PERFECT STORM: HOW RECENT CONGRESSIONAL INTEREST AND INFLUENCE HAS AFFECTED SEXUAL ASSAULT LAW AND POLICY IN THE ARMED SERVICES

A Thesis Presented to The Judge Advocate General's School United States Army in partial satisfaction of the requirements for the Degree of Master of Laws (L.L.M.) in Military Law

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> *It's often the toxic ingredient of a military rape allegation: binge drinking. Many times the woman knows the man and was drinking alcohol with him. Lots of it. As a result, she says she doesn't remember the entire encounter because she was drunk. Sometimes, she's not even sure herself whether she was sexually assaulted. The man says it was consensual. No other witness can say either way.*[1]

I. Introduction

"Drunken regret is not rape" has often been the first line uttered by a military defense counsel in an opening statement for a sexual assault case. Most contested sexual assault cases in the military do not arise from "real" rape or "traditional rape."[2] Most rape cases in the military, like civilian jurisdictions, involve an accused and a victim who know each other and may even have had a previous dating or sexual relationship.[3] "People tend to believe that sexual assault is a stranger jumping out of the bushes and using a lot of force. What we're dealing with on a daily basis is where you draw the line between drunk sex and sexual assault."[4]

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[1] Marisa Taylor, *Mix of Booze and Sex Can Spell Trouble for Military*, MCCLATCHY WASHINGTON BUREAU (Nov. 28, 2011), http://www.mcclatchydc.com/2011/11/28/v-print/131522/mix-of-booze-and-sex-can-spell-trouble-for-military.

[2] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986). Ms. Estrich refers to violent rapes committed by strangers as "real" rape or traditional rape, explaining that in these cases, the law recognizes that a serious crime has been committed. *Id.* She further explains that in cases where the initial contact was a date, rather than a kidnapping, the woman did not say "no" and she does not fight, are "non-traditional" rapes and are not viewed as criminal. *Id.*

[3] SUBCOMM., JOINT SERV. COMM. ON MILITARY JUSTICE, U.S. DEP'T OF DEF., SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, 11 (2005) [hereinafter DOD SEX CRIMES REPORT] (citing Lenore Simon, *Therapeutic Jurisprudence: Sex Offender Legislation and the Antitherapeutic Effects on Victims,* 41 ARIZ. L. REV. 485, 496-97 (1999)). Researchers report high prevalence of sexual assault in the armed forces, ranging from 7 to 33% of women and 1 to 4% of men. Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION AND VIOLENT BEHAVIOR 267, 268 (2010).

[4] Taylor, *supra* note 1.

The sexual assault this thesis focuses on is not the type that arises from force; nor is it the type that arises from lack of consent without force.[5] The scenario contemplated in this thesis involves two impaired people having sex. Neither party said or remembers saying "no." In fact, neither party remembers much at all. Typically, what one of the parties remembers differs in important respects from what the other party remembers. And there are no other witnesses.

Cases arising from this type of scenario are very difficult to prove and prosecute. Often, the Article 32 investigating officer notes this in his or her report and perhaps recommends that the case not go forward to trial. Nonetheless, in most cases, commanders refer the charges to court-martial. The conviction rates in these types of cases, however, have been low.[6]

Rape law in the military is the reason prosecuting these cases is very difficult. Until October 1, 2007, Article 120(a) of the Uniform Code of Military Justice (UCMJ) read, "Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape."[7] In the 1990s, Congress began to call for revision of the UCMJ provisions covering sexual assault.[8] Although the language in Article 120 had not changed, military courts had largely kept up with the developments in the law of rape and interpreted the statute in a manner that was in keeping with rape reform around the country—until

[5] Sexual assault arising from a lack of consent without force refers to cases in which the woman does not resist and there is no additional force beyond the intercourse itself.

[6] *See* DEF. TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 81 (2009) [hereinafter DTFSAMS REPORT 2009], *available at* http://www.sapr.mil/ media/pdf/research/DTFSAMS-Rept_Dec09.pdf.

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 27, ¶45 (2012) [hereinafter 2012 MCM] (reprinting the UCMJ Art. 120(a) prior to 1 Oct. 07).

[8] *See* National Defense Authorization Act For Fiscal Year 1993 (NDAA FY93), Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992).

recently.[9] The law of rape and military policies with regard to treatment of accuseds and complainants has undergone recent radical change, outpacing the law of rape in society. This radical change has resulted in equal protection problems, unfair policies, and confusion among our military members.

On the 50th anniversary of the UCMJ, the Cox Commission recommended revision of Article 120 to create a comprehensive sexual assault article.[10] This recommendation sat dormant until 2003 when the United States Air Force Academy faced allegations of mishandling of sexual assault complaints.[11] These allegations piqued Congressional interest in sexual assault in the military. When Congress passed the National Defense Authorization Act (NDAA) of 2005, it directed the Department of Defense to take significant action to address sexual assault in the military.[12] In addition to requiring the Department of Defense to enact policies to assist victims, Congress also directed a review of the UCMJ and the Manual for Courts-Martial (MCM) to identify changes to improve the ability of the military justice system to address sexual assault.[13]

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[9] *See, e.g.*, United States v. Hicks, 24 M.J. 3, 6 (C.M.A. 1987) (inquiring as to whether there was consent or the victim failed or ceased to resist due to a reasonable fear of death or grievous bodily harm); United States v. Webster, 40 M.J. 384 (C.M.A. 1990) (finding that resistance by the victim is not required in rape cases); United States v. Clark, 35 M.J. 432, 436 (C.M.A. 1992) (holding "[f]orce involved in the act of penetration alone is sufficient force where there is in fact no consent."); *see also infra* Part III.B.

[10] NAT'L INST. OF MIL. J., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 11–12 (2001) (known as "COX COMMISSION REPORT"); *see infra* Part III.C discussion.

[11] INSPECTOR GENERAL, US AIR FORCE, SUMMARY REPORT CONCERNING THE HANDLING OF SEXUAL ASSAULT CASES AT THE UNITED STATES AIR FORCE ACADEMY (2004), *available at* http://www.af.mil/shared/media/document/AFD-060726-033.pdf.

[12] National Defense Authorization Act For Fiscal Year 1995 (NDAA FY95), Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1924–26 (1995).

[13] *Id*. § 571.

As a result of this Act, the Joint Service Committee on Military Justice[14] (JSC) created a subcommittee to address the provisions dealing with military sexual assaults.[15] The subcommittee recommended against changes, stating an inability to "identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM."[16] Despite the recommendation from the subcommittee, the JSC proposed changes to "clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment [and] find a balance between conforming the format of the UCMJ and MCM to the format in Federal law."[17] Fifteen months later, Congress took the JSC proposal and revised Article 120 UCMJ. The 2007 version of Article 120 took effect on 1 October 2007.[18]

The "new Article 120" incorporated all of the sexual assault provisions into one article,[19] with the exception of sodomy, which was left under Article 125. The statute faced, and

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[14] *See generally*, U.S. DEP'T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY (3 May 2003) (establishing the role and mission of the Joint Service Committee on Military Justice (JSC)). Among the JSC's several responsibilities, the JSC must conduct an annual review of the Manual for Courts-Martial in light of judicial and legislative developments in civilian and military practice. *Id.* The JSC's annual review fulfills the requirement that "the Secretary of Defense shall cause the Manual for Courts-Martial to be reviewed annually and shall recommend to the President any appropriate amendments." *Id.* This review assists the President in fulfilling his rule-making responsibilities under Articles 36 and 56 of the UCMJ. *Id.*

[15] Memorandum from Exec. Chair, Joint Serv. Comm. on Military Justice, to Office of the Gen. Couns., U.S. Dep't of Def., subject: Review of Sexual Assault Offenses (18 Feb. 2005) (on file with author).

[16] Letter from Subcomm. Chair, Joint Serv. Comm.on Military Justice, to Chair, Joint Serv. Comm. (13 Jan. 2005), *available at* http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf.

[17] Letter from Principle Deputy General Counsel, U.S. Dep't of Def., Office of the General Counsel, to Chair, Comm. on Armed Servs. (7 Apr. 2005), *available at* http://www.dod.gov/dodgc/php/docs /transmittal _ letters 2005.pdf.; DOD SEX CRIMES REPORT, *supra* note 3, at 2–3.

[18] National Defense Authorization Act For Fiscal Year 1996 (NDAA FY96), Pub. L. No. 109-163, §552, 119 Stat. 3136, 3256–63.

[19] *See infra* note 198 and accompanying text.

failed, a constitutional Due Process challenge.[20] The Honorable John Maksym, judge for the Navy-Marine Corps Court of Criminal Appeals called the statute a "poorly written, confusing and arguably absurdly structured and articulated act of Congress."[21] Judge advocates found the statute confusing and expressed concern that it may lead to unwarranted acquittals."[22] The Defense Task Force on Sexual Assault in the Military Services recommended a review of the 2007 Article 120.[23] Congress also called for its review.[24]

On April 13, 2011, Iowa Congressman Bruce Braley introduced H.R. 1517, the "Holley Lynn James Act,"[25] calling for all sexual assault cases to automatically be handled by a general court-martial convening authority. The Act also calls for the armed services to provide an attorney to each victim, a victim's right to appeal a general court-martial decision, and for the JSC to amend the MCM to codify these changes.[26]

On November 16, 2011, California Congresswoman Jackie Speier introduced H.R. 3435, the "Sexual Assault Training Oversight and Prevention Act" or the "STOP Act."[27] This Act seeks to establish a Sexual Assault Oversight and Response Council composed mainly of civilians as an independent entity from the chain of command within the Department of

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[20] United States v. Prather, 69 M.J. 338, 340-44 (C.A.A.F. 2011); *see infra* Part III.C.

[21] United States v. Medina, 68 M.J. 587, 595 (N.M.C.C.A. 2009).

[22] DFTSAMS REPORT 2009, *supra* note 6, at 81.

[23] *Id.* at ES-5.

[24] *See* Holley Lynn James Act, H.R. 1517, 112th Cong. § 940A (2011); Sexual Assault Training Oversight and Prevention Act (STOP Act), H.R. 3435, 112th Cong. §§ 145, 940A (2011).

[25] H.R. 1517; *see infra* Part IV.

[26] H.R. 1517.

[27] STOP Act, H.R. 3435 §§ 145, 940A.

Defense.[28] The Act also proposes to establish a of Director of Military Prosecutions appointed by the Council who has independent and final authority to oversee the prosecution of all sexual-related offenses committed by a member of the Armed Forces and to refer such cases to trial by courts-martial.[29]

Also in 2011, director and screenwriter Kirby Dick completed a documentary titled *The Invisible War*[30] highlighting the problem of rape and sexual assault in the military. The film features interviews with lawmakers, military personnel, victim advocates, and survivors of sexual assault in the military. Many of those interviewed call for changes to the way the military handles sexual assault. For instance, they suggest shifting prosecution decisions away from unit commanders, claiming these commanders often are either friends with assailants or are assailants themselves. This film won an award at the 2012 Sundance Film Festival in the U.S. Documentary category and was nominated for an Academy Award.[31] More importantly, the film garnered national media attention and captured congressional attention.

On April 16, 2012, Defense Secretary Leon E. Panetta went to Capitol Hill to announce initiatives to address sexual assault in the military.[32] Secretary Panetta purportedly told one of the film's executive producers that the screening of *Invisible War* was partly responsible

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[28] *Id.* at §188.

[29] *Id.* at §940A.

[30] THE INVISIBLE WAR (Cinedigm Entertainment Group 2012).

[31] THE INVISIBLE WAR, http://invisiblewarmovie.com (last visited Feb. 5, 2013).

[32] Lisa Daniel, Am. Forces Press Serv., *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, U,S. DEP'T OF DEF. (Apr. 16, 2012), http://www.defense.gov/newsarticle.

for his decision to make crucial changes in the way in which reported rapes are addressed in the military.[33]

Sexual assault is not unique to the military. Colleges and universities across the country face similar trends.[34] Sexual assault cases in civilian society, however, are tried in state courts, subject to each individual state statute and not subject to congressional oversight or action. Sexual assault cases involving military personnel are tried at courts-martial which are federal courts and subject to federal law.[35] Over the past two years congressional concern aligned with congressional influence and created a perfect storm for changes to sexual assault policy and law in the armed services. These changes outpace the development of rape law in civilian society and by doing so result in policy and Due Process problems for the Department of Defense.

This thesis addresses problems created by the recent radical changes to rape policy and law in the armed services. This thesis also proposes ways the Department of Defense can prevent and respond to sexual assault within its ranks in a manner that reflects society's values while recognizing the military's unique interest in maintaining good order and discipline. This thesis is divided into eight sections. Section II provides a synopsis of rape under common law and statutory reforms in order to explain how the law has developed in the civilian community. Section III is a history of the development of rape law in the military. Section IV details the increased Congressional scrutiny and influence. Section V questions the idea of "drunk sex" as sexual assault. Section VI details the dangers of these

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[33] Steve Pond, *Military Rape Documentary 'Invisible War' Leads to Changes Before Its Opening*, THE WRAP (June 18, 2012, 6:35 PM), http://www.thewrap.com/movies/column-post/military-rape-documentary-invisible-war-leads-policy-changes-its-opening-44671.

[34] DTFSAMS REPORT 2009, *supra* note 6, at 9.

[35] "The Congress shall have power to constitute tribunals inferior to the Supreme Court." U.S. Const. art. I, § 8.

new policies and laws. Section VII discusses operating in this new political environment. Section VIII concludes the article.

II. Rape in Civilian Jurisdictions

A. The Common Law Period

American law rape law developed from English common law in the early 17th century.[36] For the next 300 years, Anglo-Saxon males wrote the law. Those men believed rape law was necessary to protect men's property rights—their rights to their wives and daughters.[37]

Sir Matthew Hale was one those men.[38] As Chief Justice of the Court of the King's Bench from 1671 to 1675, Sir Hale authored *The History of the Pleas of the Crown*.[39] This influential treatise on the criminal law of England is considered "of the highest authority"[40] and shaped American law, notably in area of rape.[41]

In *The History of the Pleas of the Crown,* Sir Hale defined rape as the unlawful carnal knowledge of a woman against her will.[42] American rape law assumed this definition, though many jurisdictions added "by force" as an element of the crime. Common law in

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[36] *See, e.g.*, Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 803 (1996).

[37] *Id.*

[38] JOHN HOSTETTLER, THE RED GOWN: THE LIFE AND WORKS OF SIR MATTHEW HALE (2002) (stating that Hale is universally appreciated as an excellent judge and jurist who was noted for resistance to political and other pressures and a willingness to make politically unpopular decisions which upheld the law). *The History of the Pleas of the Crown* is his most famous work. *Id.*

[39] SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] W. A. STOKES AND E. INGERSOLL, 627 (Vol. 1, 1st Am. ed. 1847).

[40] HOSTETTLER, *supra* note 38, at 151.

[41] Rebecca M. Ryan*, The Sex Right: A Legal History of the Marital Rape Exemption,* 20 LAW & SOC. INQ. 941 (1995).

[42] HALE, *supra* note 39.

America eventually took on the force element and the definition of rape became "the unlawful carnal knowledge of a woman forcibly and against her will."[43]

In addition to shaping the American common law definition of rape, Sir Hale's writings are responsible for the victim-focused prosecution of rape cases under American common law.[44] Sir Hale remarked that "rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[45] This oft-quoted passage reflects Sir Hale's concern that rape allegations may be false and therefore the victim's credibility should be highly scrutinized. Sir Hale distinguished between chaste and unchaste women and focused on the victim's state of mind and actions in addition to those of the defendant.[46] Sir Hale believed the victim should report the crime right away; therefore, making no outcry at the time of the assault or immediately indicated false testimony.[47]

As a result of Sir Hale's influence, the law recognized requirements unique to rape cases, making them more difficult to prove than other felonies. The first requirement was that the victim resist to the utmost extent because a woman was expected to fight to the death to preserve her chastity.[48] Courts also expected that a woman would promptly "hue and cry" in

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[43] *In re* Lane, 135 U.S. 443 (1890).

[44] HALE, *supra* note 39, at 633.

[45] *Id.* at 633–34.

[46] *Id.* at 627.

[47] *Id.*

[48] Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 589 (2009) (citing Kinselle v. People, 227 P. 823, 825 (Colo. 1924); People v. Geddes, 3 N.W.2d 266, 267 (Mich. 1942); State v. Hunt, 135 N.W.2d 475, 479 (Neb. 1965); Holmes v. State, 505 P.2d 189, 191 (Okla. Crim. App. 1972); Purpero v. State, 208 N.W. 475 (Wis. 1926); State v. McClain, 149 N.W. 771, 771 (Wis. 1914)); *see also*, People v. Dohring, 59 N.Y. 374, 382 (1874) (recognizing that "utmost resistance" is a relative term depending on a victim's strength

order for her neighbors to catch the perpetrator,[49] despite rejecting a "hue and cry" requirement for other offenses. Courts held it against the prosecution if the woman did not confide in anyone right after the attack.[50] Though generally a court could act on the testimony of a single witness, rape statutes and courts in rape cases required corroboration.[51] Difficult to find in a crime often committed without witnesses, the corroboration requirement reflected the view that women are temptresses and liars like the first woman, Eve.[52] This view also prompted courts to provide cautionary instructions to address concerns of unjust punishment that could result from falsely convicting a man " tho never so innocent."[53] These rules focused entirely on the complainant and her conduct, placing her as much on trial as the accused. Satisfying the force element and the non-consent element depended on the victim's response to the encounter. The inquiry disregarded the accused's mens rea.[54]

B. Criminal Rape Law Reform in America

The common law definition of rape was prevalent throughout the United States until the mid-1950s and remained the law of many states through the mid-1970s.[55] The rise of

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and concluded that a victim must resist until overpowered, unless overcome by the number of assailants or the threat of death.).

[49] HALE, *supra* note 39, at 633.

[50] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. Rev. 945, 955 (2004).

[51] *See, e.g.*, GA. CODE ANN. § 16-6-3 (1994) ("No conviction shall be had for this offense on the unsupported testimony of the victim . . . ."); People v. Benson, 6 Cal. 235, 237-38 (1856).

[52] Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORD L. REV. 1585, 1587 (2007).

[53] *Id.*

[54] *See* Estrich, *supra* note 2, at 1094.

[55] BATTELLE MEM'L INST. LAW AND JUSTICE STUDY CTR., FORCIBLE RAPE 5 (U.S. Dep't of Justice ed., 1978); CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 31 (1992).

feminist advocacy then began to challenge many discourses and institutions in the United States. Rape law was one of the primary areas in which feminists sought reform.

In 1923, Alice Paul drafted the Equal Rights Amendment (ERA), and introduced it in Congress for the first time as the "Lucretia Mott Amendment."[56] This constitutional amendment called for absolute equality for women under the law stating, "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[57] Legislators introduced the ERA in every session of Congress from 1923 until it passed both houses of Congress in 1972.[58] After passing, the ERA went to the state legislatures for ratification. The ERA fell short, receiving thirty-five of the required thirty-eight state ratifications by June 30, 1982, the deadline set by Congress.[59] Although the ERA was not ratified, the legislation prompted changes in some state constitutions ending distinctions based on sex.[60]

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[56] *Alice Paul: Feminist, Suffragist and Political Strategist*, ALICE PAUL INST., http://www.alicepaul.org /alicepaul.htm (last visited Dec. 5, 2012). Alice Paul, founder of the National Women's Party, authored the original ERA while a student at Washington College of Law, American University. cite Paul played a pivotal role in the passage of the Nineteenth Amendment, which gave women the right to vote. *Id.*

[57] S.J.Res. 21, 68th Congress, 1st session (1923) (Equal Rights Amendment 1923).

[58] *Alice Paul: Feminist, Suffragist and Political Strategist*, *supra* note 56. On March 5, 2013 Senator Robert Menendez (Democrat-New Jersey) reintroduced the traditional ERA ratification bill with 10 co-sponsors in the U.S. Senate. S.J. Res. 10, 113th Cong. (2013).

[59] H.R.J. Res. 638, 95th Cong. (1978) (enacted).

[60] Martha Fineman, *Feminist Theory in Law: The Difference it Makes*, 2 COLUM. J. GENDER & L. 1, 9 (1992) (citing to eighteen states' laws specifically mandating sexual equality under the law: ALA. CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 3; Ill. CONST. art. I, § 18; LA. CONST. art. I, § 3; MD. CONST. DECL. OF RTS. art. 46; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. II; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; P.R. CONST. art. II, § 1; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3, art. VI, § 1).

Despite the failure of the ERA, the women's movement gained ground in the 1960s through passage of the Equal Pay Act of 1963[61] and through an executive order from President Lyndon B. Johnson addressing sex discrimination in the civil service.[62] The Civil Rights Act of 1964[63] banned workplace discrimination not only on the basis of race, religion and national origin, but also on the basis of sex.[64] Betty Friedan's book *The Feminine Mystique*[65] became a bestseller.[66] Friedan also cofounded the National Organization for Women (NOW).[67] NOW became a major lobby, growing in membership and achieving political victories.[68]

As a likely result of the ban on sex-based workplace discrimination and the passage of the Equal Pay Act, women moved into the workforce in greater numbers. They moved into professions historically occupied by men, particularly the legal profession.[69] Along with their movement into the workforce, women became more politically active. Women started following the voting records of their legislators and became involved in political

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[61] 29 U.S.C. § 206(d) (1963).

[62] Exec. Order No. 11,375, 32 Fed. Reg. 14303, (Oct. 17, 1967).

