Is Article 125, Sodomy a Dead Letter in Light of *Lawrence v. Texas* and the New Article 120?

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"[Y]our friend here is only mostly dead. There's a big difference between mostly dead and all dead. . . . Now mostly dead, he's still slightly alive."[1]

I. Introduction

Is Article 125, Sodomy a dead letter? Like Miracle Max's patient in *The Princess Bride*, maybe Article 125 is only mostly dead thus still slightly alive? Since the inception of the Uniform Code of Military Justice (UCMJ) in 1950,[2] the military has used Article 125 to prosecute consensual and non-consensual sexual conduct.[3] Since its creation and until recently, sodomy law has remained relatively unchanged and full of life.[4]

Sodomy is an unnatural carnal copulation with another person or animal: including fellatio, cunnilingus, or anal sex.[5] Sodomy is a general intent crime punishable regardless of the consent or the age of the parties.[6] There are three kinds of sodomy. The first kind, forcible sodomy, is done by force and without consent of the other person.[7] The second kind, underage sodomy, has two variations. It is done either with a child under the age of twelve or with a child between twelve and sixteen.[8] For purposes of this discussion, nonconsensual sodomy constitutes the first two categories, forcible and underage. Finally, the third kind, consensual or non-forcible sodomy, is all other sodomy that is not done by force and not done with someone under sixteen years old.[9]

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[1] THE PRINCESS BRIDE (20th Century Fox 1987) (quoting actor Billy Crystal playing the role of Miracle Max).

[2] SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 17–24 (Feb. 2005), *available at* http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (discussing the history of sexual assault crimes in the military). With the adoption of the Uniform Code of Military Justice (UCMJ) in 1950 and with the publication of the *Manual for Courts-Martial* (*MCM*) in 1951, the military criminalized sodomy which is in essentially the same form today. *Id.* at 20. Until 1951, the *MCM* and Articles of War did not specifically prohibit sodomy. *Id.* at 24. The first Articles of War adopted in 1775 contemplated that commanders would turn over Soldiers accused of crimes to the local civil authorities. *Id.* at 17. Prior to 1951, a servicemember could still be punished for sodomy provided the commander delivered the accused over to the civil authorities or prosecuted under a more general article. *Id.* With the adoption of the UCMJ, commanders now had criminal jurisdiction over their servicemembers regardless of whether or not the civil authorities had the capacity to prosecute. *Id.* at 21. The 1950 UCMJ adopted many common law crimes existing at the time including the crime of sodomy. *Id.* at 24. *See* United States v. Hall, 34 M.J. 695 (A.C.M.R. 1991) (discussing the history of military sodomy crimes).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51c (2008) [hereinafter MCM].

> It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

Id. ¶ 51c. "Penetration, however slight, is sufficient to complete the offense." *Id.* at pt. IV, ¶ 51a.

[4] Bowers v. Hardwick, 478 U.S. 186, 192 (1986) ("It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.") (citing Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986)); United States v. Henderson, 34 M.J. 174 (1992) (upholding Article 125 based upon *Bowers*, 478 U.S. 186).

[5] MCM, *supra* note 3, pt. IV, ¶ 51c.; *Henderson*, 34 M.J. 174 (holding Article 125(a) included heterosexual fellatio).

[6] *See id.* pt. IV, ¶ 51a (the general intent crime is complete upon unnatural carnal copulation with another person or animal and only the slightest penetration is sufficient).

[7] *Id.* pt. IV, ¶ 51b(4) ("That the act was done by force and without the consent of the other person.").

[8] *Id.* pt. IV, ¶ 51b(2), (3).

[9] *Id.* pt. IV, ¶ 51b, e. Sodomy has one essential element of carnal copulation with another certain person or with an animal and three aggravating elements to be added as appropriate. *Id.* pt. IV, ¶ 51b. All sodomy crimes allow the possibility of a dishonorable discharge and total forfeiture of all pay and allowances. *Id.* pt. IV, ¶ 51e. The presence of an aggravating element would increase the maximum confinement allowable. *Id.* Without an aggravating element (meaning adult, non-forcible, unnatural carnal copulation), the maximum amount of confinement is five years. *Id.* If the sodomy victim is under twelve

In the last six years, two developments call into question the vitality of Article 125. First, the Supreme Court invalidated a state statute criminalizing consensual sodomy.[10] In the 2003 decision of *Lawrence v. Texas*, the Supreme Court found a right to privacy protecting consensual sexual relations in the home which was outside of the Government's power to criminalize.[11] This seems to wipe out consensual sodomy.

The second development began in 2004 when Congress ordered a study into reforming military sexual assault crimes including sodomy.[12] As a result of the study, Congress enacted significant reforms to sexual assault prosecutions in the military.[13] As of 1 October 2007, nonconsensual, underage or forcible sex crimes are punishable under the new Article 120, UCMJ.[14] Article 120 seems to replace forcible and underage sodomy.

Understanding what is alive or dead in Article 125 requires separating its goals of punishing both consensual and non-consensual conduct. In order to punish consensual sodomy, practitioners must understand when military interests trump privacy rights. In order to punish non-consensual (meaning forcible or underage) sodomy, practitioners must understand the impact of the new Article 120. Taking these two influences together, military justice practitioners should relegate Article 125 to consensual, adult sodomy which is prejudicial to good order and discipline, and let the new Article 120 do the heavy lifting on forcible or underage sex crimes.

This article separately examines consensual and non-consensual sexual misconduct and then explores the intersection of the two. For consensual sodomy, Section II shows how judges in providence inquiries or trial counsel in contested cases should be able to meet the low constitutional threshold for an Article 125 conviction. For Article 125's non-consensual sodomy, Section III argues that the new Article 120 replaces forcible sodomy and underage sodomy through the canons of statutory interpretation. Section IV discusses the intersection between the remainder of Article 125 and the new Article 120.

II. Article 125's Consensual Sodomy Is Mostly Alive

A. Background on Consensual Sodomy Before 2003

Prior to 2003, sodomy prosecutions presented little constitutional concern. The Supreme Court resolved the issue in its 1986 decision, *Bowers v. Hardwick*.[15] The *Bowers* case involved two homosexual adults who engaged in a private act of consensual sodomy.[16] The opinion held that the U.S. Constitution did not prevent a state from criminalizing consensual sodomy, even in the privacy of a home.[17] The *Bowers* Court upheld a law similar to Article 125 which punished sodomy regardless of the parties' gender even if the act was private and consensual.[18]

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years of age or if the sodomy is done by force and without consent, the maximum punishment is life without parole. *Id.* If the victim is over twelve but under sixteen years of age, the maximum punishment is twenty years confinement. *Id.* All other cases of sodomy (non-forcible and adult) allow a maximum sentence of five years confinement. *Id.*

[10] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[11] *Id.*

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government.

Id.

[12] SEX CRIMES AND THE UCMJ, *supra* note 2, at 1 (discussing the genesis of the reform movement).

[13] UCMJ art. 120 (2005), *amended by* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256. Article 120 was formerly known as "Rape and carnal knowledge" and only addressed forcible and underage vaginal intercourse. *Id.* Article 120 now has fourteen enumerated offenses intended to cover all non-consensual or underage sexual misconduct. *Id.*

[14] *See* § 552, 119 Stat. 3256 (expanding the nature of the physical act punished by Article 120 from narrowly-defined sexual intercourse to broadly-defined "sexual act" and "sexual contact"); Exec. Order No. 13,447, 3 C.F.R. 278 (2008) (repealing several sex crimes in Article 134 such as assault-indecent, indecent acts or liberties with a child and indecent acts with another since those are now covered in Article 120).

[15] 478 U.S. 186, 188 (1986).

[16] *Id.*

[17] *Id.* at 192–94.

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. . . . Against this background, to claim that a right

Since the UCMJ sodomy statute is similar to the state statute upheld in *Bowers*, the Court of Appeals for the Armed Forces (CAAF) easily upheld the constitutionality of Article 125.[19] In *United States v. Henderson*, the CAAF relied on *Bowers* to uphold Article 125 as applied to heterosexual consensual sodomy.[20] The *Henderson* court upheld a sodomy conviction based on consensual, adult, heterosexual fellatio between a Marine recruiter and a high school student.[21] At least until 2003, Article 125 prohibited private, non-adulterous, noncommercial fellatio, cunnilingus, or anal sex regardless if it was a homosexual or heterosexual act based on the *Bowers-Henderson* line of cases.[22]

In 2003, *Lawrence v. Texas* overruled *Bowers v. Hardwick* and in doing so created a constitutional right to engage in consensual, private, adult sexual conduct.[23] *Lawrence* involved two men convicted of violating a Texas statute prohibiting two persons of the same sex from engaging in certain sexual conduct.[24] The petitioners were engaging in anal sodomy when police entered their home in response to a reported weapons disturbance.[25] The Supreme Court ruled that two consenting adults, either homosexual or heterosexual, had a right to sexual conduct in the privacy of a home free from criminal penalty.[26] This right is in apparent conflict with Article 125's prohibition of private, consensual sodomy.

B. *Lawrence-Marcum* Cases; Privacy Rights Limit Article 125

1. The Lawrence *Court Giveth and It Taketh Away*

In order to understand the effect of *Lawrence* on Article 125, one has to first understand what the *Lawrence* liberty interest is. The *Lawrence* Court uses sweeping, broad language in defining this liberty interest[27]

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making private sexual conduct a crime. Their right to liberty under the Due Process clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. [28]

> to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Id. (citing Apasu-Gbotsu et al., *supra* note 4, at 524–25).

[18] Aside from the inclusion of bestiality in the Article 125, the Georgia statute effectively criminalized the same conduct that is unnatural carnal copulation (sodomy) in Article 125. *Compare id.* at 188 (quoting GA. CODE ANN. § 16-6-2 (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."), *with* MCM, *supra* note 3, pt. IV, ¶ 51c.

[19] United States v. Henderson, 34 M.J. 174 (C.M.A. 1992) (holding no right to privacy in the federal constitution that invalidated UCMJ Article 125, which included heterosexual fellatio); United States v. Fagg, 34 M.J. 179 (C.M.A. 1992) (relying on *Bowers* and holding UCMJ Article 125, sodomy is constitutional).

[20] *Henderson*, 34 M.J. at 178 (ruling on broader grounds than *Bowers*, which limited itself to homosexual sodomy, not heterosexual sodomy).

[21] *Id.*

[22] United States v. Gates, 40 M.J. 354 (C.M.A. 1994) (ruling that a conviction for engaging in private, non-adulterous, non-commercial, consensual, heterosexual fellatio does not violate penumbral rights reserved in Ninth Amendment or due process and equal protection guaranteed in Fifth Amendment); United States v. Hall, 34 M.J. 695 (C.M.A. 1991) (holding that Article 125 does not unconstitutionally infringe on right to privacy by criminalizing consensual acts of heterosexual anal intercourse).

[23] 539 U.S. 558, 578 (2003) (overruling *Bowers*, 478 U.S. 186).

[24] *Id.* at 563 (invalidating a conviction under TEX. PENAL CODE ANN. § 21.06(a) (2003) which punished same-sex deviate sexual intercourse defined as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or anus of another person with an object").

[25] *Id.* at 562.

[26] *Id.* at 575, 578.

[27] *Id.* at 578; *see id.* at 575 (holding that the liberty interest is founded on grounds broader than the Equal Protection clause in order to protect both homosexual and heterosexual sodomy).

[28] *Id.* at 578 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992)).

The opinion specifically extends the liberty interest to both homosexual and heterosexual sodomy if done in private between two consenting adults.[29]

In order to contain the use of precedent, the *Lawrence* Court was careful to list the situations to which the liberty interest might not extend:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[30]

In sum, the constitutional right in *Lawrence* is apparently limited to circumstances similar to the facts of the case: private, consensual sodomy between two adults. Because this was a civilian case, the *Lawrence* court did not address any limits as specifically applied to the military.

