



Copyright (c) 2004 College of William & Mary
William & Mary Law Review

April, 2004

45 Wm. & Mary L. Rev. 2425

LENGTH: 14152 words

NOTE: Reveille for Congress: A Challenge to Revise Rape Law in the Military

NAME: Captain Alexander N. Pickands

LEXISNEXIS SUMMARY:

... All too often, however, this trust between military leaders, peers, and subordinates is undermined by coercive sexual imposition. ... The call to revise the UCMJ's treatment of criminal sexual misconduct is not a new one, but the focus has frequently been misguided, choosing to expand rape law to cover other forms of nonviolent coercion rather than supplementing rape law with additional criminal sexual misconduct statutes. ... After all, reading the CAAF's holding literally keeps it in line with traditional constructive force analysis: To the extent that a perpetrator's "abuse of authority place[s] the victim in fear of *physical injury*," the perpetrator has applied coercive force in the form of implied threat of violence. ... a. *Text*(1) 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:

- (a) by death if the intercourse results in the death of the victim; or
- (b) by imprisonment of a maximum term of life, if the intercourse is consummated by violent action; or
- (c) by imprisonment of a maximum term of forty years, if the intercourse is consummated by threats of violent action, implied or expressed; and
- (d) such other punishment as a court-martial may direct. ...

TEXT:

[*2425] INTRODUCTION

When the chips are down and our subordinates have accepted us as their leader, we don't need any superior to tell us; we see it in their eyes and in their faces, in the barracks, on the field, and on the battle line. And on that final day when we must be ruthlessly demanding, cruel and heartless, they will rise as one to do our bidding, knowing full well that it may be their last act in this life. n1

The unique relationship between a military leader and his or her subordinate is at once both powerful and fragile; strong enough to compel the subordinate to put life and liberty on the line, yet fragile enough that it cannot thrive in anything short of an environment of complete trust. All too often, however, this trust between military leaders, peers, and subordinates is undermined by coercive sexual imposition.

The United States military's rape law does not effectively prevent sexual coercion. Those victimized by fellow service members suffer a loss of autonomy and privacy as a result of sexual pressures taking a number of forms not yet adequately addressed by the Uniform Code of Military Justice (UCMJ), which, on its face, continues to criminalize only

forcible rape. n2

[*2426] Commentators have long recognized that a wide spectrum of behavior exists capable of destroying resistance to, or willingness to resist to, unwanted sexual contact almost as effectively as the direct application of force. The military's definition of rape remains unchanged, however, and is almost indistinguishable from the traditional common law crime described over two hundred years ago. n3 The result is a gap left by the UCMJ large enough to include a wide variety of destructive behavior. Coercive activity that does not fit Article 120's narrow definition of rape can be addressed only by other assorted articles that impose mild punishment relative to the blameworthiness of the underlying act. n4 The dilemma created by this gap is twofold: military panels may convict someone of rape under Article 120 out of a desire to hold the defendant criminally accountable for his n5 reprehensible actions, despite the fact his conduct did not amount to force or even forcible coercion; n6 on the other hand, panel members may acquit a person who illegitimately used his authority to pressure a subordinate into having sex, simply because it does not fit within the paradigm of forcible rape. Either outcome is possible under the current state of the law, and both outcomes are disastrous.

The misuse of rank or authority to coerce sex fits neatly into the gap in the UCMJ. The elements required for rape may be absent, yet the pressures exerted can be equally destructive of human dignity and personal autonomy. It is particularly dangerous in the military, where such egregious abuses of authority not only destroy the personal interests of the victim, but also undermine discipline, morale, and unit cohesiveness--all of the *legitimate* objectives of [*2427] military authority. Thus, in a larger sense, both the individual and the community have been victimized.

Recognizing the destructive effects of coerced sex, military courts have begun shoehorning into their rape analysis factors that bear no relevance to the elements of forcible rape. n7 Such judicial activism is not the answer, but should instead serve as a signal to Congress that military rape law needs to change.

This Note argues that Article 120 fails to accomplish its goal of protecting the autonomy and privacy interests of the victim not because its definition of rape is inherently flawed, but because it exists in a vacuum. By itself, the definition of rape, especially as conceived of by the UCMJ, cannot legitimately be extended to encompass other forms of culpable coercion. Courts attempting to do so have strained Article 120 beyond its meaning and have threatened to destroy any meaningful analysis of criminal sexual conduct in the military. The solution is clear: retain the principled distinction between forcible rape and all other forms of coercive sex, while creating separate crimes to cover those instances of nonviolent coercion that are equally capable of robbing women of their autonomy and privacy.

Perceiving the need for a more reasoned and comprehensive approach to setting limits on behavior designed to achieve sexual relations can only begin with an understanding of common law rape. Part I of this Note reviews the elements of rape and how military courts and commentators have understood them. This Part ends with a discussion of the expansion of military rape law, from beneficial reforms and exceptions to the dangerous threshold upon which it now stands.

Having framed the issue in terms of rape law's traditional roots, its evolution, and its expansion, Part II explains why sex procured by deceit as well as sex procured by nonviolent coercion--such as the coercion present through the misuse of rank--are not, and should not be, considered rape. A principled distinction exists between *compelled* sex and *coerced* or *fraudulently induced* sex. An analysis of the pressures exerted by the accused to achieve sexual intercourse will both restrain the overexpansion of rape and provide a sound basis for measuring the wrongdoer's culpability.

[*2428] This Part continues by describing how the misuse of military authority can seriously degrade combat effectiveness. n8 Part II ends by emphasizing the importance of criminalizing coercive sex outside the limits of rape law, especially in light of the failure of the UCMJ in the recent widespread allegations of sexual misconduct at the Air Force Academy. n9 The call to revise the UCMJ's treatment of criminal sexual misconduct is not a new one, but the focus has frequently been misguided, choosing to expand rape law to cover other forms of nonviolent coercion rather than supplementing rape law with additional criminal sexual misconduct statutes. To that end, this Note proposes adding another Article to the UCMJ, as well as revising the existing Article 120.

Part III analyzes this new continuum of culpability. This analysis provides the basis for a new punitive scheme, filling the gap in Article 120 by providing different criminal sanctions for rape and the newly delineated sexual offenses.

Answering this critical need will allow commanders to punish and deter leaders who would abuse their position, as well as legitimize the chain of command and remove impediments to mission success. Our nation, embroiled in war abroad and defending domestic security at home, needs the military to focus on the enemy without rather than the enemy within.

I. THE CRIME AND THE LAW

Two of the most cherished liberties in society, particularly coveted in American culture, are personal autonomy and privacy. It is the violation of these prized freedoms which makes rape such a despicable crime. Sexual intimacy lies at the heart of privacy, and sexual autonomy is equally central to a person's dignity. n10

[*2429] Some commentators have described rape as a crime against property n11 as well as a crime of violence against a person. The notion that something has been stolen from the victim of rape is not uncommon among commentators, and thus some even argue for protections in the law based on similar rationales as those provided for extortion or robbery. n12 In any case, the crime of rape as charged under the UCMJ should be understood both in terms of its traditional legal evolution and its place in the unique environment of the military services.

A. The Crime

In the government's efforts to safeguard these essential personal liberties, Congress has proscribed certain conduct that is injurious to society and thus labeled it "unlawful." n13 Declaring certain acts criminal has one all-encompassing goal: protecting the public from [*2430] further occurrences of such conduct. n14 By proscribing rape, society has traditionally regarded the forcible imposition of unwanted sex upon another to be such a social wrong. Put simply, society has decided to prohibit otherwise lawful activity (sexual intercourse) pursued in a violent and compulsive manner.

The harm of rape can be measured in terms of each of the three traditional common law elements of the crime: (1) sexual intercourse, (2) accomplished by force, and (3) against the will of the woman. n15 The harm in unwanted *sexual intercourse* is a loss of dignity, personal integrity, and honor. The harm that results from *force* almost goes without saying; physical harm can be easily seen in the victim's injuries. The psychological effects of being brutalized, of having one's *will* completely overwhelmed and subdued, can endure long after the physical pain fades.

