

CONSENSUAL SEX CRIMES IN THE ARMED FORCES: A PRIMER FOR THE UNINFORMED

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I. INTRODUCTION

This article is about the prosecutions of certain sex crimes in the armed forces, many of which may well not constitute offenses in our civilian society. In the military, a number of offenses arise out of sexual conduct that is non-commercial and consensual between, and even among, consenting adults. There are, of course, the classic common-law crimes of rape and a variety of assaults with the intent to commit some sexual act against the will of the victim. For example, Article 120 of the Uniform Code of Military Justice (UCMJ)¹ proscribes rape and defines it by explaining: “Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.” Article 120 has been amended to define broadly the type of conduct to be punished under this title.² This article is not about this classic common-law crime of rape, which is punishable in both military and non-military settings. Rather, it is a discussion of sexual conduct that, while punishable if it occurs within the military, may well constitute lawful conduct in a non-military setting.

Before we begin the discussion, it is important to consider the composition of our modern armed forces. Beginning in 1976, with the first admission of women to the military service academies and the ever-increasing addition of women to the enlisted ranks and grades within the services, both the role and the number of women in the armed forces have increased dramatically. These women are integrated into the armed forces in the very same way that women are integrated in civilian life into educational institutions and the work force, with one notable exception. As the Supreme Court observed in *In re Grimley*, the

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1. See 10 U.S.C. § 920 (2000) (codifying the Uniform Code of Military Justice, Article 120); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, Art. 120, ¶ 45.a (2005) [hereinafter MCM], available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

2. 10 U.S.C. § 920 was amended on January 6, 2006, effective on October 1, 2007, to include “rape, sexual assault, and other sexual misconduct.” See Pub. L. No. 109-163, div. A, title V, § 552(a)(1) (Jan. 6, 2006), 119 Stat. 3257, 3263 (effective Oct. 1, 2007) (to be codified at 10 U.S.C. § 920) (reprinted *infra* Appendix A). As of this writing, the Manual for Courts-Martial has not been updated to reflect the new law. See MCM, *supra* note 1, at pt. IV, Art. 120, ¶ 45.a.

military “is the executive arm . . . [whose] law is that of obedience.”³ While members of the military community enjoy many of the same rights and bear many of the same burdens that members of the civilian community do, within the military community there is not the same autonomy and freedom of movement that there is in the larger civilian community.⁴

To understand this discussion, one also needs to consider that in large part there are no specific, congressionally-enacted laws prohibiting many of the “sex crimes” that are prosecuted in the military. To find the genesis of these offenses, we need to look at Article 134, UCMJ, which provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, . . . shall be punished at the discretion of that court.⁵

To implement this congressionally-enacted prohibition, the President, as Commander-in-Chief of the Armed Forces, has deemed by executive order that a number of acts are punishable under this Article. Of course, many of the crimes prosecuted under Article 134 have nothing to do with sexual misconduct.⁶ On the other hand, a laundry list of sexual misconduct may be punished under Article 134, including adultery,⁷ pandering and prostitution,⁸ and solicitation.⁹

II. FRATERNIZATION

The crime of fraternization, one of the most interesting crimes prosecuted under Article 134, is a good place to start. The crime of fraternization is committed when (1) it is against the customs and traditions of the services for an officer to “fraternize on terms of military equality with one or more certain enlisted member(s) in a certain manner” and (2) “such fraternization violated the customs of the accused’s service that officers shall not fraternize with enlisted members.”¹⁰

Fraternization has been punished as a military offense throughout military history. Its prohibition dates back to when the legions of Rome marched through Europe and the Middle East, and it continues in our system today. Traditionally,

3. 137 U.S. 147, 153 (1890).

4. This article makes no attempt to discuss sexual harassment in the military environment. See REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES (2005), available at http://www.dtic.mil/dtfs/doc_recd/High_GPO_RRC_tx.pdf.

5. 10 U.S.C. § 934 (1956) (codifying Uniform Code of Military Justice, Article 134); see also MCM, *supra* note 1, at pt. IV, Art. 134, ¶ 60.a.

6. See generally MCM, *supra* note 1, at pt. IV, Art. 134, ¶¶ 60–113.

7. *Id.* at pt. IV, Art. 134, ¶ 62.

8. *Id.* at pt. IV, Art. 134, ¶ 97.b.

9. *Id.* at pt. IV, Art. 134, ¶ 105. Without trying to complicate matters, it should be noted that service regulations may govern conduct, and violations may be prosecuted as violations of Article 92, UCMJ. See 10 U.S.C. § 892 (2000) (codifying Uniform Code of Military Justice, Article 92); see also MCM, *supra* note 1, at pt. IV, Art. 92, ¶ 16.a.