2. Marcum *Finds a Right to Non-prejudicial Sodomy*

Prior to *Lawrence*, in the case of *Parker v. Levy*, the Supreme Court recognized that constitutional rights may apply differently in the military context.[31] The CAAF has limited the application of certain constitutional rights to servicemembers.[32] The CAAF had its first opportunity to apply *Lawrence* to Article 125 in *United States v. Marcum*.[33] Thus, when the CAAF chose the *Marcum* case, the court had the benefit of a history of balancing constitutional rights with military interests.[34]

On 21 May 2000, a court-martial found Technical Sergeant (TSgt) Marcum not guilty of forcible sodomy but guilty of non-forcible (consensual) sodomy in violation of Article 125.[35] The trial established that TSgt Marcum often socialized with airmen from his flight at parties involving alcohol.[36] After these parties, these airmen often spent the night at TSgt Marcum's off base home.[37] After one such party, a subordinate of TSgt Marcum, Senior Airman (SrA) Harrison, spent the night on TSgt Marcum's couch.[38] During the night, SrA Harrison awoke to find TSgt Marcum orally sodomizing him.[39]

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[29] *Id.*; *see id.* at 575 (holding that the liberty interest is protects both homosexual and heterosexual sodomy).

[30] *Id.* at 578 (excluding from the right cases involving minors, persons who may be injured or coerced, persons situated in relationships where consent might not easily be refused, public conduct, prostitution, or same sex marriage). After using broad language to establish the right, the exceptions swallow the rule.

[31] 417 U.S. 733, 743 (1974).

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.

Id. (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[32] In these cases, the court balances constitutional rights with the military interest in maintaining disciplined armed forces. United States v. McCarthy, 38 M.J. 398, 400 (C.M.A. 1993) (holding a warrantless entry into a military barracks to effectuate an apprehension did not violate the Fourth Amendment); United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972) (holding that the right to free speech in the armed services is not unlimited and must be brought into balance with the greater interest of defense of the country).

[33] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

[34] *Id.* at 205.

> [T]his Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite.
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> At the same time, these constitutional rights may apply differently to members of the armed forces than they do to civilians.

Id. (citations omitted).

[35] *Id.* at 201.

[36] *Id.* at 200.

[37] *Id.*

[38] *Id.*

The court-martial panel convicted TSgt Marcum of sodomy but did not find the element of "force or without consent."[40] Using a consent defense at trial, TSgt Marcum testified that the conduct was "equally participatory."[41] The defense showed that after the incident, SrA Harrison continued his friendship with TSgt Marcum. Furthermore, the two went salsa dancing together and exchanged numerous emails.[42] On appeal, TSgt Marcum argued that his conviction for consensual sodomy in the privacy of his home must be set aside in light of *Lawrence v. Texas*.[43]

In *Marcum*, the CAAF held that *Lawrence v. Texas* requires a case by case review of constitutionality rather than a facial attack on Article 125 itself:[44]

> This as-applied analysis requires consideration of three questions. First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior of factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[45]

In other words, the *Marcum* court reads the *Lawrence* right to privacy as broad, but with many exceptions.[46]

According to the first prong of the *Marcum* test, if the sodomy is consensual, then it is within the *Lawrence* liberty interest.[47] Even if the conduct is within the interest, the general exceptions stated in *Lawrence* may apply under the second prong.[48] Furthermore, under the third prong, military interests may justify criminalizing conduct not criminalized in the civilian world.[49]

In effect, the *Marcum* court reserved the right to find military-specific exceptions based upon the history of applying constitutional rights in the military environment. This article defines a general exception as one based on the second prong of *Marcum*. In other words, the general exception is grounded in the *Lawrence* opinion and applies to both civilian and military personnel. This article defines a military-specific exception as one based the third prong of the *Marcum* opinion and only applying to military personnel.

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[39] *Id.*

[40] MCM, *supra* note 3, pt. IV, ¶ 51b. Sodomy has one essential element of unnatural carnal copulation with another certain person or with an animal and three aggravating elements to be added as appropriate. *Id.* One of the three aggravating elements is if the sodomy was done by force and without consent. *Id.* If a court-martial does not find this element beyond a reasonable doubt but so finds that the act occurred, then the court-martial may convict on consensual sodomy based on the essential element. *Id.*

[41] *Marcum*, 60 M.J. at 201 (quoting the appellant's testimony at trial).

[42] *Id.*

[43] *Id.* at 202.

[44] *Id.* at 206 ("Therefore, we consider the application of *Lawrence* to Appellant's conduct. However, we conclude that its application must be addressed in context and not through a facial challenge to Article 125.").

[45] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[46] *Id.* at 203–05 (discussing *Lawrence*, 539 U.S. at 578). The CAAF addressed the hybrid nature of the principles underlying the liberty interest. *Id.* at 204. The Supreme Court supported the right to sodomy with cases establishing a fundamental right. *Id.* However the Court did not declare sodomy a fundamental right. *Id.* Nor did it use a strict scrutiny standard of review similar to other fundamental rights. *Id.* The CAAF held that the appropriate standard of review was a searching constitutional inquiry. *Id.* at 205. Without clear guidance, the CAAF found that the Supreme Court held the door open for lower courts to further develop the right to commit sodomy. *Id.*

[47] *But see id.* at 212–15 (Crawford, C.J., concurring in the result); United States v. Stirewalt, 60 M.J. 297, 305 (C.A.A.F. 2004) (Crawford, C.J., concurring in part and in the result on a similar consensual sodomy case). Chief Judge Crawford would narrowly define the *Lawrence* right to privacy in the first prong, which presumably would mean less need for many exceptions. *Marcum*, 60 M.J. at 212. She distinguished *Marcum* from *Lawrence* because the *Marcum* case had probable cause to allege force whereas the *Lawrence* case was clearly consensual. *Id.* at 212–13. In other words, if there is probable cause to allege force, then Chief Judge Crawford would answer "No" to the *Marcum* test's first question of whether "the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?" *See Stirewalt*, 60 M.J. at 304 (quoting *Marcum*, 60 M.J. at 206). However no lower court has advanced Chief Judge Crawford's reasoning further. This reasoning stems from ambiguity in the *Lawrence* opinion. The *Lawrence* court did not explicitly state whether this right to privacy was broad with many exceptions or this right was narrow because many things did not apply. *Marcum*, 60 M.J. at 203–05.

[48] *Marcum*, 60 M.J. at 206.

[49] *Id.*

In *Marcum*, the court assumed that the conduct in question was within the *Lawrence* liberty interest under the first prong, but found that a general exception applied under the second prong.[50] The appellant was the supervisor of the other sodomy participant. Because of the supervisory relationship, the other sodomy participant was in a position where freely given consent was difficult to discern, unlike the parties in *Lawrence*.[51] The court did not reach the issue of whether any military-specific exceptions applied under the third prong.[52]

Although it did not reach the military-specific exception, the *Marcum* court essentially added to Article 125 the element of prejudice to good order and discipline from Article 134.[53] The third prong of the *Marcum* test asks if the conduct is impermissible for servicemembers even though it may be permissible for civilians.[54] As the offspring of *Marcum* will show, the evidence supporting the military-specific exception looks similar to evidence that would support the element of prejudice to good order and discipline in Article 134.[55]

3. Marcum*'s Offspring Finds a Military-Specific Exception When Prejudice Exists*

Approximately one month after the *Marcum* decision, the CAAF found a military-specific exception for a consensual sodomy conviction in *United States v. Stirewalt*.[56] The enlisted appellant engaged in sodomy with an officer assigned to the same Coast Guard cutter.[57] The court assumed, without deciding, that the conduct was within the *Lawrence* liberty interest (first prong) and that no general exceptions applied (second prong).[58] The CAAF did not find a situation where consent might not easily be refused.[59]

Instead, the court found that a military-specific exception applied to the *Lawrence* liberty interest in prohibiting consensual sexual conduct between officers and enlisted who are assigned to the same ship.[60] The opinion cited Coast Guard regulations prohibiting such relationships because they undermine good leadership and military discipline.[61] In other words, such conduct was prejudicial to good order and discipline, and therefore, outside the *Lawrence* liberty interest under the military-specific exception.

Since *Marcum* and *Stirewalt*, military service courts have also upheld some consensual sodomy convictions as military-specific exceptions to the *Lawrence* liberty interest. In *United States v. Bart*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) applied a military-specific exception when the appellant's sodomy with a junior Sailor impacted unit

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[50] *Id.* at 208.

[51] *Id.* (finding SrA Harrison, the other sodomy participant, "was a person 'who might be coerced' or who was 'situated in [a] relationship[] where consent might not easily be refused'") (alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[52] *Id.* Arguably, the *Marcum* court could have found a military-specific exception at the same time it found that a general exception applied. The appellant's conduct may have violated a punitive regulation governing senior-subordinate relationships. *See id.* at 207 (citing U.S. DEP'T OF THE AIR FORCE, INSTR. 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS paras. 2.2, 3.1 (1 May 1996)).

[53] MCM, *supra* note 3, pt. IV, ¶ 60b(2) ("That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces . . . ."); *see* United States v. Foster, 40 M.J. 140, 143 (C.A.A.F. 1994) (holding that Article 134 is implicitly a lesser included offense of the enumerated articles like Article 125, however the Government must prove the extra Article 134 element beyond a reasonable doubt).

[54] *Marcum*, 60 M.J. at 207.

[55] MCM, *supra* note 3, pt. IV, ¶ 60c(2)(a).

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Id.

[56] 60 M.J. 297 (C.A.A.F. 2004).

[57] *Id.* at 303–04 (affirming the conviction of consensual sodomy pursuant to a re-trial where the appellant was originally convicted of rape and forcible sodomy).

[58] *Id.* at 304.

[59] *Id.* The other participant was actually the superior commissioned officer to the appellant. *Id.*

[60] *Id.*

[61] *Id.* (citing U.S. DEP'T HOMELAND SECURITY, COMDTINST 1000.6A, PERSONNEL MANUAL para. 8.H.2.f (C26, 1988) (Unacceptable Romantic Relationships)).

morale.[62] The *Bart* court noted that regulations prohibited this type of relationship between people of different rank in order to prevent harm to good order and discipline.[63] The adulterous relationship was intertwined with other crimes such as false official statement, obstruction of justice, and murder.[64] The NMCCA applied the military-specific exception since this conduct in this context was prejudicial to good order and discipline.

The Air Force Court of Criminal Appeals (AFCCA) also based a military-specific exception on the existence of prejudice. In *United States v. Christian*, the AFCCA applied a military-specific exception where the appellant gave the other sodomy participant alcohol knowing she was under the legal drinking age.[65] The appellant broke dormitory rules in giving an underage person alcohol prior to engaging in sodomy.[66] Since the sodomy undermined good order and discipline in the dormitory, the military-specific exception applied.

4. Unpublished Cases Find a Military-Specific Exception When Prejudice Exists

In addition to the military-specific exception, some unpublished sodomy cases also find a general exception to *Lawrence* when the parties hold unequal status. In senior to subordinate sodomy, the convictions may be sustained under both the general and military-specific exceptions.[67] Military subordinates who engage in sodomy with an accused are "situated in relationships where consent might not easily be refused," the general exception found in *Lawrence*.[68] At the same time, as a military-specific exception, good order and discipline requires that senior personnel refrain from relationships with subordinates that could create an appearance of partiality.[69] Regardless of which exception applies, the discussion remains whether the conduct is prejudicial to good order and discipline.