The victim may be robbed of her privacy twofold: first, she is deprived of her most private choices--with whom, and under what circumstances, she shares herself; second, her past secrets may be laid bare, dragged into the courtroom to become part of a trial and thus made into a public record. n16 The accused faces similar exposure and examination, something for which one may not have much sympathy if his actions are later judged to be criminal. In the event he turns out to be innocent, however, one may have more empathy for the doubt sown into his character by the mere accusation of such [*2431] a reprehensible act. Even the allegation of rape thus calls the honor and integrity of both accused and accuser into question. n17

B. The Law

The military's definition of rape is a very simple one, almost indistinguishable from the traditional common law crime Sir William Blackstone described. n18 The military's version has two stated elements: (1) sexual intercourse, accomplished (2) by force and without consent of the victim. n19

Although remarkably similar to traditional common law rape, two of the elements are stated as one. The combination of the force and consent elements of the crime undoubtedly reflects the common understanding that force

and nonconsent are entwined very closely in terms of evidentiary proof. n20 This is really a technical, organizational difference that some courts choose to ignore; some military courts, however, have stated openly that they view the requirements of force and lack of consent as distinct from one another. n21

It makes sense that lack of consent is an element of rape separate and distinct from force. Physically violent sex is not, by itself, criminal behavior; the government has not chosen to interfere so substantially in our private matters as to dictate the "gentleness" of sexual intimacy, only to proscribe its violent imposition upon the [*2432] unwilling. n22 The military has said little about consent outside the context of the force applied to nullify it. It is clear, however, that lack of consent must be affirmatively shown. n23 It is not enough for a victim to say after the act has occurred that she did not want to have sex: The military's highest court--the United States Court of Appeals for the Armed Forces--found it significant in one case that "although [the victim] did not actually want to have sexual intercourse with appellant or [another man], she did not indicate that to either of them." n24

The fact that a victim must manifest her lack of consent clearly raises a question that has been the subject of a long-standing debate in the area of rape: How clearly must she express herself? To the point of resistance? n25 Although the Manual for Courts-Martial (MCM) states that a victim's failure to "make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances" n26 can give rise to an inference that the victim actually consented, the courts have stated that resistance is not the only means to show lack of consent. n27

[*2433] The concept of force in rape is much more straightforward; the military has adopted Black's Law Dictionary's definition of "force": n28 "*n.* Power, violence, or pressure directed against a person or thing;" n29 and "*vb.* To compel by physical means...." n30

Article 120 does not define how much force is required. Commentators generally have agreed that the only amount of force required is "force used to overcome female nonconsent." n31 The lower limit of actual force is that it must be greater than "that merely incidental to the act of sexual intercourse... [The force] element contemplates an application of force to overcome the victim's will and capacity to resist." n32

In cases where consent cannot be given, either because of the perpetrator's actions or circumstances the perpetrator takes advantage of, the law finds sufficient force in the act of sexual intercourse itself. In these situations, the perpetrator will not have to force himself upon his victim physically because the victim was unconscious, under the influence of alcohol or drugs, n33 or mentally unable to understand or make choices freely due to a disability. n34 In these cases the doctrine of constructive force serves as a substitute for actual force, eliminating the need to prove that force was actually applied to the victim to make her submit to sexual contact.

Constructive force also comes into play when the perpetrator did not have to apply force to achieve sexual contact because the victim reasonably and subjectively believed any resistance would be [*2434] futile. n35 This exception is made for the sound policy reason that when the defendant's own conduct creates a threat of violence so severe that resistance appears futile, the law should not require the victim to bring greater harm upon herself by attempting to resist anyway.

The victim's belief is tested for reasonableness "under the totality of the circumstances." n36 Factors have traditionally included: the relative size of the perpetrator and victim, demonstrating an apparent difference in physical power; n37 the reputation of the perpetrator for violence, if known by the victim; n38 a parental relationship over the victim, n39 the rationale being that the application of force by the parent was unnecessary because of the close relationship and obvious physical control exerted on the child for potentially long periods of time; the coerciveness of the perpetrator's expressed intent to achieve sexual contact through physical means or threat to meet any physical resistance with violent retaliation; n40 and the surroundings and timing of the incidents, n41 including how isolated the location is and how likely assistance would have responded to screams or calls for help. n42

[*2435] Three hypothetical scenarios are conceivable when applying constructive force analysis. In the first situation the perpetrator has actually applied force, so any threats he made are beside the point. The doctrine of constructive force would not apply, except to the extent that further resistance from the victim is discouraged by implication of future harm--implications conveyed by the perpetrator's past willingness to exert actual force.

Another possibility is that the perpetrator has actually expressed a threat of force. n43 Constructive force analysis of the totality of the circumstances would enable the factfinder to decide whether the threat was reasonably taken as being coercive enough to make resistance appear futile.

Finally, the perpetrator may not have expressed a threat of force at all. The analysis of the totality of the circumstances would enable the factfinder to decide whether the perpetrator's *affirmative* actions, characteristics, and the surrounding circumstances all reasonably implied a threat of force. n44 Ostensibly, this analysis would also determine whether the implied threat was sufficiently coercive to render resistance effectively futile.

The doctrine of constructive force is not a recent invention of a modern, enlightened age; it has existed for more than a century. While the military's official use of the doctrine dates to 1917, n45 the concept evidently predates the turn of the century, appearing in commentary as early as 1886. n46 In the past ten to fifteen years, however, the courts have been improperly adding factors to rape analysis under the guise of constructive force.

C. *The Expansion of Constructive Force Analysis*

The most troubling of these factors that the courts, particularly the highest military court, have injected into constructive force analysis is that of rank or authority. This dubious practice began in [*2436] 1989, when the Court of Military Appeals--the military's court of last resort at the time--considered the defendant's position as the drill instructor for the victim's spouse in its calculation of constructive force, stating: "this military relationship with its ancillary implications for the dependent spouse created a unique situation of dominance and control where explicit threats and display [sic] of force by the military superior were not necessary." n47 What is even more troubling is that this part of the court's holding was completely unnecessary, because it had already found that the late-night encounter in an isolated trailer off post, as well as the defendant's size and demeanor, was "highly coercive," n48 a holding certainly sufficient to find the doctrine of constructive force applicable.

Three years later, the court made clear that its consideration of rank should not be dismissed as either a mistake or mere dicta, concluding its opinion in *United States v. Clark* by emphasizing "the unique situation of dominance and control presented by appellant's superior rank and position." n49 This trend has continued in several recent rulings from the current incarnation of that court, the United States Court of Appeals for the Armed Forces (CAAF). n50

The court has lost sight of the fact that constructive force is a substitute for actual force. As such, each factor is considered only to the extent that it would contribute to determining whether the perpetrator did not have to apply actual force because of the victim's reasonable fear of death or bodily harm. All the surrounding circumstances, including characteristics of the perpetrator, victim, location, and timing, are relevant *only* to establish the victim's reasonable belief that resistance was *physically* futile, not [*2437] that the victim experienced a generalized "feeling of coerciveness" of the encounter. n51

The only coercion of legal significance in a rape case should be that which may result from physical or violent compulsion. This is simply not true for factors such as (1) rank, or military authority; n52 (2) command authority; n53 (3) reputation in the unit for being intolerant of failure or overly demanding; or (4) threats of push-ups or other corrective training. n54 None of these factors bear any relevance to determining whether someone was coerced "forcibly," because a threat of force cannot be reasonably inferred from them. The first two factors, military and command authority, do not grant the senior person rights to assault or mistreat the subordinate. Nor in fact do they suggest that the senior person would have any more propensity or physical ability to do so. Indeed, it would take an extreme extension of logic to say that because my commander can order me to climb that ridge into hostile fire, he can

therefore beat me, or rape me, or that he would be more likely to do so. The other two factors, the reputation for being intolerant of failure or overly demanding, combined with presence of threats of physical training, plainly do not include forcible sexual compulsion, because there is no force inherently implied in either.

[*2438] If superior rank and position were enough to invoke the doctrine of constructive force, then, as one Court of Military Appeals judge stated, "all of the significant number of sexual fraternization cases that reach this Court could conceivably come here as *rape* convictions rather than fraternizations." n55

By adding factors that are clearly extraneous to forcible rape analysis, the courts have manifestly signaled their desire to include more than just forcible compulsion into the realm of criminally accountable behavior. Judge Brown admitted as much in his concurring opinion in *Simpson*, asserting: "I don't believe this constitutes constructive force as defined by our superior court. In my view, it should ... Until and unless Congress ... decides to overhaul the [military's] current sexual crime scheme, that is the approach that our superior court should take." n56

The consideration of rank as a factor in constructive force analysis has now been cemented in the military common law. Late last year, the CAAF affirmed the service court's decision in *Simpson*, stating "we have held that it is sufficient if the Government proves that the abuse of authority placed the victim in fear of physical injury." n57 This statement, though seemingly restating the law in *Palmer*, n58 takes a legitimate factor of constructive force analysis--that of the "unique situation of dominance and control" n59 inherent in parent-child relationships--and applies it to superior-subordinate relationships.

The CAAF expanded and applied the narrow holding in *Palmer* to the facts in *Simpson*, clearly adopting military authority or power as a factor in the constructive force analysis, by affirming the military judge's instruction summarizing constructive force:

[*2439] Force [is] required for the crime of rape ... it could be in the form of constructive force, and that constructive force could be brought to bear on the victim through the use or abuse of military authority that created a reasonable belief that the victim would suffer physical injury or that resistance would be futile. n60

The assertion that the "use or abuse of military authority" could amount to constructive force is an expansion both unwarranted and illogical. The rationale for the use of authority in constructive force analysis arose from parent-child relationships, and results from the convergence of *two* factors: (1) the "youth and vulnerability of children;" n61 and (2) the "power inherent in a parent's position of authority." n62 To apply these concepts to superior-subordinate relationships requires the presumption that soldiers are to their leaders as children are to their parents--but soldiers are not and cannot be children; they must have reached the age of majority to serve. In addition, soldiers do not have a child's mental and emotional vulnerability to coercion; children's unique situation of vulnerability comes from their utter dependency on their parents for everything up to life sustenance, as well as their prolonged exposure to the total authority of their parents n63--exposure that lasts all of their formative years. The *Palmer* court even stated as much; the situation created by a child's vulnerability and a parent's unparalleled authority was "unique." n64

If the lower courts read the CAAF's holding strictly, the expansion of constructive force may still be held in check. After all, reading the CAAF's holding literally keeps it in line with traditional constructive force analysis: To the extent that a perpetrator's "abuse of authority place[s] the victim in fear of *physical injury*," n65 the perpetrator has applied coercive force in the form of implied [*2440] threat of violence. This situation should remain safely hypothetical as authority can in no way logically imply a threat of force. n66

II. THE NEED FOR REFORM

A. *Reveille*: n67 *Arise, and Witness Injustice*

The source of the court's dilemma is the UCMJ itself. Article 120 criminalizes only forcible rape, providing no

related crimes or lesser-included offenses that cover nonviolent coercive conduct (e.g., threats of nonviolent reprisal such as an unfavorable performance review). n68 In an attempt to compensate, government counsel may charge a defendant with violating Article 93 "Cruelty and maltreatment," along with rape. This Article may well be used to cover nonviolent coercive sex, n69 but in realistic terms the punishment is "peanuts" compared to rape, imposing at most one year of confinement. n70

[*2441] As a result, courts and panel members are cast adrift without legal standards, hearing a sordid tale of unjustifiable pressures to procure sex from a female soldier and having to choose between straining to fit the accused's conduct into the paradigm of traditional forcible rape, finding him guilty of cruelty and maltreatment ("peanuts"), or simply letting him off entirely.