[63] 42 U.S.C. § 1981 (1964).

[64] *Id.*

[65] BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963). *Encyclopedia Britannica Profiles 300 Women Who Changed the World, Betty Friedan*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com /women /article-9035419 (last visited Jan. 31, 2013). It is widely credited with sparking the beginning of second-wave feminism in the United States. *Id.* By the year 2000, *The Feminine Mystique* had sold more than 3 million copies and had been translated into many foreign languages. *Id*.

[66] *Id.*

[67] *Id.*

[68] *The Founding of NOW*, NOW.ORG, http://www.now.org/history/the_founding.html (last visited Jan. 31, 2013).

[69] *See* Fineman, *supra* note 60, at 1.

organizations such as the League of Women Voters and the American Civil Liberties Union.[70]

The increase of women in the legal profession and alliance with these political organizations added momentum to rape reform in many states.[71] Women began to examine and question the male-oriented rules unique to rape prosecutions.[72] Rape law reform was an important item on the feminist agenda. Women worked to demonstrate that the common law rules about rape were different from the rules for other crimes and were based on archaic stereotypes about women.[73] They sought formal legal recognition of the principle that rape is a crime of violence and advocated rejection of the common law subjugation of woman as sex objects. Eventually, their persistence paid off as virtually all states enacted rape reform legislation by the mid-1980s.[74]

> [O]ne's position within society through different biological capabilities , different experiences, different social expectations or some combination of these influences one's perspective in viewing the rest of the world, and thereby influences one's understanding of the world. Insofar as most women share the possibility of becoming pregnant for part of their lives and most also share the experience of being relatively weaker physically than most men, social experiences in which these two factors are implicated, such as rape, are likely to be perceived by most women in substantially the same way. Furthermore, since no man shares the possibility of becoming pregnant and most men have substantially more physical strength than most women, most men's perceptions of the same social encounters are likely to differ substantially from those shared by most women.[75]

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[70] *See* HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 153 (1980).

[71] *See* Ross, *supra* note 36, at 844–49.

[72] *Id.*

[73] *See Id.* at 852.

[74] Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Reforms*, 39 JURIMETRICS J. 119, 121 (1999).

[75] *See* Ross, *supra* note 36, at 800.

Rape reform met resistance, however, particularly from defense attorneys within state legislatures.[76] Defense attorneys argued that the reforms would unfairly impact defendants' rights. As a result, many jurisdictions enacted more limited reform bills than originally proposed. [77]

The varied treatment of reform legislation from state to state resulted in individual state rape laws differing substantially from one another. Some states enacted aggressive and comprehensive reform, while other states took an incremental approach, enacting smaller reforms over a number of years.[78]

Initial rape reforms addressed the male-oriented rules developed through common law. Feminists sought legislative reforms to remove the many legal obstacles to proving that a rape had occurred.[79] These reforms included: (1) replacing the single offense of rape with a number of different offenses, varying in severity depending on aggravating circumstances; (2) eliminating the resistance requirement; (3) eliminating the corroboration requirement and cautionary instructions; and (4) enacting "rape shield laws" to limit introduction of evidence of the complainant's past irrelevant sexual history.

1. Replacing "Rape" With a Range of Offenses

Reformers recognized that the severe penalty attached to the single offense of "rape" made it difficult to obtain a conviction. "Rape" was an all-or-nothing offense good for high-end conduct, but not adequate to address less severe conduct. Rape convictions typically

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[76] Spohn, *supra* note 74, at 121.

[77] *Id*. at 122.

[78] *Id*.

[79] Leslie Francis, *Introduction to* DATE RAPE, at viii (Leslie Francis, ed.,1996).

resulted in penalties ranging from 20 years to life in prison and sometimes execution.[80] Juries were unwilling to convict defendants of rape unless there was accompanying serious injury or the accused was black and raped a white woman.[81] Reformers argued for elimination of the single offense of rape and replacement with a range of offenses addressing different degrees of sexual assault and resulting penalties.[82]

2. Eliminating the Resistance Requirement

The elimination of the resistance requirement was a significant reform. Studies showed that "utmost" resistance was an atypical response to rape because those victims who did resist their assailants had a greater chance of suffering serious injuries than those who submitted.[83] Most women will not resist their assailants, but will "freeze" in a state of shock.[84] As a result of this new understanding, some laws, such as Pennsylvania's rape statute, explicitly stated that the alleged victim need not resist the actor.[85] New Mexico simply eliminated the resistance requirement.[86] Some state legislatures focused on the accused's acts constituting force rather than inquiring into the victim's actions.[87] Other state

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[80] *See* Ross, *supra* note 36, at 845 (explaining "[p]rior to these reforms the common law offense of rape generally carried a penalty ranging from execution and life imprisonment to 20 years imprisonment. Experience had shown that, because of the severity of these penalties, many juries were unwilling to convict defendants for any rape other than those involving aggravated assault and serious injury.").

[81] *See* Ross, *supra* note 36, at 845.

[82] *Id.*

[83] Martin Symonds, *The Rape Victim: Psychological Patterns of Response*, AM. J. PSYCHOANALYSIS 27, 29–33 (1976).

[84] *Id.* The behavior of a vast majority of women is called "psychological infantilism." *Id.* The victim appears relaxed and calm but she is actually in terror. *Id.* To an outsider, she may appear friendly and cooperative. *Id.* It is confusing to the rapist, the victim and investigators. *Id.*

[85] 18 PA. CONS. STAT. ANN. § 3107 (West 1983).

[86] N.M. STAT. ANN. § 30-9-10(A)(4) (1979).

[87] *See* Spohn, *supra* note 74, at 124.

laws were silent on resistance and focused more on specifically defining consent and incorporating it as an affirmative defense.[88]

3. Eliminating the Corroboration Requirement

Another significant reform was the elimination of the corroboration requirement and special cautionary instructions. Critics argued that corroboration was too difficult to obtain for an act that typically takes place without witnesses. Cautionary instructions were not necessary because judges and juries were already biased against the complainant.[89] Pennsylvania eliminated the corroboration requirement and mandated evaluation of the rape victim's testimony by the same standard as the testimony of the victim of any other crime.[90] Since no other crime in Pennsylvania requires corroboration, "no special instructions shall be given cautioning the jury to view the [alleged victim's] testimony in any other way than that in which all [victims'] testimony is viewed.[91] By 1984, only eight states required corroboration and two of those states required it only in statutory rape cases.[92]

4. Rape Shield Laws

Perhaps the most pervasive reforms were the "rape shield laws" adopted by the federal government and almost every state by 1985.[93] Under common law, a complainant's prior sexual history was admissible for two purposes: to show consent because a woman who has

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[88] 720 ILL COMP. STAT ANN. 5/12-17 (West 1993).

[89] *See supra*, note 52 and accompanying text; *see also*, Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 YALE L.J. 55 (1952); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967).

[90] 18 PA. CONS. STAT. ANN. § 3106 (1983).

[91] *Id.* § 3107 (1983).

[92] Spohn, *supra* note 74, at 126.

[93] *See David* Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence,* 1985 WIS. L. REV. 1219.

engaged in sexual acts voluntarily in the past is ostensibly more likely to consent; and to impeach her credibility because the risk of perjury is so great that the character of the complainant should be thoroughly dissected.[94] Reformers argued that these inquiries made it seem as though the complainant was on trial and dissuaded women from reporting rape.[95] Consequently, rape shield statutes were intended to restrict defense attorneys' cross-examination of a complaining witness's irrelevant sexual history, alleviating embarrassment and eliminating a reason not to testify.[96] Except for a few narrow exceptions, all evidence concerning her prior sexual history became inadmissible.[97]

The past three decades witnessed significant transformation in rape law in the United States. The reformers sought to shift the focus of a rape case from the victim's actions to the offender's unlawful acts. The laws changed, however societal norms lagged behind and minimized the impact of the new laws.[98] Society's failure to let go of bias against rape victims disappointed reformers, however the symbolic message of the reforms was important and resulted in a more sensitive treatment of rape victims.[99]

C. Post- Reform Discussion of Rape: a discussion of resistance and consent

1. Is It Rape?

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[94] *See* Spohn, *supra* note 74, at 126.

[95] Wayne R. La Fave, *Offenses Against the Person*, 2 SUBST. CRIM. L. § 17.5 (3d ed. 2007)

[96] *See* Spohn, *supra* note 74, at 128–29.

[97] La Fave, *supra* note. 93.

[98] *See* CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 41, 167 (1992). Spohn and Horney conducted a study of six major jurisdictions, three of which produced greatly reformed statutes and three where the reforms were minimal. *Id.* The results indicated that reforms had little or no impact on conviction rates. *Id.* Spohn and Horney concluded that criminal law reform "that contradicts deeply held beliefs may result in open defiance of the law or in a surreptitious attempt to modify the law." *Id.*

[99] *Id* at 175.

What is rape? The definition of rape varies depending on the jurisdiction. Some jurisdictions continue to define rape as sex by force. Other jurisdictions focus on the element of consent.[100] Rape law has expanded to encompass a whole spectrum of conduct. At one end of the spectrum is "real rape" or "traditional rape."[101] These are the proverbial violent rapes committed by strangers with ski masks and knives. In these cases, the law recognizes that a serious crime has been committed. [102] Most rape cases, however, are not as clear.[103] In these "non-traditional" [104] and less-clear cases, the two parties know each other, the setting

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[100] Michelle J. Anderson, *All American Rape*, 79 ST. JOHN'S L. REV. 625, 631 (2005), (citing ALA. CODE § 13A-6-65 (2004) (defining sexual misconduct as intercourse occurring "without [the victim's] consent"); CONN. GEN. STAT. § 53a-73a (1999) (making sexual contact without consent a misdemeanor fourth degree sexual assault); D.C. CODE ANN. § 22-3006 (LexisNexis 2001) (defining "misdemeanor sexual abuse" as "engag[ing] in a sexual act **...** without that other person's permission"); FLA. STAT. ANN. § 794.011(5) (West Supp. 2005) (defining second degree sexual battery as "without that person's consent" and without the use of force); HAW REV. STAT. ANN. §§ 707-700, 707-733 (LexisNexis 2004) (noting that "compulsion" necessary for fourth degree sexual assault is satisfied simply by the absence of consent); KY. REV. STAT. ANN. § 510.130 (LexisNexis 1999) (making sexual contact without the other's permission a misdemeanor); ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(B) (2004) ("The other person has not expressly or impliedly acquiesced in the sexual contact and the sexual contact includes penetration."); MD. CODE ANN., CRIM. LAW § 3-308 (Supp. 2004) (making contact without consent a sexual offense in the fourth degree); MINN. STAT. ANN. § 609.3451(West 2003) (defining criminal sexual conduct in the fifth degree as nonconsensual sexual contact); MO. ANN. STAT. § 566.040 (West 1999) (defining sexual assault as "sexual intercourse with another person knowing that he does so without that person's consent"); N.Y. PENAL LAW § 130.20 (McKinney 2004) (defining the crime of "sexual misconduct" as sexual intercourse without the person's consent); N.D. CENT. CODE 12.1-20-07(1)(a) (Supp. 2003) (noting that "sexual assault" requires one to "knowingly ha[ve] sexual contact" and "know[ ] or ha[ve] reasonable cause to believe that the contact is offensive to the other person"); OR. REV. STAT. § 163.425(1) (2003) (stating that one who commits second degree sexual abuse "subjects another person to sexual intercourse, deviate sexual intercourse or . . . penetration . . . and the victim does not consent thereto"); 18 PA. CONS. STAT. § 3124.1 (Supp. 2005) (defining the offense of sexual assault as "sexual intercourse or deviate sexual intercourse. . . without the complainant's consent"); S.D. CODIFIED LAWS § 22-22-7.4 (Supp. 2003) ("No person fifteen years of age or older may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact."); WASH. REV. CODE ANN. § 9A.44.060 (West 2000) (creating a lesser offense "[w]here the victim did not consent . . . and such lack of consent was clearly expressed by the victim's words or conduct"); WIS. STAT. ANN. § 940.225(3) (West Supp. 2004) (defining third degree sexual assault as any sexual intercourse or contact "without the consent" of the victim).

[101] Anderson, *supra* note 100.

[102] *Id.*

[103] *Id.*

[104] *Id.*

may be a bedroom, they may be on a date, the woman says no to intercourse, but does not resist. The law in any jurisdiction no longer requires a victim to resist to the utmost; however, the definitions accorded to force and consent continue to make reasonable resistance necessary in order for a sexual act to be adjudged rape.[105]

The elimination of the resistance requirement made determining if a sexual encounter was rape much more difficult. Under common law, rape was a general intent crime; the accused only needed to intend to penetrate the victim.[106] There was no mens rea requirement because penetration could not occur accidentally. In effect, the resistance requirement obviated the mens rea requirement with respect to non-consent. Resistance put the defendant on notice that the victim did not consent.[107]

The elimination of the resistance requirement meant that non-consent became a strict liability element in a general intent crime. That is, so long as the prosecution proved resistance, then there was no legal consent. This is peculiar because, in general intent crimes, reasonable mistake of fact is normally a defense.[108] If an accused reasonably believed the victim consented – even if she did not in fact consent – he could be found not guilty. A few jurisdictions prohibit jury instructions on mistake of fact as to consent.[109]

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[105] *Id.*

[106] *See generally*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 531-32 (2d ed. 1995); *see, e.g.*, State v. Reed, 479 A.2d 1291, 1296 (Me. 1984); Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989); People v. Hale, 370 N.W.2d 382, 383 (Mich. Ct. App. 1985); Commonwealth v. Williams, 439 A.2d 765, 769 (Penn. 1982) (holding that a reasonable mistake as to consent is not a defense); State v. Elmore, 771 P.2d 1192, 1193 (Wash. App. 1989); Brown v. State, 207 N.W.2d 602, 609 (Wis. 1973) (holding that intent is not an element of rape).

[107] Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 961 (2008).

[108] *See, e.g.*, DRESSLER, *supra* note 106, at 155–56.

[109] *See, e.g.*, Commonwealth v. Lopez, 745 N.E.2d 961, 968–69 (Mass. 2001) (citing decisions from Illinois, Iowa, Maine, New Hampshire, Pennsylvania, Michigan, and Wisconsin).

Other jurisdictions permit a reasonable mistake of fact as to consent defense and instruction.[110] In some of those jurisdictions, the defense has been eroded.[111] California, for example, requires an accused to raise substantial evidence in support of his claim of mistake of fact as to consent.[112] Such evidence must include that he reasonably and in good faith believed his partner consented. The end result is serious, felonious liability turning on simple negligence as opposed to beyond a reasonable doubt.[113]

Rape reform created a reorientation in the law of rape. Most scholars agree the gravamen of the rape offense is no longer the use or threat of physical force; it is non-consent or the absence of consent.[114] "Consent possesses the 'magic' to transform sexual intercourse from being conduct that is only second to murder in its heinousness into being conduct that is criminally innocuous."[115] Scholars' justification for the central role of consent is protection of women's choice and sexual autonomy.[116] Reformers believed, however, that the focus on

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[110] People v. Mayberry, 542 P.2d 1337 (Cal. 1975) (en banc); *see* Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); People v. Lowe, 565 P.2d 1352 (Colo. Ct. App. 1977); State v. Smith, 554 A.2d 713 (Conn.1989); In Interest of J.F.F., 341 S.E.2d 465 (Ga. Ct. App. 1986); State v. Dizon, 390 P.2d 759 (Haw. 1964); State v. Williams, 696 S.W.2d 809 (Mo. Ct. App. 1985); Owens v. Nevada, 620 P.2d 1236 (Nev. 1980); People v. Crispo, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988); Green v. State, 611 P.2d 262 (Okla. Crim. App. 1980). *See also* United States v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954).

[111] *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 815–16 (1996).

[112] People v. Williams, 841 P.2d 961, 966 (Cal. 1992).

[113] *See* Dripps, *supra* note 107, at 961.

[114] Alan Wertheimer, *What is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 558 (2000); Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011) (citing STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 171–73 (1998).

[115] Heidi M. Hurd, *The Moral Magic of Consent,* 2 LEGAL THEORY 121(1996).

[116] *See* Dripps, *supra* note 107, at 971.

consent did not protect women from sexual intercourse contrary to their wishes. Demonstrating non-consent required women to resist physically.[117]

Another reason reformers did not believe the focus on consent protected women from unwanted sexual intercourse was a lack of agreement as to what consent meant.[118] Few state statutes define consent, but those that do require words or actions establishing "a freely given agreement" to have sexual intercourse or contact.[119] Under Colorado law, consent is a "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act."[120] California's definition of consent is similar—requiring "positive cooperation."[121] Illinois and Minnesota likewise require a competent person's words or overt actions indicating consent.[122] Upon reviewing the New Jersey rape statute, New Jersey Supreme Court held that consent is "affirmative and freely given permission."[123] These states stand out as requiring affirmative consent rather than mere acquiescence and eliminate the resistance requirement.

The disagreement as to the meaning of consent is evident in the absence of its definition in most state statutes. Legislatures drafted statutes that make sex without consent a crime—

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[117] *See* Note, *Acquaintance Rape and Degrees of consent: "No" means "No," But what does "Yes" mean?,* 117 HARV. L. REV. 2348 (citing NEB. REV. STAT. §28-318(8)(b) (holding "[t]he victim need only resist, either verbally or physically, so as to reasonably make known to the actor the victim's refusal to consent")).

[118] *See* Dripps *supra* note 107, at 970.

[119] *See, e.g.,* D.C. CODE § 22-3001 (2001); ILL. ANN. STAT. ch. 38, para. 12-17 (West. 1990); NEV. REV. STAT. ANN. § 200.366(1) (Lexis-Nexis 1986); WASH. REV. CODE ANN. § 9A.44.010 (1988); WIS. STAT. ANN. § 940.225(4) (West 1982).

[120] COLO. REV. STAT. § 18-3-401 (2003).

[121] CAL. PENAL. CODE §§ 261(2), (6) to (7) (West 1988).

[122] 720 ILL. COMP. STAT. 5 § 12-13; MINN. STAT. § 609.341(4) (2000).

[123] *In re* M.T.S., 609 A.2d 1266, 1276-77 (N.J. 1992).

leaving it up to prosecutors to evaluate the facts and decide if a crime may have been committed. [124]

Despite the disagreement as to the meaning of consent, consent is universally viewed as morally transformative. That is, consent can transform what would be considered a harmful action into a non-harmful action.[125] Inability to define and recognize consent or non-consent is the central dilemma for reformers seeking to use legal reform to change societal norms. Sexual intercourse is accepted by society as a good and desirable activity. In a sexual assault case, the prosecutor and victim have to prove that it was not desired.

2. Reform Goes Only So Far

Reformers were very successful in advancing rape shield statutes and other reforms. By the early 1990s, all major jurisdictions enacted rape reforms through legislation and case law.[126] The feminists[127] were successful in changing the mindset on *some* gendered crime. Domestic violence was no longer a private matter and batterers were excoriated.[128] Society began to view perpetrators of crimes against women and children as predatory monsters—the lowest forms of criminals deserving of severe sentences.[129] Women's groups lobbied for,

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[124] "The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions." ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.2 (3d ed. 1993); *see also infra,* note 340 and accompanying text; *see* Dripps, *supra* note 107, at 970.

[125] *See* ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 120 (2003).

[126] *See*, *e.g.*, Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S LAW J. 72 (2001).

[127] The term "feminist" is often viewed as pejorative. In this thesis, the term "feminist" is used to describe an individual who advances the theory of the political, economic, and social equality of the sexes.

[128] This is evident in the passage of laws like the Lautenberg Amendment, in which even those convicted of a misdemeanor charge of domestic assault were restricted from using, possessing or owning firearms. 18 U.S.C. § 922 (g)(9) (1996).

[129] Gruber, *supra* note 48, at 584 (citing Nora Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 567–68 (2002)); *see also*, DANIEL GARDNER, THE SCIENCE OF FEAR 182 (2009) ("There is probably no figure more reviled in

and achieved, increased sentences and registration for sex offenders under both state and federal law.[130]

Progress in rape law reform has been relatively slow and steady over the past three decades. Nonetheless, for all the reforms feminist groups have achieved in the areas of violent stranger and child rape, little to nothing has changed to criminalize other forms of "coercive domestic control."[131] Lawmakers, prosecutors, judges, and jurors have been reluctant to apply reforms such as rape shield laws and affirmative consent laws to non-stranger rape-type cases. Terms like "consent" are too vague, penalties are severe, and registration requirements can be life-long. "Feminists hoped enlisting state prosecutorial power would improve the lives of individual women and change norms about female sexual agency, male dominance, and courtship behavior. Unfortunately, that's not what happened."[132] As a result of feminist efforts to achieve rape reform, the feminist movement focused more on crime control and prosecution of men who commit offenses against women rather than its original purpose of achieving equality.[133]

This focus on prosecution resulted in society viewing rape as a product of individual criminality rather than a more pervasive social reality. In other words, only criminals rape—not people like fellow college students, friends, or co-workers. Trying to impose rape law

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modern Western culture than the man – he's always a man…In the tabloid press, he's a 'monster,' a 'pervert,' or a 'sicko.'. . . The revulsion is so profound and universal that even quality American newspapers, which are normally scrupulous about avoiding prejudicial language, have taken to calling sex offenders 'predators.'")

[130] Megan's Law is the informal name for laws throughout the United States requiring law enforcement databases containing information regarding registered sex offenders. Under federal law, Megan's Law was an amendment to the Sexual Offender (Jacob Wetterling) Act of 1994. 42 U.S.C. §§ 14071 – 14073, *repealed by* Pub.L. 109-248, Title I, §129(a) (July 27, 2006).

