> Congress attempted to answer the criticism of the current rape statute. However, the statute does not adequately address many of the significant issues facing the Armed Forces in their attempt to eliminate sexual assault in the military.<sup>20</sup> A consent-based statute would better address these issues and concerns, but in the unique culture of the military services, a statute requiring affirmative consent would affect the greatest positive change and best serve the men and women of the armed forces.

This article proposes a military sexual assault statute that requires verbal affirmative consent before the act of sexual penetration, and argues that an affirmative consent standard will provide a clear standard, prevent miscommunication, and assist in maintaining good order and discipline in the armed forces. The complete statute proposed by this article is located in Appendix A. The background section will identify and discuss the prevalence of sexual assault and the ways in which it impacts the armed forces and degrades military readiness. Next, the article describes the growing trend among academia, legislatures, and courts toward viewing and defining rape in terms of sexual autonomy rather than force. Sections II.B and II.C describe the concept of affirmative consent and lay the foundation for the affirmative consent statute proposed by the author. Sections II.D and II.E provide an overview of the development of contemporary rape law in both the civilian sector and in the military. In doing so, they will highlight the historical tension between the true essence of rape as a violation of sexual autonomy, and the convenience of defining rape in terms of force. Sections II.F and II.G discuss the current military rape statute, as well as the criticism of the statute and other events that led Congress to reform the current military rape law. Section III of the article will review the new statute and its positive aspects, and then focus on where the new statute falls short. Specifically, this section discusses the significant drawbacks of defining sexual assault in terms of force, rather than sexual autonomy. Section IV explains the affirmative consent statute proposed by this article and compares it to the UCMJ offenses of assault, unlawful entry, and larceny. Section IV.B of the article then outlines the need for affirmative consent in the military and discusses the benefits of the proposed statute. Finally, Section IV.B addresses common criticisms of an affirmative consent statute. This section explains how the issues identified in the criticism are actually improved by the proposed statute as applied to the armed forces. The article concludes with the argument that the proposed affirmative consent statute will strengthen military readiness by producing a culture of respect for sexual autonomy.

## II. Background

The new statutory scheme for criminal sexual misconduct in the 2006 NDAA represents the military's first significant change of rape and sexual misconduct statutes in the history of the UCMJ.<sup>21</sup> With the increasing numbers of women serving in the armed forces,<sup>22</sup> and the recognition that males are also victims of these crimes,<sup>23</sup> the issue of sexual assault has become increasingly important. In addition, several scandals involving sexual assault in the military have sharpened attention to the issue.<sup>24</sup> These factors resulted in calls from many sectors for the military's rape statute to be modernized to more adequately address the sex-related crimes most commonly encountered in the military today.<sup>25</sup>

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<sup>19</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006). In the 2006 NDAA, Congress passed a new military sexual assault statute that becomes effective in October 2007.

<sup>20</sup> See *infra* Part III.C.

<sup>21</sup> See Sims, *supra* note 4; Johnson, *supra* note 4.

<sup>22</sup> James Kitfield, *Front and Center*, GOV'T EXECUTIVE, Oct. 27, 1997, available at <http://www.govexec.com/dailyfed/1097/102797b3.htm>.

In 1970, women made up only 1.4 percent of active-duty personnel. With the establishment of the all-volunteer force in 1973, however, the military services began actively recruiting women to meet their overall numerical goals. The percentage of women has grown steadily since, reaching 11.8 percent of the active force in 1994 and 13.6 percent today [1997].

*Id.*

<sup>23</sup> For the years 2002 and 2003, males constituted nine percent of the victims of sexual assault in the military services. CARE FOR VICTIMS, *supra* note 18, at 20.

<sup>24</sup> The Army, Navy, and Air Force have each had large public sexual assault scandals. "At the 35th Annual [Navy] Tailhook Symposium (September 5 to 7, 1991) at the Las Vegas Hilton Hotel, 83 women and 7 men were assaulted during the three-day aviators' convention, according to a report by the Inspector General of the Department of Defense (DOD)." PBS, *Frontline*, "Tailhook 91," available at <http://www.pbs.org/wgbh/pages/frontlines.shows/navy/tailhook/91.html> (last visited Oct 16, 2007) [hereinafter "Tailhook 91"]; In 1997, Staff Sergeant Delmar Simpson was convicted of eighteen counts of rape involving female trainees under his control. PBS Online NewsHour transcript, [http://www.pbs.org/newshour/bb/military/april97/sex\\_scandal\\_4-29.html](http://www.pbs.org/newshour/bb/military/april97/sex_scandal_4-29.html) [hereinafter PBS Online NewsHour Transcript] (last visited Mar. 15, 2007). In 2003, at least twenty-two female Air Force Academy cadets reported that they had been sexually assaulted, and the administration had failed to investigate the reported crimes. See Cathy Booth-Thomas/Tucson, *The Air Force Academy's Rape Scandal*, TIME, Mar. 6, 2003, available at <http://www.time.com/time/magazine/article/0,9171,1101030310-428045-1,00.html>.

<sup>25</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 57; United States v. Leak, 61 M.J. 234, 246 (2005); United States v. Webster, 37 M.J. 670, 675 (C.G.C.M.R. 1993).

## A. Sexual Assault's Impact on the Military

The Department of Defense (DOD) has embraced the fact that sexual assault in the military adversely impacts unit cohesion and negatively affects mission accomplishment.<sup>26</sup> In April 2004, former Secretary of Defense Donald Rumsfeld clearly demonstrated how significant he considered the impact of sexual assault on military readiness to be when he took the “unusual step of writing directly to [the combatant commanders] on the subject of sexual assault.”<sup>27</sup> In his memo, Secretary Rumsfeld called sexual assault unacceptable behavior that threatens military readiness and must not be tolerated.<sup>28</sup> He described it as an affront to the decency owed each human being.<sup>29</sup> His memorandum recognized that sexual assault is a crime that violates the dignity of the victim and degrades military readiness. The memorandum further acknowledged that the military must address the occurrence of this behavior.<sup>30</sup>

The threat to military readiness that Secretary Rumsfeld references is significant. An allegation of sexual assault in a unit and the ensuing investigation and trial often cause the deterioration of unit morale and cohesion.<sup>31</sup> The Army's command policy regulation says that sexual assault “degrades mission readiness by devastating the Army's ability to work effectively as a team.”<sup>32</sup> In most cases, the mission of the unit is affected to some degree.<sup>33</sup> The accused Soldier is usually not allowed to change duty stations,<sup>34</sup> may not be able to deploy with the unit,<sup>35</sup> and may spend large amounts of the duty day meeting with attorneys and investigators. The victim must also meet with investigators and attorneys while trying to cope with the trauma and stress of the assault.<sup>36</sup> Witness lists may include dozens of unit members, each of whom must spend time in interviews and, possibly, in court. The commanders of the accused and victim must dedicate valuable time and resources to supporting their affected unit members.<sup>37</sup> Sexual assault's impact often sweeps like a shock wave through the unit—consuming time and effort of the leadership and those involved, causing distrust and suspicion, and thereby destroying a formerly cohesive and effective team.

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<sup>26</sup> See, e.g., Memorandum, Secretary of Defense, to Combatant Commanders, subject: Confronting Sexual Assault (30 Apr. 2004) [hereinafter Combatant Commanders Memo] (on file with author); Memorandum, Secretary of Defense, to Chairman of the Joint Chiefs of Staff et al., subject: Sexual Assault Prevention and Response (3 May 2005), available at <http://www.sapr.mil/contents/references/OSD%2008248-05.pdf> [hereinafter JCS Memo] (Then Secretary of Defense Rumsfeld characterized sexual assault as an affront to the institutional values of the armed forces, and said it harms individuals, undermines military readiness, and weakens communities.); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-2 (7 June 2006) [hereinafter AR 600-20].

<sup>27</sup> Combatant Commanders Memo, *supra* note 26.

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

<sup>29</sup> *Id.*

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

<sup>31</sup> See, e.g., AR 600-20, *supra* note 26, para. 8-2.

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

<sup>33</sup> See SEX CRIMES AND THE UCMJ, *supra* note 7, at 2 (“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 effectiveness of military personnel and units.”).

<sup>34</sup> See U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) para. 1-12(a) (23 Dec. 2004) [hereinafter AR 600-8-2]. (A soldier under investigation or charged with a crime must be “flagged”, meaning no favorable personnel actions may be taken on the soldier. This includes prohibitions against: change of duty station or reassignment, promotion, awards, attendance at civil or military schooling, etc.).

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

<sup>36</sup> “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.” SEX CRIMES AND THE UCMJ, *supra* note 7, at 117 (citing Sergeant First 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)); see also CARE FOR VICTIMS, *supra* note 18, at 67 (“research has suggested that 94% of all rape victims reporting a recent rape to authorities will meet criteria for PTSD two weeks after the rape”) (citing B.O. Rothbaum et al., *A Prospective Evaluation of Post-traumatic Stress Disorder in Rape Victims*, 5 J. TRAUMATIC STRESS 455 (1992)).

<sup>37</sup> U.S. DEP'T OF DEFENSE, INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (23 June 2006) [hereinafter DODI 6495.02] (This instruction contains commander's checklists for the numerous tasks the commander of a victim or accused service member must complete following an allegation of sexual assault. Many of the tasks are to be done immediately, taking priority over any other duties. The commander of a victim may need to issue a temporary restraining order, or reassign the victim (or accused) to a different unit. The victim's commander often must attend the monthly case management meetings and meet with other agencies to ensure the victim is getting the care they require. The accused member's commander must perform many of the same tasks for the alleged offender. The commander must try to keep rumors and reprisal from taking place in the unit, and remind all members that the accused is innocent until proven guilty. An allegation of sexual assault in a unit may necessitate extra refresher training, climate surveys, and other steps to try to minimize the impact on morale in the unit.).

Unfortunately, many commanders will face the challenge of dealing with a sexual assault allegation within their command, as sexual assault is not a rare occurrence in the armed forces. Studies indicate that men and women in the armed forces are victims of sexual assault at the same rate as, if not greater than, society at large.<sup>38</sup> Section 577 of the Ronald W. Reagan NDAA for Fiscal Year 2005<sup>39</sup> required the military services to provide an annual summary to Congress with the number of sexual assaults reported in each of the services. In calendar year 2006, there were 2947 reported sexual assaults involving a military service member as either the victim or perpetrator.<sup>40</sup> Between March 2002 and October 2003, the Veterans Administration (VA) screened almost three million veterans.<sup>41</sup> Of those screened, 20.7% of females and 1.2% of males had a history of military “sexual trauma.”<sup>42</sup>

Certain service members are at greater risk for sexual victimization. A Navy study surveyed recruits during basic training and followed them for two years. Of that group, 7.5% of females reported experiencing behavior that constituted rape within six months of entering the Navy.<sup>43</sup> Of the males surveyed, 2.6% admitted to committing behaviors that constituted rape during their first six months in the Navy.<sup>44</sup>

Many recruits entering the military services are already victims of sexual assault when they arrive for duty. Research shows that these previously-victimized service members are far more likely to be victimized again.<sup>45</sup> Female Navy recruits who experienced childhood sexual abuse were five times more likely to experience adult rape prior to entering the military.<sup>46</sup> Male recruits who had been victims of childhood physical and sexual abuse were four to six times more likely to report having committed rape prior to entering the military.<sup>47</sup> The trend continues once the victims enter military service. Female veterans “who joined the military before the age of 20, who were of enlisted rank (regardless of age), or who experienced childhood physical or sexual violence”<sup>48</sup> were at least twice as likely as other female service members to be raped during their military service.<sup>49</sup>

In addition to the risk factors many young service members bring with them, the environment they encounter when they join the military often adds to their vulnerability. One study of active duty women found that “low sociocultural power (i.e. age, education, race/ethnicity, marital status) and low organizational power (i.e. pay grade and years of active duty service) were associated with an increased likelihood of . . . sexual assault.”<sup>50</sup> Among female veterans surveyed, the likelihood of rape during military service also increased for those who “observed heterosexual activities of others in military sleeping quarters (three-fold increase for Vietnam era; four-fold increase for post Gulf War era).”<sup>51</sup>

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<sup>38</sup> CARE FOR VICTIMS, *supra* note 18, at 56-59 (The Task Force specifically rejected the feasibility of direct comparisons between sexual assault rates between military and civilian populations. They did, however, report the results of various reports and surveys, including FBI Uniform Crime Reporting (UCR) rates of sexual assault and the military services’ own reported statistics, which are derived from reports to law enforcement. These reports are relatively comparable because they are both collected by law enforcement agencies and define sexual assault similarly. The UCR rates for 2002 were thirty-three percent per 100,000 population, and the services reported rate in 2002 was 69.1 per 100,000 population. Again, these two statistics cannot be compared side by side, but they indicate a rough estimate of occurrence in each community).

<sup>39</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1811 (2004).

<sup>40</sup> DEPARTMENT OF DEFENSE ANNUAL REPORT ON MILITARY SERVICES SEXUAL ASSAULT FOR CY 2006 2 (15 Mar. 2007) [hereinafter 2006 ANNUAL REPORT] (These are only the sexual assaults that were reported to law enforcement. “Sexual assault is one of the most underreported crimes, with more than half still being left unreported.” Shanah M. Catalano, *Criminal Victimization, 2005*, National Crime Victimization Survey, U.S. Department of Justice (Sept. 2006). Of the reported assaults on military victims in 2002 and 2003, nine percent were male; CARE FOR VICTIMS, *supra* note 18, at 20).

<sup>41</sup> CARE FOR VICTIMS, *supra* note 18, at 58 (citing unpublished VA data).

<sup>42</sup> The VA classified any sexual harassment or sexual assault that occurred during military service as “sexual trauma.” *Id.*

<sup>43</sup> *Id.* (stating that eighty percent of the perpetrators were active duty males).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 61 (citing L.L. Merrill, et al., *Childhood Abuse and Sexual Revictimization in a Female Navy Recruit Sample*, 12 J. TRAUMATIC STRESS 211 (1999)).

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

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

<sup>48</sup> *Id.* (quoting A.G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262 (2003)).

<sup>49</sup> *Id.* at 62 (citing Sadler et al., *supra* note 48).

<sup>50</sup> *Id.* at 61-62 (citing M.S. Hamed, et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 2 J. OCCUPATIONAL PSYCHOL. 174 (2002)).

<sup>51</sup> *Id.* at 62 (citing Sadler et al., *supra* note 48).

Sexual assault in the military has an injurious effect on the individuals involved in the assault, a demoralizing and destructive influence on the military community in which the assault occurs, and a direct negative impact on military readiness.<sup>52</sup> The DOD's stated policy is to "prevent and eliminate sexual assault within the Department by providing comprehensive procedures to better establish a culture of prevention, response, and accountability that enhances the safety and well-being of all DoD members."<sup>53</sup> The DOD recognizes that this is an issue that demands a direct and progressive approach.

The main focus of the DOD's efforts to this point has been in the areas of training and response.<sup>54</sup> Progress has been made in both areas, but none of the improvements are likely to have a real preventative effect on the occurrence of sexual assault.<sup>55</sup> Because the new UCMJ statute remains focused on the use of force and fails to provide a clear standard, it is also unlikely to prevent the crime from occurring. A law that demands absolute respect for sexual autonomy and provides a clear and simple standard to which service members must adhere would be the strongest, most effective weapon in the military's war against sexual assault.

## B. Sexual Autonomy

*The first and most important step is to recognize that sex should never be considered permissible unless there is genuine, freely given consent on both sides.*<sup>56</sup>

The DOD is not alone in its determination to conquer sexual assault. Civilian communities and courts struggle alongside the military in attempting to prevent and deal with sexual assaults. An important step taken by many jurisdictions in this struggle has been the attempt to accurately define the nature of rape, and re-draft statutes to reflect the essence of the crime.<sup>57</sup> Recently, there is a growing consensus among academia and the courts that the traditional force-based statutes should be reformed into statutes centered upon consent and the notion of protecting sexual autonomy.<sup>58</sup>

The theory of rape as a violation of sexual autonomy and bodily integrity has existed, to some extent, throughout history. The original English common law defined rape as a crime centered on consent.<sup>59</sup> The drafters of the Model Penal Code acknowledged that the "central mission of rape law was to protect 'freedom of choice' and 'meaningful consent.'"<sup>60</sup> Over time, however, rape laws have evolved into statutes centered primarily on the force used to commit the rape, rather than the actual violation of the victim's sexual autonomy. An increasing number of academics, courts, and legislatures are now identifying the focus on force as a central flaw in rape law, and advocating reform based on the definition of rape as sex without consent.<sup>61</sup>

In his book, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*,<sup>62</sup> Stephen Schulhofer provides what many consider to be the most persuasive and insightful discussion of this concept.<sup>63</sup> Schulhofer argues, "Of all our rights and

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<sup>52</sup> JCS Memo, *supra* note 26 (then Secretary of Defense Rumsfeld characterized sexual assault as an affront to the institutional values of the armed forces, and said it harms individuals, undermines military readiness, and weakens communities).

<sup>53</sup> DODI 6495.02, *supra* note 37, para. 4.

<sup>54</sup> See 2006 ANNUAL REPORT, *supra* note 40, at 6-9 (describing increased training and response programs).

<sup>55</sup> Although better and more frequent training will have some preventative effect, the most significant improvements resulting from the new programs are likely to be a better atmosphere for encouraging victims to report, and better response to those reports.

<sup>56</sup> Katherine Guckenberger, *Interview with Stephen Schulhofer*, ATLANTIC MONTHLY, 22 Oct. 1998, available at <http://www.theatlantic.com/unbound/bookauth/ba981022.htm> (quote by Schulhofer during the interview).

<sup>57</sup> See *infra* Part II.B.

<sup>58</sup> See, e.g., David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000); SCHULHOFER, *supra* note 5, at 282.

<sup>59</sup> See Cynthia A. Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988); *Ex rel. M.T.S.*, 609 A.2d 1266, 1270 (N.J. 1992).

<sup>60</sup> AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES pt. II, cmt. to § 213, at 301 (1980) [hereinafter MPC COMMENTARIES]; SCHULHOFER, *supra* note 5, at 282.

<sup>61</sup> Bryden, *supra* note 58, at 322 ("Virtually all modern scholars want to modify or abolish the force requirement as an element of rape.").