This predicament causes the court-martial to fall short of securing justice for the victim because the panel may be unwilling to brand the nonviolent defendant a "rapist." When the culpable go free, the justice system has failed to achieve any of the goals for sentencing.

This situation may yield unfair results for the defendant as well. The panel may be unwilling to fail in its responsibility to protect society, deciding instead to implement its only potent option: convicting the defendant of rape. If he neither used force, nor threatened the use thereof, a terrible injustice has been done. n71 The innocent, at least he who is innocent of forcible rape, is branded a "rapist," and placed in risk of being incarcerated for the majority of, if not the entirety of, the rest of his life. In this situation, too, the justice system has again failed to achieve many of the goals for sentencing. n72

B. Charge!: n73 Explicitly Criminalize More Forms of Coercive Sex

That the touchstone of rape analysis is the presence of force or forcible compulsion makes sense: "Rape is, after all, the ultimate form of aggression against someone--short of homicide." n74 This type [*2442] of analysis may serve to narrow the focus of criminal culpability to only one of the harmful aspects of rape (violence), completely ignoring the effects on the other (loss of autonomy). As Professor Schulhofer notes:

Recognition of sexual autonomy as a fully protected entitlement suggests a different approach to this problem. All coercive behavior, whether violent or nonviolent, seeks to induce sexual intimacy that the coerced individual would not otherwise choose. A person violates another person's autonomy--and therefore should be considered guilty of sexual abuse--whenever he attempts to engage in sexual intercourse with consent that was obtained by coercion. n75

It is important to note that Professor Schulhofer labels such coercive behavior "sexual abuse," not "rape."

Other commentators have expressed the view that coercion can serve to destroy sexual autonomy as effectively as force. n76 That is not to say that such coercive conduct is as criminally culpable as rape. As Professor Dripps succinctly stated: "Whether measured by the welfare or by the dignity of the victim, as a general matter unwanted sex is not as bad as violence... It follows that those who press sexual advances in the face of refusal act less wickedly than those who shoot, or slash, or batter." n77 What benefit is there, though, to pigeonholing behaviors into one or the other camp? The answer is that there is more than a semantic difference between coercive sexual practices and rape, which should be reflected in any statutory scheme designed to address this problem.

The analysis can be framed in terms of the legitimacy of the pressures exerted by the perpetrator, and how that reflects the level of imposition on the autonomy of the victim. Specifically, what alternatives has she been left with as a result of the perpetrator's actions? The choice actually made by the victim is irrelevant to the [*2443] culpability of the perpetrator; we should be concerned only with the relative legitimacy of the alternatives left.

It may help to draw some distinctions between types of pressures that the perpetrator can bring to bear on the victim. For simplicity's sake, this Note labels them *compulsion*, *coercion*, and *persuasion*.

Compulsion is the equivalent to hijacking the will of the victim, leaving no alternatives (no real choice). When an attacker leaps from the darkness to seize his victim, he has left no choice in the victim but the manner and extent to which she will resist him to try to stay alive. The attacker has declared his intention to use any and all means to achieve his goals. This is rape, and the attacker should certainly be considered culpable.

Coercion is pressure upon the will of the victim by virtue of an illegitimate choice--the choice between two evils of the perpetrator's making. Such a threat as "submit to sex or I will beat you or punish you" is clearly wrongful because the victim has a right to be free from *both* the unwanted sex and physical savagery. Both possibilities are harmful and both are the result of the perpetrator's actions. "Courts often treat a choice as coerced only if two conditions are met: The choice must be made in response to a threat ... *and* the person receiving the threat must have 'no reasonable alternative' but to submit." n78 This is rape if the coercive threat is of violence or force. If not, it is not rape but the actor should certainly be criminally culpable n79 unless the threat is trivial. n80

Persuasion is pressure upon the will of the victim by virtue of a promise of gain. It is the choice between an evil compensated by a gain or no change from the status quo. An offer such as "sleep with me and I will give you money or a recommendation for employment" is one of persuasion rather than coercion--it is essentially an offer of potential gain, not a threat of potential loss. The choice remains purely voluntary; choosing to refuse sex in this situation leaves [*2444] the offeree no worse off than she was before the offer was made. Consent has been given not for sexual gratification, but the achievement of some other perceived gain. One who has made the choice to accept the offer can be understood to have decided that the undesirability of the sexual contact has been mitigated or eliminated by the gain of the return promise. This type of exchange should not be considered criminal sexual imposition, n81 because autonomy has not been destroyed, or even reduced, as in the previous examples. n82

This form of analysis really turns on the element of consent, using force only to indicate the illegitimacy of the pressure exerted on the victim. Sex without *voluntary* consent--the lack of consent inherent in compulsion and the involuntary consent given as a result of coercion--should be criminal.

Some argue that fraudulently procured sex should be equated to rape. n83 The military does not subscribe to such a radical view: "If there is actual consent, although obtained by fraud, the act is not rape" n84 As well it should not be; the concept of consent is one based upon autonomy, and an after-the-fact reflection cannot change whether an act was done willingly at the time it was performed.

Scholars frequently subdivide fraud into *fraud in the factum* and *fraud in the inducement*. n85 The distinction concerns the scope, and thus effectiveness, of consent. In the first instance, when there is fraud in the factum, the perpetrator has deceived the victim so as to render her consent ineffective, because the action she consented [*2445] to was not what occurred. Professor LaFave uses the example of a doctor who "has had intercourse with the patient but has managed to conceal from her the fact that it occurred by representing the event as nothing more than a routine pelvic examination or some similar treatment." n86 The consent given to the doctor was for treatment, not sexual intercourse, so her consent was ineffective. n87 The other situation is fraud in the inducement, in which the "doctor has achieved intercourse with his patient by fraudulently misrepresenting that such intercourse was a necessary medical treatment for some real or pretended malady." n88 In this case the consent was to intercourse, but for a reason which was later shown to be false. n89 The military's exclusion of fraud is aimed at this situation, and comports with traditional notions of fraud and consent in rape prosecutions: "Any woman, then, is protected by the criminal law from the imposition of sexual relations without her consent, but in general, women are not equally protected when their expression of consent is involuntary by virtue of a mistaken motivating belief produced by deception." n90

This distinction is ultimately an artificial one, and is unnecessary when analyzing sex gained by fraud in terms of autonomy. Another way to look at the two previous examples is that in the first, rape has occurred because consent to sex was never given, thus the force required by the doctor was only that which was necessary to achieve penetration. His deception removes the necessity of violent action and then serves to conceal his crime. In the second example, no rape has occurred because consent *was actually given*.

Fraudulent promises of benefit cannot be seen as giving rise to criminal culpability in this context for the same reason that actual promises do not--they are both *persuasion*, the transfer of contemplated benefits. The fraudulent nature of the promise does not serve to destroy the effectiveness of the consent at the time it is given. This may be true even if the deception is not about a future occurrence, but a misrepresentation about a present fact, such as identity:

[*2446] Suppose *B* is an enthusiastic fan of the rock star Johnny Limbo. She has heard all his records but has never seen his photographs. On learning of this, the villainous *A* proclaims that *he* is Johnny Limbo and invites her to come to bed with him. The ruse works, let us suppose, and now the question is how involuntary was her consent for such purposes as determining his criminal liability. If we consider this deception to be fraud in the inducement, then the voluntariness of her consent is reduced but to nowhere near the extreme of total involuntariness, for its inducement was an envisaged good, not the avoidance of a dreaded evil. Hence it had no coercive force. n91

Again, the fact that consent was actually given at the time of the sexual encounter cannot be changed by an after-the-fact decision by the victim.

While Article 120 criminalizes only the top of the spectrum, compelled and forcibly coerced sex, an ideal statute would address nonviolent coercion as a lesser form of criminal sexual conduct. On the other hand, persuaded sex, fraudulent or otherwise, should be left out of a punitive scheme entirely because while it may be despicable, it would be more harmful to personal autonomy for the government to intrude into this area of sexual conduct.