[131] Gruber, *supra* note 48, at 584.

[132] *Id.* at 585.

[133] *Id*. at 582.

reform on acquaintance or date-rape, and more specifically, on drunk sex fails within this paradigm. Ultimately, rape law reform reached a limitation in attempting to change widely accepted courtship rituals.[134] In state legislatures, lawmakers stopped short of making the radical changes to the law reformers sought with the goal of changing social attitudes about sexual relations. As a result, current rape statutes reflect both the reforms and the reluctance.

III. Rape in the Military Justice System

While legislatures reformed rape laws across the country, military rape law remained essentially unchanged until 1992. From 1992 until 2007 reforms were limited—not keeping pace with the reforms in civilian jurisdictions. As a result of several high-profile scandals, Congress called for change.

A. The Law

The American military justice system, like the civilian justice system, traces its roots back to Britain. The first written American Military Code was the Massachusetts Articles of War. Approved in 1775, colonial lawmakers based this Code on the 1774 British Articles of War.[135] In 1776, the Continental Congress enacted sixty-nine Articles of War to govern the conduct of the Revolutionary Army.[136] The 1776 Articles of War neither listed rape as an offense nor authorized a court-martial for a military man accused of rape.[137] Instead, the Articles required that a commander turn over a military man accused of rape to the

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[134] *Id.* at 630.

[135] *See* David Schlueter, *The Court-Martial: An Historical Survey,* 87 MIL. L. REV. 129, 145-46 (1980).

[136] *Id*.

[137] Articles of War of 1776, art. 1, § X, *in* WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS, 972 (2d ed. 1920 reprint).

responsible civilian jurisdiction.[138] During the Civil War, the lack of civilian courts left the Union and Confederate states unable to prosecute soldiers accused of rape.[139]

The Act for Enrolling and Calling Out the National Forces and for Other Purposes[140] addressed this problem by giving the military exclusive jurisdiction over military men accused of rape in a time of war, insurrection, or rebellion. Commanders became responsible for referring rape allegations to courts-martial. The Act, however, did not define rape but adopted the common law definition of rape at the time: "unlawful carnal knowledge of a woman forcibly and against her will or without her consent."[141]

Congress amended the Articles of War in 1874 to include court-martial jurisdiction over rape offenses during time of war, insurrection, or rebellion.[142] Congress amended the Articles again in 1916 and 1920; however, the definition of rape did not change and commanders were still required to turn servicemembers accused of rape over to civilian jurisdictions for peacetime prosecutions.[143]

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[138] *Id.*

[139] WINTHROP, *supra* note 137 at 972.

[140] 12 Stat. 736 (1863).

[141] WINTHROP, *supra* note 137, at 677.

[142] 18 STAT. 228 (1874).

> Article 58. In the time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by a person in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offence may have been committed.

Id.

[143] Loving v. United States, 517 U.S. 748, 753 (1996) (citing 39 Stat. 664 (1916)).

Commanders finally gained complete jurisdiction over servicemen accused of rape in 1950 with the adoption of the UCMJ. The most comprehensive change to military law in United States history, the UCMJ applied to all services and gave the services jurisdiction over all offenses committed by servicemembers in times of peace and war.[144] Until 1987, however, the military only prosecuted rape cases with a "service connection."[145] In 1987, the United States Supreme Court held that the military had universal jurisdiction to prosecute any servicemember offense regardless of service connection.[146]

Although the UCMJ was a significant reformation of military jurisprudence, until 1992, the military rape statute was identical to the Articles of War under which the military prosecuted servicemembers during the American Revolution.[147] The UCMJ's rape statute, Article 120, read, "[a]ny person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape,"[148] a definition nearly identical to the common law definition.[149]

B. Pre-2007 Practice

In 2001, the Army Court of Criminal Appeals explained that the definition of rape, in practice, was not so simple:

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[144] WINTHROP, *supra* note 137 at 667.

[145] United States v. Solario, 483 U.S. 435, 449–51 (1987).

[146] *Id*. at 451.

[147] DOD SEX CRIMES REPORT, *supra* note 3, at 11 (citing Major Martin Sims, "*Coercive Sexual Intercourse": A Proposal to Amend Article 120, UCMJ, to Prevent the Misapplication of the "Parental Duress" Theory of the "Constructive Force" Doctrine of Rape* (1999) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's School Library).

[148] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45 (2002) [hereinafter 2002 MCM].

[149] In 1992, Congress amended Article 120 to make the offense gender neutral and remove the spousal exception. NDAA FY93, Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992). The spousal exception, or marital rape exemption, is a provision barring prosecution for raping one's spouse. 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Lawbook Exch. 2003) (1736).

> Despite its often vile nature and profound consequences, rape is a deceptively simple crime with only two elements: (1) an act of sexual intercourse; (2) done by force and without the consent of the victim . . . Practically speaking, however, rape is often a complex offense because of interrelationships among the legal concepts of force, resistance, consent, and mistake of fact.[150]

1. Act of Intercourse

"An act of sexual intercourse" was the first element of the military rape statute. Sexual intercourse was defined as "any penetration, however slight of the female sex organ by the penis."[151] Ejaculation was not required.

2. By Force and Without Consent

The 2002 MCM made a distinction between two different types of rape cases – actual force cases and constructive force cases. Actual force cases occurred when an accused engaged in an act of sexual intercourse with a victim despite vigorous physical resistance and that the accused overcame the resistance by application of superior force. In these cases, the victim's resistance substantiated lack of consent.[152] Constructive force cases occurred when an accused engaged in an act of sexual intercourse but the victim failed to resist because actions of the accused threatened death or great bodily harm. Lack of resistance did not evidence consent in these cases because the threatening conduct of the accused and the resulting sexual intercourse was sufficient to constitute rape.[153] Constructive force cases also occurred when the "female [was] unable to resist because of the lack of mental or physical faculties."[154] Distinguishing between an actual force case and a constructive force case was

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[150] United States v. Simpson, 55 M.J. 674, 695 (Army Ct. Crim. App. 2001).

[151] 2002 MCM, *supra* note 148, pt. IV, ¶ 45.

[152] *See* United States v. Clark, 35 M.J. 432, 435 (C.M.A. 1992).

[153] *Id.*at 435-36.

[154] *Id* at 435-36 (1992) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45c(1)(b) (1984)).

important because of the different definitions of the second element "by force and without consent."

3. Actual Force

The pre-2007 military rape statute required the use of force to accomplish the act of sexual intercourse.[155] If the finder of fact determined that constructive force did not apply, then it was an actual force case. The 2002 MCM, however, did not provide the evidentiary requirement for proving the force element in these cases.[156] In *United States v. Watson*,[157] the Court of Military Appeals rejected the view that a victim had "an independent, affirmative duty" to resist an attacker.[158]

Captain Watson, USAF, resided in the barracks aboard San Miguel Naval Air Station. Liza, the prosecutrix in the case, worked in housekeeping and cleaned Captain Watson's room as part of her regular duties. On one occasion, Captain Watson was present when Liza entered to clean. According to Liza, Captain Watson pushed her onto the bed and laid on top of her. She asked him to let her go, but he refused. Instead, he held her arms above her head with one hand and fondled her breasts and "private parts" with the other hand. She physically resisted and told Captain Watson to stop. He persisted and ultimately penetrated her vagina with his penis. Captain Watson contended that the entire episode culminating in intercourse was consensual. He testified that throughout the foreplay she did not complain. However,

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[155] 2002 MCM, *supra* note 148 pt. IV, ¶ 45c(1)(b).

[156] United States v. Bonano-Torres, 31 M.J. 175, 179 (C.M.A. 1990).

[157] United States v. Watson, 31 M.J. 49, 52 (C.M.A. 1990).

[158] *Id.*

after intercourse began, he noticed she was crying, and she said he was hurting her; so he discontinued the intercourse.[159]

A military judge convicted Captain Watson of the lesser crime of indecent assault, finding that there was some additional affirmative duty or requirement that a victim must perform before a charge of rape could stand. On appeal, Captain Watson contended that a not guilty finding of rape was inconsistent with a finding of guilty to indecent assault. The Court of Military Appeals found it "bewildering" that the "military judge could seemingly have found such an independent, affirmative duty on the part of a rape victim."[160]

Just fifteen days after *Watson*, the Court of Military Appeals decided a case where the court held a victim did not resist sufficiently: *United States v. Bonano-Torres*.[161] In cases where constructive force did not exist and the victim was fully capable of resisting, the court ruled that the force must be greater than the "incidental force involved in penetration."[162] Satisfying the second element required enough force to overcome the victim's will and capacity to resist.[163]

Staff Sergeant Bonano-Torres and Specialist SLC (a female) went out socially one evening after work. Specialist SLC consumed more alcohol than normal and the accused accompanied Specialist SLC back to her hotel room. During the night, Specialist SLC occasionally awoke from either her alcohol-induced unconsciousness or sleep to discover the

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[159] *Id.*

[160] *Id.*

[161] 31 M.J. 175, 179-80 (C.M.A. 1990).

[162] United States v. Bonano-Torres, 31 M.J. 175, 179 (C.M.A. 1990) (citing United States v. Short, 16 C.M.R. 11, 16 (C.M.A. 1954)).

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

accused fondling her breasts and undressing her, and preparing to engage in sexual intercourse with her. Specialist SLC testified that the accused was very persistent and would continue to harass her. She wanted to go to sleep and knew that if the accused got what he wanted he would leave her alone. Specialist SLC permitted the accused to have sexual intercourse with her. She did not yell, scream, or attempt to leave the hotel room.[164]

The *Bonano-Torres* court cited *United States v. Watson* and rejected the appellant's invitation to establish resistance as a necessary element of rape.[165] The *Bonano-Torres* court emphasized a "totality of the circumstances" approach to determine if the victim sufficiently manifested her lack of consent to the accused.[166] In order to determine whether or not an accused exerted physical force to overcome the victim's will and capacity to resist, the finder of fact must evaluate all of the circumstances surrounding the sexual intercourse.[167] Relevant evidence includes the actions of the victim as well as the actions of the accused.[168] "Proof of resistance – or lack thereof – is highly significant in all rape cases where the victim has the capacity to resist. From evidence of resistance, the finder of fact may draw inferences as to the victim's state of mind on the factual issue of consent, and the accused's state of mind regarding the affirmative defense of mistake of fact."[169] The courts also consider the

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[164] *Id.* at 176.

[165] *Id.* at 179.

[166] *Id.* at 177.

[167] *Id.*

[168] *Id.* at 178.

[169] *Id.* (citing United States v. Williamson, 24 M.J. 32, 34 (C.M.A. 1984)); *see e.g.*, United States v. Carr, 18 M.J. 297, 299 (C.M.A. 1984) (holding "[w]hile resistance is tangentially probative of the issues of consent and mistake of fact, proof of resistance is central to finding the element of force")

victim's age, strength, and the surrounding circumstances.[170] Ultimately, to determine actual force, the courts apply a reasonable victim standard where "[f]orcible compulsion becomes the force necessary to overcome reasonable resistance."[171]

4. Constructive Force

In constructive force cases, the finder of fact evaluates all the circumstances of the sexual intercourse in order to determine whether or not a victim freely consented or whether the victim failed to resist because of a reasonable fear of death or grievous bodily harm.[172] "In order to apply the doctrine of constructive force, a court must find that the 'resistance would have been futile,' resistance was 'overcome by threats of death or great bodily harm,' or 'the female is unable to resist because of the lack of mental or physical faculties.'"[173] If the finder of fact determines that the evidence shows the victim failed to resist under such circumstances, the "by force and without consent" element is satisfied, requiring no more force than is incidental to penetration.[174]

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[170] *See* United States v. Palmer, 33 M.J. 7, 10 (C.M.A. 1991).

[171] *See id.*; *see also* United States v. Henderson, 15 C.M.R. 268, 273 (C.M.A. 1954); United States v. Webster, 40 M.J. 384, 387 (C.M.A. 1994) (citing Estrich, supra note 2, 1105–21 (1986).

[172] Clark, 35 M.J. at 435–36.

[173] *Id.* (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45c(1)(b) (1985) [hereinafter 1985 MCM]. "Use of the doctrine of constructive force to satisfy an element of the crime of rape dates back at least as far as 1917, when the Manual for Courts–Martial provided: "Force, *actual or constructive,* and a want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient force where there is in fact no consent." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1917, at 251. Colonel Winthrop discussed the topic of force necessary to accomplish rape in 1886, saying: "It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion." WINTHROP, *supra* note 137, at 677–78 (2d ed. 1920 Reprint).

[174] Examples of scenarios in which resistance might be futile, overcome by threats of death or great bodily harm, or lack of mental or physical faculties are: (1) overt or implied threats; (2) abuse of military power/position; (3) parental compulsion; (4) child of tender years; (5) parental compulsion with a child of tender years; (6) mental infirmity; and (7) incapacity due to sleep, unconsciousness, or intoxication. U.S. DEP'T

5. Mistake of Fact

When the victim of an alleged rape was not a child, mistake of fact was an affirmative defense to rape in military courts.[175] Mistake of fact as to consent meant that 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, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake could not be based on the negligent failure to discover the true facts. "Negligence" was the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.[176]

In deciding whether or not the accused reasonably believed the victim consented, the finder of fact needed to evaluate all of the evidence to determine the probability of mistake of fact. The United States Army Court of Military Review (ACMR) looked to the totality of the circumstances in the case of *United States v. King*.[177] Captain King was working behind the bar at a tavern when Mrs. R arrived to meet friends. When she did not find her friends, she sat down at the bar, ordered a drink and struck up a conversation with Captain King.[178] After

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OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, 459 (1 JAN. 2010) [hereinafter BENCHBOOK] at 459–479.

[175] United States v. Carr, 18 M.J. 297 (C.M.A. 1984)(holding "[u]sually an honest and reasonable mistake of fact is a defense, even in a crime involving general criminal intent. . . . Likewise we perceive no occasion to deviate in rape cases from the principle that an accused can be excused by and honest and reasonable mistake of fact."). *Id.* at 301.

[176] BENCHBOOK, *supra* note174, at 491-92.

[177] 32 M.J. 558 (C.M.A. 1991).

[178] *Id.* at 560.

talking for a while, Captain King invited Mrs. R back to his apartment to hear a song he had just written.[179] Witnesses saw the pair holding hands and sitting close together in a pick-up truck when they departed. On arriving to his apartment, Captain King led Mrs. R to a bedroom, played his guitar and sang two songs to her. One of those songs caused Mrs. R to become teary-eyed. Upon seeing the emotional reaction, Captain King hugged Mrs. R and led her to his bed. He began undressing himself and Mrs. R finished undressing herself. Captain King and Mrs. R had sexual intercourse in several different positions. Captain King requested Mrs. R perform oral sex on him, but she refused. Although she stated that "[they] really should not be doing this," she continued to participate in the sexual intercourse without resisting or complaining. After the intercourse was over, Captain King went to his bathroom and Mrs. R remained on the bed without attempting to leave. Captain King drove her back to her car. Upon returning to her home, Mrs. R told her husband that Captain King had raped her. The medical examination later that night confirmed that Mrs. R had had sexual intercourse that night but did not disclose any physical evidence that would support an inference of force.[180]

A military judge convicted Captain King contrary to his pleas.[181] His approved sentence included dismissal from the service, confinement for fourteen years, and total forfeitures of all pay and allowances.[182] Upon review, the ACMR ruled that the government failed to prove beyond a reasonable doubt that the accused did not have a reasonable belief the victim

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[179] *Id*. at 561.

[180] *Id.* at 561–62.

[181] *Id.* at 559.

[182] *Id.* at 559.

consented.[183] The court referenced the totality of the circumstances, the romantic contact between the two, the ability to say "no" to oral sodomy, lack of sobbing or crying, Mrs. R's lack of communication of non-consent, and Mrs. R's failure to attempt to leave. The court concluded, "[a]s to the element of force, the totality of the evidence does not suggest forcible sexual intercourse."[184] The court set aside the findings of guilty to the rape charge and its specification and dismissed the charge.[185]

C. 2007 Reform

On the 50th anniversary of the UCMJ, Congress called for interested organizations to complete a critical appraisal of the Code and evaluate the need for change.[186] The National Institute of Military Justice and the George Washington University Law School in Washington, D.C. co-sponsored a *Commission on the 50th Anniversary of the Uniform Code of Military Justice.*[187] Recently retired Senior Judge Walter T. Cox, III chaired the Commission, called the Cox Commission. The Cox Commission issued its report in May 2001.[188] Significantly, the Commission recommended revision of Article 120 to create a comprehensive sexual assault article.[189] Congress did not act on the Cox Commission recommendations at that time.

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[183] *Id.* at 563-64.

[184] *Id.*at 564.

[185] *Id.*at 564.

[186] *See* Floyd D. Spence National Defense Authorization Act, Pub. L. No. 106-398, 114 Stat. 1654 § 556 (2000).

[187] *Id.*

[188] COX COMMISSION REPORT, *supra* note 10, at 11–12.

[189] *Id.*

In 2003 the United States Air Force Academy faced allegations of mishandling of sexual assault complaints.[190] These allegations piqued Congressional interest in sexual assault in the military. When Congress passed the National Defense Authorization Act of 2005, it directed the Department of Defense to take significant action to address sexual assault in the military.[191]

As a result, the JSC proposed six options to "clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment [and] find a balance between conforming the format of the UCMJ and MCM to the format in Federal law."[192] The members of the JSC evaluated the six options and discussed them extensively.[193] Support was not unanimous for any particular option.[194] The subcommittee members initially disagreed on how to rank the different options from least preferential to best option. They eventually settled on a continuum of options with Options 1 recommending no change and Option 6 recommending the greatest change.[195] Ultimately, the JSC determined that Congress intended to conform the UCMJ to Title 18[196] and "Option 5" best achieved conformity along with taking into account unique military requirements.[197]

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[190] INSPECTOR GENERAL, US AIR FORCE, SUMMARY REPORT CONCERNING THE HANDLING OF SEXUAL ASSAULT CASES AT THE UNITED STATES AIR FORCE ACADEMY (2004).

[191] NDAA FY05, *supra* note 12, at § 576.

[192] Principle Deputy General Counsel, U.S. Dep't of Def, *supra* note 17.

[193] DOD SEX CRIMES REPORT, *supra* note 3, at 3.

[194] *Id.*

[195] Option 6 recommended all of the changes in Option 5, however it also included separating the sexual acts of sodomy from intercourse, resulting in five additional crimes. *Id.* at 5.

[196] Rape is grouped with all forms of non consensual sexual acts under chapter 109a of the United States Code. 18 U.S.C.§§ 2241–2248 (2007).

[197] DOD SEX CRIMES REPORT, *supra* note 3, at 3, app. E (2005).

Fifteen months later, Congress accepted Option 5 and revised Article 120 UCMJ. The "new Article 120" took effect on 1 October 2007 and incorporated all of the sexual assault provisions into one article,[198] with the exception of sodomy which remained prohibited under Article 125.[199]

Central to the 2007 Article 120 was the treatment of consent. As discussed above, under the pre-2007 Article 120, the prosecution had to prove that the victim did not, or could not, consent whether due to actual or constructive force. The 2007 Article 120 defined consent as "words or overt acts indicating freely given agreement to the sexual conduct at issue by a competent person."[200] Consent and mistake of fact as to consent were affirmative defenses only to four specific offenses: rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.[201] Additionally, the defense had the burden of proving the existence of the affirmative defense by a preponderance of the evidence.[202] After the defense met this burden, the prosecution had the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.[203]

The 2007 Article 120 statute did not work as intended at trial because the allocation of burdens of proof relating to the mistake of fact defense violated due process by shifting the burden to the defense to disprove an element of the offense. Specifically, the defense had to

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[198] The 2007 Article 120 encompassed sexual conduct ranging from most severe (Rape) to least severe (Indecent Exposure). 2012 MCM, *supra* note 7, app. 28, ¶45.

[199] NDAA FY06, Pub. L. No. 109-163, §552, 119 Stat. 3136, 3256-63.

[200] 2008 MCM, *supra* note 220, ¶45(t)(7).

[201] *Id.*, pt IV, ¶45(r).

[202] *Id.,* pt IV, ¶45(t)(16).

[203] *Id.*, pt IV, ¶45(t)(16).

disprove an implied element or fact essential to the offense of aggravated sexual assault – consent.[204] Substantial incapacity and consent are "two sides of the same coin" because under the statute a person cannot consent to sexual activity if incapacitated from consumption of alcohol.[205]

In the 2011 case of *United States v. Prather*, the Court of Appeals for the Armed Forces (CAAF) agreed that if an accused proved that the victim consented, the accused had necessarily proven that the victim had the capacity to consent.[206] This logically resulted in the accused having disproved an element of the offense of aggravated sexual assault—and impermissibly shifted the burden of proof.[207]

The 2007 statute also created an illogical second burden shift to the government to disprove an affirmative defense beyond a reasonable doubt. The burden shift was illogical because if the defense raised consent by a preponderance of the evidence[208], then by definition, the defense raised reasonable doubt.[209] The government thus failed to prove its case beyond a reasonable doubt.[210] The second burden shift back to the government to then prove lack of consent beyond a reasonable doubt was legally impossible.[211]

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[204] United States v. Prather, 69 M.J. 338, 341 (C.A.A.F. 2011).

[205] *Id.*

[206] Prather, 69 M.J. at 343.