<sup>62</sup> SCHULHOFER, *supra* note 5.

<sup>63</sup> *Id.* at 323 ("All rape-law scholars are indebted to the authors of two important books . . . Stephen Schulhofer's recent *Unwanted Sex* . . . is a landmark in the history of rape-law scholarship.").

liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person. Yet, as far as the law is concerned, this right—the right to sexual autonomy—doesn’t exist.”<sup>64</sup> Schulhofer points to the comprehensive protection the criminal law provides for our property, privacy, right to vote, labor, and confidential information.<sup>65</sup> The law “ensures that we retain these rights until we choose to give them to someone else; we can’t simply lose them by default. And the law doesn’t say . . . that people facing interference with these rights should just ‘take responsibility’—that they should scream, fight back physically, or ‘stop whining.’”<sup>66</sup> In comparison, the protection provided to the important right of sexual autonomy is quite limited.<sup>67</sup> As Schulhofer points out, although the law seeks to protect women from significant violence, it seems unconcerned with protecting the right to make a truly free choice about whether to participate in sexual activity.<sup>68</sup>

Schulhofer recommends a law that protects sexual autonomy “directly and for its own sake, not with hesitation or apology, nor with irritation at victims who aren’t able to help themselves.”<sup>69</sup> Others echo this opinion. In fact, Professor David Bryden, in *Redefining Rape*,<sup>70</sup> boldly asserts, “Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape.”<sup>71</sup> Although there seems to be consensus on that point, the implementation of the concept is less unanimous.<sup>72</sup> Schulhofer would retain the crime of rape by force, but add an offense for sexual penetration without the freely-given consent of the other person.<sup>73</sup> Other suggestions include changes in the mens rea for rape, either to make rape a strict liability crime or a crime of negligence.<sup>74</sup> This trend toward consent-based statutes is more than an academic discussion. Many state legislatures have enacted sexual assault laws that, to differing degrees, move away from the element of force, and focus more on consent.<sup>75</sup> As with the scholars, however, the legislative approaches are varied.

State rape and sexual assault statutes vary widely in their approach to what constitutes criminal behavior. At least twenty states have specific offenses for sexual penetration without consent that do not list force as an element.<sup>76</sup> Mississippi’s offense of sexual battery reads, “A person is guilty of sexual battery if he or she engages in sexual penetration with . . . [a]nother person without his or her consent.”<sup>77</sup> The District of Columbia has the offense of misdemeanor sexual abuse for any sexual act (to include penetration) or sexual contact with another person without that person’s permission.<sup>78</sup> These state statutes reflect a growing recognition that violations of sexual autonomy should be criminalized.

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<sup>64</sup> SCHULHOFER, *supra* note 5, at 282.

<sup>65</sup> *Id.* at 274.

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

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

<sup>68</sup> *Id.* at 114.

<sup>69</sup> *Id.* at 282.

<sup>70</sup> Bryden, *supra* note 58, at 322.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> SCHULHOFER, *supra* note 5, at 283.

<sup>74</sup> See, e.g., John Dwight Ingram, *Date Rape: It’s Time for “No” to Really Mean “No,”* 21 AM. J. CRIM. L. 3 (1993); Bryden, *supra* note 58, at 322.

<sup>75</sup> ACADEMIES TASK FORCE, *supra* note 18, at 31, N-14 (“As of 2004, 46 out of the 50 states, as well as the District of Columbia and Federal government, had enacted revised sexual assault and/or rape statutes. . . . Many statutes have crimes that make having intercourse without the consent of the other party a crime . . .”).

<sup>76</sup> See, e.g., ALA. CODE § 13A-6-65 (2007) (sexual misconduct); ALASKA STAT. § 11.41.410 (2007) (sexual assault in the first degree); DEL. CODE ANN. tit. 11 § 770 (2007) (rape in the fourth degree); D.C. CODE § 22-3006 (2007) (misdemeanor sexual abuse); FLA. STAT. § 794.011 (2007) (sexual battery); KY. REV. STAT. ANN. § 510.140 (LEXISNEXIS 2006) (sexual misconduct); MISS. CODE ANN. § 97-3-95 (2007) (sexual battery); MO. REV. STAT. § 566.040 (2007) (sexual assault); MONT. CODE ANN. § 45-5-502 (2005) (sexual assault); NEB. REV. STAT. § 28-319 (2007) (sexual assault); NEV. REV. STAT. § 200.366 (2006) (sexual assault); N.Y. PENAL LAW § 130.25 (Consol. 2007) (rape in the third degree); OR. REV. STAT. § 163.425 (2006) (sexual abuse in the second degree); PA. CONS. STAT. § 3124.1 (2006) (sexual assault); TENN. CODE ANN. § 39-13-503 (2007) (rape); TEX. PENAL CODE § 22.011 (Vernon 2006) (sexual assault); UTAH CODE ANN. § 76-5-402 (2006) (rape); VT. STAT. ANN. tit. 13, § 3252 (2007) (sexual assault); WASH. REV. CODE § 9A.44.060 (2007) (rape in the third degree); WIS. STAT. § 940.225 (2006) (third degree sexual assault).

<sup>77</sup> MISS. CODE ANN. § 97-3-95.

<sup>78</sup> D.C. CODE § 22-3006 (“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 \$1000.”).

Unfortunately, some of these statutes then resort to defining consent in terms of force used, thereby defeating the positive step of recognizing sexual autonomy.<sup>79</sup> Alabama's criminal code, for example, has a misdemeanor crime of sexual misconduct for engaging in sexual intercourse without consent.<sup>80</sup> The victim's consent, however, is defined in terms of lack of consent, resulting from forcible compulsion or incapacity to consent.<sup>81</sup> Even more disappointing, forcible compulsion is then defined in terms of force that "overcomes earnest resistance" of the victim.<sup>82</sup> Nonetheless, the absence of force as an element in these offenses demonstrates the growing focus on consent-based rape and sexual assault statutes.

Despite the momentum of this movement, many jurisdictions have chosen to maintain force as an element of rape and sexual assault.<sup>83</sup> One important reason for this may be the difficulty lawmakers and courts have defining consent.<sup>84</sup> Even with a working definition of consent, however, lack of consent is hard to prove without invoking requirements for evidence of force or resistance by the victim.<sup>85</sup> Thus, even once a jurisdiction progresses to a statute that recognizes sexual autonomy, they often still find themselves looking to evidence of force and resistance to prove lack of consent.<sup>86</sup> A promising, although more controversial, solution gaining support in academic and legal circles is the requirement for affirmative consent before sexual penetration.<sup>87</sup>

### C. Affirmative Consent

A requirement for affirmative consent before sexual penetration has the promise of succeeding where other rape law reforms have failed.<sup>88</sup> In their article *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, Ilene Seidman and Susan Vickers discuss the success and shortcomings of rape law reform over the past thirty years and make recommendations for future reform.<sup>89</sup> In addressing the issue of consent, they echo Schulhofer's call for the elimination of force as a statutory element of rape, noting that after thirty years of rape law reform, "society still expects rape to be a horrifically violent crime."<sup>90</sup> Seidman and Vickers argue that the most persistent issue in rape law is the distinction between seduction and assault.<sup>91</sup> Affirmative consent is their remedy for this obstacle. They assert that consent should be verbal and affirmative, eliminating the notions of implied consent or that silence equals consent.<sup>92</sup>

The law should not assume that women are or must be coy about sex. Women cannot be viewed as consenting merely by their conduct, appearance, reaction, or silence. Women must directly and explicitly express their sexual desire or agreement to have intercourse in a given situation, and men must respond accordingly. Instead of assuming a woman's sexual ambivalence indicates consent, the law should assume that sexual ambivalence means no.<sup>93</sup>

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<sup>79</sup> See, e.g., ALA. CODE § 13A-6-70; ALASKA STAT. § 11.41.470; DEL. CODE ANN. tit. 11 § 761; KY. REV. STAT. ANN. § 510.010; MONT. CODE ANN. § 45-5-501; NEB. REV. STAT. § 28-318; TEX. PENAL CODE § 22.011.

<sup>80</sup> ALA. CODE § 13A-6-56.

<sup>81</sup> *Id.* § 13A-6-70.

<sup>82</sup> *Id.* § 13A-6-60.

<sup>83</sup> See e.g., ARIZ. REV. STAT. ANN. § 13-1401; ARK. CODE ANN. § 5-14-103; CONN. GEN. STAT. § 53a-70; GA. CODE ANN. § 16-6-1; MASS. GEN. LAWS ANN. ch. 265, § 22.

<sup>84</sup> See sec. II.F.1 for a discussion of the difficulty military courts have in defining force and consent.

<sup>85</sup> See Bryden, *supra* note 58, at 355-60.

<sup>86</sup> See *supra* note 76 (listing the states with consent-based statutes that define consent in terms of force or resistance).

<sup>87</sup> See, e.g., Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 484 (2005); Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 37 (1996); *Ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992); Bryden, *supra* note 58, at 396-411.

<sup>88</sup> See, e.g., Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 12 (1998) ("Despite several decades of legislative reform designed to free rape law from these misogynistic antecedents, contemporary courts remain hostage to the traditional definitions, which require rape victims to surmount special legal obstacles that the victims of other crimes are spared.").

<sup>89</sup> Seidman & Vickers, *supra* note 87, at 484.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 485.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Seidman and Vickers recommend “making the direct verbal expression of desire or agreement to sex necessary to establish affirmative consent”<sup>94</sup> and “defining a lack of verbal expression of affirmative desire or agreement to sex as a dispositive lack of consent.”<sup>95</sup> In *Redefining Rape*, David Bryden conducts a thorough and objective review of the most popular recommendations for redefining rape law.<sup>96</sup> Bryden finds the affirmative consent rule promising in many ways, and cautiously identifies it symbolically and educationally as “an excellent rule.”<sup>97</sup> Bryden points out, “what it requires of a man is simply that he behave with a civilized regard for his companion’s wishes. If she signifies assent . . . he may proceed. . . . If she equivocates, or gives no positive signal, he must wait.”<sup>98</sup>

Bryden believes an affirmative consent rule would have the benefits of alternative rules, without their drawbacks.<sup>99</sup> It serves the purpose of a bright line rule, and avoids the vagueness of other subjective standards.<sup>100</sup> Perhaps most importantly, under affirmative consent “force would be decoupled from consent.”<sup>101</sup> A violation of sexual autonomy could be punished without proving force, and violations involving force could be punished as a separate crime with more severe penalties.<sup>102</sup> This treatment of consent would put rape law on even ground with consent standards in other areas of the law.<sup>103</sup> Requiring affirmative verbal consent may take the standard a step beyond the consent required in other areas, but for the military, it is a necessary and promising step.

Currently, only New Jersey has an affirmative consent standard for sexual penetration.<sup>104</sup> In 1992, the Supreme Court of New Jersey concluded that “any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.”<sup>105</sup> In that case, *M.T.S.*, a seventeen-year-old male, was living, along with his girlfriend, in a house with eight other people, including the fifteen-year-old victim and her mother.<sup>106</sup> *M.T.S.* and the victim gave conflicting accounts of their relationship.<sup>107</sup> The victim said that *M.T.S.* had tried to kiss her several times and once attempted to put his hands inside her pants, but she rejected his advances every time.<sup>108</sup> On the night of the assault, the victim said she awoke with *M.T.S.* on top of her with his penis in her vagina.<sup>109</sup> She slapped him and told him to get out, and he complied.<sup>110</sup> According to *M.T.S.*, he and the victim were good friends.<sup>111</sup> Their relationship had led to kissing and hugging and they had discussed having sexual intercourse.<sup>112</sup> *M.T.S.* said they were kissing and hugging in her bed and they had sexual intercourse.<sup>113</sup> *M.T.S.* says after the fourth thrust, she pushed him off and said, “stop, get off,” which he did.<sup>114</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; see also Kasubhai, *supra* note 87, at 41 (“The sex act is a violation per se without consent.”).

<sup>96</sup> Bryden, *supra* note 58.

<sup>97</sup> *Id.* at 400.

<sup>98</sup> *Id.*

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

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 402.

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

<sup>103</sup> See, e.g., *Ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992); Kasubhai, *supra* note 87, at 41 (“In order to properly align the consent doctrine in rape law with consent in other areas of the law, nonconsent must be presumed.”).

<sup>104</sup> N.J. REV. STAT. § 2C:14-2 (2006).

<sup>105</sup> *Ex rel. M.T.S.*, 609 A.2d at 1277.

<sup>106</sup> *Id.* at 1267.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1268.

<sup>109</sup> *Id.*

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

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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

The trial court concluded that the victim had consented to a session of kissing and petting with M.T.S.<sup>115</sup> The court also found that the victim had not been sleeping, but that she had not consented to the actual penetration.<sup>116</sup> They found M.T.S. guilty of second degree sexual assault.<sup>117</sup> The appellate division reversed, holding that the New Jersey statute required a showing of force.<sup>118</sup>

After an analysis of the legislative intent of the statute, the New Jersey Supreme Court reversed and reinstated the finding of juvenile delinquency.<sup>119</sup> In their opinion, the court held, “[r]easonable people do not engage in acts of penetration without permission, and it is unlawful to do so.”<sup>120</sup> The court was specific about what evidence should be considered relevant in these cases. They said neither the victim’s subjective state of mind nor the reasonableness of the victim’s actions is relevant to the case.<sup>121</sup> The victim may be questioned about what he or she said or did “only to determine if the accused was reasonable in believing that affirmative permission had been freely given.”<sup>122</sup> The court explained that the affirmative consent may be verbal or demonstrated through physical actions.<sup>123</sup>

New Jersey’s affirmative consent law is one of the most progressive sexual assault laws in the United States.<sup>124</sup> The theory of requiring affirmative consent before sexual penetration requires a significant shift in the way the crime of rape, and consent within that crime, is traditionally viewed. Throughout much of the history of common law, consent in rape has been treated differently from other crimes.<sup>125</sup> The rape victim, unlike other crime victims, has been shouldered with the burden of proving his or her non-consent.<sup>126</sup> This difference may seem acceptable and necessary because it has been that way throughout modern history. The different treatment, however, is not needed, and is in fact unreasonably disparate from other laws. The tension between acknowledging the true essence of rape as a violation of sexual autonomy and the reliance upon the convenience of defining rape in terms of force is not new. An examination of the history of rape law shows that the concept that rape law should be consent-based and not focused on the use of force has been an undercurrent throughout modern legal history. Understanding this history helps explain why rape law is where it is today, and why it must continue to evolve.

#### D. Origins of Contemporary Rape Law

*If there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex.*<sup>127</sup>

The historical origins of rape law explain, in part, the current form of force-centered laws against rape and sexual assault. The historic approach to rape as a crime against the father’s or husband’s property has shaped the theory of the law, and remnants of that legacy remain.<sup>128</sup> Throughout modern history, however, there have been acknowledgements that the essence

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<sup>115</sup> *Id.* at 1269.

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

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

<sup>118</sup> *Id.* (The New Jersey statute defines sexual assault as sexual penetration with the use of “physical force or coercion.”) (citing NEW JERSEY CODE OF CRIMINAL JUSTICE, N.J.S.A. 2C:14-2c(1) (2006)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1279.

<sup>121</sup> *Id.*

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

<sup>123</sup> *Id.* at 1277.

<sup>124</sup> N.J. REV. STAT. § 2C:14-2 (2006).

<sup>125</sup> *See Ex rel. M.T.S.*, 609 A.2d at 1270-74; SCHULHOFER, *supra* note 5, at 18-29.

<sup>126</sup> *Ex rel. M.T.S.*, 609 A.2d at 1274.

<sup>127</sup> Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 814-15 (1991); Kasubhai, *supra* note 87, at 51.

<sup>128</sup> Kasubhai, *supra* note 87, at 51.

of the crime of rape is sex without consent rather than force.<sup>129</sup> Nonetheless, for both historical and practical reasons, force-centered statutes have prevailed over time and are the law to this day in the majority of U.S. jurisdictions.<sup>130</sup>

The crime of rape has been punished throughout history, but it was traditionally a crime against the legal interests of fathers and husbands.<sup>131</sup> For example, Mosaic law codified the rights of a father over his daughter as property.<sup>132</sup> The rape of a daughter, especially a virgin daughter, was viewed as theft from the father because it lowered her monetary value for marriage.<sup>133</sup> Because Biblical law demanded adulterers be stoned to death, a claim of rape by a married woman was frequently viewed as an excuse to avoid execution for adultery.<sup>134</sup>

Remnants of this view toward the crime of rape linger. Claims of rape in the military are often viewed as excuses to avoid punishment for adultery or other crimes.<sup>135</sup> These suspicions partially account for the special burden historically placed on a rape victim to prove not only that she resisted enough, but that enough force was used to convince her skeptics that she is telling the truth.<sup>136</sup>

Interestingly, English common law originally defined rape as “carnal knowledge of a woman against her will,”<sup>137</sup> with no requirement for force. It appears the early crafters of common law understood that the essence of rape was the lack of consent, rather than the use of force. In the seventeenth century, however, British Chief Justice Mathew Hale infamously pronounced that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>138</sup> Courts worried that a woman might falsely accuse a man of rape to avoid embarrassment over having consented to intercourse or to explain a pregnancy.<sup>139</sup> They were also concerned that scorned women would use accusations of rape for revenge or blackmail.<sup>140</sup> By the eighteenth century, Blackstone had defined rape as “carnal knowledge of a woman forcibly and against her will.”<sup>141</sup> During this time, American jurisdictions adopted the requirement for force, apparently to prove that the carnal knowledge was against the victim’s will.<sup>142</sup>

By the early twentieth century, American courts were adamant that a victim resist “to the utmost”<sup>143</sup> to prove her unwillingness.<sup>144</sup> Additional rape-specific rules requiring independent corroborating evidence,<sup>145</sup> prompt complaint,<sup>146</sup> and

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<sup>129</sup> English common law originally defined rape as “carnal knowledge of a woman against her will,” with no requirement for force. Wicktom, *supra* note 59, at 401; *Ex rel. M.T.S.*, 609 A.2d at 1270. (The American Law Institute reformers who wrote the Model Penal Code specifically identified that the primary goal of rape law is protecting “freedom of choice” and “meaningful consent”). MPC COMMENTARIES, *supra* note 60, pt. II, cmt. to § 213, at 301; SCHULHOFER, *supra* note 5, at 22.