Similar to senior-on-subordinate sodomy, appellate courts found both exceptions applied to public or three party sex acts.[70] Public sexual acts are a general exception to the *Lawrence* privacy right.[71] Public sex acts could be construed broadly

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[62] 61 M.J. 578 (N-M. Ct. Crim. App. 2005); *cf.* United States v. Tate, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (finding sodomy conviction constitutional where appellant killed his wife in order to continue the adulterous affair which included sodomy). These are companion cases.

[63] *Bart*, 61 M.J. at 582 (quoting U.S. NAVY REGS., ch. 11, General Reg., art. 1165 (1990)).

[64] *Id.*

[65] 63 M.J. 714, 716 (A.F. Ct. Crim. App. 2006); *see also* United States v. Diebel, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006).

[66] *Christian*, 63 M.J. at 715.

[67] United States v. Habian, No. 200600753, 2007 CCA LEXIS 352 (N-M. Ct. Crim. App. Sept. 18, 2007) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where victim was drunk and subordinate to appellant); United States v. Bonner, 64 M.J. 638 (A. Ct. Crim. App. 2007) (finding no legal error in conviction for sodomy for a sergeant who subsequently raped the other sodomy participant, a junior Soldier); United States v. Hurst, No. 200401383, 2007 CCA LEXIS 56 (N-M. Ct. Crim. App. Feb. 8, 2007) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where victim was subordinate to appellant); United States v. Albaaj, No. 20000121 (A. Ct. Crim. App. Aug. 1, 2006) (unpublished) (affirming consensual sodomy conviction between senior and subordinate during the duty day); United States v. McClelland, No. 200101300, 2006 CCA LEXIS 6 (N-M. Ct. Crim. App. Jan. 24, 2006) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where the officer appellant was the treating psychiatrist to the enlisted sodomy partner); United States v. Tate, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (finding consensual sodomy conviction constitutional under a general exception and under a military-specific exception where the appellant was senior to other participant and their relationship violated military regulations); United States v. Pyles, No. 20010967 (A. Ct. Crim. App. Oct. 8, 2004) (unpublished) (affirming consensual sodomy conviction between commander and his enlisted medic during a field exercise).

[68] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the *Lawrence* liberty interest "does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused"); United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004); *see* United States v. Ritter, No. 20010528 (A. Ct. Crim. App. Mar. 4, 2005) (unpublished) (affirming conviction for consensual sodomy during duty hours between married prison cadre and former inmate on the day of his release).

[69] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-14 (18 Mar. 2008) [hereinafter AR 600-20] (prohibiting relationships between Soldiers of different rank); U.S. DEP'T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS para. 1-5c (21 Feb. 2000).

> The authority or influence one soldier has over another is central to any discussion of the propriety of a particular relationship between soldiers of different rank. Abuse of authority and appearance of partiality are the major sources of problems. Limiting the potential for actual or perceived abuse of authority or partiality is a primary purpose of the policy on relationships.

Id.

[70] United States v. Taylor, No 200300876, 2006 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb 28, 2006) (finding a consensual sodomy conviction constitutional under a general exception and under a military-specific exception to *Lawrence* when done on board a ship in a *ménage a trois*); United States v. Teague, No 200202276, 2005 CCA LEXIS 292 (N-M. Ct. Crim. App. Sept. 15, 2005) (finding a consensual sodomy conviction constitutional under a general exception and under a military-specific exception to *Lawrence* when in a patrol car on duty in public).

to include any incident in which someone is present besides the two participants and that person is cognizant of the act.[72] Public sex acts would also arguably include a three person sex act or a *ménage à trois*, even if done in the privacy of a home.[73] The key to prosecuting a private *ménage à trois* would not only be establishing the presence of a third party, but also how the third party's presence creates prejudice.

5. *Without Prejudice*, Lawrence *May Negate a Lesser Included Offense*

If a case lacks prejudice to good order and discipline, *Lawrence* may nullify a consensual sodomy conviction which results from a failed forcible sodomy prosecution.[74] In these types of cases, the Government prosecutes forcible sodomy but only convicts on consensual sodomy.[75] In other words, the accused succeeds on either a defense of consent or mistaken consent. In these cases, the defense may argue that the consensual sodomy conviction is unconstitutional under *Lawrence*. If the record does not establish a general exception listed in *Lawrence*, or if the record does not indicate a military-specific exception suggested in *Marcum*, then that consensual sodomy is arguably not a crime.[76] Post-*Lawrence*, a successful mistake of fact as to consent or a consent defense may negate the crime.

The situation is more complicated when dealing with a failed underage sodomy prosecution. The two variations of underage sodomy involve either a child who is under twelve years old or a child who is between the ages of twelve and sixteen years of age. In either case, underage sodomy does not have a mistaken age or consent defense.[77]

In *United States v. Wilson*, the CAAF recently held that a mistake of fact as to age defense does not apply to Article 125's underage sodomy.[78] Prior to this, the CAAF allowed this defense to the child element in Article 134, Indecent Acts with a Child, in *United States v. Zachary*.[79] After *Zachary*, several service courts extended the defense in Article 134 to the child element in Article 125's underage sodomy.[80]

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[71] *Lawrence*, 539 U.S. at 578. As discussed above, the *Lawrence* case involves private, not public conduct. The opinion does not say whether public conduct (and other listed conduct) is an exception to the privacy interest or simply not part of the privacy interest. This semantic issue is unresolved. *See Marcum*, 60 M.J. at 203–05.

[72] *Lawrence*, 539 U.S. at 564, 578 (finding that only the two participants were present at the time the police interrupted the sex act and holding public sex acts outside the liberty interest); *see* United States v. Cotti, No. 20021210 (Army Ct. Crim. App. June 16, 2006) (unpublished) (affirming sodomy conviction based on the fact a third person was present).

[73] This is the potential dilemma of a sex act which is public as a matter of law but done in private as a matter of fact. Although the application of *Lawrence* liberty interest is currently limited to two party sex acts, a defense counsel may make a good faith argument to extend this right to three party sex acts done in the privacy of a home absent prejudice to good order and discipline.

[74] MCM, *supra* note 3, R.C.M. 916(j)(1) ("If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances."); U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-51-2 n.12 (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK] (describing mistake of fact as to consent in complete forcible sodomy). A similar impact occurs under the new Article 120 where the accused has a successful defense as to consent, mistaken consent or mistaken age. This impact is discussed below in Section IV.

[75] BENCHBOOK, *supra* note 74, para. 3-51-2, Note 20 (explaining that consensual sodomy is a lesser included offense of forcible sodomy with a reasonable doubt as to force or consent but beyond a reasonable doubt proof that the sodomy occurred).

[76] United States v. Humphreys, No. 200300750, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. Dec. 29, 2005) (finding a conviction for non-forcible sodomy unconstitutional when in a private barracks room); United States v. Meno, No. 20000733 (A. Ct. Crim. App. June 22, 2005) (unpublished) (holding conviction for consensual sodomy, the lesser included offense of the charged forcible sodomy, is not punishable); United States v. Parker, No. 9600945 (A. Ct. Crim. App. May 17, 2005) (unpublished) (holding consensual sodomy conviction not punishable after earlier appellate decision modified forcible sodomy conviction to consensual sodomy).

[77] United States v. Wilson, 66 M.J. 39 (C.A.A.F. 2008); BENCHBOOK, *supra* note 74, para. 3-51-1d (explaining that lack of force and consent are not defenses).

[78] *Wilson*, 66 M.J. at 39.

[79] *See* 63 M.J. 438 (C.A.A.F. 2006) (holding an honest and reasonable mistake of fact as to age may negate the child element in Article 134, Indecent acts with a child).

[80] *See* United States v. Knepper, No. 200401159, 2007 CCA LEXIS 25 (N-M. Ct. Crim. App. Jan. 31, 2007) (affirming the conviction for consensual sodomy but not for the period past the other participant's sixteenth birthday); United States v. Jaeger, No. 36127, 2006 CCA LEXIS 353 (A.F. Ct. Crim. App. Dec. 14, 2006) (rejecting the appellant's mistake of fact as to age defense because the record established appellant knew the other sodomy participant was fifteen years old); United States v. Cotti, No. 20021210 (A. Ct. Crim. App. June 16, 2006) (unpublished) (affirming consensual sodomy conviction because of a third party presence but after mistake of fact as to age negated the child element).

In *Wilson*, the CAAF held that the *Zachary* defense in Article 134 did not extend to Article 125's underage sodomy.[81] In this case, a girl who was between the ages of twelve and sixteen years of age performed fellatio on the accused on many occasions.[82] These acts violated Article 125 with the underage aggravating element.[83] Even though the accused honestly and reasonably believed the girl to be at least sixteen, the accused was still guilty of underage sodomy.[84]

In light of *Wilson*, the accused has a harder time reaching the safe harbor of the *Lawrence* liberty interest with young sodomy partners. Since the accused does not have a mistaken age defense to underage sodomy, the accused would not be able to subsequently raise the *Lawrence* argument. In Section V, this article will revisit the *Wilson* case after discussing the new Article 120 in Section IV. After this discussion, the impact of *Wilson* is arguably moot.

Regardless of the impact of the new Article 120, the key to sustaining a consensual sodomy conviction is establishing prejudice to good order and discipline. An adulterous connection may support a military-specific exception if the adultery is proven to be prejudicial to good order and discipline.[85] Likewise, violating regulations close in time to sodomy may prejudice good order and discipline removing the protection of *Lawrence*.[86]

The *Marcum* court could have, but did not, simply state prejudice to good order and discipline removes conduct from the *Lawrence* liberty interest. The *Marcum* court only created a place holder in the *Lawrence* privacy right for a military-specific exception.[87] In practice, prejudice to good order and discipline is the key factor in establishing the military-specific exception.[88] With all the cases that apply the military-specific exception, the court's discussion is really about the existence or absence of such prejudice. In effect, the *Marcum* court made consensual sodomy like an Article 134 offense requiring an element of prejudice to good order and discipline.[89]

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[81] *Wilson*, 66 M.J. at 41 n.4.

[82] *Id.* at 40.

[83] MCM, *supra* note 3, pt. IV, ¶ 51b, e. Sodomy has one essential element of unnatural carnal copulation with another certain person or with an animal and three additional elements to be added as appropriate. *Id.* One additional element is if the victim is over twelve but under sixteen years of age. *Id.* This element does not have a mens rea which would allow a mistaken age defense. *Wilson*, 66 M.J. at 47.

[84] *Wilson*, 66 M.J. at 47.

[85] United States v. Stephens, No. 200602368, 2007 CCA LEXIS 428 (N-M. Ct. Crim. App. Oct. 11, 2007) (affirming the consensual sodomy conviction where the other participant was married to a deployed service member); United States v. Johns, No. 36406, 2007 CCA LEXIS 274 (A.F. Ct. Crim. App. May 25, 2007) (affirming the consensual sodomy conviction resulting from a notorious affair with the dependant spouse of a deployed service member); United States v. Avery, No. 200400665, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (affirming a consensual sodomy conviction resulting from an open, notorious and adulterous affair which impacted good order and discipline); United States v. Myers, No. 200201623, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (affirming a consensual sodomy conviction where the other participant was married to another service member and the sodomy occurred prior to adultery in military housing).

[86] United States v. Barrera, No. 200400371, 2006 CCA LEXIS 215 (N-M. Ct. Crim. App. Aug. 28, 2006) (affirming consensual sodomy conviction where appellant admitted the sodomy was prejudicial to good order and discipline in the providence inquiry and a standing order in the barracks prohibited all sexual activity); United States v. Diebel, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006) (affirming a consensual sodomy conviction where the appellant smuggled sixteen year old girl into his barracks room and gave her alcohol); *see* United States v. Humphreys, No. 200300750, 2005 CCA LEXIS 401 (N-M. Ct. Crim. App. Dec. 29, 2005) (finding a conviction for non-forcible sodomy unconstitutional when in a private barracks room without regulations prohibiting the conduct or the visitor); United States v. Bullock, No. 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (unpublished) (finding a conviction for consensual sodomy in the barracks unconstitutional); United States v. Barber, No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004) (unpublished) (finding a conviction for consensual sodomy in the barracks unconstitutional).