[207] *Id.* at 342-43.

[208] The preponderance of the evidence is evidence which is of the greater weight or more convincing than the evidence which is offered in opposition to it. BLACK'S LAW DICTIONARY 1301 (9th ed. 2009).

[209] Prather, 69 M.J. at 345.

[210] *Id.*

[211] *Id*.

Aside from being legally flawed, the Defense Task Force on Sexual Assault in the Military Services reported to the Secretary of Defense and the Service Secretaries that the new Article 120 was also ineffective.[212] As part of its findings regarding the military justice process, the Defense Task Force found that the 2007 Article 120 was "cumbersome and confusing and . . . may lead to unwarranted acquittals."[213] The Task Force noted CAAF review of constitutional issues as well as confusion surrounding lesser-included offenses in both charging decisions and panel instructions.[214] The Task Force recommended a follow-up review by military justice experts of the effectiveness of the 2007 Article 120.[215]

D. The 2012 Article 120

During 2011, Congress took JSC's recommendation and ratified an amendment to Article 120.[216] The amended statute took effect on June 28, 2012.[217] The 2012 Article 120 has four categories: Article 120, Adult Crimes; Article 120a, stalking; Article 120b, Child Crimes; and Article 120c, Other Sexual Misconduct.[218]

"Commission of a sexual act" is the primary element of both Rape and Sexual Assault under the 2012 statute.[219] Prior statutes defined "sexual act" as penetration of either the

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[212] 2009 DFTSAMS Report, *supra* note 6, at 81.

[213] *Id*.

[214] For an example of confusion in charging, *see* United States v. Stewart, 71 M.J. 38, 40 (C.A.A.F. 2012).

[215] 2009 DFTSAMS Report, *supra* note 6, at 80.

[216] National Defense Authorization Act for Fiscal Year 2012 (NDAA FY12), H.R. 4310, § 573, 112th Cong. (2d. Sess. 2011).

[217] Many judge advocates referred to the statute as the "new, new Article 120" in jest.

[218] The following offenses fall under Article 120, Adult Crimes: Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact. *Id.* Stalking was already prohibited under UCMJ Art 120(a). 2012 MCM, *supra* note 7, pt IV, ¶45.

[219] 2012 MCM, *supra* note 7, pt. IV, ¶45.

vulva or the ″genital opening.″[220] The 2012 statute is gender neutral, but more importantly, expands the definition of "sexual act" considerably by adding penetration of the vulva, anus, or mouth, by a penis, or any other body part.[221]

The 2012 Article 120 shifts the focus more to the offender than the prior statutes did. Under the 2012 statute, a person who commits a sexual act upon another is guilty of rape if the person does so in one of five ways: (1) by force; (2) using force causing or likely to cause grievous bodily harm; (3) threatening grievous bodily harm; (4) rendering the victim unconscious; or (5) administering a drug.[222]

The 2012 law completely revised the 2007 statute's definition of force in order to remove its victim-centric language and focus on the acts of the offender. The 2007 statute defined force as "action to compel submission of another or to overcome or prevent another's resistance,″ using or suggesting use of a dangerous weapon, or by "physical violence, strength, power or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct."[223] The victim was required to resist the assault, a requirement all but eliminated from any other rape statute in civilian jurisdictions, and absent in other assault-type statutes. The 2012 statute takes an objective approach with regard to offender behavior. Force is now defined as "use of a weapon; the use of such physical strength or violence sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to

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[220] *See, e.g.*,2005 MCM, *supra* note 7 pt IV, ¶45; MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 28, ¶45 (2012) [hereinafter 2008 MCM] (reprinting the UCMJ Art. 120(a) from Oct. 07 to June 12).

[221] UCMJ Art. 120 (2012). If the sexual act involves another body part other than a penis, the statute contains the added requirement of the specific intent "to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.″ 2012 MCM, *supra* note 7, pt. IV, ¶45(g)(1)(B).

[222] *Id*.

[223] 2008 MCM, *supra* note 220, pt IV, ¶45(t)(5).

coerce or compel submission by the victim."[224] The 2012 statute also added the requirement that the force be "unlawful," meaning without justification or excuse.[225]

The 2012 statute amends the second way an offender can be guilty of rape by adding "or likely to cause grievous bodily harm" to the 2007 statute's element "causing grievous bodily harm." The remaining three ways an offender can be guilty of rape remain the same as the 2007 Article 120.

The 2007 statute included the offense of Aggravated Sexual Assault.[226] The 2012 statute titles the very same offense "Sexual Assault."[227] The following are ways in which an offender can be guilty of Sexual Assault (a "Sexual Act" is an element of each): (1) threatening or placing another person in fear; (2) causing bodily harm—meaning an offensive touching "however slight;" (3) fraud; and (4) misrepresentation.[228]

The 2012 statute also contains changes that affect cases involving impaired victims—the circumstances which comprise the vast majority of sexual assault cases in the military.[229] The 2007 statute made a sexual act illegal if the victim was "substantially incapacitated" or "substantially incapable of appraising the nature of the act, declining participation in the act, or communicating unwillingness to engage in the act."[230] Trial counsel and defense counsel presented forensic toxicologists to testify about blood alcohol levels and reverse

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[224] 2012 MCM, *supra* note 7, pt. IV, ¶ 45.a.(g)(5).

[225] *Id.*, pt. IV, ¶ 45.a.(g)(6).

[226] 2008 MCM, *supra* note 220, pt. IV, ¶ 45.a.(d).

[227] This is generally a result of criticism that there was no regular sexual assault offense and thus an "aggravated" statute was illogical.

[228] 2012 MCM,, *supra* note 7, pt. IV, ¶ 45.

[229] *See infra* note 377 and accompanying text.

[230] 2008 MCM, *supra* note 220, pt. IV, ¶ 45.

extrapolation of blood alcohol concentration (BAC) in an effort to demonstrate substantial incapacitation at the time of the sexual act or disprove that element.[231] Even with expert testimony, substantial incapacitation was difficult to define for the fact-finder. It was not statutorily defined under the 2007 statute and the testimony would focus on the behavior and mental state of the victim rather than that of the accused.

The 2012 statute requires proof of what the offender knew, or "reasonably should have known" about the victim's capacity—a negligence standard.[232] A sexual act is criminal if the offender knows, or reasonably should know, that the other person is "asleep, unconscious, or otherwise unaware that the sexual act is occurring."[233] The statute remains difficult in that "otherwise unaware" is indistinct and nowhere defined.[234]

The 2012 statute also criminalizes a sexual act with a conscious but impaired person or a mentally ill person. The statute requires proof that the person was incapable of consenting to the sexual act due to "impairment by any drug, intoxicant, or other similar substance, or due

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[231] Jan Semenoff, Advanced Issues in Breath Alcohol Testing–Shifting Paradigms, presented at the TACDL DUI Seminar (Oct. 30-31, 2008), *available at* http://www. dwidude.com /documents/TACDLDUI.pdf. The *Widmark Ratio*, is the proportion of the concentration of ethanol in the body to the concentration of ethanol in the blood. *Id.* Forensic toxicologists use the *Widmark Ratio* to estimate what a person's blood alcohol level may have been several hours before a given event. *Id.* In 1932, Dr. Erik M.P. Widmark of the University of Lund in Sweden formulated *Widmark's Ratio* in response to a request from the US Department of Justice, Bureau of Prohibition. *Id. Widmark's Ratio* has been used since its initial postulation 80 years ago. *Id.* Widmark used only 20 men, and 10 women in his initial formulation of the ratio, therefore his sampling population is widely considered too small to provide a statistically valid result. *Id.* Some experts feel that back extrapolation is an unsound process, as there are too many physiological factors that affect an individual during the alcohol elimination phase. *Id.* at 6.

[232] 2012 MCM, *supra* note 7 pt. IV, ¶ 45.a(b)(2).

[233] *Id*.

[234] *See id*.

to "mental disease or defect, or physical disability" and that condition is "known or reasonably should be known" by the accused.[235]

E. Cultural Change in the Military

While women moved into the workforce in civilian society, effecting changes such as rape reform, integration of women into the armed forces lagged significantly behind.

> In every time of crisis, women have served our country in difficult and hazardous ways . . . women should not be considered a marginal group to be employed periodically only to be denied opportunity to satisfy their needs and aspirations when unemployment rises or a war ends.[236]

President John F. Kennedy made this remark as part of his address at the Launch of the Commission of the Status of Women in December of 1961.[237] As discussed above, the Equal Pay Act passed in 1963 and subsequently President Johnson signed an Executive Order eliminating sex discrimination in the civil service.[238] The Civil Rights act of 1964 banned workplace discrimination on the basis of sex—except in the armed forces.[239]

Although women served in every major war since the American Revolution, they did not officially begin to serve in the American Armed Forces until 1901.[240] It was not until 1942

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[235] 2012 MCM *supra* note 7, pt. IV, ¶ 45.a.(b)(3).

[236] President John F. Kennedy, Remarks at the Launch of the Commission of the Status of Women (Dec. 141961), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=8483.

[237] *Id.*

[238] *Supra* note 62and accompanying text.

[239] *See* 42 U.S.C. § 1981 (1964).

[240] Barbara Brehm, Captain, U.S. Navy, ret., at the Fourth Annual Gender, Sexuality, and the Law Symposium: Gender and Sexual Orientation in the Military (transcript available at 3 GEO. J. GENDER & L. 113, 114–15 (2001). Women like Deborah Sampson hid their gender in order to fight during the Revolutionary War. *Id.* Her gender was discovered when she was injured. Dr. Mary Walker was a physician, but the Army only allowed her to enter as a nurse to tend to wounded during the Civil War. *Id.* The Army also allowed women to serve as contract nurses during the Spanish American War. Dr. Anita McGue created the Army Nurse Corps in 1901, marking the date women first served officially in uniform in the armed forces *Id*.

with the creation of the Women's Auxiliary Corps (later renamed Women's Army Corps), that women were allowed to serve in uniform in very limited capacities.[241] The rest of the services established their own auxiliary women's services in 1942.[242] During World War II, between 350 and 400 thousand women served in the armed forces. When the war ended, the women mainly demobilized.[243] The Chief of Staff of the Army, General Eisenhower, had positive experiences with the women of the Women's Army Corps and did not want them disbanded.[244] On June 12, 1948, the Women's Armed Services Integration Act[245] was passed and signed, giving women permanent status to stay in the military.[246] The status, however, was extremely restrictive. Women could comprise no more than two percent of the force, could report only to other women, and could only serve aboard hospital ships or transports.[247] Additionally, each service could have only one female colonel (or Navy captain).[248] During Korea, there were 48,000 women serving in a variety of capacities; however, after the conflict ended, women resumed work in primarily administrative and medical functions. [249]

There was little change in the status of women in the armed forces until 1967 with the passage of Public Law 90-130 which increased the cap on the number of women who could

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[241] *See id.*

[242] *Id. at* 115.

[243] *Id*.

[244] *Id.*

[245] 62 Stat. 356 (June 12, 1948).

[246] *Id.*

[247] *See* Brehm, *supra* note 240, at 115.

[248] *Id*. at 116.

[249] *Id.*

serve and increased the cap on women's promotions. Women were also allowed to serve as crew members on the hospital ship *USS Sanctuary*, where previously they only served as medical personnel.[250]

In 1973, the Chief of Naval Operations, Admiral Zumwalt, permitted women to enter aviation training in the Navy, though they were not able to serve in combat.[251] The Army followed suit in 1974 and the Air Force in 1976. In 1975, President Ford signed a law finally granting women entry into the service academies.[252] In 1978, Congress repealed the law prohibiting women from serving on Navy ships and women were allowed to go to sea as crewmembers on noncombat vessels.[253]

During the 1980s, little changed to further open doors to women in the armed forces. Then during Desert Shield/Desert Storm in the early-1990s, 41,000 women—or 7% of the force—were serving in the Middle East.[254] This set the stage for a legal battle to allow women greater roles in the armed forces. In 1991, Congress repealed the law that prohibited women from flying combat aircraft.[255] President George H. W. Bush created the Commission on the Assignment of Women in the U.S. military.[256] The Commission

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[250] *Id*. at 117.

[251] *See id.*

[252] *See id.* at 118; Department of Defense Appropriation Authorization Act of 1975, Pub. L. No. 94-106, 89 Stat. 531, (1975).

[253] 10 U.S.C. § 6016 (1978).

[254] *See* Brehm, *supra* note 240, at 118.

[255] National Defense Authorization Act for Fiscal Year 1992, Pub. L. No. 102-190, 105 Stat.1365, § 531(b) (1991).

[256] *See* Brehm, *supra* note 240, at 118.

published a report two months before President Bush left office.[257] President Clinton implemented one of the report's recommendations when he signed a changed to Section 6015 of Title X allowing women to go to sea aboard combat vessels (except submarines).[258]

On January 13, 1994, Secretary of Defense Les Aspin issued a memorandum, titled "Direct Ground Combat Definitions and Assignment Rule"[259] (Aspin Memorandum) to provide consistency among the military services and to "expand opportunities for women."[260] In reality, the Aspin Memorandum provided a list of assignment restrictions that the services could impose on women.[261] The Aspin Memorandum was the official policy regarding assignment of women until January 24, 2013 when Secretary Panetta announced its rescission.[262] "The Department of Defense is determined to successfully integrate women into the remaining restricted occupational fields within [the] military."[263]

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[257] *See id.* at 118; PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, REPORT TO THE PRESIDENT (1992). In light of women's performance in the Persian Gulf, Congress focused on the repeal of combat exclusion laws. The Presidential Commission on the Assignment of Women in the Armed Forces conducted a research study to assess the assignment of servicewomen and submit a report of recommendations, findings, and conclusions. *Id.* at i – iii.

[258] *Id*. at 118-119; Martha E. McSally, *Defending America in Mixed Company: Gender in the U.S. Armed Forces*, 3 DAEDALUS 148, 156 (2011).

[259] Memorandum from Sec'y of Def., to Sec'y of Army et al., subject: Direct Ground Combat Definition and Assignment Rule. (13 Jan. 1994) [hereinafter Aspin Memorandum] *available at* http://big.assets.huffingtonpost.com/DirectGroundCombatDefinitionAndAssignmentRule.pdf

[260] Shelly S. McNulty, *Myth Busted: Women Are Serving in Ground Combat Positions*, 68 A.F. L. REV. 122 (2012) (citing the Aspin Memorandum, *supra* note 259).

[261] McNulty, *supra* note 261. Notably, the Coast Guard, which falls under the Department of Homeland Security, does not have any assignment restrictions based on gender. All assignments have been open to women since 1978. *Id.*

[262] Press Release, U.S. Dep't of Def, U.S. Dep't of Def. Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), *available at* http://www.defense.gov/releases/release.aspx?releaseid=15784.

[263] *Id.*

Although women's roles in the armed forces have increased since 1901, equality for women has progressed much more slowly in the military than it has in civilian society. Arguably it still has a long way to go. Women comprise almost 51% of the U.S. population, yet today compose only approximately fifteen percent of the total active duty military and a mere six percent of all senior officers.[264] Military culture is part of American culture, but in many ways has its own unique values, rules, customs, and norms, and is far from gender-blind, or even appearing so.[265] Despite females comprising fifteen percent of the military population, "the military is the last bastion of manhood. It is a male-defined space where thongs of men (and women) are prepared to fight tooth and nail to maintain is masculine nature."[266]

F. The U.S. Military Has Not Been a Battlefield for Feminists

The advancements women have made in the military owe some acknowledgment to feminism in that the feminist movement advanced acceptance of women in nontraditional occupations generally. The slow increase of women's involvement in the military, however, has occurred outside the sphere of feminist influence and activities.[267] The feminist movement existed alongside the antiwar movement in the United States and feminists avoided the issue of war and women soldiers. Feminists realized that taking up the cause of women's opportunities in the military was ideologically awkward for them. "Feminists have

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[264] Yochi J. Dreazen, *Women Fighting the Nation's Wars*, NAT'L J., Nov. 5, 2011, at 13; *see also,* McSally, *supra* note 258, at 151.

[265] Dreazen, *supra* note 264.

[266] Anne M. Coughlin & Blake Points, *Women and the Military*, IRIS: J. ABOUT WOMEN, SEPT. 22, 2002, at 39

[267] "The increased utilization of women in the military after 1973 until at least the early 1990s, it must be stressed, was connected primarily with military necessity not direct feminist pressure." Regina Titunik, *The Myth of the Macho Military*, 40 POLITY 137, 139 (2008) (citing Mady Wechsler Segal, *Women's Military Roles Cross-Nationally: Past, Present and Future*, 9 GENDER & SOC'Y 757–75 (1995)).

not been able to decide whether women should join the military as equals or use the achievement of gender equality to put an end to the scourge of war that men have perpetrated."[268] Thus, feminists were relatively ambivalent toward the issue of women in the military.[269]

Likewise, most military women have not embraced feminism.[270] Military women tend to be much like military men in their conservative and ideological attitudes and their respect for the traditions of the military. Servicemembers, regardless of gender, seem to gain satisfaction from a life of service and sacrifice and generally focus more on a sense of duty than on individual rights.[271]

The feminist movement in the 1970s, credited for propelling rape law reform in civilian society, largely disregarded servicewomen issues – until the Tailhook scandal.[272] In 1991, during the annual Tailhook Convention of Naval and Marine aviators in Las Vegas, twenty-six women were groped and molested when forced to pass by the male aviators lined up for this very purpose.[273] The political and media attention on the Tailhook scandal heightened sensitivity toward servicewomen's issues. Additional scrutiny of the military occurred in

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[268] Titunik, *supra* note 267, at 139 (citing JEAN BETHKE ELSHTAIN, WOMEN AND WAR 231 (1995)).

[269] Regina F. Titunik, *The First Wave: Gender Integration and Military Culture*, 26 ARMED FORCES & SOC'Y, 229, 245 (2000) (citing Cynthia H. Enloe, *The Politics of Constructing the American Woman Soldier*, WOMEN SOLDIERS: IMAGES AND REALITIES 89 (1994)).

[270] *See* Titunik, *supra* note 269, at 246.

[271] *Id.* at 246 (citing HELEN ROGAN, WOMEN IS THE MODERN ARMY 303 (1981)).

[272] *See* Ross, *supra* note 36, at 803; Titunik, *supra* note 267, at 139 (citing Cynthia H. Enloe, *The Politics of Constructing the American Woman Soldier*, WOMEN SOLDIERS: IMAGES AND REALITIES 89 (1994)); Titunik at 142 ("These scandals bought further attention to the issue of gender integration in the armed forces and energized feminist critics of the military.").

[273] Titunik,*supra* note 267, at 142

1996 when male Army drill sergeants were sexually assaulting female soldiers participating in advanced training at Aberdeen Proving Ground.[274]

In 2003, an anonymous e-mail sent to members of Congress and the media asserted that there was a sexual assault problem at the Air Force Academy that had been ignored by the Academy's leadership.[275] Congress directed the Secretary of Defense to appoint seven private citizens with expertise in the United States military academies, behavioral and psychological sciences, and standards and practices relating to the proper treatment of sexual assault victims to conduct an independent review of misconduct allegations at the Air Force Academy.[276] Those experts comprised the Fowler Panel and issued a report on September 22, 2003.[277] The following April, Representative Duncan Hunter introduced the bill that became the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005. The Act directed the Department of Defense to improve the ability of the military justice system to handle sexual assault cases and to conform the UCMJ and the MCM more closely to other federal laws and regulations addressing sexual assault.[278]

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[274] *Id.* at 143.

[275] INSPECTOR GENERAL, US AIR FORCE, SUMMARY REPORT CONCERNING THE HANDLING OF SEXUAL ASSAULT CASES AT THE UNITED STATES AIR FORCE ACADEMY, *supra* note 11.

[276] *Id.*

[277] Congress directed the Fowler panel carry out a study of the policies, management and organizational practices, and cultural elements of the United States Air Force Academy that were conducive to allowing sexual misconduct (including sexual assaults and rape) at the United States Air Force Academy. Pub. L. No. 108-11, 117 Stat. 559 (Apr. 16, 2003); REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (2003), *available at* http://www.defense.gov/news/Sep2003/d20030922 usafareport.pdf.

[278] NDAA FY05 Pub. L. No. 108-375, § 576, 118 Stat. 1811, 1924–26 (2005).

As a result of this Act, as discussed *supra,*[279] the JSC proposed changes intended to "clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment [and] find a balance between conforming the format of the UCMJ and MCM to the format in Federal law."[280] Congress took the JSC proposal and amended Article 120 UCMJ. The "new Article 120" took effect on 1 October 2007.[281] As discussed, *supra,* the statute faced, and failed, a constitutional due process challenge and was cumbersome and confusing.[282] Congress called for its review.

IV. The Perfect Storm

> Perfect Storm (noun): a critical or disastrous situation created by a powerful concurrence of factors.[283]

A. Concurrence of Factors

In 2011, a critical situation captured the attention of the nation – an "epidemic of rape in the armed forces."[284] According to one article, "[t]he mounting pressure on the military to confront what's been deemed an 'epidemic' of rape and sexual assault within its ranks hit a new stride . . . with three separate developments—stemming from three different sources—

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[279] *See supra* Part III.C.

[280] Letter from Principle Deputy General Counsel, U.S. Dep't of Def., Office of the General Counsel, to Chair, Comm. on Armed Serv. *supra* note 17.

[281] NDAA FY06, Pub. L. No. 109-163, §552, 119 Stat. 3136, 3256-63 (2006).