10. MCM, *supra* note 1, at pt. IV, Art. 134, ¶ 83.b.(2), (4).

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fraternization involved situations where officers gambled with, borrowed money from, loaned money to, or got publicly intoxicated with an enlisted member of the military.¹¹

The substantial increase of women in the armed forces in the early 1980s gave rise to significant new challenges. Major Jonas began his law review article with the following introduction:

The problems of pregnancy, single-parents, and dual service couples were made possible largely by the erosion of the age-old ban on fraternization between the ranks. To be sure, the American military has been moving toward greater and greater egalitarianism for some time, but nothing has done more to cheapen rank and diminish respect for authority than cute little female lieutenants and privates. Military customs and regulations are no match for the forces that draw men and women together in pairs without regard for differences in pay grade. Cupid mocks Mars. Lust and love laugh in the face of martial pomp and the pretensions of power.¹²

The case of *United States v. Johanns* illustrates the situation described by the passage quoted by Major Jonas.¹³ Captain Johanns was stationed at an Air Force base in Minot, North Dakota.¹⁴ At the time of Captain Johanns's offenses, the Officers' Club was being redecorated, which compelled both stationed officers and enlisted non-commissioned officers to share use of the NCO (Non-Commissioned Officers) Club.¹⁵ The U.S. Air Force Court of Military Review¹⁶ described the facts as follows:

The accused availed himself of the opportunity and socialized at the NCO Club. There he met Sgt R. (who was married), SrA P. and SSgt K. He dated each and ultimately had sexual relations with them all. On one occasion, the accused and Sgt R. went on a date downtown, and thereafter returned to her house on base. Sgt R. was intoxicated and therefore remembers nothing other than the next morning the accused was asleep next to her in her bed.

All this interaction was completely consensual, private, nondeviate, and sometimes instigated by the women involved. The accused was neither the commander nor supervisor of any of these enlisted members, and their respective relationships were not publicized. In the opinion of the enlisted women, the accused's activities were neither dishonorable nor service discrediting. The charges resulted from the apparently private, voluntary liaisons.¹⁷

11. See Major Kevin W. Carter, *Fraternization*, 113 MIL. L. REV. 61, 98-101 (1986); Major David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37, 69 n.174 & accompanying text (1992).

12. Jonas, *supra* note 11, at 37 (quoting BRIAN MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* 176 (Regnery Pub. 1989)). This rhetoric was a common sentiment among the hue and cry heard against the rise of women in the Armed Forces in the 1980s.

13. 20 M.J. 155 (C.M.A. 1985).

14. *Id.* at 157.

15. *Id.*

16. This court is now known as the Air Force Court of Criminal Appeals.

17. *United States v. Johanns*, 17 M.J. 862, 864 (A.F.C.M.R. 1983) (footnote omitted), *overruled by* *United States v. Boyett*, 42 M.J. 150 (C.M.A. 1995).

Captain Johanns was convicted by General Court Martial and sentenced to a dismissal from the Air Force.¹⁸ On appeal, he contended that his conduct did not violate the customs of the Air Force because there was no regulation or tradition that prohibited him from having consensual sexual relations with a female member of the Air Force. The Air Force Court of Military Review reversed his conviction, holding:

We specifically find that as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable.¹⁹

The Air Force remained haunted by the decision in *Johanns*. In two subsequent cases, *United States v. Appel*²⁰ and *United States v. Wales*,²¹ convictions for fraternization were also reversed. The decisions in these subsequent cases were based on a lack of definitive proof that either officer had violated Air Force custom regarding sexual relations with enlisted non-commissioned officers.

This view of Air Force custom did not last for very long. The Air Force took proactive steps to define more clearly the limits on relationships between an officer and members of the opposite sex and adopted a regulation defining fraternization.²²

Of course, distaff members of the armed forces are not immune to allegations of fraternization. In one case, a lieutenant was charged and convicted of engaging in sexual relations during duty hours with a subordinate under her command.²³ However, her conviction was later reversed on other grounds.²⁴

Another example of female staff being subject to fraternization laws is *United States v. Arthen*. Major Arthen was convicted of conduct unbecoming of an officer after engaging in a sexual affair with an enlisted member of the Air Force.²⁵ She pled guilty and was subsequently sentenced to dismissal.²⁶ In order to demonstrate the extent of fraternization occurring in the Air Force at the time of her conviction, the court hearing her appeal stated:

Some of appellant's activities with H[] occurred in the presence of other military personnel assigned to the hospital; each of these individuals was also involved in officer-enlisted romantic relationships. Appellant and H[] spent several nights together and engaged in sexual intercourse at the home of Captain and Staff Sergeant (SSgt) J[], an officer-enlisted married couple. Major W[] C[] and Staff Sergeant T[] D[] were other witnesses to some of appellant's activities with H[]. C[] and D[] were also lovers and C[] was

18. *Id.* at 864.