[87] United States v. Marcum, 60 M.J. 198, 208 (C.A.A.F 2004) (finding a general exception to *Lawrence* so it did not reach the issue of the military-specific exception); *see* United States v. Stirewalt, 60 M.J. 297, 304 (C.A.A.F 2004) (assuming that no general exceptions applied but finding that a military-specific exception removed the appellant's conduct from the *Lawrence* liberty interest).

[88] It is unresolved whether service discrediting conduct alone is a sufficient military interest to remove consensual sodomy from the *Lawrence* right to privacy. The *Marcum* cases focus on actual prejudice to good order and discipline rather than on a tendency to bring the service into disrepute or on a tendency to lower the service in public esteem. *See* MCM, *supra* note 3, pt. IV, ¶ 60c(3).

[89] *Id.* pt. IV, ¶ 60b ("That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."); *see* United States v. Foster, 40 M.J. 140, 143 (C.A.A.F 1994) (holding that Article 134 is implicitly a lesser included offense of the enumerated articles like Article 125, however the Government must prove the extra Article 134 element beyond a reasonable doubt).

C. The *Lawrence* Privacy Interest Does Not Significantly Prevent Sodomy Prosecutions

With the application of the *Marcum* test, the *Lawrence* privacy interest prevents few sodomy prosecutions. In other words, the military historically has not focused on prosecuting the conduct that *Lawrence* now protects. According to *Marcum*, the *Lawrence* liberty interest has no affect on sodomy which is prejudicial to good order and discipline.[90]

With that in mind, what is the goal of prosecuting the conduct that *Lawrence* protects? A purpose of UCMJ prosecutions is to maintain good order and discipline.[91] Logically then, commanders would focus UCMJ prosecutions on conduct which affects a unit's good order and discipline. Before and after the 2003 *Lawrence* opinion, a commander has little incentive to prosecute consensual sodomy that does not prejudice good order and discipline.

In cases of non-prejudicial, homosexual sodomy, commanders may pursue administrative separation from service in lieu of court-martial.[92] If the petitioners in *Lawrence* were subject to the UCMJ, their commander could have administratively separated them. Only their commander could convene court-martial proceedings.[93] However, if the sodomy is non-prejudicial or if separation is an option, why prosecute it?

In the past, the Government may have charged non-prejudicial sodomy when it is collateral to some other serious misconduct.[94] In other words, this type of non-prejudicial conduct is rarely the gravamen or heart of the case. Even if *Lawrence* prevents charging non-prejudicial sodomy, the prosecution for the more serious conduct will still proceed.

1. A Survey of Appellate Cases to Test the Hypothesis

A survey proves that *Lawrence* has little effect on what cases are brought to trial even if some charges are no longer sustainable. The survey excludes cases of consensual sodomy resulting from a failed nonconsensual sodomy prosecution. The issue is the ability of the trial counsel to charge consensual sodomy, not the ability to charge nonconsensual sodomy. By its terms, *Lawrence* does not affect the Government's ability to prosecute forcible or underage sodomy.[95]

The survey will start in 1992. This is when the CAAF decided *United States v. Henderson*[96] and is shortly before Congress enacted the law relating to homosexuals in the military.[97] After these two developments, military sodomy law remained relatively stable until the *Marcum* decision in 2004.[98]

The survey has two categories of consensual sodomy cases. The first category involves consensual sodomy convictions that courts have actually overturned under the *Lawrence-Marcum* rationale. The time period for this search is 2004 to the

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[90] *See Marcum*, 60 M.J. at 206–07.

[91] MCM, *supra* note 3, pt. I, ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[92] Loomis v. United States, 68 Fed. Cl. 503, 521 (2005) (finding that *Lawrence* does not invalidate a non-punitive discharge for homosexual conduct under service regulations); Grant v. United States, 162 Ct. Cl. 600, 611 (1963) (finding no right to court-martial when administratively discharged for sodomy); *see* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 15-2 (6 June 2005) (describing the Army's homosexual conduct policy in relation to enlisted separations); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-22 (12 Apr. 2006) (describing the Army's homosexual conduct policy in relation to officer discharges).

[93] MCM, *supra* note 3, R.C.M. 407 (showing that only convening authorities decide who is prosecuted); *Grant*, 162 Ct. Cl. at 611 (finding no right to court-martial when administratively discharged for sodomy).

[94] If the conduct would not be a civilian crime and the conduct is not prejudicial to good order and discipline, military criminal investigators would have little practical incentive to pursue such cases. Theoretically, those investigators could get search authorizations for midnight raids of married couples's homes. The probable cause would be based on the reasonable likelihood that consensual sodomy may be presently occurring therein. More likely, non-prejudicial consensual sodomy would likely come to light pursuant to an investigation for some other serious misconduct.

[95] *Marcum*, 60 M.J. at 207 ("Clearly, the *Lawrence* analysis is not at issue with respect to forcible sodomy.").

[96] 34 M.J. 174 (C.M.A. 1992) (holding no right to privacy for heterosexual fellatio). The case of *Henderson* relatively settled the right to privacy issue with consensual sodomy crimes in the military post-*Bowers* and up until *Marcum* in 2004.

[97] 10 U.S.C. § 654 (2000). This law is the basis for the controversial policy for homosexuality in the armed forces commonly known as "Don't Ask, Don't Tell."

[98] Although the Supreme Court decided *Lawrence* in 2003, the CAAF did not apply this privacy right to the military until the *Marcum* decision on 23 August 2004. *See* United States v. Abdul-Rahman, 59 M.J. 924, 925 (C.G. Ct. Crim. App. 2004) (upholding a consensual sodomy conviction done onboard a Coast Guard cutter in the presence of other people but declining to apply *Lawrence* until the CAAF did so).

present. Presumably, trial counsels have adjusted their charging decisions in consideration of the *Marcum* test. However, shortly after the *Marcum* decision, the appellate history has several cases brought to trial apparently without this test in mind.

The second category of cases involves the *Henderson* line of consensual sodomy cases finalized prior to the *Marcum* opinion. The survey will examine the appellate opinions for evidence of prejudice to good order and discipline. If this is present, these opinions would show that the Government would still have charged the consensual sodomy. In other words, *Marcum* would have little effect on the charging decision when consensual sodomy is prejudicial to good order and discipline. If the prejudice is not apparent in the opinion, then the trial counsel would probably be prevented from charging the consensual sodomy had *Lawrence* been the law at the time.

Even if past consensual sodomy is likely unsustainable today, the survey will look for other serious misconduct which may have been the gravamen of the case. In these cases, the Government apparently had an independent reason to bring the accused to trial notwithstanding the consensual sodomy. To caveat, appellate opinions do not necessarily discuss the reasons trial counsel charge non-prejudicial, consensual sodomy in addition to other serious misconduct.[99] After these cases are eliminated, however, the survey will show that the military rarely prosecutes non-prejudicial, consensual sodomy as the gravamen of the case. If true, the limits on Article 125 from *Lawrence* have little practical impact on military prosecutions generally.

2. The Survey Indicates Lawrence *Only Prevents Rare Prosecutions*

The first category of recent cases does not produce an example of non-prejudicial consensual sodomy which is the gravamen of the case. Again, this survey excludes sodomy as a lesser included offense which eliminates a substantial number of cases. Since the Government is not prevented from prosecuting sodomy which is prejudicial to good order and discipline, it is irrelevant whether or not such sodomy is the gravamen of the case. Even so, the appellate courts have upheld many prejudicial, consensual sodomy convictions under *Marcum*.[100]

When the Government convicts on consensual sodomy, the appellate courts have reversed some of those sodomy convictions under *Marcum*.[101] These cases are the best examples of what conduct the trial counsel may no longer charge. In these cases, however, the overturned convictions were collateral to some other serious misconduct. Although trial counsel are now more limited in charging consensual sodomy, the survey shows that trial counsel generally do not charge non-prejudicial sodomy as the gravamen or heart of a case.

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[99] MCM, *supra* note 3, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses may be preferred at the same time."). Although trial counsel are not required to charge every known offense, a reasonable tactic may be to include all offenses supported by reasonable grounds as allowed under this rule. *See id.* R.C.M. 601(e)(2) discussion ("Ordinarily all known charges should be referred to a single court-martial.").

[100] United States v. Stephens, No. 200602368, 2007 CCA LEXIS 428 (N-M. Ct. Crim. App. Oct. 11, 2007) (upholding consensual sodomy conviction where participants were married to other people and the other person's husband was deployed); United States v. Johns, No. 36406, 2007 CCA LEXIS 274 (A.F. Ct. Crim. App. May 25, 2007) (upholding consensual sodomy conviction done in notorious affair with the wife of another service member); United States v. Hurst, No. 200401383, 2007 CCA LEXIS 56 (A.F. Ct. Crim. App. Feb. 8, 2007) (upholding consensual sodomy conviction done with a subordinate); United States v. Barrera, No. 200400371, 2006 CCA LEXIS 215 (N-M. Ct. Crim. App. Aug. 28, 2006) (upholding consensual sodomy conviction done in violation of a barracks policies prohibiting all sexual activity); United States v. Albaaj, No. 20000121 (Army Ct. Crim. App. Aug. 1, 2006) (unpublished) (upholding consensual sodomy conviction between senior and subordinate during the duty day); United States v. Christian, 63 M.J. 714 (A.F. Ct. Crim. App. 2006) (upholding consensual sodomy when appellant gave the other participant alcohol knowing she was underage); United States v. Banker, 63 M.J. 657 (A.F. Ct. Crim. App. 2006) (upholding consensual sodomy conviction where appellant groomed his babysitter twenty years his junior); United States v. Cotti, No. 20021210 (Army Ct. Crim. App. June 16, 2006) (unpublished) (upholding sodomy conviction based on the presence of a third party); United States v. Diebel, No. 35824, 2006 CCA LEXIS 129 (A.F. Ct. Crim. App. May 31, 2006) (upholding consensual sodomy conviction done after violating post regulations and involving underage drinking); United States v. Taylor, No. 200300876, 2006 CCA LEXIS 53 (N-M. Ct. Crim. App. Feb. 28, 2006) (upholding consensual sodomy done during a *ménage a trois* aboard a warship); United States v. McClelland, No. 200101300, 2006 CCA LEXIS 6 (N-M. Ct. Crim. App. Jan. 24, 2006) (upholding consensual sodomy conviction between officer and an enlisted person who was also a patient of the appellant); United States v. Tate, No. 200201202, 2005 CCA LEXIS 356 (N-M. Ct. Crim. App. Nov. 21, 2005) (upholding consensual sodomy conviction with subordinate which also led to appellant murdering his wife); United States v. Bart, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (upholding consensual sodomy which was prejudicial to good order and discipline and which encouraged the other participant to kill his wife); United States v. Ritter, No. 20010528 (Army Ct. Crim. App. Mar. 4, 2005) (unpublished) (upholding consensual sodomy between prison guard and former inmate during duty hours); United States v. Avery, No. 200400665, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (upholding consensual sodomy conviction done in an open and notorious adulterous affair impacting his unit's activities); United States v. Myers, No. 200201623, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (upholding consensual sodomy conviction done with the wife of another service member as a precursor to adultery); United States v. Pyles, No. 20010967 (Army Ct. Crim. App. Oct. 8, 2004) (unpublished) (upholding consensual sodomy conviction between a commander and his enlisted medic).

[101] United States v. Bullock, No. 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (reversing consensual sodomy conviction for conduct preceding an indecent assault several hours later); United States v. Barber, No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004) (unpublished) (reversing two consensual sodomy convictions done while videotaping the acts without the other person's consent in violation of state law in a case also involving extortion and indecent assault).