[282] *See supra* Part III.C.

[283] *Perfect Storm Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com (last visited Jan. 7, 2013).

[284] THE INVISIBLE WAR *supra* note 30.

coming to a head in the nation's capital."[285] There were at least seven key developments that fueled the storm.

On April 13, 2011, Iowa Congressman Bruce Braley introduced H.R. 1517, the Holley Lynn James Act.[286] Holley Lynn James was a second lieutenant in the Army whose Marine Corps husband, John Wimunc, murdered her in 2008. James had filed domestic violence complaints against her husband; however, neither the Army nor the Marine Corps protected her.[287] The Act called for automatic referral of all sexual assault cases to a general court-martial convening authority.[288] The Act also called for the services to provide an attorney to the victim, victim right to appeal a general court-martial decision, and for the JSC to amend the MCM to codify these changes.[289]

Later that year, on September 6, 2011, twenty-eight former service members filed a lawsuit against Leon Panetta and former secretaries of defense claiming they were raped, sexually assaulted or harassed while on military duty.[290] The plaintiffs alleged that military personnel were not protected from sexual harassment and assault, perpetrators were promoted, plaintiffs and other victims were openly retaliated against and "ordered to keep

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[285] Jesse Ellison, *Will the Military Finally Confront its Rape Epidemic?,* DAILY BEAST (Nov 19, 2011), http://www.thedailybeast.com/articles/2011/11/19/will-the-military-finally-confront-its-rape-epidemic.

[286] Holley Lynn James Act, H.R. 1517, 112th Cong. § 940A (2011).

[287] *See* Mike Navarre, *Introducing the Holley Lynn James Act*, CAAFLOG (Apr. 22, 2011), http://www.caaflog.com/2011/04/22/introducing-the-holley-lynn-james-act.

[288] Holley Lynn James Act, H.R. 1517, 112th Cong. § 940A (2011).

[289] *Id.*

[290] Jury Demand, Klay v. Panetta, no. 1:11cv00151, (E.D. Va. Sept. 6, 2011) (dismissed).

quiet" about their colleagues' crimes, and congressionally mandated reforms were mocked.[291]

On November 16, 2011, California Congresswoman Jackie Speier introduced H.R. 3435, the "Sexual Assault Training Oversight and Prevention Act" or the "STOP Act." This Act seeks to establish a "Sexual Assault Oversight and Response Council," composed mainly of civilians, as an independent entity from the chain of command of the Department of Defense. The act also calls for the position of Director of Military Prosecutions, appointed by the Council, to have independent and final authority to oversee the prosecution of all sexual-related offenses committed by a member of the Armed Forces, and to refer such cases to trial by courts-martial.[292]

Also in 2011, Director and Screenwriter Kirby Dick completed a documentary titled "*The Invisible War"* purporting to expose the "rape epidemic in the armed forces." The film features interviews with male and female survivors of military sexual assault. In the film, many of the women are shown working with a plaintiff's attorney preparing to file the lawsuit filed in 2011. The film also includes interviews and C-Span footage with senators and representatives from both parties, calling for changes to the way the military handles sexual assault. This film won an award at the 2012 Sundance Film Festival in the U.S. Documentary category.[293] The film garnered national media attention and captured policy-maker attention.

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[291] *Id.* at 4.

[292] STOP Act, H.R. 3435, 112th Cong. §§ 145, 940A (2011).

[293] THE INVISIBLE WAR, *supra* note 30.

In February 2012, Representatives Niki Tsongas (Democrat - Massachusetts) and Michael Turner (Republican - Ohio) were among a bipartisan group of senators and representatives who hosted a special congressional screening of *The Invisible War.* On March 6, 2012, Secretary Panetta, along with former defense secretaries Robert Gates and Donald Rumsfeld, was named in another lawsuit, *Klay v. Panetta*, holding them accountable for an environment in which rape is rampant and victims are subject to retaliation.[294]

On April 16, 2012, Secretary Panetta made an "unprecedented" visit to Capitol Hill, where he met with Representatives Turner, Tsongas, and Representative Loretta Sanchez (Democrat - California). He then appeared alongside the representatives and Chairman of the Joint Chiefs of Staff General Martin Dempsey to announce initiatives to address military sexual assault.[295] The initiatives included the requirement that sexual assault allegations be handled by, at a minimum, special court-martial convening authorities who were 0-6 pay grade or above.[296] Secretary Panetta purportedly told one of the film's executive producers that the screening of *Invisible War* was partly responsible for his decision to make crucial changes in the way in which reported rapes are addressed in the military.[297]

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[294] Klay v. Panetta, No. 1:12-cv-00350-ABJ (D.D.C.) (This is a subsequent case to the case referenced *supra* at note 290.

[295] Lisa Daniel, AMERICAN FORCES PRESS SERVICE, *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, U.S. Dep't of Def. (Apr. 16, 2012), http://www.defense.gov/news/newsarticle.aspx?id=67954. One initiative is elevating the level of investigation for the most serious sexual assault allegations and mandatory reporting of allegations of rape, forcible sodomy and sexual assault, and attempts of those offenses, to an officer in the rank of O-6 or higher. *Id.* Other initiatives include establishing a "special victims unit" of specially trained experts within each service; requiring sexual assault policies be explained to all servicemembers within fourteen days of entry into the service; enhancing training programs and wider dissemination of available sexual assault resources; and expanding legal assistance services to sexual assault victims. *Id.*

[296] *Id.*

[297] Steve Pond, *Military Rape Documentary 'Invisible War' Leads to Changes Before Its Opening*, THE WRAP, Jun. 18, 2012, http://www.thewrap.com/movies/column-post/military-rape-documentary-invisible-war-leads-policy-changes-its-opening-44671.

On April 20, 2012, Leah Marquet and Anne Kendzior filed suit in Manhattan federal court alleging the United States Naval Academy in Annapolis, Maryland, and the United States Military Academy in West Point, New York, tolerate sexual assault and discourage victims of attacks from reporting them.[298]

These events ensured that military sexual assault remained a focus of congressional attention and influence. Despite Department of Defense initiatives to combat sexual assault, it seemed that the services could not do enough to satisfy Congress.

B. Politicized Policies

"In the media and on Capitol Hill, there's this myth that the military doesn't take sexual assault seriously . . . but the reality is they're charging more and more people with bogus cases just to show that they do take it seriously."[299] The perfect storm of the last two years has led Congress to one conclusion: the military justice system mishandles sexual assault allegations resulting in too few courts-martial for alleged perpetrators and far too few convictions.[300] Congress wants to change that, and they can. Although the Holley Lynn James Act and the STOP Act have not made it out of committee, the National Defense Authorization Act for Fiscal Year 2013 contains many similar measures.[301] Congress presented the Act to the President on December 30, 2012 and the President signed the Act on

[298] Basil Katz, *Two Women Say Were Raped, Punished at U.S. Military Academies*, CHI. TRIB., Apr. 20, 2012, , http://articles.chicagotribune.com/2012-04-20/news/sns-rt-us-usa-military-rapebre83j1db-20120420_1_sexual-assault-military-academies-sexual-harassment.

[299] Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY WASHINGTON BUREAU, (Nov. 29, 2011), http://www.mcclatchydc.com/2011/11/28/v-print/131523/militarys-newly-aggressive-rape-prosecution-has-pitfalls.

[300] *See, e.g.,* Letter from Howard P. McKeon, Chair, U.S. House Comm. on Armed Servs., to Leon Panetta, Sec'y of Def., U.S. Dep't of Def., (Sept. 13, 2012) (on file with author); Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAVIOR 267, 267–68 (2010).

[301] *See* National Defense Authorization Act for Fiscal Year 2013, H.R 4310, 112th Cong. (2d. Sess. 2012).

January 13, 2013.[302] In this Act, Congress requires the creation of hand-picked, specially trained, and certified "special victim" units of investigators, judge advocates, and victim witness assistance personnel for the prosecution of child abuse, serious domestic violence, and sexual offenses.[303] The bill also establishes two panels to study further possible reforms to the military justice system's handling of sexual assault cases.[304] The Act directs the panels to study the impact of Secretary Panetta's April 2012 policy change limiting the authority to dispose of sexual assault cases and to consider the strengths and weaknesses of proposals to take prosecutorial discretion away from convening authorities in sexual assault cases.[305]

V. Alcohol + Sex = Sexual Assault?

The 2012 Article 120 is one of the most prominent changes resulting from congressional attention on military sexual assault. The statute, however, contains vague, yet significant terms and encompasses many degrees of misconduct. The law and accompanying policies are an overcorrection and difficult to apply in cases involving alcohol. For instance, consider the following hypothetical.

Corporal Woolard was with his unit on a deployment rotation to Okinawa, Japan. He was legally married; however, he and his wife had been separated for some time. Corporal Woolard met Lance Corporal K through a mutual friend. They traded phone numbers and

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[302] *See* Press Release, BARACK OBAMA, Statement by the President on H.R. 4310 (Jan. 03, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310.

[303] National Defense Authorization Act for Fiscal Year 2013 (NDAA FY12), H.R. 4310, § 573, 112th Cong. (2d. Sess. 2012).

[304] *Id.* at § 576.

[305] *Id.; see also*, Dwight Sullivan, *Top 10 Military Justice Stories of 2012—#1 The politicization of the military's response to sexual assaults*, CAAFLOG (Jan. 1, 2013), http://www.caaflog.com/2013/01/01/top-10-military-justice-stories-of-2012-1-the-politicization-of-the-militarys-response-to-sexual-assaults.

began communicating and socializing in person a few times. Corporal Woolard really liked Lance Corporal K, thinking they had many things in common. A few weeks after the initial meeting, Using a false identification, Lance Corporal K went out for a few drinks to celebrate her twentieth birthday. Corporal Woolard was unable to attend but arranged to meet her later at the enlisted club aboard base. They did meet at the enlisted club and spent some time drinking and dancing. Corporal Woolard and Lance Corporal K decided to leave and began walking back to Lance Corporal K's barracks. On the way back, a military police officer offered them a ride. Although Lance Corporal K was able to walk under her own power, the military police officer escorted Lance Corporal K to her barracks room and told Corporal Woolard he should go home.

Instead of walking to his barracks, Corporal Woolard returned to Lance Corporal K's barracks room and the two had sexual intercourse. In a conversation the next day, Corporal Woolard realized that Lance Corporal K did not remember having sex the night before. Corporal Woolard then told her they had sex. Lance Corporal K reported it as a sexual assault that next evening. The ensuing investigation resulted in charges and Corporal Woolard faced a general court-martial for sexual assault and adultery.

This type of scenario is common[306] – characterized as "drunk sex." The accuser and the accused know each other. Often, they have spent time socializing prior to the alleged incident. The incident typically takes place after both parties consumed alcoholic beverages. There are usually no witnesses and often the sexual assault forensic examination results indicate no trauma.

[306] *See infra* note 377 and accompanying text.

These are cases that test the limits of a progressive military sexual assault statute. There are two separate inquiries when considering this category of cases: first, *can* we prosecute drunk sex cases under the law; and second, *should* we prosecute drunk sex cases? The answer to the first question is yes—now written directly in Article 120.[307] The answer to the second question is significantly more difficult as prosecution may not be a successful resolution to a complaint.[308]

A. By Law, *Can* The Military Prosecute "Drunk Sex"?

For decades, the only adult sexual offense was rape by force and without consent.[309] Prior to 2007, the military's prohibition against sexual intercourse with someone incapacitated due to alcohol was dictated by case law.[310] The specific prohibition against sexual intercourse with incapacitated victims was added to the UCMJ in 2007 as an aggravated sexual assault.[311] As discussed earlier, the 2007 statute made a sexual act illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating an unwillingness to engage in the sexual act.[312]

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[307] 2012 MCM, *supra* note 7, pt. IV, ¶ 45.

[308] Based on the author's professional experiences as a trial attorney from 19 March 2001 to 30 July 2012, prosecutions of drunk sex cases have historically resulted in acquittals. In those cases where the accused was convicted, juries did not always sentence the accused to significant confinement—or in one case, *any* confinement. *See* United States v. Roumer No. 2011-00081, 2012 CCA LEXIS 21 (N-MC. Ct. Crim. App. Jan. 31, 2012). In other cases, appellate courts overturned convictions due to factual insufficiency. United States v. House 2009 CCA LEXIS 192 (A.C.C.A. Mar. 30, 2009) rev. denied, 69 M.J. 177, (C.A.A.F. 2010).

[309] Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012*, 2012 EMERGING ISSUES 6423.

[310] *See, e.g.*, United States v. Mathai, 34 M.J. 33 (C.M.A. 1992) (holding that there was sufficient evidence in the record for the trier of fact to find that the victim was unconscious and thus could not consent to sexual intercourse).

[311] 2008 MCM, *supra* note 198, pt. IV, ¶ 45.

[312] *Id*.

The 2012 Article 120 has made it easier to charge a drunk sex case in the military. Section (b)(2) of the 2012 Article 120 specifically prohibits a person from engaging in a sexual act with another person when the person knows or reasonably should know that the other person is "asleep, unconscious, or otherwise unaware that the sexual act is occurring."[313] While asleep and unconscious are very clear, the language "otherwise unaware" is vague and prohibits a sexual act with a person who is not unconscious or asleep. Section (b)(3) of the 2012 Article 120 also specifically prohibits a person from engaging in a sexual act with another person when the other person is "incapable of consenting to the sexual act" due to "impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person."[314]

B. *Should* The Military Prosecute Drunk Sex?

Although the text of the statute specifically proscribes sexual activity with intoxicated individuals, the available evidence in many of these cases does not rise to the level of probable cause,[315] let alone the beyond a reasonable doubt standard for conviction. As such, prosecuting "weak cases"[316] will not, and should not, be successful.

1. Civilian Jurisdictions' Approach

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[313] 2012 MCM, *supra* note 7 pt. IV, ¶ 45a.(b)(2).

[314] 2012 MCM, *supra* note 7 pt. IV, ¶ 45a.(b)(3).

[315] *See infra* note 341.

[316] "Weak case" is a term frequently used by attorneys to describe a case that lacks significant evidence.

Lawmakers and the media frequently compare the military's treatment of sexual assault cases with that of civilian jurisdictions.[317] For example, in a March 13, 2013, hearing of the Senate Armed Forces Subcommitte on Personnel, Senator Claire McCaskill (D – Missouri) frequently cited to her experience as a Jackson County[318] prosecutor when questioning the panel of the most senior lawyers from each of the services. [319]Given this frequent comparison, it is illustrative to look at how civilian jurisdictions handle alcohol-related sexual assault.

Two states, Nebraska and Nevada, do not specifically prohibit intercourse with individuals incapacitated by intoxicants.[320] Many states do specifically criminalize sexual intercourse with individuals incapacitated by intoxicants administered without their knowledge or consent.[321] A minority of states, however, criminalize sexual intercourse with

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[317] *See, e.g.,* Michael Doyle and Marisa Taylor, *Congress tries again to get military sexual assault laws right,* MCCLATCHY WASHINGTON BUREAU, Dec. 14, 2011, http://www.mcclatchydc.com/2011/12/13/v-print/133000/congress-tries-again-to-get-military-sexual-assault-laws-right.

[318] "Jackson County is one of 114 counties in Missouri. It includes most of Kansas City, Missouri, and 17 other cities and towns. The County population is about 654,000 people living within 607 square miles." *About Us, Jackson County, Missouri,* http://www.jacksongov.org/content/3273/default.aspx, (last visited 20 Mar 2012).

[319] The panel testifying at the March 13, 2013 hearing included Rear Admiral Frederick Kenney, USCG; Lieutenant General Dana Chipman, USA; Lieutenant General Richard Hardin, USAF; Vice Admiral Nanette Derenzi, USN; and Major General Vaughn Ary, USMC. Also on the panel were Mr. Robert Taylor, Defense Department Acting General Counsel and Major General Gary Patton, Director, Defense SAPRO. *Senate Armed Forces Subcommittee on Personnel Hearing on Military Sexual Assault* (C-SPAN television broadcast, Mar. 13, 2013), *available at* http://www.c-spanvideo.org/program/311468-2.

[320] *See* NEB. REV. STAT. §§ 28-319(1), 200.366(1) (West 2012).

[321] *See, e.g.*, ALA. CODE § 13A-6-61; CONN. GEN. STAT. § 53a-70; DEL. CODE ANN. § 761; D.C. CODE ANN. § 22-3002(4); FLA. STAT. ANN. § 794.011; HAW. REV. STAT. § 707-700; KY. REV. STAT. ANN. § 510.010; ME. REV. STAT. tit. 17-A § 253; MICH. COMP. LAWS SERV. § 750.520A; MINN. STAT. ANN. § 609.241; MISS. CODE. ANN. § 97-3-97; MO. ANN. STAT. § 566.030; N.H. REV. STAT. ANN. § 632-A:2; N.J. STAT. ANN. § 2C:14-1(i); N.Y. PENAL § 130.00 (Consol.); N.D. CENT. CODE § 12.1-20.07; OHIO REV. CODE ANN. § 2907.02(A)(1)a; OKLA. STAT. ANN. tit. 21§ 1111; OR. REV. STAT. § 163.305; PA. CONS. STAT. § 3125; R.I. GEN. LAWS §11-37-1; TENN. CODE ANN. §39-13-501; TEX. PENAL CODE ANN. § 22.011(b)(6); UTAH CODE ANN. § 76-5-406(8); VT. STAT. ANN. §3252(2); W. VA. CODE 61-8b-1(4); WYO. STAT. ANN. § 6-2-303(a)(iii).

individuals incapacitated by intoxicants without specifying whether or not the victim knowingly and voluntarily ingested the intoxicant.[322]

In January 1995, California updated its rape statute by deleting the language that required proof that the accused provided the drugs or alcohol to the victim.[323] After that deletion, the law stated "[r]ape is an act of sexual intercourse accomplished with a person, not the spouse of the perpetrator, under any of the following circumstances . . . where the person is prevented from resisting by any intoxicating or anesthetic substance, and this condition was known, or reasonably should have been known by the accused."[324] After this amendment, many lawyers were left wondering exactly how drunk does a victim have to be to be too drunk to resist?[325] One law professor told the *Los Angeles Times* in 1995 that if the language "was interpreted to mean that the mere fact of intoxication meant the accuser couldn't give consent, that would be a disaster."[326] Los Angeles Deputy District Attorney Jane Blissert told the same reporter that "most of the crimes [she] recalls prosecuting under the law . . . involved women who were raped while completely unconscious." Ms. Blissert further stated

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[322] *See, e.g.*, ARK. CODE ANN. § 5-14-101; ARIZ. REV. STAT. §13-1401; CAL. PEN. CODE § 261; IDAHO CODE ANN. § 18-6101; IOWA CODE ANN. § 709.1A; KAN STAT. ANN. § 21-3502; L.A. REV. STAT. §14:43 A. (1); MD. CODE ANN. § 3-304; MONT. CODE ANN. § 45-2-101(41); S.C. CODE ANN.§ 16-3-654; S.D. CODIFIED LAWS § 22-22-1; WASH. REV. CODE ANN. § 9A.44.010; WIS. STAT. ANN. § 940.225

[323] CAL. PEN. CODE § 261(a)(3) (2004).

[324] ID.CAL. PEN. CODE § 261(a)(3) (2004).

[325] Dennis Romero, *Sex and Consent Under the Influence: Legislation: California's revised rape law has many young people wondering just what 'prevented from resisting' means. Even some experts say the language is too vague.,* L. A. TIMES, Feb. 9, 1995, http://articles.latimes.com/ 1995-02-09/news/ls-30077_1_young-people.

[326] *Id.*

that "a case where a possible victim was conscious, but intoxicated beyond her ability to distinguish between yes and no, probably hasn't been tested." [327]

On March 4, 2007, twelve years after that amendment, three female DeAnza College soccer players alleged that they witnessed the sexual assault of an intoxicated 17-year-old girl at a party at the home of a college baseball player.[328] After a lengthy investigation that included testimony to a grand jury, Santa Clara County District Attorney Delores Carr decided not to file charges citing insufficient evidence.[329] After public outcry, the District Attorney asked California Attorney General Jerry Brown to review the case.[330] After review, the California Attorney General's Office found that there was no way to tell whether the allegations of disgraceful behavior by several men also amounted to a crime.[331] A representative for the office further stated that "wildly conflicting accounts" supplied by witnesses whose memories were often clouded by alcohol prevented prosecution of the case. The victim had no memory of the incident.[332] Widespread intoxication among the party attendees also hampered their memories of the event. Attorney General Jerry Brown's report concluded that these factors made proof beyond a reasonable doubt impossible.[333] The

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[327] *Id.*

[328] *See* Jim Herron Zamora, *State to Review DeAnza Rape Case*, S. F. CHRON. June 7, 2007, http://www.sfgate.com/bayarea/article/state-to-review-de-anza-rape-case.

[329] *Id.*

[330] *Id.*

[331] *See id.*; *see also*, John Cote, *Evidence Lacking in DeAnza Rape Case*, S. F. CHRON., May 3, 2008, http://www.sfgate.com/bayarea/article/state-evidence-lacking-in-de-anza-rape-case.

[332] Zamora, *supra* note 328.

[333] *Id*.