<sup>130</sup> At least twenty-eight states and the federal government have force-centered sexual assault statutes. *See supra* note 76 (listing states with consent-based statutes).

<sup>131</sup> *See Kasubhai, supra* note 87, at 51.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 52 (citing BROWNMILLER, *supra* note 12).

<sup>134</sup> *See Deuteronomy* 22:22 (“If a man be found lying with a woman married to a husband, then they shall both of them die, both the man that lay with the woman, and the woman . . . .”); *id.* 22:23-24 (“If a damsel that is a virgin be betrothed unto a husband, and a man find her in the city, and lie with her then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die; the damsel, because she cried not, being in the city; and the man, because he hath humbled his neighbor’s wife: so thou shalt put away evil from among you.”); Kasubhai, *supra* note 87, at 51.

<sup>135</sup> *See ACADEMIES TASK FORCE, supra* note 18, at 34; CARE FOR VICTIMS, *supra* note 18, at 40-42.

<sup>136</sup> *See SCHULHOFER, supra* note 5, at 17-20.

<sup>137</sup> Wicktom, *supra* note 59, at 401; *Ex rel. M.T.S.*, 609 A.2d 1266, 1270 (N.J. 1992).

<sup>138</sup> 1 MATHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed., 1778).

<sup>139</sup> Wicktom, *supra* note 59, at 403; *Ex rel. M.T.S.*, 609 A.2d at 1271; SCHULHOFER *supra* note 5, at 18.

<sup>140</sup> SCHULHOFER *supra* note 5, at 18; Wicktom, *supra* note 59, at 403; *Ex rel. M.T.S.*, 609 A.2d at 1271.

<sup>141</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (University of Chicago Press, 1979) (1765); SCHULHOFER *supra* note 5, at 18.

<sup>142</sup> Wicktom, *supra* note 59, at 402 (citing ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 211 (1982)); *Ex rel. M.T.S.*, 609 A.2d at 1270.

<sup>143</sup> *Ex rel. M.T.S.*, 609 A.2d at 1271; SCHULHOFER *supra* note 5, at 19.

<sup>144</sup> SCHULHOFER *supra* note 5, at 19. *See also Ex rel. M.T.S.*, 609 A.2d at 1271.

<sup>145</sup> *See, e.g., SCHULHOFER supra* note 5, at 25-26.

<sup>146</sup> *See, e.g., United States v. Wiley*, 492 F.2d 547 (D.C. Cir. 1974); SCHULHOFER *supra* note 5, at 20.

special instructions by the judge<sup>147</sup> were also firmly entrenched in the law. In the 1950s, at the same time the UCMJ was created, a group of respected judges, lawyers, and scholars from the American Law Institute began an in-depth study of American criminal law.<sup>148</sup> When the reformers began their examination of rape, they were shocked by the low rate of conviction.<sup>149</sup> After studying the cases, the group of men identified three contributing flaws in the law: “the resistance requirement, the undue preoccupation with victim consent, and the inclusion of too many diverse kinds of misbehavior within a single felony that carried extremely severe punishments.”<sup>150</sup> This 1950 group of experts identified flaws in the rape law that are strikingly similar to many of the problems the current study groups, task forces, and courts have repeatedly identified.<sup>151</sup> The reformers specifically identified that the primary goal of rape law is protecting “freedom of choice” and “meaningful consent.”<sup>152</sup>

Despite the prescient and progressive view of the American Law Institute reformers, in the end, the Model Penal Code they crafted avoided the issue of consent and fell back onto the convenience of a rape statute defined by force.<sup>153</sup> The group’s work was very influential, and many jurisdictions throughout the United States adopted versions of the Code.<sup>154</sup> Once again, despite the acknowledgement that the essence of rape is the violation of sexual autonomy, statutes centered on force, and thereby the insistence that rape requires force, were further ingrained into American law and public understanding.

Throughout history and the development of contemporary rape law, the requirement for force has served as a useful evidentiary tool. Proof issues and fear of wrongful conviction have played a large role in forming the legal framework for the crimes of rape and sexual assault,<sup>155</sup> and physical violence used in perpetrating a sexual assault provides the fact finder with tangible evidence. Physical injury is usually a clear signal that whatever occurred between the victim and defendant was not consensual. The demand for some physical evidence of resistance on the part of the victim provides a convenient bright line rule.<sup>156</sup> Unfortunately, centering the law on force rather than sexual autonomy suppresses the true nature of the crime, and tends to send the message that anything short of physical brutality is an acceptable method of obtaining sexual activity.<sup>157</sup>

The original crafters of English common law defined rape as it should be: sex without consent—a crime because it violates the bodily integrity of the victim. Over the course of history, for reasons of distrust and suspicion, as well as the legitimate practical need to have a clear standard, the law became about force. The central issue of sexual autonomy was lost in the requirements for proof of adequate resistance and force. Even though influential reformers in the 1950s correctly identified the problems with a force-centered statute and viewed the essence of rape as a violation of bodily integrity and free choice, they ended up solidifying the reliance on force to define the crime. The law continued to move away from the true nature of rape, and rely more heavily on requirements for force.

This analysis suggests that over time, lawmakers and courts decided that the true essence of rape as a violation of bodily integrity and free choice could be sacrificed in the interest of providing a convenient evidentiary tool. Modern courts and legislatures, however, are increasingly rejecting this historical trade-off and searching for ways to draft contemporary rape laws that protect sexual autonomy.

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<sup>147</sup> See, e.g., SCHULHOFER *supra* note 5, at 19.

<sup>148</sup> *Id.* at 20.

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

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

<sup>151</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 57; United States v. Leak, 61 M.J. 234, 246 (2005); United States v. Webster, 37 M.J. 670, 675 (C.G.C.M.R. 1993).

<sup>152</sup> MPC COMMENTARIES, *supra* note 60, at 301; SCHULHOFER *supra* note 5, at 22.

<sup>153</sup> MPC COMMENTARIES, *supra* note 60, at 301 (The choice to focus on force rather than consent relied on the reformer’s inability or unwillingness to define consent; their assumptions that women were often ambivalent about sex, and might say “no” when they meant “yes”; and a belief that focusing on force would keep the factfinder away from the sticky issue of consent.); SCHULHOFER *supra* note 5, at 23.

<sup>154</sup> SCHULHOFER *supra* note 5, at 23.

<sup>155</sup> See *id.* at 18.

<sup>156</sup> See, e.g., *Ex rel. M.T.S.* 609 A.2d 1266, 1271 (N.J. 1992) (“Evidence of resistance was viewed as a solution to the credibility problem; it was the ‘outward manifestation of nonconsent, [a] device for determining whether a woman actually gave consent.’ Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 689 (1966)”).

<sup>157</sup> See, e.g., SCHULHOFER *supra* note 5, at 99-103.

## E. History of Military Rape Law

Military rape law has followed a similar path in its development, and like civilian rape law, the UCMJ retains the focus on force rather than sexual autonomy.<sup>158</sup> Also like civilian courts, however, modern military courts have gradually reformed military law with respect to its treatment of force and consent. In some ways, military case law increasingly indicates an acknowledgement of the concept that sex without consent should be punished, whether or not force was an issue.<sup>159</sup>

Like its civilian counterparts, military law also has its origin in British law. The first American military code was the Massachusetts Articles of War, which was an adoption, with slight changes, of the British Articles of War of 1774.<sup>160</sup> The later 1775 Articles of War, rather than listing rape as a specific offense, required a commander to turn over any military members accused of rape, or any other civilian capital crime, to the local civil magistrate for prosecution.<sup>161</sup> This requirement continued until the American Civil War.<sup>162</sup>

The National Forces Act of 1863<sup>163</sup> gave the military exclusive jurisdiction over service members accused of rape or other violent crimes in time of war. This resulted in commanders having the responsibility for referring military members accused of rape to courts-martial.<sup>164</sup> Because the Act did not define rape, the military adopted the common law definition of rape at that time,<sup>165</sup> which had already incorporated the requirement for force.

The 1950 Uniform Code of Military Justice went into effect on 31 May 1951, beginning the modern era of military law.<sup>166</sup> The 1950 UCMJ represented the most significant change in military law in the history of the United States, and established, for the first time, one criminal code that applied to all of the military services in times of both war and peace.<sup>167</sup> Article 120 of the UCMJ retained the common law definition of rape as a male engaging in “an act of sexual intercourse with a female not his wife, by force and without her consent.”<sup>168</sup> The 1951 Manual for Courts-Martial (*MCM*) retained many of the “special rules” required specifically for rape cases, including the requirement for corroboration,<sup>169</sup> the fresh complaint requirement,<sup>170</sup> and rules specifically allowing inquiry into a victim’s sexual history.<sup>171</sup> These special evidentiary rules remained in the *MCM* for the next thirty years.

In 1980 the Military Rules of Evidence (MRE) replaced all of the prior military evidentiary rules.<sup>172</sup> The MRE eliminated the corroboration and fresh complaint rules, and established MRE 412, the rape shield provision.<sup>173</sup> The 1993

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<sup>158</sup> Both the current Article 120, UCMJ and the new Article 120 that will become law on 1 October 2007, define rape based on the force used. In fact, the new statute relies solely on force. See discussion *infra* Parts II.F, III.A.

<sup>159</sup> See, e.g., *United States v. Webster*, 37 M.J. 670, 675 (C.G.C.M.R. 1993) (recommending consent-based law); *United States v. Leak*, 61 M.J. 234, 246 (2005) (“the essence of the offense remains the same, sexual intercourse against the will of the victim”); *United States v. Bonano-Torres*, 31 M.J. 175, 178-80 (C.M.A. 1990) (discussing constructive force).

<sup>160</sup> Captain David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145 (1980); see also Johnson, *supra* note 4, at 22.

<sup>161</sup> American Articles of War (1776), reprinted in WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 964 (2d ed. 1920 reprint); Johnson, *supra* note 4, at 23.

<sup>162</sup> WINTHROP, *supra* note 161, at 972; Johnson, *supra* note 4, at 22-30.

<sup>163</sup> 12 Stat. 736 (1863).

<sup>164</sup> WINTHROP, *supra* note 161, at 667; Johnson, *supra* note 4, at 24.

<sup>165</sup> WINTHROP, *supra* note 161, at 677; Johnson, *supra* note 4, at 22-30.

<sup>166</sup> See Brigadier General (Ret.) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 2 (2000).

<sup>167</sup> U.S. DEP’T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975*, at 203 (1976); Johnson, *supra* note 4, at 22-30.

<sup>168</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XXVII, ¶ 199(a) (1951) [hereinafter 1951 MCM]; Johnson, *supra* note 4, at 27.

<sup>169</sup> “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.” Johnson, *supra* note 4, at 27 (quoting 1951 MCM, *supra* note 168, pt. XXVII, ¶ 153(a)).

<sup>170</sup> “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.* (quoting 1951 MCM, *supra* note 168, pt. XXVII, ¶ 142(c)).

<sup>171</sup> “For the purpose of impeaching the credibility of the alleged victim, evidence the victim has an unchaste character is admissible.” *Id.* (quoting 1951 MCM, *supra* note 168, pt. XXVII, ¶ 153(b)).

<sup>172</sup> Deborah Wood, *Applying MRE 412: Should It Be Used at Article 32 Hearings?*, ARMY LAW., July 1982, at 13; Johnson, *supra* note 4, at 29.

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

NDAA<sup>174</sup> modified Article 120(a) to make the rape offense gender neutral and remove the spousal exemption, which had precluded men from being charged with rape if the victim was their wife.<sup>175</sup>

The 1993 changes were the last modifications to Article 120 until the 2006 NDAA reform. The current Article 120(a) reads: “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.”<sup>176</sup> This definition of rape is virtually identical to the common law definitions used in the seventeenth and eighteenth centuries.<sup>177</sup> An understanding of the current military rape statute and the case law that military courts have developed will be helpful in analyzing the new 2006 NDAA statute and the changes proposed by this thesis.

## F. Current Rape Statute

Although the statutory definition of rape has not changed dramatically since the inception of the UCMJ,<sup>178</sup> the military courts have effected significant changes through case law. The courts have worked toward limiting the resistance requirement,<sup>179</sup> and have developed the doctrine of constructive force to account for cases in which the force used is not physical.<sup>180</sup> In some ways, it is as if military courts have been waging their own battle to slowly and methodically eliminate the requirement for force, arriving at a consent-based statute.<sup>181</sup> This evolution is limited, though, by the undeniable presence of the distinct element of “force” in the current statute.<sup>182</sup>

*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.*<sup>183</sup>

The UCMJ’s simply stated rape statute belies the challenge and complexity of prosecuting the offense.<sup>184</sup> The *MCM* lists only two elements: “1) That the accused committed an act of sexual intercourse; and 2) That the act of sexual intercourse was done by force and without consent.”<sup>185</sup> Of the two elements, the second is responsible for the debate, dispute, and confusion in the majority of cases. The bulk of litigation surrounds the meaning of “force” and “consent,” and how they are related.

The second element actually consists of two separate and distinct elements: force and lack of consent.<sup>186</sup> The *MCM* discusses force and lack of consent,<sup>187</sup> but does not offer a clear definition of either one. In fact, the *MCM* discusses them together, adding to the challenge of distinguishing one from the other. Because of the complexity of trying to define each

<sup>174</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1066, 106 Stat. 2315, 2506 (1992).

<sup>175</sup> Johnson, *supra* note 4, at 29-30.

<sup>176</sup> UCMJ art. 120(a) (2005).

<sup>177</sup> By the eighteenth century, Blackstone had defined rape as “carnal knowledge of a woman forcibly and against her will.” 4 BLACKSTONE, *supra* note 141, at 210.

<sup>178</sup> Aside from the 1993 change making the statute gender neutral and eliminating the spousal exemption, the definition of rape has not changed.

<sup>179</sup> The requirement is still alive in current military rape law. See *United States v. Bonano-Torres*, 31 M.J. 175, 178 (C.M.A. 1990) (“proof of resistance-or lack thereof-is highly significant in all rape cases where the victim has the capacity to resist”).

<sup>180</sup> See, e.g., *id.* at 179-80; *United States v. Simpson*, 58 M.J. 368, 377-79 (2003).

<sup>181</sup> See, e.g., *United States v. Webster*, 37 M.J. 670, 683 (C.G.C.M.R. 1993) (Bridgman, J., concurring) (“‘arguably, ‘constructive force’ is applied where there has been, in fact, no actual force, but the acts are felt to be reprehensible”) (Baum, J., concurring in part, dissenting in part) (voicing frustration with the loose interpretations of the rape statute, noting that both force and lack of consent are necessary to the crime. [T]he “statutory elements have not been modified. Societal changes and case decisions may have prompted differing views on how these elements are manifested, but they still must be proven beyond a reasonable doubt . . .”).

<sup>182</sup> See *Simpson*, 58 M.J. at 377 (“Force and lack of consent are separate elements.”); *United States v. Leak*, 61 M.J. 234, 245 (2005) (“Although listed within the same element, the discussion and case law make it clear that force and lack of consent are distinct, although related, elements of the offense.”).

<sup>183</sup> UCMJ art. 120 (2005).

<sup>184</sup> *United States v. Simpson*, 55 M.J. 674, 695 (Army Ct. Crim. App. 2001).

<sup>185</sup> *MCM*, *supra* note 6, pt. IV, ¶ 45(b)(1).

<sup>186</sup> See *Simpson*, 58 M.J. at 377 (“Force and lack of consent are separate elements.”); *Leak*, 61 M.J. at 245 (“Although listed within the same element, the discussion and case law make it clear that force and lack of consent are distinct, although related, elements of the offense.”).

<sup>187</sup> *MCM*, *supra* note 6, pt. IV, ¶ 45 c(1)(b).

element, and the way in which they are often intertwined and usually depend on the same facts for proof,<sup>188</sup> military courts have developed a significant body of case law. In many respects, this body of case law is the result of the courts trying to apply the dated UCMJ definition of rape to the modern context of rape and sexual assault involving minimal levels of force or violence.

### 1. By Force and Without Consent

Over time, military courts have struggled to define the elements of force and consent, and have outlined two distinct kinds of force in rape cases: actual force and constructive force. An examination of what constitutes force inevitably turns to consent and the resistance requirement.<sup>189</sup> Current military law retains the resistance requirement in cases of actual force, demanding actual physical and/or verbal resistance by the victim against an aggressor to prove her lack of consent.<sup>190</sup> In cases involving constructive force, “the incidental force involved in penetration”<sup>191</sup> is sometimes enough to satisfy the force requirement.<sup>192</sup>

The *MCM* dedicates a large amount of attention to the explanation of force and lack of consent.<sup>193</sup> The majority of the 200-word explanation, however, is actually a description of the hurdles a victim must overcome in order to prove her lack of consent, and the circumstances in which the proof is not required. If the victim does not resist enough, consent is presumed.<sup>194</sup> Nowhere in this lengthy explanation of force and lack of consent is force defined or explained.<sup>195</sup> The *MCM* discusses the lack of consent required as “more than a mere lack of acquiescence.”<sup>196</sup> A significant burden is placed upon the victim to “make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances.”<sup>197</sup> Further, if the victim fails to take “reasonable measures” to resist, the manual states, “the inference may be drawn that the victim did consent.”<sup>198</sup> This language serves to make the determination of the victim’s consent subjective.<sup>199</sup> The reasonableness of her reaction in the midst of what is likely a surprising and traumatic event is to be determined by the judge or panel. This interpretation of silence as consent is in opposition to any other formulation of consent under the UCMJ.<sup>200</sup>

The courts have recognized the inequity of this “inflexible rule establishing resistance as a necessary element.”<sup>201</sup> Despite their rejection of an “inflexible” resistance requirement, the court in *United States v. Bonano-Torres* held that “where 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 for conviction.”<sup>202</sup> This is a reasonable conclusion to draw, given the

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<sup>188</sup> See *Leak*, 61 M.J. at 246-47; *Simpson*, 58 M.J. at 377; *United States v. Palmer*, 33 M.J. 7, 9-10 (C.M.A. 1991).

<sup>189</sup> See, e.g., *Leak*, 61 M.J. at 246 (“[T]hese elements are included within the same statutory element, suggesting an intentional substantive link. They also are often closely allied with regard to proof. The same evidence offered on the issue of force, may also serve to prove lack of consent. In this manner for example, evidence of measure(s) of resistance might prove both the elements of force and lack of consent.”).