As an illustration, the Army Court of Criminal Appeals (ACCA) reversed two consensual sodomy convictions in *United States v. Barber* which were not the gravamen of the case.[102] The appellant secretly videotaped females performing sodomy with him in his private barracks room.[103] One sodomy specification involved a Soldier married to another person.[104] The providence inquiry did not establish that the sodomy was prejudicial despite the secret videotaping and extramarital connection.[105]

Despite the reversed convictions, the ACCA upheld convictions for adultery, secretly taping nude females, extortion and indecent assault.[106] This case shows how trial counsel may be limited in charging consensual sodomy but also that trial counsel may have independent reasons to bring the accused to trial. Therefore, if *Barber* represents recent practice in charging non-prejudicial, consensual sodomy, the inability to charge this sodomy will not be missed. Under the first category of the survey, the unsustainable sodomy is best understood as an "add-on" to a case focused on other misconduct.

Similar to the first, the second category of cases from 1992 to 2004 has many examples of sodomy convictions that would probably be affirmed under the *Marcum* test.[107] The majority of surveyed cases involved prejudicial sodomy which, according to *Marcum*, *Lawrence* does not affect.

On the other hand, the survey also found an abundance of consensual sodomy convictions which courts would likely overturn under the *Marcum* test. Overall, these convictions were collateral to more serious misconduct.[108] The survey found only one case of non-prejudicial, consensual sodomy where the Government would probably be prevented from trying the case at all in light of *Lawrence*.

In *United States v. Allison*, the Government prosecuted consensual sodomy as the gravamen of the case without any evidence of prejudice in the record.[109] In *Allison*, the appellant videotaped several acts of consensual sodomy with his future wife in the privacy of their home.[110] The videotaping was also consensual and the participants kept the videotape private.[111] In addition, the Government charged the appellant with other crimes apparently connected to the underlying sodomy.[112] The

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[102] No. 20000413 (A. Ct. Crim. App. Oct. 7, 2004).

[103] *Id.* (noting that appellant pled guilty to two specifications of sodomy, three specifications of adultery and three specifications of a Missouri statute prohibiting the secret taping of nude females, furthermore, the judge found the appellant guilty, contrary to his pleas, of extortion and indecent assault as a lesser included offense to rape).

[104] *Id.* at 10–11.

[105] *Id.* at 12 ("There were no facts admitted by the appellant during the providence inquiry which demonstrated any military necessity to circumscribe appellant's liberty interest in engaging in private, consensual behavior with another adult.").

[106] *Id.* at 1.

[107] United States v. Barrow, 45 M.J. 478 (C.A.A.F 1997) (upholding consensual sodomy between superior and subordinate in the same unit); United States v. Gates, 40 M.J. 354 (C.M.A. 1994) (upholding consensual sodomy done in a three party sex act to which the appellant was accused of raping the third person); United States v. Baker, No. 9802013, 2000 CCA LEXIS 319 (N-M. Ct. Crim. App. July 24, 2000) (upholding consensual sodomy between officer and enlisted); United States v. Dinges, No. 32122, 1997 CCA LEXIS 15 (A.F. Ct. Crim. App. Jan. 8, 1997) (upholding consensual sodomy with sixteen year old who was emotionally disabled and the appellant was his boy scout master); United States v. Thompson, No. 31803, 1996 CCA LEXIS 260 (A.F. Ct. Crim. App. Aug. 8, 1996) (upholding consensual sodomy done in order to distract appellant from murdering the other participant, his wife); United States v. Oehlecker, No. 31228, 1995 CCA LEXIS 331 (A.F. Ct. Crim. App. Dec. 1, 1995) (upholding consensual sodomy conviction between officer and an enlisted person who was also a patient of the appellant); United States v. Hall, 34 M.J. 695 (A.C.M.R. 1991) (upholding consensual sodomy conviction between the civilian wife of enlisted person and the appellant who was an officer married to another officer).

[108] United States v. Moore, 38 M.J. 490 (C.A.A.F 1994) (involving consensual sodomy convictions probably not sustainable today however the sodomy is collateral to extortion and indecent assault); United States v. Austin, 38 M.J. 578 (C.M.R. 1993) (involving consensual sodomy convictions probably not sustainable today but collateral to aggravated assault of appellant's former lesbian partner); United States v. Fagg, 34 M.J. 179 (C.M.A. 1992) (involving one consensual sodomy conviction probably not sustainable today but collateral to a carnal knowledge conviction with another person).

[109] 56 M.J. 606 (C.G. Ct. Crim. App. 2001). Food Service Specialist First Class (E-6) Allison pled guilty at a judge alone general court-martial. *Id.* at 606. Pursuant to his pleas, the judge convicted him of two specifications of heterosexual sodomy (fellatio) with his future wife as well as one specification of an indecent act for videotaping the same acts. *Id.* In addition, the court convicted him of two specifications of failure to obey a lawful order and one specification of attempting to destroy evidence. *Id.* On appeal, the appellant claimed his pleas were improvident because the video taped acts were not indecent. *Id.* at 607. The appellant and his fiancée committed the consensual sodomy and the consensual videotaping of it in private. *Id.* at 608. Both persons maintained the video in the privacy of their home without showing it to anyone else. *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 606–07. The opinion does not examine the underlying conduct to the specifications of failure to obey a lawful order and the attempted destruction of evidence. *Id.* Arguably, both crimes are not the gravamen or heart of the case. It is possible that these crimes flowed out of the Government's investigation and prosecution of the acts of sodomy. Ultimately, it is unknown whether the Government would have tried the appellant but for the video taped sodomy.

trial court sentenced the appellant to eighteen months of confinement, reduction to the pay grade E-1, and a bad conduct discharge.[113] Even though the court's sentence was within the terms of the pre-trial agreement, the convening authority reduced the sentence to twelve months.[114]

Although this examination is limited to the appellate opinion, the reason for a general court-martial in *Allison* is tenuous under current law. In light of the *Marcum* test, it is unlikely the accused would be found guilty of committing a crime if prosecution occurred today. If the justification for a conviction and a twelve month sentence is unclear, *Lawrence* is arguably justifiable to prevent such a prosecution in the first place. It is unclear what goal the prosecution of the *Allison* case served given the purpose of the UCMJ.[115]

So if *Marcum*'s application of *Lawrence* only protects sodomy that is generally not prosecuted, the CAAF cleverly sidestepped a constitutional right. If the *Marcum* court held *Lawrence* generally inapplicable to the military, the Supreme Court arguably may have been more willing to grant a writ of certiorari. Instead, the *Marcum* court held that *Lawrence* generally applied but then reserved room for a loophole which swallows the rule.

In effect, *Lawrence* applies to the military as a matter of law, but *Lawrence* has minimal effect on the military as a matter of practice. *Lawrence* does limit the availability of a lesser included offense in nonconsensual sodomy prosecutions. The case may limit additional charges when the Government prosecutes other serious misconduct. *Lawrence* also prevents sodomy prosecutions which arguably do not serve the purpose of the UCMJ. Since *Lawrence* does negate some sodomy law, Article 125 is not as alive as it was prior to 2003.

III. Article 125's Forcible and Underage Sodomy is Mostly Dead

In contrast with *Lawrence*'s limited effect on consensual sodomy, the new Article 120 has a profound effect on Article 125's forcible sodomy and underage sodomy. Part IV will show how conduct that is forcible sodomy or underage sodomy in Article 125 also violates Article 120. Conduct simultaneously violating two statutes presents an interesting dilemma. Before addressing this dilemma, it is necessary to discuss a short history of the new Article 120.

A. Background on Nonconsensual Sodomy; the New Article 120

The new Article 120 is the culmination of an effort to reform the way the military prosecutes sexual assaults.[116] Pursuant to the National Defense Authorization Act for Fiscal Year 2005, the Joint Service Committee on Military Justice (JSC) studied how the military prosecutes sex crimes.[117] The JSC consists of Judge Advocates from all branches of service who perform studies and provide advice to the President on matters related to military justice.[118]

The JSC published a report in 2005 with six options for reforming sexual assault crimes in the military.[119] Option 1 was unanimously recommended by the JSC and purported not enacting any reform to the military's sexual assault statutory scheme.[120] The report found that the system in effect at the time captured all types of sexual assaults.[121] Furthermore, the

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[113] *Id.* at 607.

[114] *Id.*

[115] MCM, *supra* note 3, pt. I, ¶ 3.

[116] SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4.

[117] *Id.*

[118] U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE 3 (May 3, 2003).

[119] SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4 (discussing the six options the Joint Service Comm. recommends to Congress). Option 1 is no change. *Id.* Option 2 proposed not changing the articles of the UCMJ but revising the *MCM*. *Id.* Options 3 and 4 would have changed the law of rape to match federal law but left the definitions of "force" and "consent" up to the courts to decide. *Id.* Options 5 and 6 included the changes of Options 3 and 4 but included the definitions of terms. *Id.* Option 5 and 6 also eliminated the element of "without consent" from rape and proposed consolidating all sex crimes together with rape into Article 120. *Id.* Of all the options, Option 5 would make military law the most similar to federal law. *Id.*

[120] *Id.* at 1.

[121] *Id.* at 1–4.

report noted that any benefit of reform would be outweighed by potential confusion created with a new statutory scheme.[122] The JSC listed five other reform options in case Congress did not accept Option 1.[123]

As an alternative to Option 1, the JSC recommended Option 5.[124] This option proposed consolidating all sex crimes together with rape into Article 120.[125] Furthermore, Option 5 would move consensual sex crimes into Article 134.[126] Of all the options, Option 5 would make military crimes the most similar to federal law.[127]

Congress enacted Option 5, for the most part.[128] This plan proposed creating a new, comprehensive sex crime statute in Article 120 modeled after federal law.[129] Under Option 5, the new Article 120 would punish conduct that was once forcible or underage sodomy in Article 125.[130] The plan called for repealing the sodomy statute.[131] The President would then create a new Article 134 paragraph to punish conduct that was once consensual sodomy in Article 125.[132]

Contrary to the JSC recommendation, Congress did not repeal the sodomy statute.[133] Without any explanation why, Congress enacted Article 120 as recommended but left Article 125 untouched.[134] As a result, conduct that is forcible or underage sodomy under Article 125 is also punishable in the new Article 120. Consequently, two criminal statutes overlap in punishing the same conduct.[135]

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[122] *Id.* at 1.

[123] The five other options commonly proposed updating military sex crimes but varied in the amount of change necessary to achieve that result. *Id.*

[124] *Id.* at 1.

[125] *Id* at 3–4.

[126] *Id.*

[127] *Id.*

[128] *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 27 (identifying Option 5 as the general basis for the new Article 120).

[129] SEX CRIMES AND THE UCMJ, *supra* note 2, at 4 ("Option 5 incorporates all the statutory prohibitions of 18 U.S.C. §§ 2241–2244, 2246 into the UCMJ."); Johnson, *supra* note 128, at 27.

> The categories for rape, sexual assault, and other sexual misconduct under the new Article 120 include: (a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.

Johnson, *supra* note 128, at 27.

[130] SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 ("[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct.").

[131] *Id.* at 302 (recommending deleting Article 120, rape and carnal knowledge and deleting Article 125, sodomy then replacing both with the new Article 120). Congress did not enact the step to repeal Article 125 as listed in Option 5. Johnson, *supra* note 128, at 28.

[132] *Id.* at 318–24 (recommending the creation of a comprehensive art. 134 offense for all offenses that are manifested through consensual sexual activity).

[133] Johnson, *supra* note 128, at 28.