Attorney General ultimately concurred with the District Attorney's discretion not to prosecute.[334]

A prosecutor's discretion to file criminal charges is the broadest and least regulated power in American criminal law.[335] The most meaningful restraint on prosecutorial discretion is contained in the Due Process Clause of United States Constitution.[336] Limited constitutional and statutory constraints are based on the presumption of prosecutorial good faith.[337] The courts lack the knowledge and expertise to supervise prosecutors' exercise of discretion and the Separation of Powers doctrine reinforces this policy of judicial noninterference.[338] In civilian society, constitutional and statutory rules, state bar rules,[339] and the guidelines from the American Bar Association[340] set the boundaries for charging

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[334] Zamora, *supra* note 328; Cote, *supra* note 331.

[335] *See* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513(1992).

[336] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" U.S. CONST. amend. V. The United States Supreme Court affirm the following test for determining if a prosecutor acted within his discretion: "(i) others similarly situated generally had not been prosecuted for conduct similar to petitioner's and (ii) the Government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of First Amendment rights." Wayte v. United States, 470 U.S. 598, 607 (1985).

[337] *See id.*

[338] Gershman, *supra* note 335, at 513.

[339] *See infra* note 504.

[340] ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.2 (3d ed. 1993) ("(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction. (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict. (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the

decisions, requiring that the prosecutor have sufficient evidence to convict and that he or she not act in a discriminatory or retaliatory manner.[341]

C. No Discretion in the Military

> *Military officers began facing new obligations; their promotions could turn, in part, on how well they handled sexual assault issues. Prosecutions have proliferated. No commander, numerous military officers confided on the condition of anonymity, wants to be second-guessed for failing to prosecute even an iffy case.*[342]

Captain Nicholas Stewart was a fighter pilot who served in Iraq. He attended a graduation party of a civilian friend, AN, whom he had previously dated.[343] Although their dating relationship had included sexual activity, they never had sexual intercourse.[344] AN became intoxicated at her party and friends assisted her downstairs to bed.[345] The next thing she remembered was waking up with no clothes on and Captain Stewart lying next to her.[346]

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prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.").

[341] Gershman, *supra* note 335, at 519 (citing BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 4.3 – 4.5 (1985)); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (3d ed. 1993) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); Probable cause is the ethical standard attorneys must follow with respect to charging decisions. *See, e.g.*, Rule 3.8(a), MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8(a) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

[342] Michael Doyle and Marisa Taylor, *Bureaucracy has blossomed in military's war on rape,* MCCLATCHY WASHINGTON BUREAU, Nov. 28, 2011, *available at* http://www.mcclatchydc.com/2011/11/28/v-print/131524/bureaucracy-has-blossomed-in-military's-war-on-rape; *But see* THE INVISIBLE WAR, *supra* note 30.

[343] United States v. Stewart, 71 M.J. 38, 39 (C.A.A.F. 2012).

[344] *Id.*

[345] *Id.*

[346] *Id.*

She eventually remembered Stewart trying to put his penis inside of her and touching her vagina.[347]

Five months after the party, AN's parents made a complaint to the Marine Corps. The command preferred charges against him and those charges were investigated by a judge advocate at an Article 32 hearing. The investigating officer recommended dismissal of charges based on the lack of evidence. Pressed by AN's parents to take action, Captain Stewart's commander referred charges to a trial by general court-martial.

Despite the relatively weak evidence, [348] the court-martial convicted Captain Stewart of aggravated sexual assault and sentenced to confinement for two years and a dismissal from the Marine Corps.[349] The jury acquitted Captain Stewart of the first specification and convicted him of the second specification.[350] On March 6, 2012, CAAF overturned the conviction,[351] but not before Stewart served more than a year out of his two-year sentence.[352]

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[347] *Id.*

[348] *See* Marisa Taylor, AN acknowledged in a later e-mail to Stewart that she couldn't even tell him that she had said "no" and did not feel "forced" to have sex. Marisa Taylor, *Marine's Sex Assault ConvictionTossed as Prosecution Questioned*, MCCLATCHY WASHINGTON BUREAU, Mar. 8, 2012, http://www.mcclatchydc.com /2012/03/08/v-print/141252/marines-sex-assault-conviction. .She did not remember the entire encounter. *Id.*

[349] United States v. Stewart, 71 M.J. 38, 40 (C.A.A.F. 2012).

[350] Captain Stewart's initial charge alleged he engaged in a sexual act with an individual who was who was substantially incapacitated or substantially incapable of declining participation in the sexual act." The defense objected to the specification as duplicitous and the government conceded and argued that, pursuant to R.C.M. 906(b)(5), the sole remedy was severance. *Id.*

[351] The military judge used identical language to instruct the members as to the definitions of "incapacitated" and "substantially incapable of declining participation in the sexual act." *Id.* The members were then instructed that they may return a finding of guilty of only one of the two offenses, and they returned findings of not guilty to the first specification and guilty of the second. *Id.* Accordingly, "Stewart was initially found not guilty by members for certain conduct for a specific Article 120 offense as defined by the military judge, and was then found guilty of the same conduct for the same offense." *Id.* at 41. CAAF unanimously concludes that "the principles underpinning the Double Jeopardy Clause as recognized in *United States v. Smith* made it impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts the members found Stewart not guilty of in Specification 1. *Id.*

Captain Stewart's case is the type of scenario in which there is, in practice, no discretion—neither for the commander nor the prosecutor – in a charging decision. By law, the commander has discretion to charge a servicemember and refer a case to a court-martial.[353] Political pressure, however, has caused commanders to functionally abdicate their discretion. According to Captain Stewart's lawyer, "the commander had a legal expert telling him that he should not pursue it, but he did anyway. The only reason you do that is if there is political pressure."[354] The military prosecutes cases that civilian district attorneys would likely exercise their discretion to decline.[355] The online news service McClatchy asserts that "[t]he military is prosecuting a growing number of sexual assault allegations, including highly contested cases that would be unlikely to go to trial in many civilian courts. However, many of the accused are not being convicted of serious sex crimes, prompting concerns that the military is prosecuting cases that should not be sent to trial because of questions about the evidence."[356]

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[352] Captain Nicholas Stewart, USMC, *Opinion Analysis: United States v. Stewart, No. 11-0440/MC*, NIMJ-BLOG-CAAFLOG (Mar. 11, 2012, 11:17 PM), http://www.caaflog.com/2012/03/10/opinion-analysis-united-states-v-stewart-no-11-0440mc/#comments.

[353] 2012 MCM, *supra* note 7, pt II, R. 601.

[354] Marisa Taylor, *Marine's Sex Assault Conviction Tossed as Prosecution Questioned*, MCCLATCHY WASHINGTON BUREAU, Mar. 8, 2012, http://www.mcclatchydc.com/2012/03/08/v-print/141252/marines-sex-assault-conviction.

[355] Dwight H. Sullivan, Testimony at U.S. Commission on Civil Rights (Jan. 11, 2013) (http://www.c-spanvideo.org/program/310331-1) ("[I]n 2012, the Air Force tried 15 off-base sex assault cases that the civilian jurisdiction declined to prosecute because they saw the case as unwinnable."); *see also*, Nancy Montgomery, *Air Force Strengthens Sex Assault Prosecutions With New Measures*, STARS & STRIPES, Jan. 9, 2013, http://www.stripes.com/news/air-force-strengthens-sex-assault-prosecutions-with-new-measures-1.203291 (quoting psychologist David Lisak "It does seem that there are far more cases being taken to trial, including cases you'd never see in civilian court.").

[356] Taylor, *supra* note 348.

After decades of criminalizing only forcible rape, Congress completely expanded the scope of Article 120 to criminalize sexual acts with impaired individuals.[357] The degree of impairment necessary to transform consensual sex into sexual assault is the main area of dispute in drunk sex cases.[358] Disagreement over how drunk a victim must be order to be too impaired to consent to sex, lack of witnesses, lack of physical evidence, and poor memory make these cases very hard to prove. Despite weak cases Commanders feel pressured to prosecute.[359] Under the law the military can prosecute these cases. If the facts of the case fail to rise to the level of probable cause, the military should not prosecute these cases. After the release of *The Invisible War,* however, Congress wants more changes to law and policy and the pressure to prosecute is even greater than before.

VI. Radical Change Causing Radical Problems.

> *While we are all against sexual assault, we cannot, in the course of attempting to punish and deter such a heinous crime, forget how we arrive at a court finding that is reliable and in which the public can have confidence. This event has taught me the difference between a technicality and reversible error. It has taught me the value in objectivity, in identifying your own bias during an argument, in being quiet long enough to hear both sides, in understanding what/how much you don't know, in the judicial procedures that safeguard rights so critical to protecting the innocent. This event has taught me that it is far better for 1,000 guilty men and women to go free than for one innocent American to lose his liberty. This event has taught me the reason liberty is far more valuable than life. This event has taught me that when even the slightest protection becomes assailable, all rights become assailable. This event has taught me why the paramount object of our oath is to support and defend, not a person, not an organization, but a document — incapable of indiscretion or influence from our transitory passions.*[360]

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[357] Clark, *supra* note 309.

[358] *Id.*

[359] *See supra* note 342.

[360] Captain Nicholas Stewart, USMC, *Opinion Analysis: United States v. Stewart, supra* note 352.

A. Equal Protection Under the Law[361]

Although "[t]he rape reform movement has succeeded in lobbying for significant revisions in antiquated and gender-biased statutes,"[362] the pendulum has swung too far in the other direction. Reverse gender discrimination gives as much rise to equal protection concerns as antiquated gender-biased statutes. The risk is that the feminist sword, sharpened by the battle for equal rights is landing on the necks of innocent men.

1. Victim Primacy: Lady Victim[363] outshines Lady Justice[364]

As a result of reforms, the victim is the most significant consideration in sexual assault cases. One consequence of the politicization of the crime of sexual assault in the military is the automatic creation of a victim upon any allegation. Unfortunately this evolution causes her interest to surpass the interests of justice in several ways. In stark contrast to Lord Hale's era,[365] she is assumed to be incontrovertibly truthful and irreproachable. She has what amounts to prosecutorial powers when she makes a complaint.[366] She is virtually immunized

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[361] The Equal Protection Clause, part of the Fourteenth Amendment to the United States Constitution, provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment is not by its terms applicable to the federal government. Actions by the federal government, however, that classify individuals in a discriminatory manner will, under similar circumstances, violate the due process of the Fifth Amendment. U.S. CONST. amend. V.

[362] Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467 (2004).

[363] The estimates of percentage of female victims far exceeds the estimate of 1% to 4% male victims. Turchik & Wilson, *supra* note 3, at 268. Consequently, this thesis refers to "victim" using the feminine pronoun "she."

[364] Lady Justice (Latin: *Justitia*), Lady Justice is the Roman goddess of Justice—who is equivalent to the Greek goddess Dike—is an allegorical personification of the moral force in judicial systems. MARCI HAMILTON, GOD VS. THE GAVEL 296 (2005) ("The symbol of the judicial system, seen in courtrooms throughout the United States, is blindfolded Lady Justice."). *Id.*

[365] *See supra* Part II.A.

[366] Aya Gruber, *Victim Wrongs: The Case for A General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victim Rights*, 76 TEMP L. REV. 645, 650 (2003).

from any of her wrongdoing.[367] If she is a military victim, she is given an expedited transfer to another unit if she desires.[368] She is given a victim advocate. She is now assigned an attorney.[369]

This approach presumes the victim's claim is true – and true for more than the initial opening of an investigation when it may be appropriate. The presumption of truth continues throughout the entire process, however, and is politically and procedurally powerful and dangerous. The presumption of truth by the command, and now lawmakers subjects accuseds to a process and "convicts" accuseds even before true facts can be ascertained. The presumption of victim truthfulness erodes the principle of "innocent until proven guilty" and the standard of proof "beyond a reasonable doubt" and extends even after an accused is found not guilty.

The origin of the concepts of "innocent until proven guilty" and "proof beyond a reasonable doubt" is detailed at length by the Supreme Court in *Coffin v. United States*.[370] The idea stems from the Latin maxim "*necessitas probandi incumbit ei qui agit*." This is the ordinary rule that "the necessity of proof lies with he who complains." There is a similar

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[367] U.S. DEP'T OF DEF., INST. 6495.02, Ch. 1, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES (13 Nov. 2008). "Absent extenuating or overriding considerations, which, in the commander's judgment make it inappropriate to delay taking action, the commander should consider deferring discipline for such victim misconduct until all investigations are completed and the sexual assault allegation has been resolved." *Id.* Although the commander is instructed to "consider deferring discipline," in practice, he or she is encouraged not to take disciplinary measures to address collateral victim misconduct. This assertion is based on the author's professional experiences as a trial attorney from 19 March 2001 to 30 July 2012.

[368] NDAA FY12, Pub. L. No. 112-181, § 582, 125 Stat. 1431 (2011).

[369] *Id.*; *See* U.S. AIR FORCE GUIDANCE MEMORANDUM, AFI 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (24 Jan. 2013) (The Air Force has created a Special Victim's Counsel – a judge advocate assigned to represent a victim and assert standing at a court-martial).

[370] 156 U.S. 432 (1895).

notion that "*ei incumbit probatio qui dicit, non qui negat*" - "the burden of proof rests on who asserts, not on who denies."

In *Coffin*, the Supreme Court explained that the legal requirement of proof beyond a reasonable doubt is inextricably linked to the presumption of innocence and "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[371] The Court went on to demonstrate, using concrete examples, exactly why this requirement exists and is so philosophically important to the administration of criminal justice.

> It is stated as unquestioned in the textbooks, and has been referred to as a matter of course in the decisions of this Court and in the courts of the several states . . . Greenleaf traces this presumption to Deuteronomy, and quotes Mascardius Do Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:
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> "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day . . . ."[372]

The Supreme Court recognized in its analysis that the presumption of innocence and the requirement of proof beyond a reasonable doubt on all elements of an offense by the accuser reflect a principled decision about who should carry the burden of proof in matters of close decision. The Court provides a very concrete example of this allocation and the exact reasons why:

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[371] *Id.* at 453.

[372] *Id.* at 454 (internal citations omitted).

> Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the Governor of Narbonensis, was on trial before the emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar, if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?" Rerum Gestarum, L. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and human maxims of that system, preserved for mankind by the canon law.[373]

The Court in *Coffin*, in sorting through the annals of both the common law of England as well as reaching back to the canons of Roman law, was well-aware that "[i]n some cases, presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die."[374]

Lawmakers who measure eradication of military sexual assault in terms of the number of convictions have lost or ignored this maxim.[375] As a result of the recent changes to law and policy, it appears as though lawmakers would rather see an innocent person punished in the effort to secure more convictions. The attendant belief is that an accused must be convicted and his punishment commensurately severe. This is the current situation, and the law of sexual assault fails to account for the victim who is an equally culpable actor.[376]

2. Reverse Gender-biased Statute

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[373] *Id.* at 455 (some citations omitted).

[374] *Id.* at 456 (citing HALE, 2 Hale P.C. 290 (1678)).

[375] *Senate Armed Forces Subcommittee on Personnel Hearing on Military Sexual Assault*, *supra* note 319.

[376] *See* Gruber, *supra* note 366, at 650.

John is at a neighborhood bar watching the collegiate football national championship game with his fellow members of the Notre Dame Alumni Association. Over the course of a four hour event, John drinks approximately eight pints of Harp beer. After the game, he thinks he is OK to drive, he gets into his car and heads east on Main Street. Meanwhile, Allie is at a house party watching her alma mater, University of Alabama, play for the National Championship against Notre Dame. Over the course of a four hour event, Allie drinks approximately six red Solo cups of Bud Light. After the game, she thinks she is OK to drive and gets in her car and heads west on Main Street. On a particularly narrow stretch of the road with cars parallel-parked on both sides, John and Allie "side-swipe" each other and come to a stop. Allie calls the police department to report the accident. The officer arrives on the scene and is unable to determine which one of them crossed over the line. He believes both of them were drinking and administers field sobriety tests. The breathalyzers reveal John to be at a .08 BAC and Allie to be at a .09 BAC.

This scenario presents a number of interesting questions. Is Allie the victim of the accident because she was more drunk than John? Is Allie absolved of a "driving while intoxicated" charge because John side-swiped her? Suppose the officer arrested John for driving under the influence, yet arranges a taxi and a tow truck for Allie? Suppose he also sends her on her way with a business card for the local chapter of Alcoholics Anonymous? That is not a realistic way for the officer to handle this accident. These questions and the legal analysis they implicate provide some insight into the 2012 Article 120 and potential criminalization of drunk sex scenarios. It takes two individuals for an act of sexual intercourse. If both parties are intoxicated, who is responsible for "crossing the line?"

Alcohol is a significant factor in alleged incidents of sexual assault in the military, similar to trends at colleges and universities.[377] The prevalence of dating violence increases during the ages of 15 to 25, peaking between 20 and 25 years-of-age.[378] In the United States military, almost half of the enlisted force is under 25 years-of-age for both men and women.[379] Examinations of heavy drinking and dating violence have typically focused on female victimization and male perpetration, yet recent studies show that mutual aggression is the most common pattern of dating violence.[380] Data show that the vast majority of victims in sexual assault investigations are females, under the age of 25. The vast majority of subjects of investigations tend to be males under the age of 35.[381] The application of the 2012 Article 120 reflects this paradigm.

3. The Courtship Culture

In the military justice system, males bear the greater legal and moral burden from intoxication. Practically, if a drunk male and a drunk female engage in sexual intercourse and the next day the female either doesn't remember it, or regrets it, then she is the victim. The female believes she was raped. The male is now necessarily the perpetrator because he believes he had consensual sex. The problem in drunk sex cases, however, is that culture and science don't justify this dichotomy.

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[377] More than half of the sexual assault cases reported in fiscal year 2011 involved alcohol. *See* DEF. TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 54–55 (2011) [hereinafter 2011 DTFSAMS REPORT], *available at* http://www.sapr.mil/index.php/annual-reports.

[378] *See* Cynthia Stappenbeck & Kim Fromme, *A longitudinal investigation of heavy drinking and physical dating violence in men and women*, 35 ADDICTIVE BEHAVIORS 479 (2010).

[379] *See* David R. Segal & Mady Wechsler Segal, *America's Military Population*, 59 POPULATION BULLETIN no.4, 2004.

[380] *See* Stappenbeck & Fromme, *supra* note 378, at 479.

[381] 2011 DFTSAMS Report, *supra* note 377, at 54-55.

Modern courtship has changed in significant ways since Alice Paul drafted the Equal Rights Amendment. Two of those ways are the phenomena of cross-sex friendships[382] and today's "hookup culture."[383]

Cross-sex friendships are non-romantic,(although not necessarily non-sexual) friendships between males and females.[384] They are voluntary, non-familial relationships in which both individuals label their association as a friendship and enjoy the benefits of friendship.[385] Historically, cross-sex friendships were uncommon.[386] When they did happen, they were scandalous.[387] A generation ago, men went off to work to support the family while women stayed home to take care of children.[388] As a result, men became friends with work

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[382] *See* April Bleske-Rechek, Et Al, *Benefit Or Burden? Attraction In Cross-Sex Friendship,* 29 J. OF SOC. & PERS. RELATIONSHIPS 569 (2012). (citing KATHY WERKING, WE'RE JUST GOOD FRIENDS (1997)("Cross-sex friendship has been described as a voluntary, cooperative, non-romantic alliance between members of the opposite sex.")).

[383] *See* Hanna Rosin, *Boys on the Side*, THE ATLANTIC, Sept. 2012; Laura Sessions Stepp, *A New Kind of Date Rape,* COSMOPOLITAN, Sept. 2007, *available at* http://www.cosmopolitan.com/sex-love/tips-moves/new-kind-of-date-rape. ("Today's hookup culture: lots of partying and flirting, plenty of alcohol, and ironically, the idea that women can be just as bold and adventurous about sex as men are.").

[384] Michael Monsour, *Cross-Sex Friendship*, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (2007), *available at* http://www.sociologyencyclopedia.com/public/tocnode?id=g9781405124331_yr2012_chunk_g97814051243319_ss1-167.

[385] Cross-sex friendships are characterized by generic friendship benefits such as mutual trust, loyalty, fun, enjoyment, and social support which manifests itself as aid, affect, and affirmation. *Id.* Significantly, cross-sex friends also offer one another the unique benefit of providing an insider's perspective on how members of the other sex think, feel, and behave. *Id.* The bestowing of insider perspectives between cross-sex friends enables males and females of all ages to take the role of the other sex, thereby increasing their understanding of their friend and the gender their friend represents. *Id.* Cross-sex friendships have a variable nature in that their form and function change as they appear in different stages of the life cycle. *Id.*

[386] *See* Bleske-Rechek, Et al, *supra* note 382, at 570.

[387] *See* WILLIAM SHAKESPEARE, OTHELLO (Washington Sq. Press, 1993) Desdemona tells her husband Othello of her platonic love for Cassio. (IV.i.234). Othello hits her and chastises her. *Id.* Othello also asserts that she is "false as hell." (IV.ii.41) as a result of his suspicions that she is having an affair with Cassio and lying about it. *Id.* Othello also calls her a whore (IV.ii.81). Desdemona remains in the relationship and attempts to convince Othello that she has been faithful. *Id.*

[388] *See* Heidi M. Reeder, *The Effect of Gender Role Orientation on Same- and Cross-Sex Friendship Formation*, 49 SEX ROLES: A J. OF RESEARCH 143, 143–52, Aug. 2003.

colleagues and women became friends with other stay-at-home-wives.[389] As more women attended higher-level schooling and moved into the work force, opposite-sex friendships are more commonplace.[390] Cross-sex friendships are more complex than both same-sex friendships and romantic relationships as each of those types of relationships have boundaries and a traditional place in society.[391]

Not surprisingly, cross-sex friends often deal with sexuality and attraction (whether mutual or not) in their relationships, and both young men and women report attraction to their cross-sex friends.[392] Men, however, are more likely to experience greater sexual attraction to their female friends than women will to their male friends.[393] Thus, males are also more likely to over-estimate how sexually attracted their female friends are to them.[394] Men are thus more likely to "over-infer the degree of sexual attraction portrayed in ambiguous signals from women."[395] In other words, men are more likely to think "she wants me" than women think "he wants me."