C. Taps: n92 It's Long Past Time To Put This Problem to Bed

We have a tremendous problem. It's time to get our heads out of the sand. n93

The year 2003 may very well become known in military circles as the year of the Air Force Academy sexual assault scandal. In January, the Secretary of the Air Force, Dr. John Roche, received an e-mail that had been initially sent to female cadets "asserting [*2447] that there was a significant sexual assault problem at the United States Air Force Academy that had been ignored by the Academy's leadership." n94 Dr. Roche charged the Air Force General Counsel, Mary Walker, with conducting an exhaustive review of the Air Force Academy (AFA) and its practices and procedures for handling sexual assault complaints, preventing sexual misconduct, and legal responses to reported incidents. n95 The Working Group formed to conduct this investigation reported a disturbing situation at the Academy, stating: "The focus on sexual assault issues had varied over time and lessened in recent years, and a number of culture and process matters are problematic. Collectively, they produced a less than optimal environment to deter and respond to sexual assault or bring assailants to justice." n96 Remarkably, however, the Working Group "found no systemic acceptance of sexual assault at the Academy, institutional avoidance of responsibility, or systemic maltreatment of cadets who report sexual assault." n97

Unwilling to await the report of an internal Air Force investigation, Congress launched its own investigation by creating an independent panel to "study ... the policies, management and organizational practices, and cultural elements of the [AFA] that were conducive to allowing sexual misconduct (including sexual assaults and rape) at the [Academy]." n98 The Panel delivered its report in September, harshly criticizing the Working Group Report, stating that the Air Force General Counsel attempted both to "shield Air Force Headquarters from public criticism" and "avoid[] any reference to the responsibility of Air Force Headquarters for the failure of leadership which occurred at the Academy." n99

[*2448] Although the reports disagreed on a number of points, the importance of their findings, not to mention their very existence, was that one of the military's premier institutions has had a significant sexual misconduct problem for some time--as does the military itself. n100

1. Lessons from the Air Force Academy

It is well known that the Air Force, and its Academy, are not the only military institutions to have faced scandals concerning sexual misconduct. n101 This scandal, however, has particular meaning: (1) it sends a clear "wake-up" signal to Congress, in an urgent and very publicly observable manner that the opinions of military judges did not, that military sex crime law needs revision; and (2) it may help to explain, in the context of this Note's analysis, both why and how it should change.

As the Working Group and Fowler Commission reports will undoubtedly be studied in detail and for some time to come, the reports have only begun to expose a pervasive problem in military culture, both in administering justice in cases of sexual misconduct, and in preventing future incidents. As noted in *The Denver Post*: "The true story of sex crimes inside the [service] academies remains [*2449] largely hidden from public view. It's tucked into a secret world of files and confidential proceedings, where sexual-assault cases are treated as conduct breaches instead of criminal offenses and bring no public embarrassment." n102 There is plenty of public embarrassment to go around now that the scandal has broken; the Air Force has already removed several of the senior leaders at the AFA, and demoted the superintendent at his retirement. n103 Such publicity has both positive and negative impacts. An outcry of the people might motivate their representatives to review, and hopefully change, the factors contributing to prevalent sexual misconduct. Whether this will occur remains to be seen. The negative impacts, however, have already manifested themselves. The flood of journalism and its attendant flock of "experts" has served to muddy the waters. n104

Both the Working Group and Fowler Commission reported that the use of alcohol, as well as other misconduct, frequently attended incidents later alleged to be acts of rape or sexual assault. n105 This finding is important, as it accentuates one of the common myths about military rape law: that any amount of coercion, or consumption of alcohol by the victim that *influences* consent also renders it legally *ineffective*.

The Academy's definition broadly asserts "consent is not given where there is force, threat of force, coercion, or when the [*2450] person is alcohol impaired, underage, or unconscious." This misstates the law, as alcohol impairment short of intoxication sufficient to render a person incapable of consent will not, alone, negate consent... To the extent that the definition implies that having consumed alcohol and being impaired to any degree negates consent, it is significantly misleading to cadets, and likely to result in allegations of sexual assault under circumstances that would not meet criminal requirements. n106

This statement seems somewhat circular, stating in essence that drinking short of the amount of alcohol needed to negate consent does not negate consent. It serves to remind us that it takes more than just *any* amount of drinking to vitiate consent, and it should also remind us that it takes more than just *any* form of coercion to do so as well. Failing to recognize this could "raise unrealistic expectations for prosecution in the minds of victims." n107 These kinds of misconceptions about the law almost certainly affect the number of people reporting rape and sexual assault in the surveys considered by the Working Group and Fowler Commission. n108 Clarifying the law of rape and other forms of sexual misconduct would bring victims' expectations closer in line with the legal reality, as well as providing them with greater justice.

Unlike many of the sexual misconduct scandals that the military has experienced in the past, where the public has attacked the conduct of particular leaders or the services themselves, this [*2451] scandal has caused military sex crime law itself to come under fire. n109

2. *The True Significance of Power and Authority*

According to the Preamble of the most recent Manual for Courts-Martial, 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." n110 Good order and discipline mean more than troops who do not get into trouble with the law. They comprehend the proper functioning of leader-subordinate relationships in order to minimize distractions from the military's foremost "responsibility ... to win

the nation's wars." n111

In a unit whose leaders have abused their authority by placing illegitimate demands on their troops, confidence in the chain of command's legitimate direction of authority is broken. A soldier's most sincere wish is that if she is called on to trade her life for her country, her leader will ensure that her life is well-accounted for in enemy dead--not wasted or thrown away due to that leader's incompetence, fear, or selfishness. How can one trust her leader with her life if she cannot trust him to respect her autonomy and her sexual privacy?

The selfishness and unprofessionalism displayed by a leader who would coerce sex from his subordinates destroys unit cohesiveness, degrades the chain of command, and distracts troops from their mission. The integrity of the chain of command has always been of paramount importance, as reflected in the military's prohibitions on intimate relationships within the command. n112

Considering that the UCMJ does not significantly criminalize many coercive sexual practices, it is very likely that their occurrence [*2452] is seriously underreported. n113 Some commentators believe that sexual coercion occurs so frequently in the military because the purpose of the military to fight wars can foster a culture of aggression and domination, even among members of the same team:

References are frequently made, especially in basic training, to a man's masculinity and ability to perform. Those who do not meet the standards, are often referred to as a "wimp, pussy, or girl." Drill instructors have been known to call their troops "ladies" as a form of degradation and humiliation. The male persona is one that is strong, powerful, and in control, whereas the female stereotype is considered weaker, powerless, and physically unequal to their male counterparts. n114

Feminist commentators often argue that coercive sexual practices by men are a "means by which male dominance and power is established and maintained." n115 Other explanations for the incidence of sexual coercion include socioeconomic theory, which posits that the stratification of males and females in the workplace reinforces female dependency and gives rise to male "oppression and victimization." n116 Yet another theory explains rape and sexual aggression in terms of biological drives. n117

It would be too easy to blame the military culture for whatever the sociological, psychological, economic, or biological pressures that come to bear on the relations of men and women; in the end, [*2453] however, the choice to exert power over another is an individual choice, one whose outcome lies solely within the control of that person. Along with an indoctrination emphasizing aggression, dominance, and decisive action, service members are also trained to temper those qualities with values such as "loyalty, duty, respect, selfless service, honor, integrity and personal courage." n118 The people who choose to let their aggression run rampant do so not because the military has trained them to do so, but because they have chosen to ignore the aspects of military culture that deny them their "fun" and emphasize the parts of that culture that allow them to rationalize their behavior.

It is more accurate to say that the nature of the military structure, more so than its culture, makes the exploitation of rank or authority to gain sex more likely. The CAAF's acknowledgment of the "unique situation of dominance and control" n119 created by the difference in military rank is a recognition of this principle. Human nature is such that where there is opportunity to use an advantage, such as a difference in power, n120 there will be some who attempt to use it illegitimately. n121

It is important to recognize what significance military structure, such as the hierarchy of rank and power, *can* contribute to the [*2454] analysis of sexual coercion. The concept of "disparity of power" mentioned in the Working Group Report and the Panel Report is indeed useful, though only in a broader psychological or sociological analysis of *why* rape occurs, not in a legal analysis of *whether* it has occurred. The "disparity of power" between superiors and subordinates may provide the superior the opportunity to control the timing, location, and surrounding circumstances of the encounter in which the alleged rape occurs n122--but there is nothing inherent in the rank or authority itself that

would demonstrate to a factfinder that a rape is more or less likely to have occurred. n123

Of the countless lessons to be learned, one should stand to the forefront: military law not only must comprehend nonviolent coercive sexual imposition, but also must recognize that it is not rape. Explicitly criminalizing the abuse of military authority, albeit under criminal sanctions other than those reserved for rape, is itself enough to justify a reform of Article 120. In a time of either peace or war, troops need to focus on the mission without worrying about being harmed by their leaders.

III. AN INCLUSIVE SCHEME

A. *Continuum of Culpability*

Applying an analysis of the three types of pressures that the perpetrator can bring to bear on the victim (compulsion, coercion, and persuasion) yields a continuum of culpability from greatest to least in the following scenarios:

1. Actual force is applied with resulting physical harm.
2. Actual force is applied, but to a lesser degree. There is no beating, although there is some physical manifestation of the perpetrator's aggression, perhaps grabbing or pulling off clothes. The victim is compelled to cooperate by the implied threat of beating as in the previous scenario.
- [*2455] 3. No actual force is applied. There is, however, an express threat of force sufficient to render resistance apparently and reasonably futile.
4. No actual force is applied, although a threat of force is sufficiently and reasonably apparent to be implied in the circumstances.