<sup>190</sup> See *United States v. Bonano-Torres*, 31 M.J. 175, 178 (C.M.A. 1990) (“proof of resistance-or lack thereof-is highly significant in all rape cases where the victim has the capacity to resist”).

<sup>191</sup> *Id.* at 179.

<sup>192</sup> See generally *Simpson*, 58 M.J. at 368; see also *Palmer*, 33 M.J. at 9-10 (“Consent induced by fear, fright, or coercion is equivalent to physical force.”).

<sup>193</sup> *MCM*, *supra* note 6, pt. IV, ¶ 45 c(1)(b).

<sup>194</sup> *Id.* (“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.”).

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

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

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See, e.g., *United States v. Webster*, 37 M.J. 670, 683 (C.G.C.M.R. 1993) (Bridgman, J., concurring) (voicing frustration that “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 . . . consent is sometimes treated as a state of mind and sometimes related to the physical manifestations of the victim conveying a lack of consent. Again, to an unfortunate extent, rape is in the mind of the beholder.”).

<sup>200</sup> See *infra* Part III (comparing consent in rape to consent in other areas of the UCMJ).

<sup>201</sup> *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990).

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

wording of the statute and ensuing case law, but it leaves the responsibility for preventing the rape squarely on the shoulders of the victim. The court goes on to lament the fact the *MCM* “stops short of explaining what is sufficient force in the non-constructive force cases.”<sup>203</sup> It is this inability to define force that results in forming the definition in terms of what type of resistance the victim must offer.

## 2. Constructive Force

The concept of constructive force does not exist in the language of the UCMJ, nor is it found anywhere in the *MCM*. Constructive force is an alternative theory of force that military appellate courts have developed in addressing instances of clearly non-consensual sexual acts where there was no use of overt physical force. In these cases, force is found in abuse of authority, fear, or coercion.<sup>204</sup> As in cases of actual force, however, the doctrine of constructive force still requires some level of force.<sup>205</sup>

It is in this area of law that the courts have ventured farthest away from the actual language of the statute, which plainly requires both lack of consent and force in every case. The courts have stopped short of interpreting the law to allow for a crime of sex without consent, but involving no force at all.<sup>206</sup> The direction in which the military appellate courts have taken rape law under the UCMJ, however, indicates a growing attitude that military rape law should protect sexual autonomy, rather than merely protecting against the use of force to obtain sex.<sup>207</sup> The military courts have taken the outdated rape statute as far along into the future as they can, but leading up to the 2006 NDAA reform, they have signaled that they cannot do more without a reformation of the statute itself.<sup>208</sup>

## G. The Call for Change

Several incidents in the past twenty years focused attention on the issue of sexual assault in the military. The Army, Navy, and Air Force have each had large public sexual assault scandals. In 1991, eighty-three women and seven men were sexually assaulted at the Navy’s Tailhook convention in Las Vegas.<sup>209</sup> The Navy’s investigation was viewed by many as a cover-up of the events that took place, and the DOD Inspector General subsequently investigated and substantiated most of the reported assaults.<sup>210</sup> In 1997, Army drill sergeant Staff Sergeant Delmar Simpson was convicted of eighteen counts of rape involving female trainees under his control.<sup>211</sup> In response to the allegations of sexual assault at Aberdeen Proving Ground, the Army established a hotline for reports of sexual assault and received thousands of phone calls and hundreds of allegations.<sup>212</sup> In 2003, at least twenty-two female Air Force Academy cadets reported that they had been sexually assaulted, and that the Academy’s administration had failed to investigate the reported crimes.<sup>213</sup> Most recently, congressional alarm over reports of sexual assaults in Iraq and Afghanistan led to the appointment of the Task Force on Care for Victims of Sexual Assault.<sup>214</sup> The resulting investigations and study groups have called for reform of the military’s sexual assault policies and rape law.<sup>215</sup>

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

<sup>204</sup> See *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (“Where intimidation or threats of death or physical injury make resistance futile, it is said that ‘constructive force’ has been applied”); *United States v. Simpson*, 58 M.J. 368, 377 (2003).

<sup>205</sup> See *Bonano-Torres*, 31 M.J. at 179.

<sup>206</sup> See *id.*

<sup>207</sup> See, e.g., *United States v. Webster*, 37 M.J. 670, 683 (C.G.C.M.R. 1993) (Bridgman, J., concurring) (“arguably, ‘constructive force’ is applied where there has been, in fact, no actual force, but the acts are felt to be reprehensible”); *United States v. Leak*, 61 M.J. 234, 246 (2005) (“the essence of the offense remains the same – sexual intercourse against the will of the victim”).

<sup>208</sup> See, e.g., *Webster*, 37 M.J. at 675; *Leak*, 61 M.J. at 246; see sec. II.G for more discussion of specific calls by the courts for reformation of the statute.

<sup>209</sup> *Tailhook 91*, *supra* note 24.

<sup>210</sup> *Id.*

<sup>211</sup> See PBS Online NewsHour Transcript, *supra* note 24.

<sup>212</sup> See *id.*

<sup>213</sup> See Booth-Thomas, *supra* note 24.

<sup>214</sup> CARE FOR VICTIMS, *supra* note 18.

<sup>215</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 57.

While some maintained that the UCMJ rape and sexual misconduct statutes did not need to be revised,<sup>216</sup> others argued that the statute was outdated and due for an update. The requests that the statute be updated came from many different directions. Military appellate courts pointed to the antiquated statutes and stated the need for reform.<sup>217</sup> Commissions and task forces studied sexual assault in the military and recommended statutory revision.<sup>218</sup> Most importantly, in the 2005 NDAA, Congress demanded feedback from the DOD on modernizing sex crimes in the UCMJ.<sup>219</sup> In the 2006 NDAA, Congress responded to the DOD feedback by updating the military sexual misconduct statute for the first time in the history of the UCMJ.

The most common criticism of the current UCMJ rape offense is that it does not adequately address the full range of contemporary sexual misconduct.<sup>220</sup> Military appellate courts, commissions, and task forces have identified the need for a shift to a statute centered on consent rather than force.<sup>221</sup> Additionally, the current statute does not draw clear lines identifying criminal conduct for situations involving voluntary intoxication, abuse of authority, and coercion.<sup>222</sup> Critics also recommended that the reformed statute have better definitions of concepts such as consent, force, and incapacity.<sup>223</sup> The recommendations from each group were consistent that change is necessary and Congress must update the statute. A review of these groups' recommendations demonstrates that virtually all of the critics envisioned military rape law moving toward a more consent-based sexual assault statute.

### 1. Studies and Reports

In May 2001, the National Institute of Military Justice issued a report entitled *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*,<sup>224</sup> the so-called "Cox Commission."<sup>225</sup> The commission recommended repealing the rape and sodomy provisions of the UCMJ, as well as the offenses specified under Article 134 that concern criminal sexual misconduct, and replacing 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."<sup>226</sup> The commission reasoned:

Because it is crucial that service members are both made aware of and held accountable for sexual activities that interfere with military missions, undermine morale and trust within military units, or exploit the hierarchy of the military rank structure, the Commission recommends that a new statute be drafted to replace the current provisions. Many issues presented in the modern context simply do not fit the current statutes.<sup>227</sup>

The commission echoed the opinion from others in the past, and those that followed, that the military statute failed to keep pace with the times. Though they did not specifically recommend a consent-based standard, the Cox Commission recognized that a progressive military sexual assault law has the power to both educate and deter "sexual activities that interfere with military missions [and] undermine morale and trust within military units."<sup>228</sup>

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<sup>216</sup> See *infra* note 260.

<sup>217</sup> See, e.g., *United States v. Leak*, 61 M.J. 234, 246 (2005); *United States v. Webster*, 37 M.J. 670, 675 (C.G.C.M.R. 1993).

<sup>218</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 57.

<sup>219</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811 (2004) ("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.").

<sup>220</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; *Leak*, 61 M.J. at 246; *Webster*, 37 M.J. at 675.

<sup>221</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; *Leak*, 61 M.J. at 246; *Webster*, 37 M.J. at 675.

<sup>222</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31.

<sup>223</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31.

<sup>224</sup> COX COMMISSION, *supra* note 18.

<sup>225</sup> See discussion *supra* note 18.

<sup>226</sup> COX COMMISSION, *supra* note 18.

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

<sup>228</sup> *Id.* ("The Commission urges that the new statute recognize that military rank and organization may produce an atmosphere where sexual conduct, although apparently consensual on its face, should be proscribed as coercive sexual misconduct.").

In February 2004, former Secretary of Defense Rumsfeld responded to growing publicity and congressional concern about the treatment of victims of sexual assault in the military by appointing the Task Force on Care for Victims of Sexual Assault.<sup>229</sup> Secretary Rumsfeld directed the task force to study the handling of alleged victims of sexual assault throughout the DOD.<sup>230</sup> This task force found that confusion existed over the definitions and terms used in the military to refer to sexual assault, rape, and sexual harassment.<sup>231</sup> The Task Force recommended “that DoD bring greater transparency to the UCMJ, improve definitions of sexual assault, and resolve confusion over terms, behaviors, and legal definitions.”<sup>232</sup>

In the aftermath of the Air Force Academy’s sexual assault scandal in June 2005,<sup>233</sup> Congress mandated the formation of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies.<sup>234</sup> Secretary Rumsfeld appointed a task force comprised of senior military leaders and experts in sexual assault from the civilian sector. After a full year of studying the prevention of and response to sexual harassment and assault at the United States Military and Naval Academies, the task force recommended that Congress “revise the current sexual misconduct statutes to more clearly and comprehensively address contemporary sexual misconduct.”<sup>235</sup> The report specified that the revised statute should have varying degrees of sexual misconduct, including a specific provision for the criminal act of sexual penetration or assault where no force is involved.<sup>236</sup> The report concludes, “[i]f a person has intercourse or other sexual contact with someone when they know or should know that there is no consent, the person should be held criminally accountable.”<sup>237</sup> Like contemporary scholars and lawmakers, the task force recognized the need to protect sexual autonomy, regardless of any attending force. This need was echoed by military courts.

## 2. Military Courts

The military appellate courts also voiced frustration with the inability of the rape statute to adequately address many of the sexual assault crimes they encounter, and recommended statutes based on consent.<sup>238</sup> In 1993, the U.S. Coast Guard Court of Military Review affirmed a rape conviction in the case of *United States v. Webster*.<sup>239</sup> In *Webster*, the defendant engaged in sexual intercourse with a female petty officer after she told him “no” repeatedly.<sup>240</sup> The defendant agreed that she told him “no” repeatedly, but contends that she consented based upon her physical participation.<sup>241</sup> The victim said she continued to say “no” the entire time and did not participate in any way.<sup>242</sup> She admitted, however, that she never tried to hit the defendant or run away, and she was not afraid of him.<sup>243</sup> Though the court looked at the totality of the circumstances and found that the sexual intercourse “was done by force and without consent”<sup>244</sup> they made a direct and unequivocal plea for reform of Article 120 of the UCMJ:

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<sup>229</sup> CARE FOR VICTIMS, *supra* note 18.

<sup>230</sup> *Id.* at 1.

<sup>231</sup> *Id.* at 20-21.

<sup>232</sup> SEX CRIMES AND THE UCMJ, *supra* note 7, at 2 (citing Joint Statement of Dr. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, and Ms. Ellen 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>).

<sup>233</sup> In 2002 and 2003 a number of current and former Air Force Academy cadets went public with allegations that their reports of sexual assault at the Academy had been severely mishandled. Several study groups and commissions were formed to assess the problem at the Air Force Academy. See, e.g., REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (22 Sept. 2003); U.S. DEP’T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, REPORT ON THE SERVICE ACADEMY SEXUAL ASSAULT AND LEADERSHIP SURVEY (4 Mar. 2005).

<sup>234</sup> ACADEMIES TASK FORCE, *supra* note 18.

<sup>235</sup> *Id.* at 31.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *United States v. Webster*, 37 M.J. 670, 675 (C.G.C.M.R. 1993); *United States v. Leak*, 61 M.J. 234, 246 (2005).

<sup>239</sup> *Webster*, 37 M.J. at 670.

<sup>240</sup> *Id.* at 672.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 675 (quoting MCM, *supra* note 6, pt. IV, ¶ 45b(1)(c)).

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. . . . [w]e are attempting to apply a 1950's law to the post-"sexual revolution" morality [or lack of it] of the 1990's. Acknowledgement of this problem calls for a change in the law.<sup>245</sup>

The court specifically recommended the military adopt a consent-based statute:

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.<sup>246</sup>

Not only did the court endorse a consent-based approach to reform of the UCMJ, they identified New Jersey's affirmative consent standard as an "example of a better approach."<sup>247</sup> The endorsement of an affirmative consent standard by a military appellate court is a significant signal that military courts, as well as civilian courts and legal scholars, see the need for laws that recognize sexual autonomy.

As recently as 2005, the Court of Appeals for the Armed Forces (CAAF) acknowledged in *United States v. Leak*<sup>248</sup> that the essence of rape is, and always has been, "sexual intercourse against the will of the victim."<sup>249</sup> The court echoed the opinion that "Article 120 is antiquated in its approach to sexual offenses,"<sup>250</sup> and noted:

Article 120 is dated, its elements may not easily fit the range of circumstances now generally recognized as "rape," including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape. As a result, the traditional military rape elements have been applied in contexts for which the elements were not initially contemplated.<sup>251</sup>

The court went on to say that case law evolved to address these discrepancies (primarily in the form of constructive force doctrine), but acknowledged that the application of this case law is "complex because the elements of consent and force are often intertwined."<sup>252</sup> Therefore, courts assessing the totality of the circumstances may confuse actual and constructive force concepts.<sup>253</sup>

An affirmative consent standard would eliminate the persistent confusion described by the court in *Leak* by dispensing with the need for force and signs of resistance to indicate lack of consent. The court in *Webster* endorsed the concept of affirmative consent, and both courts, in their own words, recognized on the record that the "essence of the offense"<sup>254</sup> of rape is the violation of sexual autonomy.<sup>255</sup>

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<sup>245</sup> *Id.* at 675 n.8.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> 61 M.J. 234 (2005).

<sup>249</sup> *Id.* at 246.

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

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

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

<sup>255</sup> *See id.* at 239 ("the force used may vary depending on the relationship and familiarity, if any, between the perpetrator and victim, but the essence of the offense remains the same—sexual intercourse against the will of the victim"); *United States v. Webster*, 37 M.J. 670, 675 (C.G.C.M.R. 1993) (recommending that the statute be based solely on consent, and identifying an affirmative consent statute as a model clearly indicates their view that the crime of rape is, at its core, a violation of sexual autonomy).

### 3. Congress

Members of Congress had wanted to reform the sexual misconduct statutes in the UCMJ for years.<sup>256</sup> In November 2004, Representative Louise Slaughter introduced a bill entitled *Prevention of and Response to Sexual Assault and Domestic Violence in the Military Act*.<sup>257</sup> The bill sought to change the UCMJ by incorporating the federal sexual assault statutes into the Code.<sup>258</sup> Although this bill did not clear the House of Representatives, it served as a shot across the bow to the DOD that Congress was serious about updating the military's sexual misconduct statutes.

The official signal that reform of the UCMJ was inevitable came in the Ronald W. Reagan NDAA for Fiscal Year 2005. In it, Congress required the Secretary of Defense to review the UCMJ and the *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 and the Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.<sup>259</sup>

The responsibility fell to the Joint Service Committee (JSC) on Military Justice,<sup>260</sup> which created a sub-committee to review federal and state sexual assault statutes and propose changes in compliance with the mandate from Congress.

In February 2005, the sub-committee, comprised of Judge Advocate representatives from each of the military services and the Coast Guard, produced an extensive report entitled *Sex Crimes and the UCMJ: A Report for the Joint Services Committee on Military Justice*.<sup>261</sup> The report provided various options for amending the UCMJ rape statute, but concluded that a change was not necessary.<sup>262</sup> Members of Congress, and specifically the House Armed Services Committee, had wanted to revise the UCMJ rape and sexual misconduct statutes for a couple of years and were not satisfied with leaving the statute as it was.<sup>263</sup> They used what is referred to as "Option 5"<sup>264</sup> from the JSC's report as the basis for the new UCMJ Article 120.<sup>265</sup> This was the preferred option of the JSC among the options to change the UCMJ.<sup>266</sup>

### III. Two Steps Forward, One Step Back—The New Statute

In the 2006 NDAA, Congress implemented the most significant change to the UCMJ rape statute in the UCMJ's history.<sup>267</sup> The new Article 120 is nearly identical to Option 5 from the JSC's recommendation. It replaces rape and carnal

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<sup>256</sup> Interview with Mark Epley, General Counsel, House Armed Services Committee, and Colonel (Ret.) Jeanette James, HASC Staff, in Washington, D.C. (Jan. 19, 2006) [hereinafter Epley Interview].

<sup>257</sup> Prevention of and Response to Sexual Assault and Domestic Violence in the Military Act, H.R. 5391, 108th Cong. (2004).

<sup>258</sup> *Id.*

<sup>259</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811 (2004).

<sup>260</sup> The JSC on Military Justice is comprised of Judge Advocate representatives from each of the military services, and meets to review and propose changes to the *MCM*.

<sup>261</sup> SEX CRIMES AND THE UCMJ, *supra* note 7.

<sup>262</sup> The JSC presents a thorough summary of the most common arguments against reforming the UCMJ sexual misconduct statutes. The report lists five reasons the committee recommended against change:

- (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.

*Id.* The report cites concerns about the confusion and disruption that a change would cause, but concedes 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."

<sup>263</sup> Epley Interview, *supra* note 256.

<sup>264</sup> SEX CRIMES AND THE UCMJ, *supra* note 7 (Option 5, also known as Option E, is the fifth of six options put forth by the JSC in their report.).

<sup>265</sup> Epley Interview, *supra* note 256.

<sup>266</sup> *Id.*

<sup>267</sup> The new statute goes into effect 1 October 2007. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006).

knowledge, and addresses many of the sexual misconduct offenses currently found in Article 134.<sup>268</sup> Though the new statute reflects some of the changes recommended by critics of the current statute, Congress failed to truly reform the statute in the way the studies and military appellate courts recommended.<sup>269</sup> Rather than focusing the crime on the issue of consent, as an increasing number of legal scholars and legislatures are doing, and as they were encouraged to do by military courts and studies, Congress further entrenched the requirement for force.