19. *Id.* at 869 (emphasis in original; footnote omitted).

20. 31 M.J. 314 (C.M.A. 1990).

21. 31 M.J. 301 (C.M.A. 1990).

22. 42 M.J. 150 (C.M.A. 1995).

23. *United States v. Haye*, 25 M.J. 849, 853-54 (A.F.C.M.R. 1988).

24. *United States v. Haye*, 29 M.J. 213, 215-16 (C.M.A. 1989).

25. *United States v. Arthen*, 32 M.J. 541, 542 (A.F.C.M.R. 1990).

26. *Id.*

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subsequently tried by court-martial for his fraternization with D[. D[] was H[]'s immediate supervisor²⁷

Her dismissal was ultimately commuted to a fine on appeal.²⁸

After the *Boyett* decision, the legal skirmishes regarding fraternization subsided and the battle lines were more clearly drawn. As part of my opinion in *Boyett*, I commented on the state of law regarding this issue:

In my view, the only thing left to debate in a given case is whether the particular conduct is prejudicial to good order and discipline and, thus, constitutes fraternization or conduct unbecoming an officer by fraternizing. I take it that even the most ardent advocates concede that sexual intercourse by a superior officer with a subordinate service member takes it over the line of "equality," the *sine qua non* of fraternization (or "sororization" as the case may be).²⁹

This simplistic view, however, is not enough to address the myriad of situations that can easily present themselves. Suffice it to say that the issue of fraternization is a vexing one within the armed forces. There can be little room to dispute the conclusion that sexual relationships between a superior and subordinate can be devastating to good morale and discipline within a military unit. But the realities of life in the modern military are that men and women are together for long periods of time and form normal, healthy relationships that often ripen into romance, love, and eventually marriage. Facing this reality, the military services have walked a tight line trying to come up with a fair and progressive approach to the issues surrounding fraternization.³⁰

III. ADULTERY & FORNICATION

In the Judaic, Islamic, and Christian faiths, adultery and fornication have long been serious offenses requiring substantial punishment, up to and including death.³¹ Nevertheless, when Congress enacted the Uniform Code of Military Justice, it did not enact a statute specifically prohibiting either adultery or fornication.

In *United States v. Hickson*,³² Chief Judge Robinson Everett wrote extensively about the crimes of adultery and fornication. He summed it up in this fashion:

[T]reatment of adultery and fornication in military law seems to be this: (a) two persons are guilty of adultery whenever they engage in illicit sexual intercourse if either of them is married to a third person; (b) if unmarried, they are guilty of fornication whenever they engage in illicit sexual intercourse under circumstances in which the conduct is not strictly private; and (c) private sexual intercourse between unmarried persons is not punishable. This treatment is the same as that in some, but not most, states; but it differs from that in the Federal

27. *Id.* at 543 (alterations added).

28. *United States v. Arthen*, 1992 CMR LEXIS 83, *2-3 (A.F.C.M.R. 1992).

29. *United States v. Boyett*, 42 M.J. 150, 156 (1995 C.A.A.F.) (Cox, J., concurring). *See also* *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990); *United States v. Haye*, 25 M.J. 849 (A.F.C.M.R. 1988); *United States v. Hensler*, 44 M.J. 184 (C.A.A.F. 1996).

30. *See generally*, Jonas, *supra* note 11.

31. *See Qur'an* 7:32, 24:2; *Deuteronomy* 5:6-21; *Exodus* 20:2-17; *Matthew* 5:27-30.

32. 22 M.J. 146 (1986).

courts where, apart from trials under 18 U.S.C. § 13, these offenses no longer can be prosecuted.³³

The key to his summary is the term “illicit.” What, precisely, makes the offenses illicit?