> [Implementing Article 120] is further complicated by two other factors. First, the legislative history and committee notes do not specifically cite "Option 5" as the source for the legislation, although this is generally accepted to be the case. Second, Congress did not adopt several recommendations contained within "Option 5," including the recommendation that forcible sodomy be addressed under rape or that consensual sodomy be placed within a category of sexual misconduct punishable if prejudicial to good order and discipline or service discrediting. Clearly, certain portions of "Option 5" do not represent the intent of Congress.

Id. (citations omitted).

[134] H.R. REP. NO. 109-89, at 332 (2005) (Conf. Rep.); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.); S. REP. NO. 109-69, at 316 (2005) (Conf. Rep.); 151 CONG. REC. H3912-28 (daily ed. May 25, 2005); 151 CONG. REC. S12811-12 (daily ed. Nov. 15, 2005); 151 CONG. REC. H12739 (daily ed. Dec. 18, 2005); 151 CONG. REC. H12199 (daily ed. Dec. 18, 2005); 151 CONG. REC. S14014 (daily ed. Dec. 19, 2005); 151 CONG. REC. S14256 (daily ed. Dec. 21, 2005). No record of discussion exists concerning the new Article 120 and its relation to other criminal statutes. This could mean that Congress intended no change to Article 125.

[135] SEX CRIMES AND THE UCMJ, *supra* note 2, at 251–53. Option 5 recommended redefining Article 125 sodomy in terms of either sexual assault or prejudicial relationships involving sexual activity. *Id.* Since Congress did not repeal Article 125, four of the fourteen Article 120 offenses could potentially punish the same conduct that Article 125 still punishes. These four Article 120 offenses all require a "sexual contact," as well as different aggravating circumstances to reflect degrees of seriousness. MCM, *supra* note 3, pt. IV, ¶ 45a. The four Article 120 offenses which overlap with Article 125 are; aggravated sexual contact, aggravated sexual contact with a child, abusive sexual contact and abusive sexual contact with a child. SEX CRIMES AND THE UCMJ, *supra* note 2, at 251–53.

1. Sexual Contact Definition

The discussion of the overlap begins with the definition of "sexual contact." Article 120's sexual contact captures a broad range of conduct:

> The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.[136]

There are five sexual contact offenses: (1) aggravated sexual contact, (2) abusive sexual contact, (3) aggravated sexual contact with a child, (4) abusive sexual contact with a child, and (5) wrongful sexual contact.[137] Each offense is distinguished with attendant circumstances to reflect degrees of seriousness.[138] But the underlying *actus reus*, sexual contact, remains the same. Together with the nine other Article 120 offenses, the five sexual contact offenses constitute a radical departure from the old common law regime.

2. Sodomy versus Sexual Contact

It is important to understand where the definition of sexual contact in Article 120 overlaps with the definition of sodomy in Article 125. The mental state needed for sodomy is only the intent to do the act, a general intent crime.[139] The mental state needed for a sexual contact is the specific intent to abuse, humiliate, degrade, arouse or sexually gratify some person, a specific inter crime.[140] While sodomy requires a person's genitals to penetrate the mouth or anus of another person,[141] sexual contact only require a person to contact the genitalia, anus, groin, breast, inner thigh or buttocks of another.[142]

Because the *actus reus* of a sexual contact is broader, it is possible for conduct to qualify as an Article 120 sexual contact without meeting the definition of Article 125 sodomy.[143] For example, if a fully clothed frotteur[144] rubs his groin on the buttocks of a stranger on the subway, this may be a wrongful sexual contact but not an act of sodomy.[145] Although many

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[136] MCM, *supra* note 3, pt. IV, ¶ 45a(t)(2).

[137] *Id.* pt. IV, ¶ 45a(e), (g), (h), (i), (m).

[138] *Id.* pt. IV, ¶ 45a. Aggravated sexual contact is committed under one of the five circumstances required for rape but the conduct only rises to the level of a sexual contact. *Id.* pt. IV, ¶ 45a(e). The five rape circumstances are: (1) using force against that other person; (2) causing grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) rendering another person unconscious; or (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct. *Id.* pt. IV, ¶ 45a(a). Aggravated sexual contact with a child is a sexual contact with a child under twelve years of age. It is also a sexual contact with a child over twelve but less than sixteen years of age under one of the five rape circumstances. *Id.* pt. IV, ¶ 45a(a), (g). Abusive sexual contact is committed under one of the five circumstances required for aggravated sexual assault but the conduct only rises to the level of a sexual contact. *Id.* pt. IV, ¶ 45a(h). The two circumstances for aggravated sexual assault are: (1) threatening or placing that other person in fear less than required for rape or causing bodily harm; or (2) when the other person is substantially incapable of appraising the nature of the conduct, declining participation in the conduct or communicating an unwillingness to engage in the conduct. *Id.* pt. IV, ¶ 45a(c). Abusive sexual contact with a child is a sexual contact with a child over twelve but under sixteen years of age. *Id.* pt. IV, ¶ 45a(i). Wrongful sexual contact is a sexual contact without legal justification or lawful authorization without the other person's permission. *Id.* pt. IV, ¶ 45a(m).

[139] *Id.* pt. IV, ¶ 51c.

[140] *Id.* pt. IV, ¶ 45a(t)(2) (defining the mental state required for sexual contact as done "with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.").

[141] *Id.* pt. IV, ¶ 51c (defining unnatural carnal copulation as the joining of the mouth or anus of one person with the sexual organs of another person or animal).

[142] *Id.* pt. IV, ¶ 45a(t)(2).

[143] *Compare id.* pt. IV, ¶ 51c, *with id.* pt. IV, ¶ 45a(t)(2).

[144] WEBSTER'S NEW WORLD DICTIONARY 543 (3d ed. 1988) (*frottage* n. 1. sexual gratification from rubbing against the body of another person, 2. an artistic rubbing or tracing from a surface that is textured or raised, etc.); *see* Brian Shealy, *It's Not Easy Being a Frotteur*, ONION, Oct. 24, 2007, *available at* http://www.theonion.com/content/opinion/its_not_easy_being_a_frotteur?utm_source=EMTF_Onion.

[145] MCM, *supra* note 3, pt. IV, ¶ 45a(m) ("Any person subject to this chapter who, without legal justification of lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.").

more acts could be a sexual contact, sexual contact requires a higher mental state to ensure the actor has a criminal intent. In sum, an act constituting a sexual contact is not necessarily an act of sodomy.

On the other hand, any act of sodomy under Article 125 would also meet the definition of sexual contact under Article 120. Even though sexual contact requires a higher mental state, any act of sodomy would likely have the specific intent of a sexual contact. When someone puts their mouth on another person's genitals, it is hard to infer a specific intent other than sexual gratification. Even though sodomy is a general intent crime, the explicit sexual nature of the acts of sodomy creates an inference of intent for sexual gratification. Considering sexual contact's expansive *actus reus*, any act of sodomy is most likely a sexual contact.

Unfortunately, the structural differences of Article 120 and Article 125 complicate an element by element comparison. The JSC created attendant circumstances to each sexual contact offense designed to more specifically describe the same misconduct that could be forcible or underage sodomy.[146] On the other hand, forcible sodomy only requires that "the act was done by force and without the consent of the other person."[147] The meaning of this phrase is developed in case law as opposed to being in the statutory text.[148]

Comparing the definitions of forcible sodomy to sexual contacts attendant circumstances, what was once forcible sodomy is now either an aggravated sexual contact or an abusive sexual contact. The attendant circumstances for aggravated sexual contact are:

> (1) using force against that other person;
> (2) causing grievous bodily harm to any person;
> (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
> (4) rendering another person unconscious; or
> (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct.[149]

The attendant circumstances for abusive sexual contact are:

> (1) causes another person of any age to engage in a sexual [contact] by—
> (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
> (B) causing bodily harm; or
> (2) engages in a sexual [contact] with another person of any age if that other person is substantially incapacitated or substantially incapable of—
> (A) appraising the nature of the sexual [contact];
> (B) declining participation in the sexual [contact]; or
> (C) communicating unwillingness to engage in the sexual [contact].[150]

Between the two offenses, this exhaustive list of circumstances captures all of the case law doctrines concerning forcible sodomy. The JSC expressly intended this result.[151] In order to see how forcible sodomy is either aggravated or abusive sexual contact, the *Military Judge's Benchbook* instructions on Article 125 may be compared to the respective attendant circumstances in Article 120.

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[146] *Id.* pt. IV, ¶ 45a.

[147] *Id.* pt. IV, ¶ 51b(4).

[148] BENCHBOOK, *supra* note 74, para. 3-51-2 (describing doctrines in sodomy law such as constructive force which are based in case law).

[149] MCM, *supra* note 3, pt. IV, ¶ 45a(a)(1)–(5); *id.* pt. IV, ¶ 45a(e) ("Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact . . . .").

[150] *Id.* pt. IV, ¶ 45a(c). The attendant circumstances for abusive sexual contact incorporate those of aggravated sexual assault. *Id.* pt. IV, ¶ 45a(h). The word "contact" is substituted for the word "act" in the text above.

[151] SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 ("[Art. 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct."); *id.* at 252 ("Definitions for terms such as force, consent, mistake of fact, and the like are derived from military and federal caselaw, as well as from state statutes and incorporated into the new [art. 120]").

If forcible sodomy involves the actual use of force,[152] then the conduct is also either an aggravated sexual contact (causing grievous bodily harm) or an abusive sexual contact (causing bodily harm). If the forcible sodomy involves threat of force or intimidation,[153] then the conduct is also either an aggravated sexual contact (threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping) or an abusive sexual contact (threatening or placing that other person in some other fear). If the forcible sodomy involves a victim with an impaired ability to consent,[154] then the conduct is also either an aggravated sexual contact (rendering unconscious or administering a drug) or an abusive sexual contact (when the other person is substantially incapacitated or incapable of giving consent).

Using the same comparison formula, Article 120 criminalizes the same misconduct covered in Article 125's two variations of underage sodomy. The child element in both articles is the same.[155] In Article 125, sodomy with a child under twelve equates to aggravated sexual contact with a child.[156] Similarly, sodomy with a child between the ages of twelve and sixteen-years old is the same as abusive sexual contact with a child in Article 120.[157]

Ultimately, any conduct that is forcible sodomy or underage sodomy is also one of four sexual contact offenses. Not only did Congress create overlapping crimes, but they created lesser punishments for the same conduct.[158] The end result is that most of Article 125 is also punishable, though less severely, under the new Article 120.

B. The Overlap Effect; Charging Conduct Violating Both Articles 120 and 125

So what is one to do when confronted with conduct that violates both a newer, more specific criminal statute as well as an older, more severe criminal statute? This situation raises four questions. First, may a court-martial convict a person of both for the same misconduct? Two convictions for the same conduct raises multiplicity or double jeopardy concerns. Second, may a person be charged with both Article 120 and Article 125 for the same misconduct? Even if double charging is not multiplicious, charging both may be an unreasonable multiplication of the charges. Third, does the Government have the option of choosing one statute over the other? How much weight should a court give to the fact that Congress chose not to repeal Article 125? Fourth and finally, does Article 125 still exist in whole or in part? In this regard, forcible sodomy and underage sodomy may be repealed by implication through the revision of Article 120 according to the canons of statutory interpretation.

1. Double Jeopardy and Teters

As to the first question, when a person faces multiple punishments for the same criminal act, the constitutional issue of double jeopardy arises. Double jeopardy is not just a prohibition on a second prosecution for the same criminal act.[159] The Supreme Court has held that it is also a prohibition on courts issuing a greater punishment than the legislature intended for

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[152] BENCHBOOK, *supra* note 74, para. 3-51-2 n.4 ("An act of sodomy occurs 'by force' when the accused uses physical violence or power to compel the victim to submit against his/her will.").

[153] *Id.* para. 3-51-2 n.5 ("Where intimidation or threats of death or physical injury make resistance futile, it is said that 'constructive force' has been applied, thus satisfying the requirement of force."); *id.* n.6 (describing abuse of military power as constructive force); *id.* n.7 (describing constructive force through parental or in loco parentis situations).