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[389] *See id.*

[390] *See id.*

[391] Bleske-Rechek, Et al, *supra* note 382, at 569 (citing KATHY WERKING, WE'RE JUST GOOD FRIENDS (1997) =("Cross-sex friendship has been described as a voluntary, cooperative, non-romantic alliance between members of the opposite sex.")).

[392] Bleske-Rechek, Et al, *supra* note 382, at 575-81.

[393] *Id.*

[394] *Id.*; *see also,* Antonia Abbey, Et. al., *Sexual Assault And Alcohol Consumption: What Do We Know About Their Relationship And What Types Of Research Are Still Needed?*, 9 AGGRESSION & VIOLENT BEHAVIOR 271, 288 (2003).

[395] Bleske-Rechek, Et al., *supra* note 382, at 575–81; *see also*, Antonia Abbey, Et al., *Alcohol and Dating Risk Factors for Sexual Assault Among College Women*, 20 PSYCHOL. WOMEN Q. 147, 148–49 (1996) (finding "[r]esearch with college students has consistently found that men perceive women as behaving more sexually and as being more interested in having sex with them than the women actually are.").

Complicating this paradigm is the "hook-up culture." A generation ago, men were supposed to be the ones pursuing women,[396] and women were supposed to be looking for relationships, not casual sex. These boundaries eroded and many women go out looking for the hookup, or are comfortable with being the aggressor.

> "To put it crudely, feminist progress right now largely depends on the existence of the hookup culture. And to a surprising degree, it is women—not men—who are perpetuating the culture . . . .
>
> The most patient and thorough research about the hookup culture shows that over the long run, women benefit greatly from living in a world where they can have sexual adventure without commitment or all that much shame, and where they can enter into temporary relationships that don't get in the way of future success."[397]

Alcohol, a "social lubricant," is frequently a part of this hookup culture.[398] Young women's drinking habits are rising almost to the level of men's. [399]

Studies further show that alcohol intoxication heightens women's self-reported sexual arousal.[400] The Alcohol Myopia Theory (AMT) indicates that alcohol impairs cognitive information processes and focuses the drinker's attention to a narrower range of cues that prompt social outcomes.[401] "Generally, in appetitive situations such as sexual encounters,

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[396] This use of a stereotype is deliberate and intended to highlight the setting aside of traditional gender roles.

[397] Rosin, *supra* note 383.

[398] *In Groups, Alcohol a Social Lubricant*, UNITED PRESS INT'L (JUNE 30, 2012, 7:11PM), http://www.upi.com/Health_News/2012/06/30/In-groups-alcohol-a-social-lubricant/UPI-97281341097907/?spt=hs&or=hn; *see also*, Emily Esfahani Smith, *A Plan to Reboot Dating*, ATLANTIC, Nov. 2012.

[399] Laura Sessions Stepp, *A New Kind of Date Rape,* COSMOPOLITAN, (Sept. 2007), http://www.cosmopolitan.com sex-love/tips-moves/new-kind-of-date-rape (citing, Harvard School of Public Health College Alcohol Study, 2001).

[400] *See* William H. George, Et Al, *Women's Sexual Arousal: Effects Of High Alcohol Dosages And Self Control Instructions*, 59 HORMONES & BEHAVIOR 730 (2011); Sheila B. Blume, *Sexuality and Stigma: The Alcoholic Woman*, 15 ALCOHOL HEALTH & RES. WORLD 139 (1991).

[401] *See id.*

the impelling or 'go' cues tend to be higher in salience than inhibiting or 'stop' cues."[402] This means that the drinker may be more likely to "just go with it" when another person initiates a sexual encounter.

4. The Science: Passed Out or Blacked Out?

When victims do not remember what happened during an alleged rape, they may believe that they were "passed out" or unconscious at the time. More often, however, they are suffering from a blackout.[403] The distinction is critical because it is the difference between a man being a predator or truly making a mistake of fact.

Passing out from alcohol is when an individual loses consciousness due to a dangerously high blood alcohol concentration.[404] To an observer, someone who passed out could appear to have fallen asleep but cannot be easily woken up. When people pass out they are unconscious and unable to perceive what is happening. Lack of memory of events is not a result of failure to record memory or memory loss, but due to never having perceived the event in the first place.[405]

An alcohol-induced blackout is a lack of memory resulting from drinking alcohol.[406] A blackout occurs even without the loss of consciousness. Blackouts are often confused with

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[402] *Id.*

[403] Aaron M. White, Et. al., *Prevalence and Correlates of Alcohol Induced Blackouts Among College Students: Results of an E-Mail Survey*, 51 J. AM. C. HEALTH 117 (2000).

[404] *Id.*

[405] *Id.*

[406] *Id.* (finding "[e]vidence suggests that the rate at which an individual consumes his or her drinks, and thus the rate at which blood alcohol level rises, is an important predictor of whether a blackout will occur."). If individuals drink too quickly, blood alcohol levels rise to quickly and a blackout is more likely to occur. *Id.*

passing out or losing consciousness from drinking, but they are distinct.[407] Alcohol interferes with information processing in a variety of brain regions, including the hippocampus—a structure known to play a central role in forming memories of new events.[408] Unlike unconsciousness, an observer would be unable to recognize that another individual is experiencing a blackout.[409]

Blackouts are classified as either *en bloc* or fragmentary, depending on the duration and extent of the alcohol-induced memory loss.[410] *En bloc* blackouts involve memory loss for all events during a distinct period of time and typically occur at high blood alcohol concentrations. Fragmentary blackouts, or "brownouts" involve partial memory loss that is typically resolved later with reminders or contextual cues. A fragmentary blackout may allow an individual to remember some events the next day when questioned about the previous night, but that individual would typically be unable to remember the specifics or some segments of those events. Fragmentary blackouts occur more frequently than *en bloc* blackouts, but usually neither type occurs until blood alcohol concentration is greater than 0.06%.[411] In studies of college students, women are more likely than men to experience

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[407] *Id.*

[408] *Id.*

[409] *See id.*

[410] Donald W. Goodwin, et. al., *Alcoholic 'Blackouts': A Review And Clinical Study Of 100 Alcoholics*, 126 AM. J. OF PSYCHIATRY 191 (1969).

[411] Reagan R. Wetherill & Kim Fromme, *Acute Alcohol Effects On Narrative Recall And Contextual Memory: An Examination Of Fragmentary Blackouts*, 36 ADDICTIVE BEHAVIORS 886 (2011).

blackouts.[412] Notably, however, not all individuals who consume alcohol experience blackouts regardless of blood alcohol concentration.[413]

Unlike unconscious individuals, individuals experiencing a blackout are capable of participating in significant events of which they will later have no recollection.[414] They can walk around and talk without much difficulty.[415] Procedural memory and motor activities are less affected by alcohol because "[k]nowing needs far more mental skills."[416] In other words, recording and understanding events involves more regions of the brain than activities using muscle memory.[417]

Given that alcohol involvement is a characteristic of most of the sexual assault cases in the armed services, the science of alcohol's effects on behavior, recall and memory cannot be ignored.[418] For example, in the case of *United States v. Stewart*, [419] the complaining witness testified that she remembered being in bed and the next thing she remembered was waking

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[412] Donal F. Sweeney, M.D., THE ALCOHOL BLACKOUT: WALKING, TALKING, UNCONSCIOUS AND LETHAL (2003).

[413] Wetherill & Fromme, *supra* note 411, at 886.

[414] White, Et. al., *supra* note 404 at 5. During a blackout state, individuals have been known to spend unintended amounts of money, engage in sexual activity, vandalize property, drive a car, or be arrested, only to learn about the event later. *Id.* 127.

[415] Sweeney, *supra* note 412, at 156.

[416] *Id.*

[417] Muscle memory has been used synonymously with motor learning, which is a form of procedural memory that involves consolidating a specific motor task into memory through repetition. When a movement is repeated over time a long-term muscle memory is created for that task, eventually allowing it to be performed without conscious effort. John W. Krakauer, Reza Shadmehr, *Consolidation of Motor Memory*, 29 TRENDS IN NEUROSCIENCES 58, 58–64 (2006).

[418] This claim is made based on anecdotal evidence, my personal experience as a trial attorney in the Marine Corps since 2001, and a review of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2011, 54–55 (April 2012). *See also*, Teresa Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, AM. PROSECUTORS RES. INST. (2007).

[419] *See supra*, Part V.C.

up with no clothes on and Stewart lying next to her.[420] After trying to reconstruct what occurred, she remembered Stewart being on top of her trying to put his penis inside of her and touching her vagina.[421] This closely describes a fragmentary blackout (or brownout) rather than a loss of consciousness due to passing out.

5. Male's Drunkenness: Neither a Shield Nor a Sword

In military jurisprudence, a defendant cannot use his voluntary intoxication to defend himself against a rape charge or support his defense of mistake of fact as to consent.[422] Additionally, when proving that an individual lacked the capacity to consent, or was otherwise unaware that the sexual act was occurring, the Government may choose to prove that the accused "reasonably should have known" the other person lacked capacity or was unaware. This assigns a negligence mens rea to a serious felony offense.[423] The reasonable person standard is that of a "reasonably prudent sober person." The "reasonable, sober person standard" was added to the statute intentionally to increase the rate of convictions in alcohol related sexual assault cases.[424]

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[420] United States v. Stewart, 71 M.J. 38, 40 (C.A.A.F. 2012).

[421] *Id*.

[422] "The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. AP 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." 2012 MCM, *supra* note 7, pt. II, R. 916(j)(3). *But see* Commonwealth v. Blache, 450 Mass. 583, 589, 880 N.E.2d 736 (2008); Commonwealth v. Mountry, 463 Mass. 80, 81, 942 N.E.2d 438 (2012).

[423] The maximum punishment for Article 120(b) Sexual Assault is: confinement for 30 years; total forfeitures of all pay and allowances; and a dishonorable discharge from the service. 2012 MCM, *supra* note 7 app. 12. Additionally, a servicemember convicted of sexual assault is required to register as a sex offender. U.S. DEP'T OF DEF., INST. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (11 Mar. 2013).

[424] *See* Michael Doyle & Marisa Taylor, *Congress Tries Again To Get Military Sexual Assault Laws Right,* MCCLATCHY WASHINGTON BUREAU, Dec. 13, 2011, http://www.mcclatchydc.com/2011/12/13/133000 /congress-tries-again-to-get-military.html.

In light of the punitive and collateral consequences, a negligence standard is unjust in drunk sex cases.[425] This is particularly true given that men are more likely to "over-infer the degree of sexual attraction portrayed in ambiguous signals from women; women experience increased sexual arousal and lower inhibitions in response to alcohol; and an individual who is in a blackout state can be walking around, interacting socially with others, and even drive a vehicle. Thus, Congress went too far by adding a negligence mens rea to Article 120(b). Most drunk sex cases are replete with reasonable doubt because they rely on fallible memories, no witnesses, and little to no corroboration. The negligence standard undermines the "beyond a reasonable doubt" burden of proof.

Under the 2012 Article 120, the Government can charge that an accused knows, or reasonably should know that the other person is "asleep, unconscious, or otherwise unaware that the sexual act is occurring." [426] The Article also permits a charge that the accused "knew or reasonably should have known the other person was incapable of consenting to the sexual act either due to some impairment by some intoxicant."[427] When evaluating an accused's knowledge, his level of intoxication is completely discounted and the accused is held to the standard of a "reasonably prudent sober person."[428] The victim's level of intoxication, in contrast, is of paramount importance. This legal dynamic highlights serious flaws in the statute.

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[425] *See supra* note 423.

[426] 2012 MCM *supra* note 7, pt. IV, ¶ 45a.(b)(2).

[427] 2012 MCM *supra* note 7, pt. IV, ¶ 45a.(b)(3).

[428] A person who voluntarily becomes intoxicated is required to exercise the same degree of care as is required of a sober person under the same or similar circumstances. *See* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 605 (2002).

Though on its face gender neutral, the 2012 Article 120 is, in effect, making a male liable for behavior that he could have avoided if sober—a risk of having sex with a woman who acquiesces to sex because of or in spite of intoxication.[429] But the 2012 Article 120 will not say the same about a woman. It will not say that she puts herself at risk for liability for behavior that she could have avoided if sober—a risk of giving intoxicated consent.[430]

Imagine if a male cross-complained. He probably would not be believed. Consider the following scenario: a male soldier and a female soldier attend a party at a mutual friend's house. They wake up the next morning and discover that they are both naked and in the same bed in the guest room. Both of them vaguely remember intercourse. Neither one remembers every detail. The female is sure she would not have had sex with the male if she had not been drunk. Later, after telling a friend about it, she makes a report of sexual assault. The male believes he would not have had sex with the female if he had been sober. After a couple of days, he makes a report of sexual assault. It is unlikely that the command would provide him a victim advocate. It is even more unlikely that the female soldier would be charged. The politics behind rape law and benevolent sexism behind the current reforms to military rape law identify the male as a predator and the female as a victim in such a case.[431]

B. Drunken Sex or Rape? Creating a Culture of Victimization

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[429] *See* Alan Wertheimer, *What Is Consent and Is It Important?*, 3 BUFF. CRIM. LAW. REV. 557, 579 (2000).

[430] *See id*. at 579–80 (2000).

[431] Benevolent sexism is a "belief that women should be adored and idealized while at the same time believing they are weak and need to be protected." Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAVIOR 267, 274 (2010).

"The law does not clarify the confusion between rape that occurs under the influence of alcohol and consensual encounters between intoxicated participants."[432] There is no bright-line test for showing an individual was too drunk to consent—distinguishing sexual assault from drunken sex.[433] There is no test that defines precisely how much alcohol or drugs result in a person's inability to consent to sex.[434] The 2012 Article 120 does not provide any guidance;as "impaired" remains a nebulous concept. Thus the danger is an over-identification of drunk sex cases as sexual assault because women are now being conditioned to see themselves as victims of sexual assault rather than autonomous individuals who exercise their own sexual agency.

Take Anne, for example, a freshman, liked going to fraternity parties because she hoped to have a fraternity boyfriend and get an invitation to the formals . One Friday night she went to a party with her friends. As usual, the house served beer from a keg and a grain punch. She drank quite a bit and was feeling a little tired. One of the fraternity brothers Anne had been "scoping out," John, suggested she go lie down in his room. Anne agreed.

The next morning, Anne was not sure how she got home. She did not remember all of the details. As she thought about it in hindsight, she remembered going to lie down and must have fallen asleep. She awakened sometime later when John came into his room and got into bed with her. She was pretty drunk, but she was aware that John was removing her clothes. In her mind she thought "he's removing my clothes and he is expecting sex."

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[432] Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 485–86 (2004).

[433] Scalzo, *supra* note 418, at 8.

[434] Seidman &Vickers, *supra* note 432, at 486.

John did have sex with her. She did not specifically say "yes." Conversely, she also did not say "no." She does not recall really participating. She thinks she just kind of went with it. In the fogginess of her mind, Anne had thought, "eh, I don't care" or "just go with it."[435]

The next morning, though, she did care. She was embarrassed and figured the other fraternity brothers knew what happened. She is not that type of girl. That morning, Anne thought to herself, "That was a bad decision."

Anne did not allege sexual assault back in 1990 when that incident occurred. Over the subsequent years she watched rape reform take hold. She has seen and heard about "Take Back the Night." She has learned about date rape and acquaintance rape. She has heard many stories – many just like her own. She has been told by many that a woman who is drunk cannot consent to sex and that if a man has sex with her, it is deemed rape. Looking back on that fraternity party, Anne still does not believe she was raped. She could have decided not to go to John's room. She could have said no. She remembers not caring one way or the other. She knows it was because of the alcohol that she did not care, when she may have cared if she was sober. It was quintessential drunk sex.

The above scenario involves a particular demographic - college students who possibly have parents still supporting them financially and emotionally. Unless they are early in their freshman year, they have some higher education as well. Although some young enlisted servicewoman are similarly situated, the majority of them are not supported financially by their parents.[436] Although many have strong emotional ties to their family, many joined the

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[435] *See supra* Part VI.A.4.

[436] This assertion is based on the author's extensive interaction with new recruits during her assignments as a series commander and company commander at Marine Corps Recruit Depot Parris Island, South Carolina from 1 June 2004 to 1 March 2006.

service in order to find a community of support—support they did not get at home.[437] Most have no education beyond high school.[438]

Many of these young women look to their non-commissioned officers and staff non-commissioned officers for support and guidance.[439] Instead of resolving confusion regarding relationships on their own, they go to their sergeants, staff sergeants, and first sergeants. These leaders receive many hours of training in sexual assault prevention. They want to take care of their troops. They may encourage troops to make reports. The "rape-crisis culture" in today's armed forces is conditioning women who are prone to conditioning to resolve their confusion over drunk sex in favor of sexual assault, not bad decision-making. Consciously choosing to acquiesce, like Anne in the above example, is different than acquiescing out of fear. However, the current sexual assault prevention training conditions women to believe that they are incapable of acquiescing after drinking alcohol.

Because incapacity is ambiguous, it is easy to decide that a night you wish had not happened was rape. Words like "rape" and "sexual assault" assist women in easily defining and compartmentalizing a confusing experience into something that is easy to understand.[440]

> 'As far as I'm concerned, you can change your mind before, even during, but just not after sex' The reason this joke is funny, and the reason it's also too serious to be funny, is that in the current atmosphere, you can change your mind afterward. Regret can signify rape. A night that was a blur, a night you wished hadn't happened, can be rape. Since verbal coercion and manipulation are ambiguous, it's too easy to decide afterwards that he manipulated you.[441]

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[437] *Id.*

[438] *Id.*

[439] This assertion is based on the author's thirteen years of active duty service as a Marine officer.

[440] *See* KATIE ROIPHE, THE MORNING AFTER, SEX, FEAR, AND FEMINISM 82 (1993).

[441] *Id.*

This is disconcerting because it creates a culture of victimization, threatens to undermine the status and achievements of military women, and trivializes crimes committed against women by true predators.

1. Culture of Victimization: Institutionalizing Female Weakness[442]

> *Combating myths about rape is one of the central missions of the leaders of the rape-crisis movement. They spend money and energy trying to break down myths like "She asked for it." But with all their noise about rape myths, rape-crisis feminists are generating their own. We all know this plot: I trusted him – I thought people were good – then I realized – afterward I knew . . . Take Back the Night Marches are propelled by this myth of innocence lost. All the talk about empowering the voiceless dissolves into the image of the naïve girl child who trusts the rakish man.*[443]

Perpetuating the idea that women routinely become too drunk to know what they are doing, while men stay sober and lucid, allows women to abdicate responsibility for their roles in drunk sex. If one assumes women are not helpless and naïve, they should be held responsible for their choice to drink and their actions when they do. The inverse of that is the failure to take responsibility for their own choices and actions, resulting in a population of helpless women. Like the driving under the influence example,[444] the law holds women drivers to the same standard as male drivers. The law should likewise hold men and women to the same standard in drunk sex cases.

A recent article in *Rolling Stone* quoted an Army nurse who said "Ma'am, I'm more afraid of my own soldiers than I am of the enemy."[445] A Marine lance corporal told *Rolling Stone* that she "was assaulted so often during her four-year stint that she came to regard it as

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[442] *Id.* at 74.

[443] *Id.* at 82.

[444] *See supra* Part VI.A.2 and accompanying text.

[445] Sabrina Rubin Erdely, *The Rape of Petty Officer Blumer*, ROLLING STONE, Feb. 14, 2013, at 56, 59.

an unavoidable, even sanctioned part of service." She further told *Rolling Stone* that she "'thought it was just a normal thing in the military, almost like a hazing process . . . It seemed like everyone gets raped and assaulted and no one does anything about it; it's like a big rape cult.'"

While acknowledging that sexual assault does occur in the military society, it is counter-intuitive that a Marine could tolerate being assaulted "so often during her four-year stint that she came to regard it as an unavoidable, even sanctioned part of service."[446] Women of the rape crisis movement believe women like Anne in the above example rationalize away the rape so as not to feel like a victim. Maybe the Marine in the *Rolling Stone* article has been conditioned to rationalize a decision to have drunk sex as sexual assault so as not to be accountable.[447]

It is tempting to read an article like one in *Rolling Stone* and lament the "epidemic of assault and cover-ups"[448] in the military. The attitude, however, that military women are victims, and the resulting neo-paternalism,[449] undermines the progress and status of military women is more troubling. This paradigm is counter to the goals of feminists who have worked tirelessly to achieve equality for women.

Legal feminism today goes too far beyond the original goal of equality and advocates a redistribution of power from the "dominant class" (men) to the "subordinate class"

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[446] *Id.*

[447] In this sense, accountability is referring not just to legal accountability, but also to social accountability (for example the proverbial "barracks whore" or the WM (meaning walking mattress not woman Marine)). This idea may seem offensive to some, but it is not much different than a woman rationalizing away being a victim.

[448] ROLLING STONE, Feb. 14, 2013, cover headline.