As in the case of fraternization, what makes an offense “illicit” lies in the language of Articles 133 and 134, UCMJ. The conduct must be prejudicial to good order and discipline, or it must bring discredit upon the armed forces.³⁴

Early cases under the Court of Military Appeals examined the crime of fornication and concluded that there was no prohibition in the military to non-commercial sexual intercourse between two consenting adults.³⁵

As the Court noted in *United States v. Izquierdo*, “We have consistently held that fornication, when committed “openly and notoriously,” is an “aggravating circumstance[] sufficient to state an offense under Article 134.”³⁶ In *Izquierdo*, the Court found that Izquierdo committed the offense of “indecent acts with another,”³⁷ when he pinned up a sheet to block his roommates’ view and engaged in sexual intercourse with a female in a dormitory room. The Court of Appeals for the Armed Forces upheld the conviction, citing the long standing rules regarding fornication. If those acts were committed in the presence of a third person, they were considered to be “open and notorious” and thus violated the elements of Article 134. The court went on to hold that it was not the nature of the location that was important but rather the presence of others:

The public nature of an act is not always determined by the place of occurrence. A private residence in which other persons are gathered may be regarded as a public place for the purpose of evaluating the character of conduct by one of the persons. This is particularly true when the act is of such a nature as to bring discredit upon the armed forces. An act, therefore, may be open and notorious not merely because of the locus, but because of the actual presence of other persons. . . . How many persons then need be present to make the act a public one? In our opinion, the act is “open and notorious,” flagrant, and discrediting to the military service when the participants know that a third person is present.³⁸

33. *Id.* at 150.

34. Adultery charges have generated a remarkable amount of publicity. The case of Lt. Kelly Flinn, a young Air Force Academy graduate and aviator received tremendous notoriety in the mid-1990s. According to a 1997 PBS program,

Flinn’s case has drawn national attention. It is one of dozens of adultery cases the Air Force has pursued in recent years. The number of Air Force courts martial for adultery rose from 20 in 1986 to 67 last year. Of the 67, seven or 10.5 percent were brought against females.

The NewsHour with Jim Lehrer: Fallen Star (PBS television broadcast May 14, 1997) (transcript available at http://www.pbs.org/newshour/bb/military/jan-june97/flinn_5-14.html).

35. *United States v. Snyder*, 4 C.M.R. 15 (1952); *United States v. Berry*, 20 C.M.R. 325, 330 (1956); see *United States v. Hickson*, 22 M.J. 146, 150 (C.M.A. 1986); cf. *United States v. Scoby*, 5 M.J. 160, 164 (C.M.A. 1978).

36. 51 M.J. 421, 422 (C.A.A.F. 1999).

37. See MCM, *supra* note 1, at pt. IV, Art. 134, ¶ 90.

38. *Izquierdo*, 51 M.J. at 422–23 (citing *Berry*, 20 C.M.R. at 330). See also *United States v. Orellana*, 62 M.J. 595 (2005).

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As noted earlier, adultery is not proscribed in the punitive articles of the UCMJ but rather has been prosecuted under either Article 133³⁹ or 134.⁴⁰ The history of adultery as an offense has been thoroughly described in *United States v. Hickson*.⁴¹ The elements of the modern offense of adultery are stated in MCM ¶ 62.b:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That at the time, the accused or the other person was married to someone else;
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁴²

Although not spelled out in MCM ¶ 62, the term “wrongfully” implies knowingly and willfully, just as it would in other contexts.⁴³ Therefore, an unmarried service member, engaging in sexual intercourse with a married woman without knowing that she is married, would have a full defense. However, it would not be a defense for a married service member to engage in sexual intercourse with an unmarried partner. This duality is also reflected in MCM ¶ 62.c.(4), which gives rise to an affirmative defense if the service member had an honest and reasonable belief that both partners were either unmarried or married to each other.

The MCM gives a detailed explanation of circumstances that might make the conduct prejudicial to good order and discipline or service discrediting. The explanation in this section sheds revealing light on why adultery is prosecuted in the military:

(2) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service-member. Adultery may also be service discrediting, even though the conduct is only indirectly or remotely

39. See MCM, *supra* note 1, at pt. IV, Art. 133, ¶ 59.a.

40. *Id.* at pt. IV, Art. 134, ¶ 60.a.

41. 22 M.J. 146, 150 (C.M.A. 1986).

42. MCM, *supra* note 1, at pt. IV, Art. 134, ¶ 62.b.

43. *United States v. West*, 34 C.M.R. 449 (1964).

Where the lawmakers have incorporated into an act a word or words descriptive of a crime which imply the necessity of a mind at fault before there can be a crime, criminal intent becomes an essential fact in establishing the guilt of a person accused of its violation. The word “wrongful” in its legal signification must be defined from a criminal standpoint when it is used in a penal statute to define a crime. The word has a well-defined meaning when used in criminal statutes as doing a thing in a wrong manner; unjustly; in a manner contrary to moral law or justice. The word “wrongful,” like the words “wilful,” “malicious,” “fraudulent,” etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act. The word “wrongful” implies the opposite of right, a perverted evil mind in the doer of the act.