## A. The New Statute

The new sexual assault statute differs from the current statute in two significant ways. First, the new statute contains fourteen different sexual offenses against adults and children.<sup>270</sup> These offenses replace the offenses of rape and carnal knowledge, prohibit other sexual misconduct currently covered by various Article 134 offenses, and consolidate them all within one article, "Rape, Sexual Assault, and Other Sexual Misconduct."<sup>271</sup> Second, lack of consent is no longer an element of the crime.<sup>272</sup> The crimes are based upon the force used against the victim to engage in sexual acts or contact with them.<sup>273</sup> Consent now becomes an affirmative defense to the crimes of rape and sexual assault.<sup>274</sup>

### 1. Offenses

The new statute lists fourteen separate sexual offenses,<sup>275</sup> starting with the most violent and forceful rape and progressing down with decreasing levels of force and less invasive forms of contact. Included among the fourteen are several variations of crimes against children, as well as several other types of sexual misconduct. These offenses are not relevant to this topic, and are not discussed in this article.<sup>276</sup> The new sexual offenses against adults are: 120(a) rape; 120(c) aggravated sexual assault; 120(e) aggravated sexual contact; 120(h) abusive sexual contact; and 120(m) wrongful sexual contact. Rape and aggravated sexual assault are essentially the current Article 120 rape offense, broken into two offenses based on differing levels of force.<sup>277</sup> These offenses criminalize forced acts of sexual penetration. The last three offenses, aggravated sexual contact, abusive sexual contact, and wrongful sexual contact are analogous to the current offense of indecent assault, and are also broken down into decreasing levels of force.<sup>278</sup> These are the acts of improper sexual touching that do not rise to the level of sexual penetration. Each offense requires some level of force, with the exception of 120(m), wrongful sexual contact, which merely requires lack of permission.<sup>279</sup>

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<sup>268</sup> § 552.

<sup>269</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; United States v. Leak, 61 M.J. 234, 246 (2005); United States v. Webster, 37 M.J. 670, 675 (C.G.C.M.R. 1993).

<sup>270</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006) (The new offenses are: 120(a) (Rape); 120(b) (Rape of a child); 120(c) (Aggravated sexual assault); 120(d) (Aggravated sexual assault of a child); 120(e) (Aggravated sexual contact); 120(f) (Aggravated sexual abuse of a child); 120(g) (Aggravated sexual contact with a child); 120(h) (Abusive sexual contact); 120(i) (Abusive sexual contact with a child); and 120(j) (Indecent liberty with a child); 120(k) (Indecent act); 120(l) (Forcible pandering); 120(m) (Wrongful sexual contact); and 120(n) (Indecent exposure).).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (The crimes against children are: 120(b) (Rape of a child); 120(d) (Aggravated sexual assault of a child); 120(f) (Aggravated sexual abuse of a child); 120(g) (Aggravated sexual contact with a child); 120(i) (Abusive sexual contact with a child); and 120(j) (Indecent liberty with a child). The other sexual misconduct offenses are: 120(k) (Indecent act); 120(l) (Forcible pandering); and 120(n) (Indecent exposure).).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

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

a. Article 120(a) Rape

The offense of rape under the new statute is reserved for the most forceful and violent forms of forced intercourse. The text of the offense is:

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 subject to death, grievous bodily harm, or kidnapping; (4) rendering another person unconscious; or (5) administering to another person by force of 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.<sup>280</sup>

This offense, combined with the new statute's definition of "sexual act," broadens the scope of behavior that may be punished under the title of "rape."<sup>281</sup> The new statute defines a sexual act as "contact between the penis and the vulva"<sup>282</sup> or "the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person."<sup>283</sup> Therefore, rape now constitutes far more than penetration of a vulva by a penis. Rape can also include penetration by other objects. Under this portion of the offense, however, the object must penetrate the genital opening, as opposed to just the vulva. While not stated explicitly in the language, this definition of sexual act functions to limit the offense of rape to a crime against women.<sup>284</sup> A crime of sexual penetration against a male (as well as anal penetration of a female) would still be charged as Article 125, forcible sodomy.<sup>285</sup>

Whereas the current statute defines rape only as sexual intercourse by force and without consent, the new statute enumerates specific behaviors and applications of force that constitute rape. The first of these is "rape by force," with force defined as:

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 person, sufficient that the other person could not avoid or escape the sexual conduct.<sup>286</sup>

Rape may also be accomplished by causing grievous bodily harm or threatening death, grievous bodily harm, or the kidnapping of any person.<sup>287</sup> The sexual act would also be considered rape if it were accomplished by rendering the person unconscious or administering drugs, alcohol, or other substances to substantially impair the ability of the person to appraise or control her conduct.<sup>288</sup> This administration of intoxicating substances must be done by force, by threat of force, or without the knowledge or permission of the person.<sup>289</sup>

Although the offense of rape is broader in some ways, in other ways the new statute narrows activity that can be considered rape. The new definition of force restricts the definition of force developed by case law under the current statute.

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

<sup>281</sup> *Id.* (defining sexual act as "contact between the penis and vulva . . . or the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.").

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

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

<sup>284</sup> *Id.*

<sup>285</sup> UCMJ art 125 (2005).

<sup>286</sup> Notice of Proposed Amendments to the Manual for Courts-Martial, 71 Fed. Reg. 47,489-4,7490 (Aug. 17, 2006).

<sup>287</sup> *Id.* (Grievous bodily harm is defined as serious bodily injury, including fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injury. It does not include minor injuries such as a black eye or bloody nose.).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

The behaviors prohibited by the current doctrine of constructive force, as well as sex with a person who is asleep, unconscious, or highly intoxicated (voluntarily) are now included in the offense of aggravated sexual assault.<sup>290</sup>

*b. Article 120(c) Aggravated Sexual Assault*

The offense of aggravated sexual assault covers the same sexual acts as rape, but with a lower required level of force by the perpetrator. The offense may be committed by threat or placing the other person in fear, amounting to less than the threat of death, kidnapping or grievous bodily harm.<sup>291</sup> For this offense, threat or placing a person in fear is defined as “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 a lesser degree of harm than death, grievous bodily harm, or kidnapping.”<sup>292</sup> This definition includes physical damage to a person or property, as well as threats to accuse a person of a crime, expose a secret, or publicize an asserted fact that would subject someone to hatred, contempt, or ridicule.<sup>293</sup> It also specifically includes the use or abuse of military position, rank, or authority to affect or threaten to affect the military career of a person.<sup>294</sup> Finally, the offense includes engaging in a sexual act by causing bodily harm or engaging in a sexual act with a person who is incapacitated or incapable of appraising the nature of, declining participation in, or communicating unwillingness to engage in the sexual act.<sup>295</sup>

Aggravated sexual assault specifically codifies many of the behaviors that have been included as rape through the development of case law under the current statute.<sup>296</sup> Because the behaviors currently prohibited by constructive force case law are directly addressed by this offense, the majority of that case law will likely not apply under the new statute. Similarly, because force is specifically defined by the new statute, some of the movement military appellate courts had made away from force requirements and toward consent-focused law will be lost under the new law.<sup>297</sup> The new statute takes military rape law away from the consent-based law that has been embraced by military appellate courts and civilian jurisdictions, and recommended by studies and legal scholars.

*c. Article 120(e) Aggravated Sexual Contact*

Aggravated sexual contact covers behavior that would have been rape under 120(a) had the contact constituted a sexual act. It includes much of the behavior that would be considered indecent assault under the current statute. Sexual contact is defined as:

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, or degrade any person or to arouse or gratify the sexual desire of any person.<sup>298</sup>

The forms of force used to accomplish the sexual contact for this offense correspond to those required in the offense of rape as discussed above.

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006).

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

<sup>296</sup> *Id.* See, e.g., United States v. Palmer, 33 M.J. 7, 9 (C.M.A. 1991); United States v. Simpson, 58 M.J. 368, 377 (2003).

<sup>297</sup> For example, under the facts in *Webster*, where the victim resisted verbally, but the accused ignored her and penetrated her, the accused would not have violated the new statute. It would be possible to charge him with wrongful sexual contact (sexual contact without permission), but the act of penetration is not covered by the definition of sexual contact, so the penetration itself could not be specifically punished. United States v. Webster, 37 M.J. 670, (C.G.C.M.R. 1993)

<sup>298</sup> Pub. L. No. 109-163, § 552, 119 Stat. 3136.

*d. Article 120(h) Abusive Sexual Contact*

In the same way that the forms of force in aggravated sexual contact correspond to those in rape, the force used for the offense of abusive sexual contact is the same type that is used in aggravated sexual assault. The difference is that the acts are sexual contact rather than sexual acts. This offense is roughly analogous to the current crime of indecent assault where lesser forms of force are used.<sup>299</sup> For example, if a person comes across someone who is asleep or unconscious and fondles that person's breasts, the offense is abusive sexual contact. If, however, the perpetrator is the one who rendered the other person unconscious by placing an intoxicant in the other's drink without that person knowing it, the fondling would then be an aggravated sexual contact. If the person in the first scenario actually made penis to vulva contact or penetrated the genital opening of the person with any object, he or she would be guilty of aggravated sexual contact. In the second scenario, where the perpetrator rendered the victim unconscious, these acts would be rape.

*e. Article 120(m) Wrongful Sexual Contact*

This offense is particularly interesting, because it is similar to the statute proposed by this article. Wrongful sexual contact requires no force at all, only a wrongful sexual contact without permission.<sup>300</sup> The statute reads, "Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact . . . ."<sup>301</sup> This is not very different from the current indecent assault offense. It is simply a cleaner, more straightforward version because it does not require proof that the touching was indecent, with that term's lengthy definition. In addition, wrongful sexual contact does not have the marital exemption or the prejudice to good order and discipline requirement that indecent assault does.<sup>302</sup> Lack of permission is an element of the crime and, therefore, the Government must prove it beyond a reasonable doubt.<sup>303</sup>

This new offense captures the concept of sexual autonomy and bodily integrity that is missing from the rest of the new (and current) statute. It makes sexual contact with another, without the permission of that person, a crime. Strangely though, the new statute punishes mere sexual contact without permission, but leaves unpunished the more egregious offense of sexual acts without permission. This result is representative of the illogical approach current laws take toward the crimes of rape and sexual assault. Because of the deeply-entrenched notion that force and resistance from the victim are required to make non-consensual sex criminal, even this thoroughly modern statute cannot quite make the final logical step—the criminalization of sex without consent.

*2. Affirmative Consent Defense*

Under the new statute, consent is no longer an element; it is an affirmative defense.<sup>304</sup> The Government will have to prove the elements of the offense: sexual act or contact and the attending use of force.<sup>305</sup> If the defense asserts that the act or contact was consensual, they must prove this by a preponderance of the evidence.<sup>306</sup> If the defense is successful in meeting their burden, the Government must then prove the acts or contact were not consensual beyond a reasonable doubt.<sup>307</sup> Part of the reasoning for this construct was to take the focus off of the behavior of the victim and focus attention on the criminal behavior of the accused.<sup>308</sup> This notion is one of the main arguments for framing rape law around a force element and removing consent as an element.<sup>309</sup> Whether this construct will have the intended effect remains to be seen.

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<sup>299</sup> UCMJ art. 134 (2005).

<sup>300</sup> Pub. L. No. 109-163, § 552, 119 Stat. 3136.

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

<sup>302</sup> UCMJ art. 134.

<sup>303</sup> Pub. L. No. 109-163, § 552, 119 Stat. 3136.

<sup>304</sup> Consent is not an affirmative defense to 120(m) wrongful sexual contact, since lack of consent is an element of the crime and must be proven by the government.

<sup>305</sup> Pub. L. No. 109-163, § 552, 119 Stat. 3136.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> SEX CRIMES AND THE UCMJ, *supra* note 7, at 103.

<sup>309</sup> *Id.*

## B. Benefits of the New Statute

### 1. Differing Levels of Offenses with Appropriate Corresponding Maximum Punishments

Many of the advocates for changing the military's rape law cited the need for varying levels of offenses and corresponding maximum punishments.<sup>310</sup> Few rape allegations in the military involve a significant amount of force or violence.<sup>311</sup> Most of the cases fit into the category of "date rape" or "acquaintance rape."<sup>312</sup> Despite the infrequency of the traditional "stranger rape" in current society, panels and judges expect to see a violent act by a stranger when they see the charge of rape.<sup>313</sup> Instead of a masked attacker, they are presented with a young Soldier who looks just like every other hard-working young person in their unit. Instead of a victim with bruises and cuts, they are presented with a victim with no apparent injury. This unrealistic expectation of how a victim and accused should appear makes most people hesitant to stigmatize a Soldier with the label of a "rapist."<sup>314</sup> The knowledge that rape is a capital crime adds to the reluctance many feel to convict anyone for this crime, especially when the victim has no outward injury.<sup>315</sup> Different levels of offenses with corresponding maximum punishments will provide prosecutors differing levels of offenses under which to charge sexual misconduct.<sup>316</sup> The facts alleged in a sexual assault will more closely resemble the behavior prohibited by the offense, and the maximum punishment will seem more appropriate to the crime.

### 2. Improved Definitions of Consent and Force

The definitions of force and consent in the new statute are important improvements. Although military courts had developed significant case law attempting to define these crucial terms, the exact meaning of each element remained elusive.<sup>317</sup> Vague standards "leave contested issues to be settled in an unforeseeable, ad hoc manner by whichever police officers, prosecutors, or jurors decide whether to file charges or impose sanctions in a particular case."<sup>318</sup> As a result, in situations where standards and definitions are unclear, the law resolves these issues (as it should) in the favor of the accused.<sup>319</sup> This is especially true with the crime of rape, where resolving tough issues in favor of the accused undoubtedly contributes significantly to the low conviction rates for this particular crime.<sup>320</sup>

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<sup>310</sup> See, e.g., COX COMMISSION, *supra* note 18; ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 57.

<sup>311</sup> CARE FOR VICTIMS, *supra* note 18, at 65-66.

<sup>312</sup> *United States v. Webster*, 37 M.J. 670, 674 (C.G.C.M.R. 1993).

These two terms can be and have been used interchangeably. There does, however, appear to be a distinction. A "date rape" is generally one committed by a person with whom the victim has had some romantic attachment or actually is on a date. An "acquaintance rape" is a more general term and is applied to one committed by a person who is known to the victim to such an extent that the victim probably would not anticipate the criminal conduct . . . 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; (8) the failure of the victim to report the rape promptly.

*Id.*

<sup>313</sup> See, e.g., Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1332-33 (2005); Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L. J. 27, 27-33 (1996).

<sup>314</sup> See ACADEMIES TASK FORCE, *supra* note 18, at 32.

<sup>315</sup> *Id.*

<sup>316</sup> SEX CRIMES AND THE UCMJ, *supra* note 7, at 55.

<sup>317</sup> See, e.g., *United States v. Leak*, 61 M.J. 234, 246 (2005) (discussing complexity of force and consent elements).

<sup>318</sup> SCHULHOFER, *supra* note 5, at 51.

<sup>319</sup> *Id.*

<sup>320</sup> See ACADEMIES TASK FORCE, *supra* note 18, at 31; CARE FOR VICTIMS, *supra* note 18, at 43-44; 2006 ANNUAL REPORT, *supra* note 40, at 4-5 (of 2947 reported sexual assaults in calendar year 2006, seventy-two were referred to court-martial, with no statistics on the number of resulting convictions).

## C. Criticism of the New Statute

### 1. Force—“The Essence of Rape”<sup>321</sup>

The dilemma over whether to acknowledge rape as a violation of sexual autonomy or rely on force-centered definitions to facilitate evidentiary proof at trial has historically resulted in statutes demanding proof of force and resistance.<sup>322</sup> Recently, however, civilian jurisdictions and scholars, as well as military courts, have focused reform on correcting this anomaly of the law.<sup>323</sup> When military appellate courts called for a new statute, they indicated that a new rape law should center on consent.<sup>324</sup> The support for consent-based rape law is echoed by legal scholars,<sup>325</sup> and statutes based on consent have been enacted in numerous states.<sup>326</sup>

Despite this background, Congress enacted a new rape law that centers solely on force. The law’s focus on the force used to commit a sexual assault as opposed to the violation of sexual autonomy has significant negative effects. Schulhofer criticizes the force-centered laws for “making almost no effort to control abuses that are not physically violent.”<sup>327</sup> The language of the new statute itself is what the average service member will know.<sup>328</sup> The sole focus on force will likely cause people to look for clear signs of violence and dismiss allegations involving no glaring use of force. This language delivers an inference of social permission to use any method short of physical violence to achieve sexual conquest.<sup>329</sup> “It leaves women unprotected against forms of pressure that any society should consider morally improper and legally intolerable.”<sup>330</sup> Even worse, Schulhofer argues, this approach “distorts social conceptions of legitimate behavior and raises the threshold for the kind of physical violence that the law is willing to recognize as ‘abnormal’ force.”<sup>331</sup> Regardless of how the *MCM* defines force, it is inevitable that the message sent will continue to be, “as long as you don’t use overt physical violence, you can get away with forcing sex on an unwilling partner.”

The debate over whether to eliminate either force or consent when reforming rape statutes is not a new one. As discussed earlier, when the American Law Institute tackled the reform of the entire American criminal code in the 1950s, they struggled with the issue of whether to focus the crime of rape on lack of consent or violence.<sup>332</sup> Though the reformers acknowledged that “the central mission of rape law was to protect ‘freedom of choice’ and ‘meaningful consent,’”<sup>333</sup> they chose instead to focus the model statute on force rather than consent.<sup>334</sup> Their intention, in part, was to move away from focusing on the acts of the victim and refocus attention on acts of the perpetrator.<sup>335</sup> In doing this, the reformers also avoided the difficult task of defining consent.<sup>336</sup>

The JSC’s report indicates that they employed some of the same reasoning in defining rape as a crime of force.<sup>337</sup> Nonetheless, the committee stated the opinion that “the essence of rape is the force or coercion used by the defendant, not the

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<sup>321</sup> SEX CRIMES AND THE UCMI, *supra* note 7, at 103 (quoting Tchen, *supra* note 7, at 1529).