[449] Neo-paternalism is an overprotective demeanor that seeks to rectify what was previously viewed as an irresponsible exercise of liberty by close surveillance and supervision of future actions. The SAGE HANDBOOK OF POWER 11 (Stewart R. Clegg & Mark Haugaard eds., 2009).

(women).[450] Important individual protections found in Western jurisprudence—judicial neutrality and individual rights—are rebuked as patriarchal fictions serving only to protect men.[451] Those who advance this redistribution are essentially saying that the rights guaranteed by the Constitution should be set aside in the name of protecting women—essentially reinforcing traditional views about the fragility of the female body and will.[452] This platform is ironic in that women warriors, who take an oath to "support and defend" the same Constitution, are now assignable to all jobs in combat units.[453]

Ability to perform in combat largely rests on the ability to maintain your judgment and sound decision-making in life-or-death situations."[454] As evidenced by the lack of drunkenness as a defense, and the movement to get rid of the "mistake of fact defense, the services expect as much from servicemen in their personal lives. The services should expect as much from servicewomen.

2. Trivializing victims of real predators[455]

> *There is a pressure to prosecute, prosecute, prosecute. When you get one that's actually real, there's a lot of skepticism. You hear it routinely: 'Is this a rape case or is this a Navy rape case?'*[456]

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[450] Michael Weiss & Cathy Young, *Equal Rights or Neo-Paternalism*, CATO POLICY ANALYSIS, no. 256, June 19, 1996.

[451] *Id.*

[452] ROIPHE, *supra* note 441, at 66.

[453] Press Release, U.S. Dep't of Def, U.S. Dep't of Def. Rescinds Direct Combat Exclusion Rule, *supra* note 262.

[454] Kristina Wong, *Women Actually on the Front Lines May Not Happen*, WASH. TIMES, Feb. 5, 2013, http://www.washingtontimes.com/news/2013/feb/5/symposium-notes-complexities-women-combat-issue,

[455] *See* Anderson, *supra* note 100.

[456] Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY WASHINGTON BUREAU, Nov. 29, 2011, http://www.mcclatchydc.com/2011/11/28/v-print/131523/militarys-newly-aggressive-rape-prosecution-has-pitfalls.

By lumping together male-female relationships that do not follow feminist protocols with genuinely assaultive rapes, studies trivialize real crimes against women[457] committed by real felons.[458] "The seriousness of the crime is being undermined by the growing tendency…to label all heterosexual miscommunication and insensitivity as acquaintance rape."[459] Rape has become a catchall expression, a word used to define everything that is unpleasant and disturbing about relations between the sexes. Referring to drunk sex cases as "rape" dilutes its value and power as a description of a sexual crime or accusation.[460]

C. Loss of Confidence in the Justice System

1. Victims Lose Confidence When "Too Many Rapists Walk"

One of the most significant problems with pressure on the military to prosecute every allegation of sexual assault is that juries may not convict. Prosecuting these cases requires asking panels to subscribe to an understanding of sexual encounters that does not square with common human attitudes and experiences.[461] Members using their own common sense and knowledge of human nature may be unable to understand how a Marine lance corporal in the *Rolling Stone* article would tolerate being assaulted "so often during her four-year stint that she came to regard it as an unavoidable, even sanctioned part of service."[462]

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[457] *See* Estrich, *supra* note 2 and accompanying text.

[458] *When No Means No*, NATIONAL REVIEW, June 10, 1991.

[459] ROIPHE, *supra* note 441, at 81 (quoting Gillian Gillespie, founder of the rape prevention education program at University of Southern California at Santa Cruz).

[460] *See* Katie Roiphe, *Date Rape's Other Victim*, N. Y. TIMES, June 13, 1993, http://www.nytimes.com/1993/06/13/magazine/date-rape-s-other-victim.html.

[461] A military judge instructs members of military courts-martial panels as follows: "In weighing and evaluating the evidence, you are expected to use your own common sense and your knowledge of human nature and the ways of the world." BENCHBOOK, *supra* note174, at 50.

[462] Erderly, *supra* note 445, at 59.

The theory behind prosecuting drunk sex is that a woman who embraces a man who attracts her must know decisively and soberly whether or not she wants to have sexual intercourse at any given moment. The law does not take into account that human interaction is far more subtle and variable. Moreover, she must communicate these sentiments explicitly before any physical contact occurs. This perception does not allow for the modesty, emotional confusion, ambivalence, and vacillation that inexperienced young people may feel during the initial stages of sexual intimacy.[463] Many jurors remember feeling that very same way. Both prosecutors and defense attorneys have quipped "[t]here but for the grace of God, go I" when discussing why a jury acquitted an accused.[464]

Two of the women prominently figured in *The Invisible War* are Ariana Klay and Myla Haider. Both reported being raped by fellow servicemembers. Their alleged assailants *stood trial* at general courts-martial and were found *not guilty* of rape or sexual assault, but guilty of offenses such as adultery, indecent language, and consensual sodomy. The film uses Klay and Haider, and the acquittals in those cases, to support its theme that the military does not take rape and sexual assault seriously. "'The fact that there was a resolution at all is so unusual,' Klay notes wryly. 'I guess I should be happy.'"[465] Ariana Klay is not happy with

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[463] Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54 (1991)

[464] This claim is based on the author's personal experience as a trial and defense attorney in the Marine Corps since 2001. John Bradford was a martyr and English Reformer (active in the 16th century events that lead to the Church of England breaking away from the Roman Catholic Church) best remembered for his statement "There, but for the grace of God, goes John Bradford." Robert Hendrickson, THE FACTS ON FILE ENCYCLOPEDIA OF WORDS AND PHRASE ORIGINS (1997). Bradford spoke these words while he was imprisoned in the Tower of London when he saw criminals being led toward their execution. *Id.*

[465] Erdely, *supra* note 445, at 63.

the outcome of the trial and is now the named plaintiff in a lawsuit against Secretary Panetta,[466] which is indicative of a loss of confidence in the justice system.

2. Justice Is Not Served When Panels Are Tainted

The other side of the coin, juries beginning to convict in weak cases, is even more dangerous. The status of victims, sexual assault prevention training, political pressure to prosecute and using convictions as a metric to measure the military's success in eradicating sexual assault may condition juries to convict—even if contrary to their own common sense. This conditioning dilutes the beyond a reasonable doubt standard.

> I know fact from fiction . . . the fact of the matter is 80 percent of those are legitimate sexual assaults. Put another way, the Marine Corps' top officer was telling his subordinates that 80 percent of those charged with sexual assault were guilty.[467]

In May 2010, Staff Sergeant Jamie Walton, USMC faced a general court-martial relating to his relationship with a female Marine.[468] His charges included sexual assault and providing alcohol to a minor. During jury selection, prospective jurors reported that they had been trained that a woman cannot consent to sex after even a single drink. The judge instructed them to ignore that training. [469] One juror, a Marine staff sergeant, citing integrity, said he could not ignore his Marine Corps training in favor of a judge's instruction.[470]

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[466] Klay v. Panetta, No. 1:12-cv-00350-ABJ (D.D.C.)

[467] Michael Doyle, *Tough Talk By Marine Commandant James Amos Complicates Sexual Assault Cases*, MCCLATCHY WASHINGTON BUREAU (Sept. 13, 2012), http://www.mcclatchydc.com/2012/09/13/v-print/168410/tough-talk-by-marine-commandant-james-amos-complicates-sexual-assault-cases.

[468] United States v. Walton, No. 201000508/MC, Slip op. at 2 (N. M. Ct. Crim. App., Sept. 20, 2011).

[469] *Id.*

[470] *Id.*

The Marine Corps Commandant's Heritage Brief likewise affected courts-martial. In more than 30 cases since the Heritage Brief, military judges found that General Amos's remarks amounted to the appearance of unlawful command influence.[471] In a close case, where there is reasonable doubt, that doubt must be resolved in favor of the accused.[472] Some Marines, however, acknowledged that in a close case, they would "'side with the commandant.'"[473]

Lawmakers draft statutes, but courts give context to those statutes by interpreting them and applying them to the facts of a case. The 2012 Article 120 leaves crucial terms like "impaired" and "otherwise unaware" undefined.[474] The understanding of these deliberately ambiguous terms, "impairment" and "otherwise unaware" are now influenced from sources outside the courtroom—both from the political climate and the media.[475] In military courts, there are not just a few "test cases" for the 2012 Article 120. There are an overwhelming number of cases[476] in which jurors will apply ambiguous terms and outside influence and it will impact justice.

VII. Navigating the New Environment.

Servicemembers are operating in a radical new legal environment. Advances by males, in almost any form, that do not receive clear and explicit consent are deemed coercive

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[471] Telephonic interview with Col. John Baker, Chief Defense Counsel, U.S. Marine Corps (Mar. 19, 2013).

[472] BENCHBOOK, *supra* note 174, at § 2-5-12.

[473] Michael Doyle, *Tough Talk By Marine Commandant James Amos Complicates Sexual Assault Cases*, MCCLATCHY WASHINGTON BUREAU (Sept. 13, 2012), http://www.mcclatchydc.com/2012/09/13/v-print/168410/tough-talk-by-marine-commandant-james-amos-complicates-sexual-assault-cases.

[474] *See supra* Part V.A.

[475] *See, e.g.* Erdely *supra* note 445.

[476] *See* 2011 DTFSAMS Report, *supra* note 377, at 54–55; *see also*, Scalzo, *supra* note, 418, at 1

or assaultive.[477] Passion, spontaneity, or behavior *implying* assent are ruled out of intimate encounters and replaced by rational calculation and formal understanding.[478] Lawmakers have gone too far in attempting to write out the nuances. All degrees of intoxication now constitute impairment.[479] The awesome nature of human sexual interaction is reduced to "No means no." And now, "yes" *may also mean "no*."[480]

A. Danger of Doing Nothing About This Change of Course.

1. Change in the law may not be a vehicle for social change:

Culture and society do not change quickly.[481] It may not be possible or wise to try to use the criminal law to change the way people think.[482] In New Jersey in 1992, affirmative consent became the foundation of criminal regulation of sex offenses.[483] The decision in *In re MTS* is known for embodying radical reform in rape law.[484] The decision has been sharply criticized because of its failure to provide guidelines for when consent is freely given. The danger is that the decision can be too broadly construed and create criminal liability whenever consent to sex was influenced by emotional demands or social pressure.[485]

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[477] *See* Gilbert, *supra* note 463, at 61.

[478] *See id.;. Compare* 2008 MCM, *supra* note 220, app. 28, ¶ 45(t)(14))(defining consent as "words *or overt acts indicating* a freely given agreement.") *with* 2012 MCM, *supra* note 7, pt IV, ¶ 45(g)(8) (defining "consent as "a freely given agreement.").

[479] *See* Gilbert, *supra* note 463, at 61.

[480] *See id.*

[481] Fineman, *supra* note 60, at 2.

[482] Estrich, *supra* note 2, at 1181.

[483] Buchhandler-Raphael, *supra* note 114, at 161 (citing *In re MTS*, 129 N.J. 422 (1992)).

[484] *Id.* at 163.

[485] *Id*.

Consequently, New Jersey's affirmative consent law did not take hold in jurisdictions nationwide. Antioch College adopted an affirmative consent policy during its 1991-1992 academic year.[486] The school received sharp criticism for that policy.[487] The mainstream American news media ridiculed the policy that even became the subject of a *Saturday Night Live* sketch, entitled "Is It Date Rape?"[488] As a reflection of popular culture, the *Saturday Night Live* sketch demonstrates that society rejected an affirmative consent rule, despite New Jersey law.

2. Cautionary Alarm.

New Jersey's radical change to sexual assault law did not have broader legal or cultural effects because each state determines its own rape law, and other states decided not follow suit. The military, however, is subject to congressional legislation and political pressure. Unlike the states, the military cannot reject change in rape law because its population disagrees with it, regardless of how radical the change might be and how dissonant it might be from the population it effects. Interestingly, there are more than 1,400,000 active duty servicemembers[489]—a higher population than twelve U.S. states.[490]

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[486] The Policy stipulates that "if one person wants to initiate moving to a higher level of sexual intimacy in an interaction, that person is responsible for getting the verbal consent of the other person(s) involved before moving to that level." (Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 687 (1999)).

[487] *See id.*

[488] *Id.*

[489] U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT, tbl. 511 at 336 (2012), available at Military Personnel on Active Duty by Rank or Grade, U.S. Census Bureau 2012, *available at* http://www.census.gov /compendia/statab/cats/national_security_veterans_affairs/military_personnel_and_expenditures.html.

[490] States with smaller populations than the U.S. armed forces include the following: Delaware, District of Columbia, Hawaii, Idaho, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. U.S. Census Bureau, THE 2012 STATISTICAL ABSTRACT, *available at* http://www.census.gov/prod/2011pubs/12statab/pop.pdf).

Radical change in military law will have significant consequences. In effect, the law and policy changes are creating a new military justice system for sexual assault—one where the accused is presumed guilty and must prove his innocence.[491] The required mens rea is now a negligence as in civil cases.[492] The law has moved far from Sir Hale's requirements of resistance, prompt hue and cry, and corroboration.[493] Sir Hale's alarm was appropriate for a time when criminal defendants lacked the presumption of innocence, the standard of proof beyond a reasonable doubt and other fundamental rights of modern justice system.[494] This is a time to which the military justice system is arguably returning. However, Congress can act to moderate this overcorrection and political kneejerk reaction.

B. Adopt a Prosecutorial Discretion Model

> *But however strong the tendency may be to secure uniformity, a decision whether to prosecute or not has to be made on the particular facts and circumstances of the particular case.*[495]

Until recently, a double standard existed in our society: in the past, intoxication excused men, but intoxicated women were responsible for being raped.[496] The perfect storm of factors forced the pendulum in the opposite direction. Now, in a sexual encounter, intoxication excuses women, but intoxicated men are rapists. Neither of these paradigms

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[491] *See supra* Part VI.A.1.

[492] *See supra* Part VI.A.5.

[493] HALE, *supra* note 39.

[494] Anderson, *supra* note 50, at 959.

[495] R.M. JACKSON, ENFORCING THE LAW 53–54 (1967).

[496] Even into the 1990's, after most states reformed rape statutes, society continued to hold intoxicated women at least partially responsible for being raped. *See* Shiela B. Blume,supra *Sexuality and Stigma: The Alcholic Woman*, 15 ALCOHOL HEALTH & RES. WORLD 139, 140-42 (1991); *see also*, Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes,* 47 STAN. L. REV. 115, 121 (1994).

account for what actually occurs in contemporary interactions between men and women.[497] These paradigms are also useless in evaluating sexual assault cases where both parties are the same gender. If the female is presumed to be the victim and the male is necessarily the assailant, investigators, prosecutors and factfinders will struggle with same-gender cases—particularly those involving alcohol. The repeal of the "Don't Ask Don't Tell" policy[498] portends this dilemma. It's time to bring the pendulum center mass and evaluate each case individually rather than with preconceived, neo-paternalistic notions of sexual interaction.

The best way to center the pendulum is to recognize that all sexual assault cases are not alike and to adopt a model that relies on prosecutorial discretion rather than on politics. The law gives commanders discretion;[499] however, the perfect storm" of military sexual assault politics has effectively remitted commander's discretion to decide whether or not to prosecute the case. All cases go forward—even those that arguably should not.

Given the current political climate, it is understandable why commanders will make the politically safe choice to charge a servicemember and "let the jury figure it out." The problem with this choice is that it is based on the assumption that juries always do the right thing and do not make mistakes.[500] The judge advocate, not the commander is in the best position to prevent an injustice before the system miscarries.[501] A prosecutor is a gatekeeper

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[497] *See supra* Part VI.A.3. for a discussion of "the hook-up culture."

[498] Don't Ask, Don't Tell Repeal Act of 2010 H.R. 2965, S. 4023, 111th Cong. (2010) (enacted).

[499] 2012 MCM *supra* note 7, pt. II, R.401(a) ("Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges . A superior competent authority *may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally*." (emphasis added). This language enables a superior competent authority to require a judge advocate's determination as to whether or not charges should be filed in sexual assault cases. *Id*.

[500] Gershman, *supra* note 335, at 521.

[501] *Id.* at 521.

of justice and is responsible for the factual, legal and moral assessment of a case.[502] The prosecutor "make[s] and give[s] effect to the . . . value judgments that underlie our system of justice—that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished."[503] Judge advocates' ethical obligations, the supervision of prosecutors, and Article 32 pre-trial investigations are already in place and offer support for prosecutorial discretion.

1. Judge Advocates' Ethical Obligations and Supervision

Judge advocates are duty-bound to decline to prosecute charges which lack probable cause, yet the current system requires them to do so. Judge Advocates serving as prosecutors adhere to multiple sets of ethical rules and obligations. At a minimum, each judge advocate prosecutor adheres to their individual state bar oath and rules;[504] to the oath pursuant to RCM 807(b)(1)(A) and RCM 807(b)(2);[505] and oath of office.[506] Prosecutors also rely on the guidelines set forth in the American Bar Association Standards for the Function of the

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[502] *Id.* at 521.

[503] *Id.* at 522 (citing *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (there exists "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.")).

[504] *See, e.g.* Pennsylvania Rules of Professional Conduct, Rule 3.8 (stating "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . ."). *Id.*; CAL. R. PROF'L CONDUCT, R. 5-110 (stating "[a] member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause."); N.Y. STATE R. PROF'L CONDUCT, Rule 3.8 (stating "[a] prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.")

[505] 2012 MCM, *supra* note 7, pt II, R. 807(b)(1)(A), R. 807(b)(2).

[506] According to law, all U.S. military officers must swear or affirm an oath of office upon commissioning. 5 U.S.C. § 3331 (2012). Officers are bound by this oath to disobey any order that violates the Constitution of the United States. *Id.*

Prosecutor.[507] In both the oath pursuant to RCM 807 and the oath of office judge advocates swear to faithfully perform their duties.[508] The rules of professional conduct also contemplate supervisors who review and assist prosecutors in the performance of their duties Although commanders swear to the same oath at commissioning, they are not bound by the rules of professional conduct that judge advocates agree to be bound.

2. Article 32 Investigations[509]

A thorough Article 32 investigation is vital to a prosecutorial discretion model. The UCMJ designates several different forums at which infractions can be dealt. The most serious forum is a general court-martial. An Article 32 investigation is required to determine if there is enough evidence to merit the accused standing trial at a general court-martial.[510]

A thorough Article 32 investigation and well written report provides critical information for a prosecutor to use in exercising discretion as to whether or not the case should go forward. Although R.C.M. 405 does not require the investigating officer to be a lawyer,[511] the best practice is to have an experienced judge advocate litigator serve as the investigating

[507] *See supra* notes 505 and 506.

[508] "Do you swear that you will faithfully perform all the duties of trial counsel in the case now in hearing?" 2012 MCM, *supra* note 7, pt II, R. 807 (discussion) (recommending "I . . . do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; So help me God." DA Form 71, 1 August 1959.

[509] 2012 MCM, *supra* note 7, pt II, R. 405

[510] *Id.*

[511] *Id*.

officer. An experienced judge advocate is in the best position to evaluate evidence for probable cause and as discussed *supra*, is bound by ethical rules and obligations.[512]

VIII. Conclusion

Over the past four decades, civilian women moved into the legal and political arena pushing for rape law reforms to dispel many of the male-oriented rules developed through common law. Rape law reform in civilian society occurred gradually and eventually changed society's mindset on gendered crime. Society began to view perpetrators of crimes against women as predators. However, the focus on individual criminality did nothing to change widely accepted courtship rituals. Civilian lawmakers thus stopped short of making radical changes to the law with the goal of changing social attitudes about sexual relations.

The advancement of women in the military occurred much more slowly, and until recently occurred outside of the feminist movement. It is not surprising that the military rape statute did not evolve alongside civilian statutes. Although military courts largely kept up with the developments in the law of rape, military rape law did not change much until 2007.

As a result of several high-profile scandals and media attention on military sexual assault, Congress intervened and insisted on radical change to military rape law—particularly with regard to impaired victims. Congress has also insisted on policy changes regarding the treatment of victims. These changes outpace the law of rape in civilian society and have resulted in equal protection issues, concerns about the due process of law, unfair policies and confusion among military members.

Despite changes to the law, drunk sex cases have gotten no easier to prove in court. Sexual assault prosecutions within the military justice system are now a self-fulfilling

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[512] *See, e.g., supra* note 504 and accompanying text.

prophecy in which a lack of convictions becomes more "proof" to Congress that the military isn't "serious" about sexual assault. It is a vicious cycle. It appears that lawmakers and policymakers are changing the law to increase convictions and will not be satisfied until conviction rates on weak "drunk sex" cases matches the conviction rate in civilian jurisdictions—a very different class of cases because the civilian prosecutors have discretion to decline prosecute when lacking sufficient evidence.

If, under the current paradigm, the military gets to the point where conviction rates match civilian jurisdictions, innocent young men are likely going to jail and then spend their lives with a sex offender label. In order to increase convictions in a way that comports with the Constitution, only those cases with sufficient probable cause should go forward to trial. Trained military prosecutors are in the best position to identify those cases individually. Most importantly the military must not be pressured to abdicate the accused's presumption of innocence until proven guilty and the requirement of proving his guilt beyond a reasonable doubt.

The unfortunate reality is that sexual assault cannot be completely eradicated. The equal protection issues, concerns about the due process of law, and unfair policies will persist so long as the military believes it can prosecute its way out of the problem. For the military justice system to retain any integrity, its guardians must stand strong against the political pressure to obtain convictions and remain committed to upholding the Constitution they swore to support and defend.