Id. (citation and alteration omitted).

prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the conduct;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act was accompanied by other violations of the UCMJ;
- (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) Whether the accused or co-actor was legally separated; and
- (i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.⁴⁴

In *United States v. Orellana*,⁴⁵ the Navy-Marine Corps Court of Criminal Appeals reviewed the court-martial conviction of a service member, Orellana, for adultery. On appeal, Orellana argued that his conviction for "private, consensual, heterosexual adultery with an adult" violated his constitutional right of privacy. Relying on the Supreme Court's landmark holding in *Lawrence v. Texas*,⁴⁶ Orellana argued that, if "two adults . . . with full and mutual consent . . . engaged in sexual practices common to a homosexual lifestyle," their actions were protected as conduct not subject to governmental regulation, given that *Lawrence* protects sexual relations between consenting *heterosexual* adults—even if the parties are married to other people.

44. MCM, *supra* note 1, at pt. IV, Art. 134, ¶ 62.c.(2).

45. 62 M.J. 595 (N.M.C.C.A. 2005).

46. 539 U.S. 558 (2003).

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The Navy-Marine Corps Court of Criminal Appeals had little difficulty disposing of Orellana's claim. First, the court determined that *Lawrence* was not binding on Orellana's case since *Lawrence* did not involve adultery. Second, and more importantly, the Court chose to apply the factors enumerated in MCM ¶ 62.c.(2). It then concluded that adultery could be prosecuted within the military *even if* the parties were adults who had consented to the activity. This prosecution could go forward, the Court explained, even given the limitations placed on an adultery prosecution under Article 134 and *United States v. Marcum*,⁴⁷ in which the United States Court of Appeals for the Armed Forces applied the *Lawrence* decision to the military. The United States Court of Appeals for the Armed Forces denied Orellana's petition for review.⁴⁸

IV. CONSENSUAL SODOMY: ARTICLE 125⁴⁹

Article 125 states: "Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense."⁵⁰ In *United States v. Scoby*,⁵¹ the Court of Military Appeals said:

By its terms, Article 125 prohibits every kind of unnatural carnal intercourse, whether accomplished by force or fraud, or with consent. Similarly, the article does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend in the nature of the act.

As explained in the more recent *Marcum* decision, Article 125 forbids all sodomy—whether it is consensual or forcible, heterosexual or homosexual, public or private.⁵²

Two distinct issues involving consensual sodomy have arisen and presented challenges for military commanders and policymakers. The first and probably most well-known issue is homosexual sodomy. In *United States v. Marcum*, the United States Court of Appeals for the Armed Forces was confronted with a constitutional challenge arising out of *Marcum*'s conviction for consensual sodomy. Analyzing the case on the narrowest basis, the Court

47. 60 M.J. 198 (C.A.A.F. 2004).

48. *United States v. Orellana*, 62 M.J. 595 (N-M. Ct. Crim. App. 2005), *review denied*, 63 M.J. 295 (C.A.A.F. 2006).

49. See 10 U.S.C. § 925 (2000) (codifying Uniform Code of Military Justice, Article 125); see also MCM, *supra* note 1, at pt. IV, Art. 125, ¶ 51.

50. MCM, *supra* note 1, at pt. IV, Art. 125, ¶ 51.a.(a). This article deals only with consensual sodomy between adults, which is punishable as a court-martial may direct, see *id.* at pt. IV, Art. 125, ¶ 51.a.(b), but with a maximum punishment of a dishonorable discharge and five years confinement plus reduction in rank and forfeiture of pay and allowances. See *id.* at pt. IV, Art. 125, ¶ 51.e.(4). By contrast, forcible sodomy or sodomy with a child carries the potential for life imprisonment. See *id.* at pt. IV, Art. 125, ¶ 51.e.(1)–(3).

51. 5 M.J. 160, 163 (C.M.A. 1975).

52. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

concluded that there was a legitimate interest in the military community to prohibit homosexual activity.⁵³

In *Cook v. Rumsfeld*,⁵⁴ the court analyzed a challenge under the *Lawrence* rationale to the “Don’t Ask, Don’t Tell” policy⁵⁵ regarding homosexuality in the military. The legal research database LEXIS-NEXIS summarized the case as follows:

Plaintiffs alleged that there was no compelling interest to support the infringement upon, and deprivation of, their liberty interest in private adult consensual intimacy and relationships. Under § 654 and its implementing regulations, openly homosexual service members were subject to separation for that reason alone, whereas other service members were not. Plaintiffs alleged that the distinction, without a compelling government interest, amounted to an equal protection violation. The relevant inquiry under either substantive due process or equal protection analysis was, as a general matter, whether § 654 was rationally related to legitimate governmental interests. The right advanced by plaintiffs was neither fundamental nor involved a suspect class. The goal of maintaining high standards of morale, good order, and discipline was rational in the sense necessary to withstand constitutional challenge and sufficient to end the substantive due process review and foreclose most of the equal protection challenges. Finally, § 654 was a content-neutral, nonspeech policy that was justified to prevent the disruption to military readiness from homosexual activity by service members.⁵⁶

It remains to be seen if a criminal prosecution under Article 125 will withstand a constitutional challenge under circumstances where two persons of the same sex and equal rank and station in the military meet off duty in Texas (or elsewhere) and engage in consensual homosexual activity in the privacy of their home or other accommodations not provided by the military. If this activity becomes known, it may well support an administrative discharge under the rationale of *Cook v. Rumsfeld*.

The other aspect of sodomy is consensual heterosexual sodomy. In *United States v. Harris*,⁵⁷ the court was confronted with the question of whether “cunnilingus,” described as the sexual connection of the female organ with the mouth of another person, constituted sodomy. After a full analysis of the history of sodomy in the military context and reviewing civilian definitions from the Maryland and District of Columbia penal statutes in place when the Uniform Code of Military Justice was enacted, the court—over a vigorous dissent from Judge Matthew Perry—concluded that “cunnilingus” was indeed prohibited by the Code.

In *United States v. Henderson*,⁵⁸ a thirty-one-year-old Marine Corps recruiter named Henderson requested and received consensual fellatio from a sixteen-year-old female. The girl was a cadet in a Junior ROTC program, but this was

53. *Id.*

54. 429 F. Supp. 2d 385 (D. Mass 2006).

55. 10 U.S.C. § 654 (2000).

56. *Cook*, 429 F. Supp. 2d at 385 (LEXIS case summary).

57. 8 M.J. 52 (C.M.A. 1979).

58. 34 M.J. 174 (1992).

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not considered a factor as the girl was not a recruit at the time. Under Massachusetts law, where the offense took place, the girl was of the age of consent.

Henderson challenged his conviction on two grounds, arguing that: (1) consensual fellatio was not the sort of conduct that Congress intended to proscribe under Article 125(a); and (2) even if Congress intended to proscribe such conduct, it falls within a constitutionally protected zone of privacy.⁵⁹

The first challenge was quickly discarded by the court:

The legislative history of Article 125(a) has been well documented Article 125(a) amounted to a synthesis and amalgamation of preexisting sexual proscriptions in the land and naval forces of the United States, proscriptions which previously included oral copulation. Every indication in the legislative history suggests that Congress intended to incorporate the content of that prior law without significant change.⁶⁰

The second challenge was not quite so easy to resolve. The opinion of the United States Court of Military Appeals⁶¹ characterized the second prong of Henderson's argument as follows:

The Supreme Court of the United States, over the years, has recognized a variety of interests constitutionally protected in the name of privacy. Among these are the right to advertise and distribute contraceptives to minors, the right of a woman to terminate a pregnancy, the right to possess obscene materials in private, and the right of married couples to use contraceptives.⁶²

The Court of Military Appeals, however, took comfort in the more recent case of *Bowers v. Hardwick*.⁶³ Like Henderson, Hardwick was charged under a sodomy statute for a consensual act with another person in the privacy of Hardwick's bedroom in his home. Unlike Henderson, whose partner was a female, Hardwick's partner was another male. Because male-female consensual sodomy had already been recognized in *Harris*, the court had little trouble resolving the question against Henderson and opining that it was up to Congress to reconsider the scope of Article 125, UCMJ.⁶⁴

Because *Lawrence v. Texas* clearly overruled *Bowers v. Hardwick*,⁶⁵ and notwithstanding the holdings in *Marcum* and its progeny, the underpinnings for

59. *Id.* at 175.

60. *Id.* at 176 (citing *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979)).

61. This court is now known as the United States Court of Appeals for the Armed Forces.

62. *Henderson*, 34 M.J. at 176 (internal citations omitted).

63. 478 U.S. 186 (1986).

64. *Henderson*, 34 M.J. at 178. Though not related in the opinion itself, it is the recollection of the author that Henderson's brief on appeal, as well as in the oral argument presented to the court, made reference to the number of heterosexual partners who engaged in oral sex—fellatio and cunnilingus—as part of their sexual behavior. The reports of the Kinsey Institute, the findings of Masters and Johnson, and others who researched in the realm of human sexual behavior were cited to persuade the court that there was nothing inherently “unnatural” about the “carnal copulation” engaged in by consenting adults.

65. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers*[, 478 U.S. at 186,] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

the *Henderson* and *Harris* precedents of the United States Court of Appeals have been weakened. Thus the question of whether purely noncommercial, private, and consensual heterosexual sodomy can be prosecuted under Article 125 in the future is an open one.⁶⁶ Clearly, the answer lies with the United States Court of Appeal for the Armed Forces and the Supreme Court as to whether the argument that the military is a separate society in and of itself will carry the day for the prosecution. While there are congressional findings related to homosexual conduct in the armed forces,⁶⁷ there is no similar legislative history that supports the prosecution of heterosexual sodomy.

In May 2001, this author chaired a study sponsored by the National Institute of Military Justice to consider the state of military justice fifty years after the enactment of the Uniform Code of Military Justice. It was titled the Commission on the 50th Anniversary of the Uniform Code of Military Justice.⁶⁸ The Commission concluded that Article 125 of the UCMJ should be repealed and recommended that it be replaced with a more modern statute.⁶⁹ In the face of the *Lawrence* decision in 2003,⁷⁰ this recommendation seems even more timely today.

V. OTHER MATTERS

Access to the internet has given military members an easy opportunity to pursue interest in pornography, especially child pornography, which has merited the attention of authorities. Most of the resulting prosecutions have been within the Child Pornography Prevention Act of 1996.⁷¹

Senior military leaders have not been immune from getting into serious trouble with sexual misconduct. Thus in *United States v. Maxwell*,⁷² Colonel Maxwell, the base commander at Goodfellow Air Force Base, Texas, was found guilty of possession of images purporting to be of minors. He was also found guilty of indecent language in email transmissions he made to an email correspondent later determined to be also in the military. Despite these offenses, the conviction was set aside because of a questionable search and seizure.

The incidents continue like a parade of offenses and violations at the highest levels. General Joseph Ralston, although never charged, lost the opportunity to become Chairman of the Joint Chiefs of Staff because of an adulterous liaison some thirteen years earlier.⁷³ Major General David Hale was

66. The author is unaware of any cases since *Marcum* where the United States Court of Appeals for the Armed Forces has granted review of a consensual homosexual or heterosexual sodomy conviction under Article 125.

67. See 10 U.S.C. § 654 (2000) (reprinted *infra* Appendix B).

68. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001), http://www.nimj.org/documents/Cox_Comm_Report.pdf.

69. *Id.* at 11–12.

70. 539 U.S. 558.

71. 18 U.S.C. § 2252A(a) (West Supp. 2006). See, e.g., *United States v. James*, 55 M.J. 297 (C.A.A.F. 2001); *United States v. Gallo*, 55 M.J. 418 (C.A.A.F. 2001).

72. 45 M.J. 406 (C.A.A.F. 1996).

73. *The NewsHour with Jim Lehrer: Ralston: Uproar Ends Bid* (PBS television broadcast June 8, 1997) (transcript available at <http://www.law.duke.edu/lens/media/ralston.html>).

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forced to retire at a reduced rank for sexual misconduct involving the wife of a subordinate.⁷⁴ Sergeant Major of the Army Gene McKinney was tried and convicted for sexual harassment.⁷⁵ Army Major General John Longhouser was the commanding general of the Aberdeen Proving Ground in Aberdeen, Maryland, where several non-commissioned officers have been prosecuted for sexual misconduct. He elected to retire early at reduced rank following revelations that he had an adulterous relationship some five years earlier.⁷⁶

VI. CONCLUSION AND OBSERVATIONS

This author does not proclaim to be a social scientist but merely an observer of human behavior who has dealt with sexual misconduct and sexual crimes for well over forty years. It is a given that wherever men and women gather, there will be the likelihood of some degree of romance, intrigue, and sexual adventure. It will range from the traditional to the unfortunate: from quiet and discreet romances between consenting persons of reasonably equal social status to sexual predators who brutally prey on unsuspecting and helpless victims, and everything in between. There will be those who take advantage of their superior position and abuse those subordinate to them. This article is not about the latter. Rather, the purpose of the article is to demonstrate that the military community has special issues related to good order and discipline.

To restate a point made earlier: "In my view, the only thing left to debate in a given case is whether the particular conduct is prejudicial to good order and discipline."⁷⁷ While it is true that the military is a separate and distinct society, this is no justification for punishing military members for conduct that a modern society does not deem criminal unless that conduct is indeed disruptive of the needs to maintain good order and discipline in that society.