In these four scenarios, the perpetrator should be charged with rape. Constructive force would be necessary in each of the situations except the first. The maximum severity of the punishment should reflect the nature of his actions or threats, descending from death or life in prison for violent action to a significant term of incarceration, such as forty years, for forcible coercion. Rank should not be a factor in this analysis. n124

5. No force is involved in the encounter, although the perpetrator expresses a threat of nonviolent harm.

Consideration of rank has its place here--if a leader has employed his rank to create the illegitimate choice in his subordinate (to have unwanted sex or to experience some other wrong), he should be subject to substantial criminal sanctions. The "disparity of power" must be actively employed, however; the mere presence of the superior's rank should not make him criminally culpable (beyond that of fraternization). The culpable act is the misuse of that rank to pressure sex from an otherwise unwilling subordinate.

6. No force is involved in the encounter and no express threats of nonviolent harm are made, yet nonviolent repercussions can be easily inferred from the totality of the circumstances.

Situations five and six should be charged as criminal sexual conduct, with a much lower maximum punishment than rape, but much higher than Article 93 Maltreatment--ranging perhaps between five and twenty-five years. The coercion in these circumstances would have to be nontrivial n125 and the severity of the [*2456] punishment should reflect the nature of the ultimatum imposed on the victim. Implied threats of nonviolent, but coercive, action would be extremely difficult to prove. If they can be established, then criminal sanctions should be imposed in the same fashion as with express threats.

7. An express promise of gain is used to achieve intercourse, and later turns out to be fraudulent.

The seventh situation is not the result of a grave public wrong, and as such should not be subject to criminal sanction beyond what is covered by sexual harassment, maltreatment, and solicitation statutes. The analysis does not

change if the victim actually sleeps with the perpetrator.

8. An express promise of gain is used to achieve intercourse, and the promisor actually performs.

This last action is also not a public wrong beyond that which is already prohibited by laws against prostitution.

B. A New Statute and a New "Old" Statute

A new statutory scheme must accomplish two goals: (1) preserve the distinction between forcible rape and all other forms of coercive sex; while (2) creating separate crimes to cover wrongful, yet nonviolent, behavior that is calculated to pressure another person to submit to sexual contact. The best way to do this is to resist the temptation to revise heavily or expand Article 120 itself, but to supplement it with another punitive Article. Doing so will recognize that rape is a distinctly different crime than sexual coercion (a crime of violence versus a crime of extortion), and would support the dearth of traditional judicial treatment of the subject.

The new punitive Article, temporarily numbered 120a, follows a slightly revised version of the original Article 120:

[*2457] Article 120 - Rape and Carnal Knowledge n126

a. Text

- (1) 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:
 - (a) by death if the intercourse results in the death of the victim; n127 or
 - (b) by imprisonment of a maximum term of life, if the intercourse is consummated by violent action; or
 - (c) by imprisonment of a maximum term of forty years, if the intercourse is consummated by threats of violent action, implied or expressed; n128 and
 - (d) such other punishment as a court-martial may direct.
- (2) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person -
 - (a) who is not his or her spouse; and
 - (b) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.
- (3) Penetration, however slight, is sufficient to complete either offense under this Article.
- (4) In a prosecution under subsection (2) - n129
 - (a) it is an affirmative defense that:
 - (A) the person with whom the accused committed the act of sexual intercourse had at the time of [*2458] the alleged offense attained the age of twelve years; and
 - (B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of sixteen years.
 - (b) The accused has the burden of proving a defense under subparagraph (4)(a) by a preponderance of the evidence.

b. Elements

- (1) *Rape*
 - (a) That the accused committed an act of sexual intercourse;
 - (b) by force and without consent.
- (2) *Carnal knowledge*
 - (a) That the accused committed an act of sexual intercourse with a person;
 - (b) That the person was not the accused's spouse; and
 - (c) That at the time of the sexual intercourse the person was under sixteen years of age.

Article 120a - Criminal sexual conduct

a. *Text*

(1) Any person subject to this chapter who commits an act of sexual contact n130 without voluntary consent, n131 is guilty of criminal sexual conduct and shall be punished:

- (a) by imprisonment of a maximum term of twenty-five years, if consent to the intercourse was coerced as a result of an express threat of wrongful action; n132 or [*2459] (b) by imprisonment of a maximum term of ten years, n133 if consent to the intercourse was coerced as a result of the victim's reasonable belief under all the circumstances that wrongful action would otherwise result; n134 and (c) such other punishment as a court-martial may direct.

b. *Elements*

- (1) That the accused committed an act of sexual contact with another person; and
 (2) That the act of sexual contact was done without the voluntary consent of the other person.

CONCLUSION

The call to revise the UCMJ's treatment of criminal sexual misconduct is not a new one, but earlier focus has frequently been misguided, choosing to expand rape law to cover other forms of nonviolent coercion rather than supplementing rape law with an additional criminal sexual misconduct statute. The purpose of this Note is not to provide a final solution in the form of the revised Articles, but to encourage legislative examination and action. Any revision of the UCMJ in terms of sexual predators' actions and their effects on victim autonomy will yield several positive results. Such an approach leaves traditional forcible rape analysis, as it developed in the military, relatively untouched. Stability in the law is not the same as stagnation, and rape law in the military prior to *Simpson* and its kin adequately served to punish the *most* culpable of sexual predators--rapists. Separating rape from other forms of [*2460] criminal sexual conduct will also serve to end the creeping expansion of the military courts' rape analysis, because factors such as rank and authority will have a legitimate place in proving other coercive sex crimes. There is simply no such thing as "rape by authority."

It is essential for judges, legislators, and legal scholars to acknowledge the difference between the crime of rape (in which the only choice left in the victim is whether to expose herself to greater harm by struggling futilely) and nonviolent coercive sexual imposition (in which the victim retains the ultimate choice to submit in order to avoid other impositions). The recognition of a continuum of destructive behavior that falls short of rape, yet is destructive to personal liberty and thus to unit discipline and morale, allows the military justice system to accomplish its goals of rehabilitation, punishment, protection, preservation, and deterrence. To fail to proscribe these grave public wrongs implicitly condones them, allowing them to go unreported, unpunished, and unchecked in their devastating effects on personnel and mission accomplishment.

Inquiring into the pressures exerted by the accused to achieve sexual intercourse will also provide a sound basis for measuring culpability. The proposed revisions to Article 120 and the proposed Article 120a provide a more flexible punitive scheme, affording a closer fit between the seriousness of the crime and the magnitude of the sentence. This flexibility will remove the dilemma of the current military panels in choosing whether improperly to convict a person of rape who has coerced sex, rather than compelled it, or declare them innocent while knowing his actions were culpable to some degree.

In an environment where sexual predators and abusive leaders have been removed, the fragile yet powerful trust so necessary to successful military relationships can reestablish itself and eventually thrive. If we expect our servicemen and women to submit unquestioningly to their superiors, their superiors must be above question. Having thus removed the enemy within our troops' midst, all eyes will turn to the enemy to the front.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Criminal Offenses Sex Crimes Sexual Assault Rape Elements Criminal Law & Procedure Criminal Offenses Sex Crimes Sexual Assault Rape Penalties Criminal Law & Procedure Defenses Consent

FOOTNOTES:

n1 U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP: BE, KNOW, DO 1-15 (31 Aug. 1999) (quoting Colonel (COL) Albert G. Jenkins, CSA) [hereinafter FM 22-100].

n2 The Uniform Code of Military Justice proscribes criminal behavior in the armed services according to a list of punitive articles. The article devoted to delineating the elements of rape law is Article 120: "Rape and carnal knowledge." UCMJ art. 120 (2000). The UCMJ is codified at *10 U.S.C. §§ 801-950* (2000). As defined by Article 120, the elements of rape are: "(a) That the accused committed an act of sexual intercourse; and (b) That the act of sexual intercourse was done by force and without consent." *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, P45a(a) (2002) [hereinafter MCM].

n3 At common law, rape was defined as "the unlawful carnal knowledge of a woman forcibly and against her will." 4 WILLIAM BLACKSTONE, COMMENTARIES *210.

n4 *See infra* notes 68-70 and accompanying text.

n5 The author's use of pronouns in such situations that describe a suspected rapist reflects the statistical factuality that most rape victims are women, and their attackers men. In other places, the pronouns "he" or "she" are used in a generic fashion, without restricting the meaning to a specific gender.

n6 Such a defendant in a court-martial may be in peril of not only his liberty, but his life; the severity of the punishment for rape in the military can be as much as death or life in prison. *See* MCM, *supra* note 2, pt. IV, P45e(1). The death penalty is still applicable in certain cases in keeping with the Supreme Court's decision in *Coker v. Georgia*, 433 U.S. 584, 598-99 (1977), which held that the death penalty was an unconstitutional punishment for the crime of rape absent aggravating factors. *See also infra* note 127.

n7 *See* discussion *infra* Part I.C.

n8 The emphasis on the effect of coercive sexual practices on combat effectiveness recognizes that the ultimate result of sexual violence and coercion is a breakdown of military discipline. While such activity in a theater of operations would have an obvious, immediate, and profound impact on combat effectiveness, this can also be true when it occurs in a peacetime force or one that is not in the field, by disrupting training, maintenance and preparation for deployment.

n9 *See infra* notes 93-109 and accompanying text.

n10 Professor Stephen Schulhofer approaches the study of sexual crime from the perspective of this important liberty interest:

We take for granted, as birthrights, our control over our property, our labor, and our personal privacy. But we also know that these rights have to be defined, nurtured, and supported by law. Sexual autonomy is no less important. Like the other core interests of a free person, sexual autonomy deserves to be respected as a genuine entitlement, fully protected in its own right.

STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 113 (1998).

n11 See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 *COLUM. L. REV.* 1780, 1781 (1992) (observing that the rape of virgins had "unmistakable characteristics of a crime against property").

n12 See, e.g., Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1182 (1986) ("It would be a significant improvement if the law of rape in any state prohibited exactly the same threats as that state's law of extortion and exactly the same deceptions as that state's law of false pretenses or fraud."). It would be better instead, as argued below, that such instances of "extortion" and "deception" be addressed not in terms of rape law, but in terms of what they are--criminal sexual impositions of a different nature. See discussion *infra* Part II.B.

n13 When citizens, through their representative government, label an activity unlawful, they have made a judgment that the particular activity harms both individual victims and society as a whole. Otherwise, redress for the injury would be available simply as a private action in the civil courts.

Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.

3 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

n14 The central aim of each rationale for sentencing a person convicted of a crime is to shield society from further transgressions of that nature, either by the criminal being sentenced or others who would perpetrate the same wrongs.

Our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his/her crime(s) and his/her sentence from committing the same or similar offenses.

U.S. DEP'T OF ARMY, PAM. 27-9, *LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK* 90 (15 Sept. 2002) [hereinafter *BENCHBOOK*].

n15 See *supra* note 3. Common law rape can be properly labeled forcible rape, as it did not traditionally criminalize coercive behavior resulting from nonviolent action.

n16 It may be argued that the crime of rape does not cause this second loss of privacy. A woman who is raped but who never reports it does not suffer this loss. She has, however, merely traded one harm for another; choosing the isolation of silent suffering over exposing herself to examination by authorities. In this way, rape

has harmed the victim by creating this potential exposure whether she reports the crime or not.

n17 When victims have not been severely beaten, or there is little forensic evidence of the forcefulness of the encounter, the strategies of the defense and prosecution invariably turn to attacking each other's version of the truth.

She gives her version and he gives his. If you are the defense attorney, your job is to convince the jury not to believe what she says--which means that the only way to defend may be to destroy the credibility of the victim.

The key question in many acquaintance rape cases today thus becomes not what counts as rape but rather what we need to know about the victim, and the defendant, in order to decide who is telling the truth.

Susan Estrich, *Teaching Rape Law*, 102 *YALE L.J.* 509, 517 (1992).

n18 *See supra* notes 3, 15.

n19 UCMJ art. 120 (2000).

n20 This concept stems from the relationship between the two: the vigor of a victim's refusal is most clearly demonstrated by the force necessary to overcome her will. For a discussion of this relationship, and the reasons for its persistence in the law, see generally Dripps, *supra* note 11.

n21 *See United States v. Simpson*, 55 *M.J.* 674, 707 (A. Ct. Crim. App. 2001), *aff'd*, 58 *M.J.* 368 (C.A.A.F. 2003).

n22 Susan Estrich makes the point that "even force that goes far beyond the physical contact necessary to accomplish penetration--is not itself prohibited. Rather, what is required, and prohibited, is force used to overcome female nonconsent." Estrich, *supra* note 12, at 1107. Professor LaFave likewise notes that "the interplay of the force requirement with the notion of physical resistance highlights the need for recognition that nonconsent can be sufficiently manifested in other ways." 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.19 (1986 & Supp. 2003).

n23 *See, e.g., United States v. Tollinchi*, 54 *M.J.* 80, 83 (C.A.A.F. 2000) (emphasizing that "even if [the alleged victim] did not actually consent, there was no way for appellant to know that she did not consent").

n24 *United States v. Fuller*, 54 *M.J.* 107, 110 (C.A.A.F. 2000) (remarking that the victim "did not say 'no,' nor did she attempt to stop the sexual activities").

n25 *See* Major Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 *A.F. L. REV.* 19, 29 (1996) (arguing that the Court of Military Appeals "eliminated any per se rule requiring a victim to resist"). *But see* Captain Brian D. Bailey, *Does Rape Require Resistance?*, *ARMY LAW.*, Mar. 1991, at 9, 12 (concluding that "absent some demonstration of violence by the man, the force element of rape legally should require an effort by the woman to resist. Otherwise, the crime of rape will have broken completely from its original meaning to encompass any sex that a man negligently fails to perceive as unwanted").

n26 MCM, *supra* note 2, pt. IV, P45c(1)(b).

n27 See *United States v. Watson*, 31 M.J. 49, 52 (C.M.A. 1990) (emphatically rejecting the lower court's imposition of a resistance requirement, stating: "It is bewildering, admittedly, how the military judge could seemingly have found such an independent, affirmative duty on the part of a rape victim"). The court went on to deny that the MCM could be read to require resistance, holding the MCM reference, *supra* note 26, to be "mere commentary." *Watson*, 31 M.J. at 52.

n28 See BENCHBOOK, *supra* note 14, at 447.

n29 See BLACK'S LAW DICTIONARY 656 (7th ed. 1999).

n30 *Id.* at 657.

n31 *Estrich*, *supra* note 12, at 1107; see also *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990) (defining "the requisite force in terms of the force necessary to overcome the victim's resistance") (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

n32 *Bonano-Torres*, 31 M.J. at 178 (quoting the lower court's opinion, 29 M.J. 849, 851 (A.C.M.R. 1989) and citing *Coker*, 433 U.S. at 597).

n33 See, e.g., *United States v. Mathai*, 34 M.J. 33, 34, 36 (C.M.A. 1992) (stating that when the victim is unconscious from excessive drinking and that "the evidence shows that she did not consent to sexual intercourse with appellant while she was conscious, there can be no implied consent by reason of her inability to reject appellant's advances while unconscious").

n34 See, e.g., *United States v. Lyons*, 33 M.J. 543, 544, 548 (A.C.M.R. 1991), *aff'd*, 36 M.J. 183 (C.M.A. 1992) (finding that the victim who was deaf, mute, and whose mental age was that of a three- to five-year-old child was incapable of giving legally effective consent).

n35 *United States v. Clark*, 35 M.J. 432, 435 (C.M.A. 1992) (holding that "no force is needed to accomplish the rape beyond what is involved in the act of intercourse itself because the victim does not, or ceases to, resist because of a reasonable fear of death or grievous bodily harm"); see also *United States v. Hicks*, 24 M.J. 3, 6 (C.M.A. 1987) (observing that "constructive force may consist of expressed or implied threats of bodily harm") (citations omitted).

n36 *Clark*, 35 M.J. at 435; see also MCM, *supra* note 2, pt. IV, P45c(1)(b).

n37 See *Clark*, 35 M.J. at 433 ("Appellant is 5'8" in height and weighs approximately 210 pounds. In contrast, [the victim] is 5'5" in height and weighs approximately 120 pounds.").

n38 See *United States v. Simpson*, 55 M.J. 674, 707 (A. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (C.A.A.F. 2003) (noting the defendant's "reputation in the unit for being tough and mean").

n39 See *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) ("The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." (quoting *State v. Etheridge*, 352 S.E.2d 673, 681 (N.C. 1987))).

n40 See *Hicks*, 24 M.J. at 6 (finding constructive force when defendant stated: "It doesn't matter if you cooperate or not, I'm going to give it to you anyway.").

n41 *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) (observing that the defendant confronted the victim late at night in her home, knowing that the victim's husband was away on post and unable to come home).

n42 See *Clark*, 35 M.J. at 433 (noting that the defendant directed his subordinate inside a small, unlit shed, followed her inside, and locked the door); *Hicks*, 24 M.J. at 6 (considering the fact that the "victim was unfamiliar with the area and felt she had nowhere to run for safety").

n43 See, e.g., *Hicks*, 24 M.J. at 6.

n44 See, e.g., *Clark*, 35 M.J. at 433.

n45 A MANUAL FOR COURTS-MARTIAL, UNITED STATES, NINETY-SECOND ARTICLE OF WAR, Pt. II, at 251 (1917).

n46 See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 677-78 (G.P.O. 1920) (1886).

n47 *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) (citations omitted).

n48 See *id.*; see also *Hicks*, 24 M.J. at 6 (stating that the evidence demonstrated that "appellant was in a position of authority over the victim's boyfriend" but also demonstrated that the "appellant created a coercive atmosphere").

n49 *Clark*, 35 M.J. at 436.

n50 See *United States v. Fuller*, 54 M.J. 107, 111 (C.A.A.F. 2000) (stating that the court was "sensitive to the fact that appellant was a superior noncommissioned officer, and [the victim's] platoon sergeant, and that such a relationship can create a 'unique situation of dominance and control'" (citations omitted); accord *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000).

n51 The military panel instructions reflect this important understanding of the proper consideration of rank:
You may consider this evidence in deciding whether [the alleged victim] had a reasonable belief that *death or great bodily harm would be inflicted on her and that (further) resistance would be futile*. This evidence is also part of the surrounding circumstances you may consider in deciding whether [the alleged victim] consented to the act of sexual intercourse.
BENCHBOOK, *supra* note 14, at 431 (emphasis added).

n52 "General military authority originates in oaths of office, law, rank structure, traditions, and regulations" and is employed by leaders and supervisors "when they issue orders to direct and control their subordinates." FM 22-100, *supra* note 1, at A-11, A-12.