<sup>322</sup> See *supra* sec. II.B.

<sup>323</sup> *Id.*

<sup>324</sup> United States v. Leak, 61 M.J. 234, 246 (2005) (“the essence of the offense remains the same”); see also United States v. Webster, 37 M.J. 670, 675 (C.G.C.M.R. 1993).

<sup>325</sup> See, e.g., Bryden, *supra* note 58; SCHULHOFER, *supra* note 5; Kasubhai, *supra* note 87; Seidman & Vickers, *supra* note 87; Little, *supra* note 313.

<sup>326</sup> See *supra* note 76.

<sup>327</sup> SCHULHOFER, *supra* note 5, at 15.

<sup>328</sup> Training usually focuses on the language of the statute rather than the case law.

<sup>329</sup> SCHULHOFER, *supra* note 5, at 15.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 20.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> SEX CRIMES AND THE UCMI, *supra* note 7, at 103.

lack of consent of the victim.”<sup>338</sup> Whatever the reason for choosing force over lack of consent in the new statute, it is likely that consent will remain the central contested issue in most cases of sexual assault. The committee attempted to address this issue by making consent an affirmative defense, requiring the accused to raise the defense and prove the victim’s consent by a preponderance of the evidence.<sup>339</sup> If the defense is successful, the prosecution would then have to prove beyond a reasonable doubt that the victim did not consent.<sup>340</sup> This will be the likely route most cases follow, and once again, the focus will return to the victim, looking for evidence of force and resistance.

#### IV. Back on Course—An Affirmative Consent Statute

The U.S. military has an at-risk population living in a high risk environment.<sup>341</sup> Congress must recognize the gravity of this situation and act in a forward thinking and aggressive manner to protect service members and preserve good order and discipline, unit cohesion, and morale. Sexual assault can disrupt each of these and negatively impact mission accomplishment.<sup>342</sup> The military requires a rape statute that provides a clear standard, prevents miscommunication, and assists in maintaining good order and discipline. An affirmative consent standard will best accomplish these goals.

##### A. Proposed Statute

The statute proposed by this article confronts the core issue of sexual assault head-on by centering the offense upon the premise that each person has a right to sexual autonomy and bodily integrity.<sup>343</sup> Any person who infringes upon another person’s autonomy or integrity is guilty of a crime.<sup>344</sup> Rather than placing the responsibility for communication solely on the shoulders of the would-be victim, this proposed statute forces both parties to share responsibility for respectful sexual activity equally. The proposed statute’s core offense is the offense of wrongful sexual penetration—a crime requiring no force, and prohibiting penetration without affirmative verbal consent.<sup>345</sup> Any use of force elevates the crime to a more serious offense with a correspondingly greater maximum punishment. This proposed statute would provide service members with clear and simple guidance: “Before you engage in sexual intercourse, you must first get verbal consent from the other person. If you fail to get the other person’s verbal consent, you are guilty of wrongful sexual penetration and will be subject to punishment under the UCMJ.”

The proposed statute draws from the recommendations and examples of military courts, other UCMJ offenses, well respected legal scholars, and progressive state sexual assault statutes, as well as the new Article 120 statute passed by Congress in the 2006 NDAA. The proposed statute is similar to the new Article 120, but the offenses are listed in the opposite order. Rather than starting with the most serious crime and working down to lesser crimes, the proposed statute starts with the crime of wrongful penetration.<sup>346</sup> This offense is the heart of the proposed statute. It states clearly, and up front, that a violation of sexual autonomy is a crime punishable by court-martial.

##### 1. Wrongful Sexual Penetration

Wrongful sexual penetration is the foundation of the proposed statute. It is the only proposed offense that differs dramatically from the new statute enacted by Congress. Under the proposed statute, the offense of wrongful sexual penetration states: “Any person subject to this chapter who commits an act of sexual penetration with another person without

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<sup>338</sup> *Id.* (quoting Tchen, *supra* note 7, at 1529).

<sup>339</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006).

<sup>340</sup> *Id.*

<sup>341</sup> *See supra* Part II.A (discussing statistics on victims and offenders entering military and the increased risk levels associated with military service).

<sup>342</sup> *See id.* (discussing sexual assault’s impact on military readiness).

<sup>343</sup> *See infra* app. A (Proposed Statute).

<sup>344</sup> *See infra* app. A (“Any person subject to this chapter who commits an act of sexual penetration with another person without first obtaining the affirmative verbal consent of that other person is guilty of wrongful sexual penetration and shall be punished as a court-martial may direct.”).

<sup>345</sup> *Id.*

<sup>346</sup> This format is parallel to the UCMJ crimes of unlawful entry, assault, and larceny. The core violation of property, bodily integrity, or privacy is the core crime, and the use of force elevates the crime to a different offense.

first obtaining the affirmative verbal consent of that other person is guilty of wrongful sexual penetration and shall be punished as a court-martial may direct.”<sup>347</sup> The offense has two elements: an act of sexual penetration, and that the act was committed without affirmative verbal consent. Any force used in conjunction with the wrongful sexual penetration would elevate the crime to a different offense with greater maximum punishment.<sup>348</sup>

## 2. Maximum Punishment

The maximum punishment for the proposed offense of wrongful sexual penetration is five years imprisonment<sup>349</sup> This punishment strikes the right balance between recognizing the violation of sexual autonomy as a serious breach, and at the same time, acknowledging the lack of force or other aggravating circumstances. The maximum punishments for the remaining crimes are equivalent to the maximum penalties in the new Article 120 for corresponding offenses. Therefore, the penalty for the proposed offense of wrongful sexual penetration falls between the new Article 120 crimes of wrongful sexual contact (maximum of one year imprisonment) and abusive sexual contact (maximum of seven years imprisonment) in terms of maximum punishment.<sup>350</sup>

Wrongful sexual penetration’s position between these two crimes for punishment is appropriate because a non-violent violation of sexual autonomy falls somewhere between non-violent sexual touching and violent sexual touching. This determination is, admittedly, somewhat arbitrary, but in general, a physically violent sexual touching is potentially more traumatic than sexual penetration where the initiator failed to obtain verbal consent. Perhaps more important, the mal-intent of the accused is arguably greater when force is used.

## 3. Definition of Affirmative Verbal Consent

The definition of affirmative verbal consent under the proposed statute conveys the same message found in *Ex rel. M.T.S.*, Schulhofer’s proposed statute, and most importantly the new Article 120.<sup>351</sup> The definition of consent in the new Article 120 is “words or overt acts indicating a freely given agreement to the sexual conduct at issue . . . .”<sup>352</sup> This definition of consent clearly captures the concept of sexual autonomy that the proposed statute would actually implement. In the proposed statute, affirmative verbal consent is defined as “actual verbal consent prior to sexual penetration, clearly indicating that the other person is freely willing or desiring to engage in the penetration.”<sup>353</sup> The court in *Ex rel. M.T.S.* prohibited penetration “without the affirmative and freely-given permission . . . to the specific act of penetration.”<sup>354</sup> Schulhofer’s proposed statute finds an actor guilty when “he commits an act of sexual penetration with another person, when he knows that he does not have the consent of the other person.”<sup>355</sup> All of these definitions correctly focus on the violation of sexual autonomy as the key issue in sexual assault. The requirement for verbal consent is superior, however, because it is cleaner and less ambiguous. It provides a bright-line rule where the others do not. As discussed in section V(B)(1)(b) below, a bright line rule is particularly important to military service members.

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<sup>347</sup> See *infra* app. A (Proposed Statute).

<sup>348</sup> *Id.* (abusive sexual penetration or rape).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> See *Ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992); SCHULHOFER, *supra* note 5, at 283; Notice of Proposed Amendments to the Manual for Courts-Martial, 71 Fed. Reg. 47,489-90, at 16-17 (Aug. 17, 2006).

<sup>352</sup> Notice of Proposed Amendments to the Manual for Courts-Martial, 71 Fed. Reg. 47,489-90, at 16-17.

<sup>353</sup> See *infra* app. A (Proposed Statute).

<sup>354</sup> *Ex rel. M.T.S.*, 609 A.2d at 1277.

<sup>355</sup> SCHULHOFER, *supra* note 5, at 283.

#### 4. *Mens Rea and Defenses*

The offense of wrongful sexual penetration under the proposed statute is a general intent crime, as is the crime of rape in the current statute.<sup>356</sup> The accused need only have the intent to commit the act of sexual penetration. The intent to commit the acts without consent, or acquiring the requisite affirmative consent, is not required. Ignorance of the requirement for affirmative consent is not a defense under the proposed statute,<sup>357</sup> however, mistake of fact<sup>358</sup> remains a defense to the crime.

If an accused mistakenly believed that the victim gave affirmative verbal consent, and that belief was reasonable under the circumstances, a mistake of fact defense would apply.<sup>359</sup> A mistake of fact defense under an affirmative consent standard will not require scrutiny of the victim's actions and state of mind.<sup>360</sup> Instead, the fact-finder must determine whether the defendant's belief that the victim gave him verbal affirmative consent was reasonable.<sup>361</sup>

Additionally, it is a defense to the crime of wrongful penetration that the two were married or cohabitating and the sexual penetration was with the permission of the other person.<sup>362</sup> It would be unreasonable for a married or cohabitating couple with an established sexual relationship to be expected to obtain verbal consent every time they were intimate. Most would likely agree to disregard the requirement in practice anyway.

Of course, it is always a defense that the victim did, in fact, provide freely given verbal consent prior to the sexual penetration. With this, the inevitability of "he said-she said" conflicting accounts remains. The occurrence of miscommunication, operating in the gray area,<sup>363</sup> and "regret sex"<sup>364</sup> will certainly be minimized, however, by a clear standard requiring verbal consent before penetration.<sup>365</sup>

#### 5. *Other Offenses*

The remainder of the proposed statute is similar to the new Article 120 that will take effect on 1 October 2007, with some exceptions. First, the proposed statute is gender neutral, including penetration of the anus in all of the applicable offenses.<sup>366</sup> Also, the proposed statute includes penetration of a victim using any force at all, and penetration of an

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<sup>356</sup> In the current statute, rape is a general intent crime. The elements require only that "the accused committed an act of sexual intercourse" and that "the act of sexual intercourse was done by force and without consent" UCMJ art. 120 (2005).

<sup>357</sup> Because every service member must receive mandatory training on sexual assault and the law, both upon entering service and annually, ignorance of the law is not a defense.

<sup>358</sup> MCM, *supra* note 6, R.C.M. 916(j)(1).

<sup>359</sup> *Id.* ("If . . . mistake of fact goes to any other element requiring only general intent or knowledge, the . . . mistake of fact must have existed in the mind of the accused and must have been reasonable under the circumstances.").

<sup>360</sup> *See Ex rel. M.T.S.*, 609 A.2d at 1279.

<sup>361</sup> *See id.*; Bryden, *supra* note 58, at 405-06.

<sup>362</sup> *See infra* app. A (Proposed Statute).

<sup>363</sup> For example, an initiator may know his partner is either unwilling, or unsure, but engages in sexual penetration anyway, because the partner does not resist.

<sup>364</sup> "Regret sex" is an unofficial pejorative term some use to indicate the belief that an alleged victim acquiesced to, or even willingly participated in sexual penetration, but then regretted the decision, and alleged the penetration was not consensual.

<sup>365</sup> *See infra* Part IV.B.1 (discussing why these scenarios will be minimized by an affirmative consent standard).

<sup>366</sup> The violation of sexual autonomy is not gender dependent. Statistics show that up to ten percent of military victims of sexual assault are male. *See* Report from David S.C. Chu, Under Secretary of Defense for Personnel and Readiness, to Senate and House Armed Services Committees on Reported Cases of Sexual Assault in the Military for 2005 (on file with author). The new statute defines rape only as [penetration of the female sex organ], explicitly excluding forced sexual penetration of a male from the crime of rape. Male victims of sexual assault experience the same types of trauma, humiliation, and shame that female victims endure. *See, e.g.,* GILLIAN C. MEZEY & MICHAEL B. KING, MALE VICTIMS OF SEXUAL ASSAULT (Oxford: Oxford University Press, 1992); Cindy Struckman-Johnson, *Male Victims of Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 192 (Andrea Parrot & Laurie Becherhofer eds., 1991). For a male victim in the military, the reluctance to report and humiliation are likely even more significant. The laws against sexual assault in the military must acknowledge that male victims are no less affected than female victims. The goal of this proposal is to ensure members of our armed forces, male and female, are free and safe from intrusion upon their bodily integrity and violation of their sexual autonomy. Admittedly, this proposal is not the focus of this article, and is not debated further. Nonetheless, it remains an important drawback of the new statute and should be addressed as part of refining the new Article 120.

unconscious or sleeping victim in the offense of rape.<sup>367</sup> These are areas in which the new Article 120 actually took steps back, rather than forward, from the current statute.<sup>368</sup>

Under the proposed statute, the offense of wrongful sexual contact is retained from the new Article 120, with the two additional offenses of abusive sexual contact and aggravated sexual contact for varying levels of force.<sup>369</sup> Wrongful sexual contact in the new Article 120 correctly captures the criminality of the conduct: sexual contact without permission, a violation of sexual autonomy.<sup>370</sup> This offense is framed in terms of permission rather than affirmative verbal consent because of the difficulty of trying to decide where and when affirmative consent would be required (i.e. before hugging, kissing, fondling—at each step?).<sup>371</sup> Affirmative verbal consent is required only at the time of the actual act of penetration.

Before sexual penetration, you must have the freely-given verbal consent of your partner. This simple requirement is all that service members would need to know. There is no question where the line is drawn. The possibility of miscommunication is significantly diminished, and the underlying message about what is acceptable in sexual interaction is morally appropriate. The new rape law sends the message that as long as you do not use physical violence or unlawful coercion, all other means are acceptable. The proposed statute's message is that you must respect each person's sexual autonomy.

### 6. Comparison to Other UCMJ Offenses

Though affirmative consent may seem radical, the format of the proposed statute and its treatment of consent are comparable to the theory of other UCMJ offenses such as assault,<sup>372</sup> unlawful entry,<sup>373</sup> and larceny.<sup>374</sup> Military law in these crimes is focused on the protection of the bodily integrity, privacy, and property of individuals. The law does not assume consent in these offenses, and force used in committing the crimes is treated as a higher offense or simply aggravation.<sup>375</sup> The purpose of these laws is “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>376</sup> The proposed statute would accomplish this purpose by providing a clear standard, preventing miscommunication, and encouraging a culture of respect for sexual autonomy.

The violations of bodily integrity, privacy, and property in these crimes parallel the breach of sexual autonomy inherent in a sexual assault, as reflected in the proposed statute. An important distinction between these other UCMJ offenses and sexual assault is the resulting harm to the victim—not only physical, but derived from the violation of the person's autonomy or bodily integrity.<sup>377</sup> “Sexual behavior . . . puts at risk a much more sensitive, physically and psychologically precious interest—our bodily independence and our right to control our own exposure to sexual intimacy.”<sup>378</sup> Victims of sexual assault experience traumatic consequences such as post traumatic stress disorder (PTSD) at a higher rate than many other

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<sup>367</sup> Notice of Proposed Amendments to the Manual for Courts-Martial, 71 Fed. Reg. 47489-47490, at 9 (Aug. 17, 2006) (The new statute included a sleeping or unconscious person (unless rendered so by the accused) in the lesser crime of aggravated sexual assault. Also included in that lesser crime are sexual acts committed by causing bodily harm. Under the current statute, these acts are rape. UCMJ art. 120 (2005)).

<sup>368</sup> *Id.*

<sup>369</sup> See *infra* app. A (Proposed Statute).

<sup>370</sup> *Id.*

<sup>371</sup> See Seidman & Vickers, *supra* note 87, at 489-90 (“In 1996, Antioch College issued a sexual offense prevention policy that attempted to define nonconsensual sexual conduct. Consent to sex is defined as ‘the act of willingly and verbally agreeing to engage in specific sexual behavior.’ . . . [T]he policy states that such requests for and assent to intimacy must be renewed at every stage as intimacy increases. . . . We propose, instead, that to be consensual, affirmative verbal consent must be obtained immediately prior to an act of penetration, which eliminates the most maligned part of Antioch's policy as well as the possibility that one party is acting on prior given consent that has since been withdrawn.”).

<sup>372</sup> UCMJ art. 128 (2005).

<sup>373</sup> *Id.* art. 121.

<sup>374</sup> *Id.* art. 134.

<sup>375</sup> See, e.g., *id.* arts. 128, 121, 134.

<sup>376</sup> MCM, *supra* note 6, pt. I, ¶ 3.

<sup>377</sup> See SCHULHOFER, *supra* note 5, at 67.

<sup>378</sup> *Id.*

crimes, particularly when the victim knows the offender.<sup>379</sup> An individual's exposure to this level of harm should be more directly and zealously protected, not less. This recognition is reflected in the heightened level of caution required by the proposed statute.

#### *a. Assault*

The UCMJ offense of assault is constructed in a manner that protects individuals from another person touching, or even offering to touch, them in an offensive manner without the individual's lawful consent. The *MCM* defines assault as "an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated."<sup>380</sup> The attempt or offer "must be done without legal justification or excuse and without the lawful consent of the person affected."<sup>381</sup> Although the language of Article 128 requires the threat of force or violence, the *MCM* explains that 'bodily harm' is to be construed broadly to mean "any offensive touching of another, however slight,"<sup>382</sup> clearly indicating that the prohibited behavior is the non-consensual offensive touching.

The basic offense is simple assault or assault consummated by a battery.<sup>383</sup> Any increase in the level of applied force in consummating an offer or battery raises the offense to assault consummated by a battery, aggravated assault, and other forms of assault warranting increased punishment.<sup>384</sup> This is the basic construct of the proposed sexual assault statute; a violation of sexual autonomy, with additional levels of offenses for increasing use of force or infliction of bodily harm. The purpose in both the assault and the proposed sexual assault laws is safeguarding the bodily integrity of the victim and punishing a breach of that integrity, thereby increasing the military readiness of the armed forces.