[154] *Id.* n.10 ("When a victim is incapable of consenting because she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration."); *id.* n.11 (describing sodomy without consent when the victim was asleep, unconscious or intoxicated).

[155] *Compare* MCM, *supra* note 3, pt. IV, ¶ 45a(o), *with id.* pt. IV, ¶ 51b (defining, in both, a child as under sixteen years of age but allowing for aggravation when the child is under twelve years of age).

[156] *Compare id.* pt. IV, ¶ 51b(2), *with id.* pt. IV, ¶ 45a(g).

[157] *Compare id.* pt. IV, ¶ 51b(3), *with id.* pt. IV, ¶ 45a(i).

[158] Sexual contacts are punished less severely as their sodomy equivalents. *Compare id.* pt. IV, ¶ 51e, *with id.* pt. IV, ¶ 45f. Aggravated sexual contact and aggravated sexual contact with a child both have a maximum sentence of twenty years. *Id.* pt. IV, ¶ 45f. Abusive sexual contact carries a maximum sentence of seven years. *Id.* Comparatively, forcible sodomy and sodomy with a child under twelve have a maximum sentence of life without parole. *Id.* pt. IV, ¶ 51e. Abusive sexual contact with a child has a sentence maximum of seven years. *Id.* pt. IV, ¶ 45f. Looking to its counterpart, sodomy with a child between twelve and sixteen has a twenty year maximum sentence. *Id.* pt. IV, ¶ 51e. Wrongful sexual contact, which has no direct sodomy comparison, only has a maximum sentence of one year. *Id.* pt. IV, ¶ 45f.

[159] U.S. CONST. amend. V, § 2 ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . ."); Albernaz v. United States, 450 U.S. 333, 343 (1981) ("[T]he Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the offense after conviction. And it protects against multiple punishments for the same offense.'") (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

one act.[160] The law presumes that Congress ordinarily intends only one punishment when the same act or transaction violates two distinct statutory provisions.[161] The Double Jeopardy Clause is not a protection if Congress intended for multiple punishments at a single trial for the same act.[162]

In *United States v. Teters*, the CAAF analyzed the question of congressional intent for multiple convictions for the same act or transaction.[163] In *Teters*, the appellant was convicted of both larceny and forgery.[164] The appellant committed forgery in order to complete the larceny.[165] The CAAF had to resolve "whether Congress intended appellant at a single court-martial to be convicted of both forgery under Article 123 and larceny under Article 121."[166]

In *Teters*, the CAAF found a congressional intent for multiple convictions for both forgery and larceny.[167] To determine this, the CAAF first looked to the text of both statutes for express evidence of congressional intent.[168] The forgery and larceny statutes did not expressly prohibit multiple convictions and punishments in the appellant's case.[169] Next, the CAAF examined the legislative histories of the statutes for guidance.[170] The legislative history was silent on the interplay of forgery and larceny.[171]

In the absence of express legislative guidance, the CAAF had to determine if Congress intended to create two offenses allowing for separate punishment or one offense allowing for only one punishment.[172] The CAAF employed the *Blockburger* rule of construction in order to discern congressional intent.[173] "The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes."[174] If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not."[175]

Using the *Blockburger* rule of construction, the CAAF presumed Congress intended for forgery and larceny to be separate offenses.[176] Unlike forgery, larceny "requires as an element a wrongful taking, obtaining, or withholding 'by any means' of 'money, personal property, or article of value.'"[177] Unlike larceny, forgery "requires the false making or altering of any signature on any writing which, 'if genuine, apparently imposes a legal liability on another or chances his legal right

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[160] Rutledge v. United States, 517 U.S. 292, 296 (1996) ("Courts may not 'prescrib[e] greater punishment than the legislature intended.'") (alteration in original) (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983); Brown v. Ohio, 432 U.S. 161, 165 (1977)).

[161] *Rutledge*, 517 U.S. at 297; Ball v. United States, 470 U.S. 856, 861 (1985); Whalen v. United States, 445 U.S. 684, 692 (1980); Blockburger v. United States, 284 U.S. 299, 304 (1932).

[162] *Albernaz*, 450 U.S. at 344 ("[Where] 'consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.'") (alteration in original) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)).

[163] 37 M.J. 370, 376–77 (C.M.A. 1993).

[164] *Id.* at 373.

[165] *Id.* at 376.

[166] *Id.* (citations omitted).

[167] *Id.*

[168] *Id.* at 377.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Ball v. United States, 470 U.S. 856, 861 (1985).

[175] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[176] *Teters*, 37 M.J. at 377–78.

[177] *Id.* at 377.

or liability to his prejudice.'"[178] The CAAF found larceny and forgery each requiring an element that the other does not.[179] This created a presumption that Congress intended larceny and forgery to be separate offenses.[180]

2. Would Convictions for Both Sodomy and Sexual Contact Be Multiplicious?

The *Teters* analysis will help determine congressional intent on how to punish conduct that is both sexual contact and sodomy.[181] If Congress intended separate offenses, then one act may be subject to separate punishments. The Double Jeopardy Clause limits a court from exceeding its authority as granted by the legislature.[182]

When interpreting this grant of authority, the *Teters* analysis guides the discussion. The first place to find legislative intent is the text of the statute.[183] Neither Article 120 nor Article 125 directly address a relationship between the two.[184] The next step is to look at the legislative history to see if the drafters addressed this issue.[185] In 1950, the drafters of Article 125 could not possibly address another statute to be enacted in 2005. The congressional record of Article 120 is silent on its relationship to Article 125.[186]

Despite the silence on the congressional record, the JSC report upon which the statute is based states that a person should not be prosecuted under Article 125 when Article 120 is available.[187] The JSC report addresses the issue of when the same conduct violates two different statutes:

> [I]f Option 5 were enacted, preemption [by Article 120] is desirable. For example, a service person should not be prosecuted under Article 125's sodomy provision or the MCM's indecent assault provision (implementing Article 134), when a much more specific offense will be available under the new Article 120, UCMJ. Option 5 proposes elimination of those paragraphs in the MCM that overlap with the new Article 120 so that there will be no preemption issue.[188]

The drafters of Option 5 intended Article 120 to replace Article 125 if the two statutes overlapped. Congress chose Option 5.[189]

Since Congress adopted Option 5, one may presume Congress similarly intended Article 120 to replace Article 125's nonconsensual sodomy. The overall scheme of Option 5 consolidated all nonconsensual sex crimes in Article 120.[190] By the overall consolidation, Article 120 is a substitute for Article 125 and other sex crimes listed elsewhere.[191]

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[178] *Id.*

[179] *Id.* at 377–78.

[180] After presuming larceny and forgery to be constitutionally separate offenses, the CAAF also looked for "any other indications of contrary intent on Congress' part which can overcome the *Blockburger* presumption of separateness." *Id.* at 378. The CAAF examined the rule of lesser included offenses in Article 79 searching for evidence of contrary intent. *Id.* The CAAF found no evidence of Congressional intent elsewhere in the UCMJ, like in Article 79, which was contrary to the presumption created by the *Blockburger* rule. *Id.*

[181] *Id.* at 376–77.

[182] Albernaz v. United States, 450 U.S. 333, 344 (1981).

[183] *Teters*, 37 M.J. at 376; *see* 2A SUTHERLAND STAT. CONST. § 45:1 & 46:1 (7th ed. 2007) (discussing the text of the statute as the first place to look and that plain meaning rule applies to the text).

[184] *Compare* MCM, *supra* note 3, pt. IV, ¶ 45a, *with* MCM, *supra* note 3, pt. IV, ¶ 51a. *But see* MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B). The definition of Article 120, Indecent Conduct, references Article 125, Sodomy. This supports the argument that Congress intended both statutes to live in full force.

[185] *Teters*, 37 M.J. at 376–77.

[186] No record of discussion exists concerning the new Article 120 and its relation to other criminal statutes. H.R. REP. NO. 109-89, at 332 (2005) (Conf. Rep.); H.R. REP. NO. 109-360, at 703 (2005) (Conf. Rep.); S. REP. NO. 109-69, at 316 (2005) (Conf. Rep.); 151 CONG. REC. H3912-28 (daily ed. May 25, 2005); 151 CONG. REC. S12811-12 (daily ed. Nov. 15, 2005); 151 CONG. REC. H12739 (daily ed. Dec. 18, 2005); 151 CONG. REC. H12199 (daily ed. Dec. 18, 2005); 151 CONG. REC. S14014 (daily ed. Dec. 19, 2005); 151 CONG. REC. S14256 (daily ed. Dec. 21, 2005).

[187] SEX CRIMES AND THE UCMJ, *supra* note 2, at 77 (discussing the issue of preemption as it relates to the relationship between different statutes).

[188] *Id.*

[189] Johnson, *supra* note 128, at 27 (identifying Option 5 as the general basis for the new Article 120).

[190] SEX CRIMES AND THE UCMJ, *supra* note 2, at 251 ("[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct.").

After examining the text and history, further evidence of intent may be found using the *Blockburger* rule of construction.[192] Applying the above comparison of Articles 120 and 125 to the *Blockburger* test, forcible and underage sodomy offenses fit into one of four sexual contact offenses.[193] This arguably creates a presumption that Congress intended someone to commit only one offense when violating both Article 120 and Article 125.[194]

If so, a conviction on both articles for the same misconduct creates serious multiplicity concerns. Convictions under Articles 120 and 125 for the same misconduct would likely violate the Double Jeopardy Clause. This answers this section's first of four questions regarding the charging of conduct violating both articles. Congress did not intend for Articles 120 and 125 to be separate offenses allowing for dual convictions for the same misconduct.

3. Would Charging Both Be an Unreasonable Multiplication of the Charges?

Regardless of whether Congress intended for separate convictions, charging both articles for the same conduct would also likely be an unreasonable multiplication of the charges. In *United States v. Quiroz*, the CAAF held that unreasonable multiplication of the charges is a distinct concept from the multiplicity.[195]

> The prohibition against multiplicity is necessary to ensure compliance with the constitutional and statutory restrictions against Double Jeopardy . . . .
>
> By contrast, the prohibition against unreasonable multiplication of the charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. . . .
>
> In short, even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.[196]

In *Quiroz*, the CAAF endorsed a five part test to see whether charges are unreasonably multiplied.[197] Using this test, a military judge may dismiss charges found to be unreasonably multiplied even if the charges are not multiplicious.[198]

In *United States v. Paxton*, the CAAF recently reviewed whether or not charges were unreasonably multiplied.[199] A general court-martial convicted TSgt Paxton of raping and sodomizing his daughter as well as indecent acts by touching his daughter's breasts and genital area.[200] The CAAF applied the *Quiroz* five-part test to determine whether the Government unreasonably multiplied the charges.

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[191] *Id.*

[192] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[193] *Compare* MCM, *supra* note 3, pt. IV, ¶ 51b(2), (3), (4), *with id.* pt. IV, ¶ 45a(e), (g), (h), (i).

[194] The counter argument is that Congress did not intend for only one offense because it rejected the recommendation to repeal Article 125. *See* Johnson, *supra* note 128, at 28 (describing certain portions of Option 5 that do not represent the intent of Congress).

[195] 55 M.J. 334, 338 (C.A.A.F. 2001). The appellant had pled guilty to four charges involving the receipt and sale of C-4 explosives. *Id.* The CAAF affirmed the lower court's decision that two of the four charges of concerning the C-4 constituted an unreasonable multiplication of the charges. *Id.*

[196] *Id.* at 337–38.

[197] *Id.* at 338.

[198] United States v. Roderick, 62 M.J. 425, 433 (C.A.A.F. 2006) ("Dismissal of unreasonably multiplied charges is a remedy available to the trial court.").