n53 Command authority is different than general military authority. It "originates with the president and may be supplemented by law or regulation," and is employed by commanders "by virtue of rank or assignment." *Id.* at A-9. The most marked difference between those who exercise general military authority and those who exercise command authority is the special responsibility that a commander has for both the well-being and conduct of his subordinates.

n54 In one recent case, *United States v. Simpson*, 55 M.J. 674 (A. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (C.A.A.F. 2003), the court's analysis included three of these factors: "[the defendant's] reputation in the unit for being tough and mean ... his position as a noncommissioned officer ... [and] his actual and apparent authority over each of the victims in matters other than sexual contact." *Id.* at 707.

n55 *United States v. Clark*, 35 M.J. 432, 436 (C.M.A. 1992) (Wiss, J., concurring). While it is "conceivable," it is arguably unlikely that a rape conviction could be founded solely on rank in a fraternization scenario. It is not far-fetched, however, given the CAAF's later rulings. *See infra* text accompanying note 57.

n56 *Simpson*, 55 M.J. at 710-11 (Brown, J., concurring).

n57 *United States v. Simpson*, 58 M.J. 368, 378-79 (C.A.A.F. 2003), *aff'g* 55 M.J. 674 (A. Ct. Crim. App. 2001). One of the questions put to the court for review was whether the military judge committed plain error by giving a panel instruction that differed from the one in the *Benchbook*, as discussed *supra* note 51. *See Simpson*, 58 M.J. at 378.

n58 *United States v. Palmer*, 33 M.J. 7 (C.M.A. 1991); *see also supra* note 39 and accompanying text.

n59 *Palmer*, 33 M.J. at 9.

n60 *Simpson*, 58 M.J. at 379.

n61 *Palmer*, 33 M.J. at 9.

n62 *Id.*

n63 Prolonged and continual exertions of parental authority were a focus in both *Palmer* and *United States v. DeJonge*, 16 M.J. 974 (A.F.C.M.R. 1983).

n64 *Palmer*, 33 M.J. at 9.

n65 *Simpson*, 58 M.J. at 378-79 (emphasis added).

n66 Military authority does not confer any more ability (as great strength or comparative size would) or signal a propensity to harm (as a violent demeanor or past behavior would) a person in a subordinate military position. *See infra* notes 119-23 and accompanying text.

n67 A reveille is a "morning signal given to soldiers, usually by beat of drum or by bugle, to waken them and notify that it is time to rise." 13 THE OXFORD ENGLISH DICTIONARY 812 (2d ed. 1989). Today, reveille accompanies the raising of the national colors.

n68 UCMJ Article 120(d) enumerates lesser-included offenses for rape covering un consummated or failed acts of forcible rape: "assault [and] assault consummated by a battery," *id.*; "assault with intent to commit rape," *id.* art. 134; "indecent assault," *id.*; "attempts," *id.* art. 80; and "carnal knowledge," *id.* art. 120(b). *See also* MCM, *supra* note 2, pt. IV, P45d. None of these crimes would cover forms of coercion that did not involve force and/or a reasonably implied threat of force.

n69 The explanation of the offense of cruelty and maltreatment specifies: "Sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors" MCM, *supra* note 2, pt. IV, P17c(2). It is important to note that further explanation of Article 93 clarifies that sexual harassment is included because "some forms of such conduct are nonphysical maltreatment." *Id.* at A23-6; *cf.* U.S. DEPT OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 7-5(c) (13 May 2002) (stating a policy assessment that "sexual assault and rape ... may be extreme forms of sexual harassment"). In legal analysis, however, sexual coercion may indeed be an extreme form of sexual harassment, while rape or assault cannot. *See infra* text accompanying notes 77-82 (differentiating between physical compulsion, coercion, and persuasion as means of obtaining sex).

n70 MCM, *supra* note 2, pt. IV, P17e.

n71 The worst type of injustice has in fact occurred; that of a government, whose purpose it is to ensure the freedom of its citizens, imprisoning one of them for a crime he did not actually commit.

n72 It is likely that the wrongdoer convicted of the more serious crime of rape, but who is factually guilty of a less culpable act, may face disproportionate punishment. The goal of rehabilitation may certainly suffer as well.

n73 Another traditional command in battle, the call to "charge" was a call to action. It roused soldiers to "rush against or upon, with all one's force, in a hostile way." 3 THE OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989).

n74 T.S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY 66 (2002); *see also* *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("Short of homicide, [rape] is the 'ultimate violation of self.'" (quoting U.S. DEPT. OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN. RPT., RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 1 (1975))).

n75 SCHULHOFER, *supra* note 10, at 115.

n76 See, e.g., Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 *BROOK. L. REV.* 39 (1998). Although the author attaches the label of "rape" to sex procured by fraud or coercion, she admits that it "may be inconsistent with dictionary definitions, potentially trivialize forcible rape, and inaccurately reflect current statutory enactments." *Id.* at 47-48. This author agrees.

n77 Dripps, *supra* note 11, at 1801.

n78 SCHULHOFER, *supra* note 10, at 126. Some argue that this is the reason that there should be protections in the law for sexual autonomy on similar rationales as those for extortion or robbery. See Estrich, *supra* note 12, at 1182.

n79 This situation, in which a perpetrator has coerced the victim into unwanted sexual contact without the threat of physical harm, is the gap left by the UCMJ and the focus of this Note's revised statute. See *infra* Part III.B.

n80 In other words, if the threat would not overcome what society assumes is the natural reluctance to engage in unwanted sex, it is "trivial"--an objective standard. See *infra* note 125.

n81 Such activity may, in fact, be chargeable as either sexual harassment or solicitation to commit prostitution, but those crimes are adequately addressed elsewhere in military law. See UCMJ art. 93 (2000); *id.* art. 134.

n82 But see JoAnn L. Miller, *Prostitution in Contemporary American Society*, in *SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION* 45, 57 n.5 (Elizabeth Grauerholz & Mary Koralewski eds., 1991) [hereinafter *SEXUAL COERCION*] (arguing that "the prostitute's 'choice' is no more of a voluntary choice than the prisoner's 'choice' to participate in a prison psychotherapy program that will reduce the length of incarceration"). Although the idea that a woman becomes a prostitute as a result of socioeconomic pressures and is thus "coerced" into having intercourse is intriguing as a sociological concept, it is unhelpful for assigning criminal culpability to a specific actor.

n83 See Falk, *supra* note 76, at 45.

n84 MCM, *supra* note 2, pt. IV, P45c(1)(b).

n85 See, e.g., LAFAVE & SCOTT, *supra* note 22, § 7.19(c); Joel Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 *ETHICS* 330, 331 (1986).

n86 LAFAVE & SCOTT, *supra* note 22, § 7.19(c).

n87 See *id.*

n88 *Id.*

n89 *See id.*

n90 Feinberg, *supra* note 85, at 333.

n91 *Id.* at 344.

n92 The last bugle call of the day, taps is "a signal sounded on the drum or trumpet, fifteen minutes after the tattoo, at which all lights in the soldiers' quarters are to be extinguished." 17 THE OXFORD ENGLISH DICTIONARY 623 (2d ed. 1989).

n93 Lieutenant General John Rosa, Remarks at the Air Force Academy's Parents Weekend (Aug. 29, 2003), *quoted in* Debbie Kubic, *Rosa Speaks Candidly About Assault Survey* (Sept. 23, 2003), *available at* http://www.aog-usafa.org/Article%20Archive/rosa_replies_candidly.html (last visited Apr. 9, 2004).

n94 OFFICE OF THE GENERAL COUNSEL, U.S. AIR FORCE, REPORT OF THE WORKING GROUP CONCERNING THE DETERRENCE OF AND RESPONSE TO INCIDENTS OF SEXUAL ASSAULT AT THE U.S. AIR FORCE ACADEMY 1 (June 17, 2003) [hereinafter WORKING GROUP REPORT], *available at* http://www.af.mil/usafa_report/usafg_report.pdf (last visited Apr. 9, 2004).

n95 *Id.*

n96 *Id.* at 165.

n97 *Id.*

n98 Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, §§ 501-503, *117 Stat. 559, 609-10 (2003)*.

n99 REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 4 (Sept. 22, 2003) [hereinafter PANEL REPORT], *available at* <http://www.usafa.af.mil/d20030922usafareport1.pdf> (last visited Apr. 9, 2004). This is in line with what many believe was the true motivation of Congress in creating an independent Panel: "The Fowler commission was formed in response to congressional demands that high-ranking Air Force officials not escape punishment if they contributed to a culture at the academy that punished rape victims for reporting." Mike Soraghan & Anne C. Mulkern, *Charges Rebutted in AFA Abuses*, DENV. POST, Sept. 24, 2003, at A1.

n100 The very purpose of the service academies is to train future officers--those who will serve in the positions of most influence. It is logical to assume that those leaders who would prey upon their peers at the academy would continue to abuse those over whom they exert control once they graduate. If the problem is in fact a "culture of rape," as discussed *infra*, that culture could be carried into the mainstream service by the leaders who escaped justice at the AFA.

n101 *See* Miles Moffeit & Amy Herdy, *AFA Isn't Alone in Sex-Assault Controversy: Other Military*