#### *b. Unlawful Entry*

The offense of unlawful entry protects the individual's property from intrusion by others without the individual's consent, as well as the privacy of the individual. The *MCM* defines an unlawful entry as an entry onto "the real property of another or certain personal property of another . . . made without the consent of any person authorized to consent to entry or without other lawful authority."<sup>385</sup> If the unlawful entry is perpetrated with the intent to commit a crime, the offense rises to house breaking and the maximum punishment increases as well.<sup>386</sup>

Of all the UCMJ crimes, unlawful entry may be the crime that most closely parallels the proposed base crime of wrongful sexual penetration. The proposed statute prohibits sexual penetration of another without that person's affirmative verbal consent. Both unlawful entry and unlawful sexual penetration seek to protect the individual's right to privacy and freedom from unlawful intrusion by requiring affirmative permission or consent to enter a person's property or body. The violation of privacy upon a person's property and his body are analogous, with the significant distinction that intrusion upon a person's bodily integrity and autonomy is more personal and potentially devastating than intrusion onto his property. The

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<sup>379</sup> See, e.g., CARE FOR VICTIMS, *supra* note 18, at 67 (Rape is widely believed to perhaps be the most traumatic violent crime for the victim (excluding murder).); D.G. Kilpatrick, *Victims of Rape and Sexual Harassment: Why Don't They Report and What Support Do They Need?* (paper presented to the Defense Advisory Committee on Women in the Services, Tampa, Florida, Oct. 31, 1997) (In a national survey, roughly one third of rape victims reported they had contemplated suicide or experienced PTSD.); Rothbaum et al., *supra* note 36, at 455 (stating that research has suggested that 94% of rape victims reporting a recent rape to authorities will meet the criteria for PTSD within two weeks of the rape).

<sup>380</sup> UCMJ art. 128.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* art. 134. The elements of unlawful entry are:

- 1) That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage; 2) That such entry was unlawful; 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.

*Id.* (The *MCM* defines an entry as "unlawful" if it is made "without the consent of any person authorized to consent to entry or without other lawful authority.")

<sup>386</sup> *Id.*

law safeguarding a person's sexual autonomy should be at least as protective, if not more, than the law defending his property. The proposed statute codifies this basic principle.

### *c. Larceny*

In addition to guarding property rights and bodily integrity through prohibitions against unlawful entry and assault, the UCMJ provides protection for individuals' property by prohibiting larceny. Under the UCMJ, "any person . . . who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind"<sup>387</sup> is guilty of either larceny or wrongful appropriation.<sup>388</sup> As with unlawful entry, the wrongfulness of the taking in this offense is based upon lack of consent.<sup>389</sup> "As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other"<sup>390</sup> or by false pretense.<sup>391</sup> Force or fear of immediate injury used to commit the crime makes the offense a robbery, and warrants increased punishment.<sup>392</sup>

In the same way that the UCMJ guards a person's right to privacy and bodily integrity, the military code also protects the individual's property.<sup>393</sup> Before taking another person's property, the law requires that you have her consent.<sup>394</sup> This prohibition against taking property without the consent of the owner is similar to the concept that violating a person's sexual autonomy without consent should be specifically prohibited. If the law requires you to obtain consent before taking a friend's DVD player to watch a movie, shouldn't it require a greater degree of consent before an act as personal and serious as sexual penetration?<sup>395</sup> The proposed affirmative consent statute acknowledges that the resulting harm to the victim, and often the entire military unit, is much greater with a violation of sexual autonomy than a violation of property rights, and demands an appropriately increased level of care.

The UCMJ protects individuals' privacy, bodily integrity, and property by requiring consent before another person may impose upon these protected areas. Sexual autonomy is in many ways more private and important than these other areas. The harm to a victim of sexual assault is generally much greater than the harm caused to victims of other crimes, such as assault, unlawful entry, or larceny.<sup>396</sup> Correspondingly, the detrimental effect on morale and unit cohesion is likely to be heightened with a sexual assault.<sup>397</sup> When the protection of sexual autonomy is viewed in light of military law's defense of other personal interests, the shift to an affirmative consent standard for sexual assault seems less dramatic and more reasonable.

## B. The Need for Affirmative Consent in the Military

A military statute requiring actual verbal affirmative consent would be truly ground-breaking. In some important respects, the military is the most appropriate jurisdiction to take this bold approach to sexual assault. First, as discussed, sexual assault has a direct negative impact on unit readiness, mission accomplishment, and morale.<sup>398</sup> Additionally, the

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<sup>387</sup> *Id.* art. 121.

<sup>388</sup> *Id.* Wrongfully taking with the intent to permanently deprive the person is larceny. Wrongfully taking with the intent to temporarily deprive the owner of use is wrongful appropriation.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* art. 122.

<sup>393</sup> *Id.* art. 121.

<sup>394</sup> *Id.*

<sup>395</sup> See Little, *supra* note 313, at 1352.

<sup>396</sup> UCMJ arts. 128 (assault), 134 (unlawful entry), 121 (larceny).

<sup>397</sup> See *supra* sec. II.A (discussing sexual assault's detrimental effect on military readiness).

<sup>398</sup> See *supra* pt. II.A.

unique culture of the military requires a heightened sense of respect and strict adherence to standards of service members.<sup>399</sup> Lastly, the military is in the unique position of being able to educate each individual subject to the UCMJ, to ensure that everyone understands the requirement to obtain affirmative consent and the consequences for failing to do so.<sup>400</sup> The military has both the motivation and the means to approach the issue of sexual assault in a truly progressive and effective manner.

Not only is the requirement for affirmative consent before sexual penetration a promising way to address sexual assault's effect on military readiness, it is also the most effective way to establish a culture of respectful and responsible sexual interaction among members of the armed forces. The need for sexual autonomy and privacy is critical in the unique military culture, where service members often live and work closely together with little or no physical separation.<sup>401</sup> In this environment, it is essential to establish firm boundaries regarding bodily integrity. The UCMJ and military regulations already recognize this in many ways.<sup>402</sup> Service members knowingly submit to these higher standards and higher levels of regulation in their lives. These laws and regulations make living and working in such close proximity more comfortable and safe by establishing and protecting boundaries. The result is an efficient and effective military establishment,<sup>403</sup> ready to accomplish the mission.

## 1. Benefits of Requiring Affirmative Consent

### a. Preventing Miscommunication

One of the concerns about leaving out the force requirement and relying solely on consent to define rape is that sexual interaction is not clear cut.<sup>404</sup> Men and women communicate differently and have differing understandings of what actually constitutes consent in a given situation.<sup>405</sup> People are understandably reluctant to convict a person of a serious crime, when the incident may have been a miscommunication or misunderstanding.<sup>406</sup> They have good reason to be cautious. A survey conducted in 1992 found that twenty-two percent of women felt they had been forced to have sex, yet only three percent of men said they had ever forced a woman to have sex.<sup>407</sup> Within that gap of misunderstanding and miscommunication there will inevitably be both perceived and actual rapes and sexual assaults. Within that same gap, there are likely allegations against men who had no intention of committing a crime. Much of the pain caused by this lack of communication would be avoided by an affirmative consent statute.

Our culture traditionally expects the man to be the assertive, and sometimes even aggressive, partner in sexual situations.<sup>408</sup> Television, movies, and other media perpetuate this expectation, and increasingly, take it to the extreme.<sup>409</sup> It is not necessarily unreasonable for a young man who has grown up watching music television shows and popular movies to think that some degree of force is acceptable, if not expected. The media bombards these men (and women) with images of a

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<sup>399</sup> See, e.g., SEX CRIMES AND THE UCMJ, *supra* note 7, at 117 (“The military is a unique society and should develop criminal laws designed to carry out its policy objectives.”).

<sup>400</sup> DODI 6495.02, *supra* note 37, para. E3.2 (requiring periodic, mandatory education and training in Sexual Assault Prevention and Response, during pre-commissioning and initial-entry training programs, and throughout the professional military education systems; annual sexual assault awareness training; and pre-deployment sexual assault training).

<sup>401</sup> See, e.g., SEX CRIMES AND THE UCMJ, *supra* note 7, at 117 (“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.”); Michelle Tsai, *Do Female Soldiers Get Any Privacy?*, SLATE, Mar. 22, 2007, <http://www.slate.com/id/216464> (discussing close living conditions of Soldiers in Iraq and Kuwait).

<sup>402</sup> Many of the crimes found in Article 134 of the UCMJ are based on activity that would not be criminal in civilian jurisdictions (adultery, self-injury). These activities are more strictly regulated in the military because of their effect on good order and discipline.

<sup>403</sup> MCM, *supra* note 6, pt. I ¶ 3.

<sup>404</sup> See Seidman & Vickers, *supra* note 87, at 485; SCHULHOFER, *supra* note 5, at 62.

<sup>405</sup> *Id.*

<sup>406</sup> See ACADEMIES TASK FORCE, *supra* note 18, at 32.

<sup>407</sup> SCHULHOFER, *supra* note 5, at 62 (quoting ROBERT T. MICHAEL ET AL., SEX IN AMERICA 221 (1994)).

<sup>408</sup> *Id.* at 61.

<sup>409</sup> See, e.g., THE FORTY YEAR OLD VIRGIN (Universal Pictures 2005) (containing a scene in which one of the lead characters helps his friend get a woman extremely drunk so that she will have sex with him); GONE WITH THE WIND (Warner Brothers 1939) (containing a famous scene in which the hero carries the screaming and protesting heroine up to the bedroom, and next shows the heroine the following morning, clearly happy and satisfied).

man forcefully and coercively overcoming the woman's reluctance to engage in sex.<sup>410</sup> Both men and women can come to see this as part of the dating ritual.

To further confuse matters, some studies have shown that a percentage of women report sometimes saying "no" when they actually mean "yes."<sup>411</sup> These studies not only reveal the complex nature of consent in sexual relations, they also perpetuate the belief that *all* women who say "no" really mean "yes." Generations of young people who have grown up in the culture described above cannot be left to sort out for themselves who actually means "no" when they say it. Requiring clear and unequivocal consent from both parties before penetration will encourage service members to assign real meaning to their words and prevent the potentially devastating results of this type of miscommunication.<sup>412</sup>

Affirmative consent not only protects potential victims, but also those who may potentially be accused of sexual assault. Anyone concerned with protecting service members from false or questionable accusations of rape has reason to embrace an affirmative consent requirement. A person who genuinely desires to have consensual intercourse should welcome clear communication of that consent from their partner. As Nicholas Little points out, most "men in dating situations do not want to be rapists by forcing their dates into unwanted sexual intercourse."<sup>413</sup> Presumably, a person who has specifically expressed their desire or consent to engage in intercourse will be less likely to feel that they were taken advantage of, or forced against their will into sexual activity. The possibility of miscommunication is significantly reduced when the law requires an affirmation of consent from participants in sexual activity.

### *b. Need for a Bright Line Rule*

In a society where there is an increasingly liberal and unclear sexual culture,<sup>414</sup> the military owes its young service members a bright line rule. The proposed statute would provide a clear moral and legal standard to which they can adhere—for their own protection, and for good order and discipline within the unit. The requirement that consent be affirmatively conveyed would benefit both male and female service members. It would protect not only potential victims, but potential perpetrators as well.

The concept of sexual autonomy—that you must have affirmative permission to engage in sexual activity with someone—is more easily understood than the current definition of "by force and without consent."<sup>415</sup> In the area of sexual activity, it is sometimes difficult to draw the line between seduction and assault.<sup>416</sup> In the current and new statutes, the line is drawn at the use of force. When service members walk away from their mandatory training on the new sexual assault law, they will still not know exactly where the line is in sexual interaction. The message many will take away is that any means of obtaining sex short of violence is acceptable. In contrast, if the law requires freely given verbal consent, the take-away message is simple: *Ask first*. Everyone will know and understand where to draw the line.

### *c. Educational and Deterrent Effect*

An affirmative consent statute would fulfill the purpose of military law by promoting justice and assisting in the maintenance of good order and discipline.<sup>417</sup> The military has its own, separate code of justice because it is a unique society, requiring criminal laws designed specifically to implement its policy objectives.<sup>418</sup> With regard to sexual assault, the military

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<sup>410</sup> "A study published in Ms. Magazine in 1990 found that one out of eight Hollywood movies depict a rape theme." Little, *supra* note 313, at 1352 (citing BERNARD LEFKOWITZ, *OUR GUYS: THE GLEN RIDGE RAPE AND SECRET LIFE OF THE PERFECT SUBURB* 248 (Michael Kimmel ed. 1997)).

<sup>411</sup> SCHULHOFER, *supra* note 5, at 64 (citing Charlene Muehlenhard & Lisa Hollabaugh, *Do Women Sometimes Say No When They Mean Yes?*, 54 F. PERSONALITY & SOC. PSYCHOL. 872 (1998)).

<sup>412</sup> See Little, *supra* note 313, at 1352.

<sup>413</sup> *Id.* at 1351.

<sup>414</sup> See, e.g., United States v. Webster, 37 M.J. 670, 675 (C.G.C.M.R. 1993) ("In my view, we are attempting to apply a 1950's law to the post-'sexual revolution' morality [or lack of it] of the 1990's.").

<sup>415</sup> UCMJ art. 120 (2005).

<sup>416</sup> SCHULHOFER, *supra* note 5, at 62.

<sup>417</sup> MCM, *supra* note 6, pt. I, ¶ 3.

<sup>418</sup> SEX CRIMES AND THE UCMJ, *supra* note 7, at 117.

has three major policy objectives: deterrence, readiness, and good order and discipline.<sup>419</sup> The proposed statute best achieves each of these objectives.

Education is a powerful tool for the military. Article 137 of the UCMJ requires the military to educate service members on relevant portions of the UCMJ, including the punitive articles.<sup>420</sup> Personnel must receive the education within six days of entering active duty, again after six months of service, and upon reenlistment.<sup>421</sup> The DOD requires additional training specifically addressing sexual assault.<sup>422</sup> This mandatory education has an important effect on service members' understanding of military law. Currently, every service member has been taught, in their training on the military definition of rape, that rape requires force.<sup>423</sup> This, along with the messages service members receive from the media and popular culture,<sup>424</sup> has undoubtedly shaped their understanding about what kind of sexual behavior is prohibited, and what is acceptable.

The military must send a stronger and louder message than the media and civilian society. Unfortunately, the message sent by the current and new force-centered laws is virtually inaudible. The proposed statute would send a clear message that sexual autonomy is a right the military demands for its members. Envision an entire generation of service members that has entered and risen through the ranks of a military that tells them, "If you have sex without first obtaining verbal consent, you are violating the UCMJ." It is not unrealistic to think that a future military generation with this clear guidance will have far fewer instances of sexual assault.

The proposed statute would deter sexual assault not only through the threat of punishment; its clear guidance and simple, yet unequivocal message would educate service members about the specific behavior required of them. By providing an easily understood message with a clear standard, and by preventing miscommunication, the proposed statute would deter sexual assault in ways that the current and new statutes cannot.

#### *d. Alcohol*

Alcohol is a crucial element to solving the problem of sexual assault in the military. Alcohol is involved in the majority of rape cases reported in the military.<sup>425</sup> There are no clear guidelines on how much alcohol or what level of intoxication negates a person's capacity to consent. An affirmative consent requirement would help provide a bright line rule in these scenarios. If a person is not sober enough to clearly voice her desire or consent to engage in sexual activity, she has not consented.<sup>426</sup>

When alcohol is involved, the victim may be unable, or less likely, to clearly and forcefully voice his opposition to an act, which is problematic when the current law "equate[s] passivity with consent."<sup>427</sup> A recent study commissioned by the Economic and Social Research Council in the United Kingdom found that intoxication of the victim often serves to nullify the requirement for consent in the minds of jurors.<sup>428</sup> The study noted that jurors viewed silence as a reasonable indication of consent.<sup>429</sup> A law that does not default to consent, but requires a verbal manifestation of willingness will help to correct the skewed vision of consent many have in rape cases.

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<sup>419</sup> *Id.*

<sup>420</sup> UCMJ art. 137.

<sup>421</sup> *Id.*

<sup>422</sup> See *supra* note 400 (describing DOD mandatory sexual assault training).

<sup>423</sup> Service members are educated on article 120 of the UCMJ, which defines rape as sexual intercourse "by force and without consent." UCMJ art. 120.

<sup>424</sup> See *supra* notes 411-12.

<sup>425</sup> See CARE FOR VICTIMS, *supra* note 18, at 60; ACADEMIES TASK FORCE, *supra* note 18, at 24.

<sup>426</sup> See Seidman & Vickers, *supra* note 87, at 486-87.

<sup>427</sup> Bryden, *supra* note 58, at 401.

<sup>428</sup> DR. E. FINCH & DR. V.E. MUNRO, FROM SOBRIETY TO STUPEFACTION: INTOXICATION & JURY DECISION-MAKING IN RAPE TRIALS, ECONOMIC AND SOCIAL RESEARCH COUNCIL (2006).

<sup>429</sup> *Id.*

Affirmative consent is not a “silver bullet” that will end sexual assault or result in guilty findings for all rapists.<sup>430</sup> Requiring service members to communicate in a straightforward manner before sexual intercourse will not prevent military courts from having to decipher the facts of ‘he said, she said’ cases. What can be expected of the proposed statute is fewer instances of miscommunication, less gray area for those looking to push the limits (or simply unsure where the limit is), and eventually, a military culture of respect for every individual’s bodily integrity and sexual autonomy, resulting in enhanced military readiness.

## 2. Arguments Against Affirmative Consent

Requiring affirmative verbal consent is a controversial proposition. Critics worry it will spell the end of romance and turn sex into a contractual relationship.<sup>431</sup> They are concerned about innocent, well-meaning men being caught up in an overly broad offense.<sup>432</sup> Some even worry that certain women may be unable to affirmatively voice their consent.<sup>433</sup> In each of these criticisms, however, affirmative consent arguably turns out to have a positive net effect. Romance and intimacy may actually be heightened by more effective communication.<sup>434</sup> A clearly stated affirmative consent requirement will be easily understood and prevent miscommunication, thereby protecting the well-intended initiator. Lastly, both parties will be encouraged to say what they really mean, resulting in more responsible sexual behavior.