This approach to sexual misconduct means that, inherently, there will be a great deal of prosecutorial discretion exercised in picking and choosing which cases to prosecute. That amount of latitude is not alien to a system of military justice where the commanding officers are charged with the responsibility of training and conditioning the troops to be "fit to fight."

74. Mark Thompson, *Sex, The Army And A Double Standard*, TIME, May 4, 1998, at 30, available at <http://cnn.com/ALLPOLITICS/1998/04/27/time/pentagon.html>.

75. See *McKinney v. Ivany*, 48 M.J. 908 (Army Ct. Crim. App. 1998); *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997).

76. Dep't of Defense, DoD News Briefing: Mr. Kenneth H. Bacon, ASD (PA) (June 5, 1997) (transcript available at <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=877>). See also Thompson, *supra* note 74, at 30.

77. *United States v. Boyett*, 42 M.J. 150, 156 (C.A.A.F. 1995) (Cox, J., concurring).

APPENDIX A

ARTICLE 120, UNIFORM CODE OF MILITARY JUSTICE (EFFECTIVE OCT. 1, 2007)

Pub. L. No. 109-163, div. A, title V, § 552(a)(1) (Jan. 6, 2006), 119 Stat. 3257 (effective Oct. 1, 2007), provides that 10 U.S.C. § 920 is amended to read as follows:

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

(a) Rape. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who causes another person of any age to engage in a sexual act by—

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

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

(b) Rape of a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who—

- (1) engages in a sexual act with a child who has not attained the age of 12 years;
or
- (2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

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

(c) Aggravated sexual assault. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who—

- (1) causes another person of any age to engage in a sexual act by—
 - (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
 - (B) causing bodily harm; or
- (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—
 - (A) appraising the nature of the sexual act;

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(B) declining participation in the sexual act; or

(C) communicating unwillingness to engage in the sexual act;

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

(d) Aggravated sexual assault of a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

(e) Aggravated sexual contact. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(f) Aggravated sexual abuse of a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.

(g) Aggravated sexual contact with a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) Abusive sexual contact. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(i) Abusive sexual contact with a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) Indecent liberty with a child. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in indecent liberty in the physical presence of a child—

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

(2) with the intent to abuse, humiliate, or degrade any person;

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

(k) Indecent act. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) Forcible pandering. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) Wrongful sexual contact. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) Indecent exposure. Any person subject to this chapter [10 U.S.C. §§ 801 et seq.] who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) Age of child.

(1) Twelve years. In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) Sixteen years. In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

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

(q) Marriage.

(1) In general. In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person

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when they engaged in the sexual act, sexual contact, or sexual conduct are married to each other.

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

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

(r) Consent and mistake of fact as to consent. Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

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

(t) Definitions. In this section:

(1) Sexual act. The term 'sexual act' means—

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

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

(2) Sexual contact. The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) Grievous bodily harm. The term 'grievous bodily harm' means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter [10 U.S.C. § 928], and a lesser degree of injury than in section 2246(4) of title 18 [18 U.S.C. § 2246(4)].

(4) Dangerous weapon or object. The term 'dangerous weapon or object' means—

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

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) Force. The term 'force' means action to compel submission of another or to overcome or prevent another's resistance by—

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

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) Threatening or placing that other person in fear. The term 'threatening or placing that other person in fear' under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

(7) Threatening or placing that other person in fear.

(A) In general. The term 'threatening or placing that other person in fear' under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) Inclusions. Such lesser degree of harm includes—

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

(ii) a threat—

(I) to accuse any person of a crime;

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

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

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

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

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(10) Lewd act. The term 'lewd act' means—

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

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) Indecent liberty. The term 'indecent liberty' means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.

(12) Indecent conduct. The term 'indecent conduct' means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of—

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

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

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

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

(A) under 16 years of age; or

(B) substantially incapable of—

(i) appraising the nature of the sexual conduct at issue due to—

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

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

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

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

(15) Mistake of fact as to consent. The term 'mistake of fact as to consent' means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

(16) Affirmative defense. The term 'affirmative defense' means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

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APPENDIX B

POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES,
10 U.S.C. § 654 (2000)

Section 654 provides:

Policy concerning homosexuality in the armed forces

(a) Findings. Congress makes the following findings:

- (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
- (2) There is no constitutional right to serve in the armed forces.
- (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.
- (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
- (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
- (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
- (7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.
- (8) Military life is fundamentally different from civilian life in that—
 - (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
 - (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
- (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.
- (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a

military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has

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demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.

(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings. The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title [10 U.S.C. § 937] (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction. Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions. In this section:

(1) The term “homosexual” means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms “gay” and “lesbian”.

(2) The term “bisexual” means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term “homosexual act” means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).