Academies Also Accused of Inadequate Response, DENV. POST, Apr. 6, 2003, at A1 (describing sexual assault allegations of current and former students at the United States Military Academy and United States Naval Academy). See generally Anne G. Sadler et al., *Factors Associated With Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 263 (2003) (articulating that "the goal of this exploratory study ... was to attempt to identify workplace environmental factors associated with rape occurring during military service"). Other sexual misconduct scandals that have rocked the services over the past decade or so have included Tailhook (Navy), the Aberdeen Proving Ground drill sergeant rape trials (Army), and the Sergeant Major of the Army sexual harassment, assault, and rape trial (Army).

n102 Moffeit & Herdy, *supra* note 101.

n103 See PANEL REPORT, *supra* note 99, at 35.

n104 See, e.g., Miles Moffeit & Amy Herdy, *Military Law on Sex Assault 'Antiquated,' Many Assert*, DENV. POST, Apr. 13, 2003, at A1 ("The [UCMJ] says that rape requires 'force.' But the code does not cite other powerful influences, such as rank, that a rapist can use to pressure or lure victims."); Editorial, *Outdated Sex-Crime Laws Leave Military Women at Risk*, USA TODAY, Apr. 17, 2003, at A12 (improperly using the terms "rape" and "sexual assault" interchangeably when describing how civilian law reform has outpaced the military's in the area of sexual misconduct).

n105 See WORKING GROUP REPORT, *supra* note 94, at 96. The connection between alcohol, its effect on judgment, and incidents of sexual misconduct was made clear:

In an opinion echoed by other Academy leaders, Major General Stephen Lorenz, a former Commandant of Cadets, stated: "Ninety-five percent of all the alleged sexual assaults that I dealt with when I was there were directly related to alcohol" The Working Group's review of allegations of sexual assault over the last ten years indicated that at least 40% of investigated cadet-on-cadet allegations involved the use of alcohol by the cadet suspect, the cadet victim, or both.

Id.

n106 *Id.* at 23-24.

n107 *Id.* at iv.

n108 This type of confusion is not confined to the "rank and file," so to speak. See Mike Soraghan et al., *AFA Official: Never Saw Case of 'True Rape'*, DENV. POST, Sept. 11, 2003, at A1. Transcripts released on September 11, 2003 by the Working Group Panel showed that in an interview with COL Sue Slavec, formerly in charge of discipline at the AFA, she stated:

I've never ... witnessed somebody who ... was taken by force, which if you look at that end of the spectrum, a true rape or a true violent assault, I've never seen that happen. I've seen the other parts of the spectrum ... where there is some contributing flirtatious activity--alcohol, poor judgment involved--that could lead to what could be, a nonconsensual activity.

Id. Alcohol, flirting, and poor judgment aside--truly "nonconsensual activity," if sexual activity, is rape. The misconception exhibited by COL Slavec is the kind that rape victim advocates fear most--that somehow the victims were at fault, and that somehow nonconsensual activity can be legal.

n109 *See supra* note 104.

n110 MCM, *supra* note 2, at Preamble, P3.

n111 FM 22-100, *supra* note 1, at 1-2.

N112 *See* MCM, *supra* note 2, pt. IV, P83c(1) (prohibiting fraternization under UCMJ art. 134 (2000)).

n113 For a discussion of the factors contributing to underreporting and underlying survey data supporting them, see NELSON, *supra* note 74, at 77-83.

n114 *Id.* at 67; *see also* Dianne Herman, *The Rape Culture*, in *WOMEN: A FEMINIST PERSPECTIVE* 20, 25 (Jo Freeman ed., 3d ed. 1984) ("The U.S. military has generally eulogized the values of masculinity and emphasized aggressiveness: the Marines built their image on their ability to form "men" out of adolescent youths... Cowardice in the face of the enemy is equated with femininity.").

n115 Wendy E. Stock, *Feminist Explanations: Male Power, Hostility, and Sexual Coercion*, in *SEXUAL COERCION*, *supra* note 82, at 61. The author goes on to say that sexual coercion "occurs systematically in this culture, perpetrated by a relatively more powerful class of males upon a relatively less powerful class, females, and how our culture supports this type of dominance by eroticizing sexual aggression." *Id.*

n116 Elizabeth Grauerholz & Mary A. Koralewski, *What is Known and Not Known About Sexual Coercion*, in *SEXUAL COERCION*, *supra* note 82, at 187, 191-95 (discussing also other social institutions such as the educational system, the legal institution, families, and dating).

n117 *See generally* RANDY THORNHILL & CRAIG T. PALMER, *A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION* (2000).

n118 FM 22-100, *supra* note 1, at 2-3 to 2-10. Although these represent the seven Army values, each service has its own equivalent.

n119 *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989).

n120 Both the Working Group and the Fowler Commission emphasized that sexual misconduct was most frequently directed at females in younger classes at the AFA. *See* PANEL REPORT, *supra* note 99, at 68-70; WORKING GROUP REPORT, *supra* note 94, at 74-96. The Fowler Commission recognized that:

Any system in which people are placed in a position of power over others has the potential for abuse. Accordingly, the Panel concurs with the *Working Group Report* finding that the cadet authority structure establishes a disparity of power that may make subordinate cadets, particularly female Fourth-Class cadets, more vulnerable to upper class male cadets who might abuse their authority.

PANEL REPORT, *supra* note 99, at 68-69.

n121 Tonna Pallas, a rape victim therapist, describes a likely motivation underlying rape:

Usually people who are sexually violent are feeling some kind of pain, anger or loneliness...

They're feeling powerless, and that's hard to live with for very long. They want to get rid of those feelings, so they rape. It's all about power and control, and not about intimate sexual behavior.

Amy Herdy, *Battling Stereotypes: Violence and Terror, Not Sex, At Root of Rapes, Expert Says*, DENV. POST, Mar. 2, 2003, at A7 (quoting Tonna Pallas, a therapist with Denver's Rape Assistance and Awareness Program).

n122 Each of *these* factors (timing, location, surroundings) are relevant, but are already considered in constructive force analysis. *See supra* notes 41-42 and accompanying text.

n123 This is not to say that rank or authority, and its attendant "disparity of power," is not coercive; it may create a situation that is *highly* coercive--but in a nonviolent fashion. For example, see the hypothetical *infra* note 125.

n124 *See supra* Part I.C.

n125 The word "nontrivial" in a proposed statute or commentary may be viewed as too ambiguous. The need for such a distinction is important, however, and may be described as follows: For coercion to be nontrivial, it would have to overcome what society assumes is the average person's natural reluctance to engage in unwanted sex. For example, if a drill sergeant threatened to make the victim's platoon do extra physical training if she did not submit to sexual contact, the coercion is arguably trivial, because the avoidance of increased training for her comrades would not induce a reasonable person to capitulate, and thus surrender her sexual autonomy. On the other hand, threatening to revoke off-post privileges for a substantial amount of time could reasonably be considered nontrivial, because such an action greatly restricts the victim's freedom of physical movement.

n126 For the current version of the statute, see UCMJ art. 120 (2000). *See also* MCM, *supra* note 2, pt. IV, P45. The versions of Articles 120 and 120a that are printed in this Note do not include a description of lesser-included offenses, commentary and explanation, or sample specifications, as they would not add to a discussion of the merits of changing the scope of the UCMJ.

n127 The addition of a(1)(a) is meant to bring the language of the UCMJ within the Supreme Court's decision in *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Marshall, J., concurring) (indicating that the death penalty was unconstitutional "as long as the rapist does not himself take the life of his victim"). There is also an indication that the death penalty may be constitutionally permissible in cases where the victim is a child. *Id. at* 592 (limiting the issue considered to the rape of an adult woman). The current Rules for Courts-Martial (RCM) provide several military-specific aggravating factors as well. *See* MCM, *supra* note 2, R.C.M. 1004(c).

n128 The addition of a(1)(c) above also reflects the fact that the most severe punishments, death and life in prison, should be reserved for the most culpable of sexual predators--those who will stop at nothing to overcome a victim's will.

n129 Subsection a(4) was reorganized for clarity.

n130 The words "sexual contact" in the statute for criminal sexual contact should be read to include many more forms of physical acts that fall short of the "sexual intercourse" requirement for rape under Article 120.

n131 The words "without *voluntary* consent" are crucial to the understanding of the new crime in Article 120a. Unlike rape, consent has been given and no force is necessary to consummate the crime. The nature of the crime is in the coercive means employed to obtain consent, not in the complete *absence* of consent.

n132 "Wrongful action" is deliberately inclusive. It comprehends any detriment that will result from withholding consent. Wrongful action does not necessarily exclude physical force, making a(1) a possible lesser-included crime of Article 120 rape.

n133 The coercion in a(1)(b) is not susceptible of direct proof, which is reflected in the lesser degree of punishment. The author of this Note believes that because the prosecution is not required to show outward expression of the intent of the perpetrator, the accused should not be at risk of as severe punishment. One can make an analogy to attempt crimes, which typically impose punishment in rough proportion to how substantial a step the perpetrator must have made toward the completed crime to be guilty. The less substantial the step, the less clearly the defendant has manifested his mens rea, a necessary element of the crime.

n134 One could plausibly claim that the distinction made between a(1)(a) and a(1)(b) is an example of overlegislation, failing to account for the discretion that the judge has in sentencing the defendant according to the circumstances of his particular case. The legislature might reasonably make this distinction, however, on similar rationales as those for creating sentencing guidelines.