Nonetheless, the requirement for actual verbal consent would be extremely progressive. In fact, many of the scholars advocating consent-based statutes dismiss the idea of requiring actual verbal affirmation of consent as a bridge too far.<sup>435</sup> Currently, New Jersey is the only state that has adopted an affirmative consent standard, and the court in *Ex rel. M.T.S.* specified that the affirmative consent need not be verbal.<sup>436</sup> Schulhofer worries that the change is too radical and may be ignored by intimate partners, and even juries.<sup>437</sup> In the end, he acknowledges that the “verbal-yes rule may be worth the costs,” but thinks the idea is too many steps beyond what contemporary courts would be willing to consider.<sup>438</sup>

### a. Loss of Romance and Spontaneity

Some critics fear that requiring affirmative consent would produce a bizarre world where romance could no longer exist because partners must ask permission before any sexual activity.<sup>439</sup> They view sexual intimacy as “a runaway train that can be stopped for nothing as rational as a yes.”<sup>440</sup> Schulhofer is also uncomfortable with the loss of spontaneity that may result, but he acknowledges that the requirement for verbal consent would lessen ambiguity and reduce the risk of misunderstanding.<sup>441</sup> Ilene Seidman and Susan Vickers point to the “highly visible and largely successful public health campaign to promote condom use as a result of the AIDS epidemic.”<sup>442</sup> The idea of getting people to stop and discuss safe sex before engaging in intercourse was once seen as impossible.<sup>443</sup> Seidman and Vickers argue that getting an affirmative

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<sup>430</sup> Little, *supra* note 313, at 1345.

<sup>431</sup> See, e.g., Stephanie Gutmann, *Date Rape: Does Anyone Know What It Is?*, PLAYBOY, Oct. 1990, at 48, 53.

<sup>432</sup> See, e.g., Bryden, *supra* note 58, at 406-07 (discussing the need for adequate notice).

<sup>433</sup> Interview with LTC Timothy MacDonnell (former Trial Counsel Assistance Program (TCAP) attorney) and MAJ Jacqueline Emanuel (former trial defense attorney), TJAGLCS, in Charlottesville, Virginia (Feb. 20, 2007) [hereinafter MacDonnell Interview].

<sup>434</sup> See, e.g., Elizabeth R. Allgeier & Betty J. Turner Royster, *New Approaches to Dating and Sexuality*, in *SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION* 133 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991) (“Sexual interaction, particularly intercourse, is never utterly spontaneous in our culture. A couple needs to find a private location, get their clothes off, and so forth, and these activities involve two people to make decisions. . . . As far as romance is concerned, it is deepened . . . by sharing the kind of personal information with one another that is needed for true informed consent.”).

<sup>435</sup> See, e.g., SCHULHOFER, *supra* note 5, at 272; Bryden, *supra* note 58, at 406-07.

<sup>436</sup> See *Ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

<sup>437</sup> See SCHULHOFER, *supra* note 5, at 272.

<sup>438</sup> *Id.* (noting that these courts are often “still willing to infer consent from passivity and silence, without any affirmative sign of consent”).

<sup>439</sup> See, e.g., Gutmann, *supra* note 431, at 48, 53.

<sup>440</sup> Seidman & Vickers, *supra* note 87, at 489.

<sup>441</sup> SCHULHOFER, *supra* note 5, at 272.

<sup>442</sup> Seidman & Vickers, *supra* note 87, at 489.

<sup>443</sup> *Id.*

“yes” before intercourse is “no more an imposition on sexual expression than condom use.”<sup>444</sup> Another proponent of affirmative consent points out the oddity “that a requirement to ask permission before borrowing a roommate’s car needs no further justification, yet asking permission from one’s date to ensure that she too is willing to engage in sex is an imposition.”<sup>445</sup>

The military already imposes certain restrictions on personal interaction and requires heightened precautions in normal social contact. Adultery and consensual sodomy are punishable under the UCMJ.<sup>446</sup> An HIV-positive service member must disclose his medical condition to a potential sexual partner or face UCMJ punishment.<sup>447</sup> Even common daily interaction is safeguarded. Consensual dating relationships between Soldiers of different ranks (for example, an officer and an enlisted member) are often prohibited, even if the two do not work together.<sup>448</sup> The same regulation prohibits Soldiers of different ranks from conducting business together.<sup>449</sup> The imposition upon individual service members to communicate clearly with a potential sex partner is a small price to pay for a new standard of respect for sexual autonomy. This culture of respect will eventually result in better communication, clearer standards, and in the end, improved military readiness.

### *b. Adequate Notice*

One of the most often cited, and perhaps most legitimate concerns about affirmative consent is ensuring adequate notice.<sup>450</sup> Though Bryden acknowledges the theoretical superiority of verbal consent, he worries that such a sweeping change to the law would result in innocent violations of the new law by the uninformed.<sup>451</sup> Providing adequate notice of a significant change in law is important. In this respect, the military is in a uniquely fortunate position. Military members are routinely educated on the UCMJ, and the new law can be incorporated into sexual assault and values training as well. This type of training is already mandatory for all new entrants to active duty, and annually throughout their careers.<sup>452</sup> The easily-understood concept of ensuring you have your partner’s permission before engaging in intercourse with them could be taught and reinforced in many ways. Because of the simplicity of the concept, the proposed statute would provide clearer notice of what constitutes a crime than either the current or new statute.

### *c. But What If Her “No” Means “Yes”?*

Some critics of an affirmative consent standard seek to protect the shrinking violet’s right to have sex.<sup>453</sup> They are concerned that a woman who does not want to seem forward or easy may not want or be able to frankly state her desire to engage in sexual intercourse. What if she says “no” but really means “yes”? The answer is simple: she doesn’t have sex that night. If she truly wants to engage in intercourse, she will find a way to communicate this to her partner. Currently, the shrinking violet faces the opposite problem. If a woman is not self-assured enough to tell her partner that she is not comfortable with intercourse, or to speak up more forcefully when he disregards her objections, the result is violation of her sexual autonomy. This outcome is far more harmful than the shy woman who is denied sexual activity because she was too embarrassed to say “yes.”

The relatively minor discomfort of having to ask if the partner consents may actually be lessened by the fact that the conversation is required by law.<sup>454</sup> The requirement will likely make the question (and answer) seem less inappropriate or

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<sup>444</sup> *Id.*

<sup>445</sup> Little, *supra* note 313, at 1352.

<sup>446</sup> UCMJ art. 125 (2005) (sodomy); *id.* art. 134 (adultery).

<sup>447</sup> U.S. DEP’T OF DEFENSE INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS 4 (17 Oct. 2006).

<sup>448</sup> AR 600-20, *supra* note 26, para. 14-4(c)(2).

<sup>449</sup> *Id.* para. 14-4(c)(1).

<sup>450</sup> Bryden, *supra* note 58, at 406-07.

<sup>451</sup> *Id.*

<sup>452</sup> See *supra* note 400 (describing DOD mandatory sexual assault training).

<sup>453</sup> MacDonnell Interview, *supra* note 433.

<sup>454</sup> Little, *supra* note 313, at 1353.

unnatural, and the stigma associated with it will diminish with time.<sup>455</sup> Discomfort and some awkwardness seem a small price to pay for ensuring that your actions are wanted and will not unintentionally cause the other person pain or trauma.

*d. Too Progressive*

Schulhofer and Bryden are both concerned that requiring verbal consent is too progressive.<sup>456</sup> The underlying theme of their criticisms, however, seems to be that in theory, verbal affirmative consent is likely to be the best solution.<sup>457</sup> In civilian jurisdictions, the notice problem and risk of nullification may very well outweigh the potential benefit of requiring verbal consent.<sup>458</sup> The real problem then, is that societal norms have not yet evolved to the point where verbal consent is a workable solution. The military is not society at large, and affirmative verbal consent is a workable solution for the armed forces. The military services have the unique ability to ensure adequate notice to every individual service member. Military personnel are accustomed to differing standards in the name of good order and discipline and military readiness. It may be that this relatively small imposition on individual service members results in a truly transformational impact on the culture, personal responsibility, and readiness of the armed forces.

V. Conclusion

The requirement that service members obtain affirmative consent from their partners before sex has the potential to be “the tipping point” in the military’s struggle against sexual assault.<sup>459</sup> The DOD has invested substantial resources into solving this problem.<sup>460</sup> An official endorsement of the concept of sexual autonomy as a right deserving the full protection of the UCMJ could very well bring about “the moment of critical mass”<sup>461</sup> that pushes DOD’s battle over the edge to success. The result would be a military culture in which bodily integrity and sexual autonomy are accepted social norms, and the thought of engaging in sexual intercourse without the verbal consent of one’s partner is as taboo as drinking and driving.

The proposed statute is an aggressive, proactive step toward DOD’s goal of eliminating sexual assault from the military.<sup>462</sup> Sexual assault is an issue that warrants a ground-breaking military law. The purpose of military law is “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>463</sup> Arguably, there is no other internal issue facing the U.S. military that poses a greater threat to justice and good order and discipline than sexual assault.

The statute proposed by this thesis has the potential to be this catalyst for change because it would unequivocally proclaim that the military’s standard is absolute respect for sexual autonomy. This message would have meaning because it is backed by the authority of the UCMJ. Service members would easily understand exactly what is expected of them, and what the consequences are for failing to abide by the standard.

In addition, requiring affirmative consent would guard against miscommunication in the current culture of sexual freedom and require responsible sexual interaction on the part of both parties. A statute that clearly defines what is required and what is criminal with regard to sexual behavior will demand that service members live by the high standards the military expects of them. The end result will be a culture of respect for sexual autonomy with fewer sexual assaults, producing correspondingly high unit cohesion, morale, and military readiness.

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<sup>455</sup> *Id.*

<sup>456</sup> See SCHULHOFER, *supra* note 5, at 272; Bryden, *supra* note 58, at 406-07.

<sup>457</sup> *Id.*

<sup>458</sup> *See id.*

<sup>459</sup> MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002). Gladwell argues that there is a “magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire.”

<sup>460</sup> While there are not specific numbers, the DOD has created a new office (Sexual Assault Prevention and Response), an entire new program with training for every military member, and financed numerous Task Forces and study groups in their attempt to address the problem of sexual assault.

<sup>461</sup> GLADWELL, *supra* note 459, at 12.

<sup>462</sup> 2006 ANNUAL REPORT, *supra* note 40, at iii.

<sup>463</sup> MCM, *supra* note 6, pt. I, ¶ 3.

## Appendix A

### Proposed Statute

#### Article 120. Rape, Wrongful Penetration, and other Sexual Misconduct

(a) Wrongful sexual penetration. Any person subject to this chapter who commits an act of sexual penetration<sup>464</sup> with another person without first obtaining the affirmative verbal consent of that other person is guilty of wrongful sexual penetration and shall be punished as a court-martial may direct.

(b) Wrongful sexual contact. Any person subject to this chapter who, without legal justification or lawful authorization, engages in or causes sexual contact with or by another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(c) Abusive sexual penetration. Any person subject to this chapter who commits the offense of wrongful sexual penetration upon another person—

(1) 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, grievous bodily harm, or kidnapping); or

(2) if that person is substantially incapable of appraising the nature of the sexual penetration or voicing that person's freely given consent

is guilty of abusive sexual penetration and shall be punished as a court-martial may direct.

(d) Abusive sexual contact. 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 (c) (abusive sexual penetration) had the sexual contact been a sexual penetration, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) Rape. Any person subject to this chapter who commits the offense of wrongful sexual penetration upon another person—

(1) by using force against that other person;

(2) by causing bodily harm to any person;

(3) by threatening or placing that other person in fear that any person will be subject to death, grievous bodily harm, or kidnapping;

(4) by 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 person to appraise or control conduct; or

(5) who is sleeping or unconscious;

is guilty of rape and shall be punished as a court-martial may direct.

(f) Aggravated sexual contact. 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 (e) (rape) had the sexual contact been a sexual penetration, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(g) 1. In a prosecution under subsection (a),

A. It is a defense that the accused was married to, or cohabitating with the other person.

B. It is an affirmative defense that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person affirmatively consented to the sexual penetration. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

(h) Definitions.

(1) Sexual penetration. The term "sexual penetration" means—

(A) contact between the penis and the vulva or anus, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening or anus of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. 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 any person or to arouse or gratify the sexual desire of any person.

(3) Affirmative consent. Affirmative consent is actual verbal consent prior to sexual penetration, clearly indicating that the other person is freely willing or desiring to engage in the penetration.

(i) Maximum Punishments

1. Wrongful Sexual Contact	DD, BCD	1 yr	Total Forfeitures
2. Wrongful Sexual Penetration	DD, BCD	5 yrs	Total Forfeitures
3. Abusive Sexual Contact	DD, BCD	7 yrs	Total Forfeitures
4. Aggravated Sexual Contact	DD, BCD	20 yrs	Total Forfeitures

<sup>464</sup> SCHULHOFER, *supra* note 5, at 283 (using Schulhofer's language "commits an act of sexual penetration").

5.	Abusive Sexual Penetration	DD, BCD	30 yrs	Total Forfeitures
6.	Rape	Death, DD, BCD	Life	Total Forfeitures

## Appendix B

### The New Statute

#### Pub. L. No. 109-163, § 552

#### National Defense Authorization Act for Fiscal Year 2006

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#### SEC. 552. RAPE, SEXUAL ASSAULT, AND OTHER SEXUAL MISCONDUCT UNDER UNIFORM CODE OF MILITARY JUSTICE.

(a) Revision to UCMJ-

(1) IN GENERAL- Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), is amended to read as follows:

Sec. 920. Art. 120. Rape, sexual assault, and other sexual misconduct

(a) Rape- 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) Rape of a Child- Any person subject to this chapter who--

(1) engages in a sexual act with a child who has not attained the age of 12 years; or

(2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

is guilty of rape of a child and shall be punished as a court-martial may direct.

(c) Aggravated Sexual Assault- Any person subject to this chapter who--

(1) causes another person of any age 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 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) Aggravated Sexual Assault of a Child- Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

(e) Aggravated Sexual Contact- 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 (a) (rape) 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) Aggravated Sexual Abuse of a Child- 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) Aggravated Sexual Contact With a Child- 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 (b) (rape of a child) 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) Abusive Sexual Contact- 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 (c) (aggravated sexual assault) 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) Abusive Sexual Contact With a Child- 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 (d) (aggravated sexual assault of a child) 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) Indecent Liberty With a Child- Any person subject to this chapter who engages in indecent liberty in the physical presence of a child--

(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

(2) 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.

(k) Indecent Act- 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.

(l) Forcible Pandering- 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 be punished as a court-martial may direct.

(m) Wrongful Sexual Contact- Any person subject to this chapter who, without legal justification or lawful authorization, 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.

(n) Indecent Exposure- Any person subject to this chapter who intentionally exposes, in an indecent manner, in 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, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) Age of Child-

(1) TWELVE YEARS- In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), 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 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) SIXTEEN YEARS- In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), 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 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

(p) Proof of Threat- In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

(q) Marriage-

(1) IN GENERAL- In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), 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.

(2) DEFINITION- For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

(3) EXCEPTION- Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

(r) Consent and Mistake of Fact as to Consent- Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). 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 subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

(s) Other Affirmative Defenses not Precluded- The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

(t) Definitions- In this section:

(1) SEXUAL ACT- The term 'sexual act' means--

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) SEXUAL CONTACT- 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 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, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) GRIEVOUS BODILY HARM- The term '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 section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.

(4) DANGEROUS WEAPON OR OBJECT- The term 'dangerous weapon or object' means--

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that 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

(C) 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- The term '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 person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) THREATENING OR PLACING THAT OTHER PERSON IN FEAR- The term 'threatening or placing that other person in fear' under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), 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 person being subjected to death, grievous bodily harm, or kidnapping.

(7) THREATENING OR PLACING THAT OTHER PERSON IN FEAR-

(A) IN GENERAL- The term 'threatening or placing that other person in fear' under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), 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 a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) INCLUSIONS- Such lesser degree of harm includes--

(i) physical injury to another person or to another person's property; or

(ii) a threat--

(I) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) BODILY HARM- The term 'bodily harm' means any offensive touching of another, however slight.

(9) CHILD- The term 'child' means any person who has not attained the age of 16 years.

(10) LEWD ACT- The term 'lewd act' means--

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to 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 or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) INDECENT LIBERTY- The term 'indecent liberty' means indecent conduct, 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, it is an indecent liberty; the child's consent is not relevant.

(12) INDECENT CONDUCT- The term 'indecent conduct' 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 observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of--

(A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125)), or sexual contact.

(13) ACT OF PROSTITUTION- The term 'act of prostitution' means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) CONSENT- The term '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 16 years of age; or

(B) substantially incapable of--

(i) 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;

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

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

(15) MISTAKE OF FACT AS TO CONSENT- The term '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.

(16) AFFIRMATIVE DEFENSE- The term '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.'

(2) CLERICAL AMENDMENT- The item relating to section 920 (article 120) in the table of sections at the beginning of subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended to read as follows:

920. 120. Rape, sexual assault, and other sexual misconduct.'

(b) 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 subsection (a), may not exceed the following limits:

(1) SUBSECTIONS (a) AND (b)- For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct.

(2) SUBSECTION (c)- For an offense under subsection (c) (aggravated sexual assault), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) SUBSECTIONS (d) AND (e)- For an offense under subsection (d) (aggravated sexual assault of a child) or subsection (e) (aggravated sexual contact), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) SUBSECTIONS (f) AND (g)- For an offense under subsection (f) (aggravated sexual abuse of a child) or subsection (g) (aggravated sexual contact with a child), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) SUBSECTIONS (h) THROUGH (j)- For an offense under subsection (h) (abusive sexual contact), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) SUBSECTIONS (k) AND (l)- For an offense under subsection (k) (indecent act) or subsection (l) (forcible pandering), dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) SUBSECTIONS (m) AND (n)- For an offense under subsection (m) (wrongful sexual contact) or subsection (n) (indecent exposure), dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(c) Applicability- Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), as amended by subsection (a), shall apply with respect to offenses committed on or after the effective date specified in subsection (f).

(d) Aggravating Factors for Offense of Murder- Section 918 of title 10, United States Code (article 118 of the Uniform Code of Military Justice), is amended in paragraph (4) by striking 'rape,' and inserting 'rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child,'.

- (e) Statute of Limitations- Section 843(a) of title 10, United States Code (article 843(a) of the Uniform Code of Military Justice), as amended by section 553(a), is amended by striking 'or rape,' and inserting, 'rape, or rape of a child,'.
- (f) Effective Date- The amendments made by this section shall take effect on October 1, 2007.