[199] 64 M.J. 484, 491 (C.A.A.F. 2007).

[200] *Id.* at 490.

> The offensive conduct underlying these specific charges took place on the same evening. As recounted by the testimony of the victim, the offending conduct occurred as follows: Paxton watched his daughter urinate and then wanted to tuck her into bed. He sat at the end of her bed and asked her if she wanted him to take her virginity. She said no. After "a while" he asked if he could touch her breasts. After touching her breasts, he asked if she would like him to finger her. She said no, but he put his finger into her vagina. Then he told her that he would teach her to do "blowjobs" and "hand jobs" and asked her to give him a "blowjob." She had her mouth on his penis for a few seconds. Then he asked for a "hand job" and she put her hands on his penis. After that, he took off his shirt, got on top of her and put his penis inside her vagina.

Id.

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?[201]

The CAAF did not find that the charges against TSgt Paxton were unreasonably multiplied.[202] The CAAF only found the first criterion in favor of the appellant in that his defense counsel objected at trial to an unreasonable multiplication of the charges.[203] The CAAF found that the multiple charges were each based upon separate and distinct acts.[204] The number of charges did not exaggerate or misrepresent the appellant's criminality.[205] Since the rape charge was potentially punishable by death, the number of other charges did not unreasonably increase the appellant's punitive exposure.[206] Finally, the CAAF found no evidence of prosecutorial overreaching or abuse in drafting the charges.[207] As the *Paxton* case shows, the test for unreasonable multiplication of the charges is a fact-intensive analysis.

Despite the case by case analysis, charging both Article 120 and Article 125 for the same conduct would fail in most circumstances. The Government will fail the first part of the test if the defense counsel objects at trial. The Government flunks the second question to the extent that Article 120 and Article 125 punish the same conduct as shown above. Charging both articles for the same conduct would exaggerate or misrepresent the accused's criminality because the sodomy crimes punish severely.[208] The accused's criminal exposure is greatly increased when using the sodomy counterparts to the four sexual contact offenses.[209] The last issue of prosecutorial overreaching or abuse would depend on the facts of each case.

After reviewing the *Quiroz* test, combining non-consensual sodomy with a sexual contact would likely constitute an unreasonable multiplication of the charges. When consensual sodomy is involved, Section V will discuss the possibility of charging both articles when consent is an alternative theory of the case. Consensual sodomy aside, it is likely prosecutorial abuse to charge both Articles 120 and 125 for the same misconduct. The next question is whether the prosecution may choose one over the other.

4. May the Prosecution Choose Sodomy When Sexual Contact Also Applies?

Recalling the four questions from the overlap of Articles 120 and 125, the third question is whether the Government may ignore a newer, more specific statute and use the older, more severe statute. The answer to this question implicates prosecutorial discretion and judicial deference. Although problematic, this answer favors allowing a choice in one statute over the other when both apply.

a. Yes, the Prosecution May Choose Either Article 120 or Article 125

Perhaps Congress did not repeal Article 125 because it wanted to provide more choices for charging. So by declining to repeal Article 125, Congress may have intended two courses of action. For the first option, the Government could charge either Article 120 or Article 125. As the second option, the prosecution could charge both but only convict on either Article 120 or Article 125. Since Congress specifically declined to repeal Article 125, courts should still give that statute effect.

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[201] *Id.* at 491 (citing United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004)).

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] MCM, *supra* note 3, pt. IV, ¶ 51e. Forcible sodomy and sodomy with a child under twelve carry a maximum sentence of life without parole. *Id.* Sodomy with a child over twelve but under sixteen years of age carries a maximum sentence of twenty years. *Id.*

[209] *Compare id.* pt. IV, ¶ 51e, *with id.* pt. IV, ¶ 45f; *see supra* note 159.

Using similar logic, a California federal district court upheld the Government's choice of one criminal statute over another in *United States v. Sapp*.[210] Ramon Sapp was charged, in part, of two counts of attempting to kill persons assisting federal officers in the performance of their duties.[211] Sapp attempted to kill two state police officers when they tried to execute a federal arrest warrant on him.[212] The Government chose to prosecute Sapp under a statute punishing whoever kills or attempts to kill any person assisting a federal officer in the performance of duty.[213]

Sapp argued that the Government chose the wrong statute.[214] He asserted that the Government must use a statute specifically addressing the killing of a state police officer.[215] The statute the defense favored did not have a provision for an attempted killing.[216] Since he did not kill a federal agent, Sapp did not violate his proposed statute.[217]

The district court held that the Government may choose either of two overlapping criminal statutes for the same act.[218] The Government may choose this so long as the statutory text and legislative history show the intent that each statute applies independently.[219] The district court relied on the Supreme Court case of *United States v. Ball* which upheld the Government's broad discretion in selecting charges.[220]

In *Ball*, the Government charged the defendant with both possessing and receiving a firearm based on the same underlying facts.[221] The Supreme Court found the statutory language and legislative history to indicate that the provisions applied independently.[222] The Government may simultaneously prosecute for both possession and receipt of the same firearm but may only convict on one offense.[223]

Relying on *Ball*, the district court upheld the Government's choice of statute.[224] The district court did not find text in either statute indicating one must be used over another.[225] Where conduct violated both statutes, the punishment was the same.[226] Since the punishment scheme was identical, the *Sapp* court found congressional intent for two separate crimes.[227] Neither statute wholly replaced the other. Both crimes punished some conduct the other did not.[228] The district court did not find evidence in the legislative history to indicate that one statute should be used over the other.[229] Since the text and history of the statutes did not indicate a contrary intent, the court upheld the Government's choice of statute.[230]

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[210] 272 F. Supp. 2d 897 (N.D. Cal. 2003) (dismissing the charges on other grounds).

[211] *Id.* at 898.

[212] *Id.*

[213] *Id.* at 901.

[214] *Id.*

[215] *Id.* at 902.

[216] *Id.* at 902 n.2.

[217] *Id.*

[218] *Id.* at 904 (citing United States v. Ball, 470 U.S. 856, 860 (1985)).

[219] *Id.*

[220] *Ball*, 470 U.S. at 859 ("This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.").

[221] *Id.* at 858.

[222] *Id.* at 860.

[223] *Id.* at 864.

[224] *Id.* at 905.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 905–06.

[228] *Id.*

[229] *Id.* at 902–05.

[230] *Id.* at 906.

Applying *Sapp* and *Ball*, the Government may choose to prosecute under Article 125, Article 120, or both, unless the text and history of Article 120 states otherwise. The text of Article 120 does not address a relationship to Article 125.[231] If Congress wanted Article 120 to have precedence over Article 125, they could have repealed Article 125.[232] Presented with this recommendation, Congress chose not to do so.[233] If they wanted Article 120 to replace Article 125 to the extent of the overlap, Congress could have included instructions on this point. The argument to allow a choice in prosecution rests on a judicial deference to both prosecutorial discretion and legislative authority.

b. No, the Prosecution Must Choose Article 120 When It Applies

On the other hand, the legislative history may support the exclusive use of Article 120 to the extent it overlaps with conduct punished under Article 125. Looking to Article 120's purpose, its JSC creators gave Congress an option to move sexual assault crimes away from the common law and towards the modern codified system.[234] Adopting this option, Congress chose to make military justice more similar to federal law. Furthermore, the comprehensive nature of Article 120 may indicate Congress's preference for this statute for all non-consensual sexual crimes.

Congress also may have indicated a preference when it downgraded the punishment scheme for conduct covered under both statutes. Where Article 120 and Article 125 punish the same conduct, Article 120 punishes less severely.[235] A similar punishment scheme would show that Congress intended to give the Government a choice in prosecution. The district court in *Sapp* found the similar punishment scheme as evidence of intent for such use.[236] The opposite is true here. The less severe punishment of Article 120 is evidence of intent to provide a replacement, not to provide a choice.

The *Wilson* case from Part II is further evidence of congressional intent for trial counsels to use Article 120 when it applies.[237] In *Wilson*, the CAAF held that Congress never intended for the availability of a mistaken age defense in Article 125.[238] The Article 120 offense of abusive sexual contact with a child is the equivalent of the sodomy crime at issue in *Wilson*.[239] This Article 120 offense has a mistaken age defense.[240]

The inconsistency in defenses is further evidence that Congress did not intend for a choice between Articles 120 and 125 when both apply. If Congress wanted to provide a choice, the statutory scheme would be more consistent on punishments and defenses in both articles.[241] This makes the affirmative answer to the third question more problematic. However, these issues do not conclusively distinguish this situation from one where the prosecution has a choice between two applicable statutes.

The precedent from *Ball* allowing for a choice in prosecution outweighs the precedent requiring the use of Article 120.[242] Although problematic, a court could still theoretically convict on the Article 125 offense used in *Wilson* even though a defense may be available under Article 120. The theory permitting this prosecution to occur would require the court to place

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[231] MCM, *supra* note 3, pt. IV, ¶ 45d, e. Sodomy is not listed as a lesser included offense. *Id.* However, the definition of "Indecent Conduct" in Article 120 includes sodomy as an act that a person cannot observe or visually record without that other person's consent. *Id.* pt. IV, ¶ 45a(t)(12)(B).

[232] *See* United States v. Wilson, 66 M.J. 39, 45 (C.A.A.F. 2008) (holding that the new Article 120 has no effect on the availability of a mistaken age defense in Article 125 where Congress or the President could have, but did not, provide this defense). This case supports the argument that Article 120 did not affect Article 125.

[233] Johnson, *supra* note 128, at 27.

[234] SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4.

[235] *Compare* MCM, *supra* note 3, pt. IV, ¶ 51e, *with id.* pt. IV, ¶ 45f; *see supra* note 159.

[236] United States v. Sapp, 272 F. Supp. 2d 897, 905–06 (N.D. Cal. 2003).

[237] *Wilson*, 66 M.J. at 45 n.10. The *Wilson* court did not address the viability of Article 125 when Article 120 is available. *Id.*

[238] *Id.* at 47 ("We decline to redraft Article 125, UCMJ, to include a defense that Congress might have added, but did not.").

[239] MCM, *supra* note 3, pt. IV, ¶ 45a(i).

[240] *Id.* pt. IV, ¶ 45a(o)(2).

[241] *Contra Wilson*, 66 M.J. at 46 ("The parties argue, from respective histories of Articles 120 and 125, UCMJ, that Congress intended to harmonize the legislative scheme, but overlooked Article 125. After reviewing the history of both statutes, we fail to see support for this position.").

[242] United States v. Ball, 470 U.S. 856, 859 (1985); *see Wilson*, 66 M.J. at 45 n.12 (noting that if the controversial policy concerning homosexuals in the military is the reason elected officials failed to act, it did not justify the court in making a public policy determination by judicial fiat).

great weight on the meaning derived from what Congress does not do. To allow such a conviction, a court would be operating at the height of judicial deference to the discretion of the trial counsel and to the significance of legislative inaction.

5. Did Article 120 Partially Repeal Article 125 by Implication?

Similarly examining this inaction, the fourth question asks whether Congress repealed Article 125 even though it specifically chose not to do so. If the answer to the third question allows for a choice in prosecution, this would be the height of judicial deference to congressional inaction. If the answer to the fourth question favors implied repeal, this would be the height of judicial activism. Both questions seek to derive congressional intent from what Congress does not say about what it does not do.

What did Congress intend when, without discussion, it enacted Article 120 without repealing Article 125? The canon of implied repeal is instructive:

> Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute or covers the subject of a prior act or section and is a substitute act. The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute, or the whole prior statute if the later act is intended as a substitute, are treated as repealed.[243]

The Supreme Court recently re-articulated the theory of implied repeal in *National Association of Home Builders v. Defenders of Wildlife*.[244] The case concerned the interplay of two federal environmental statutes: the Clean Water Act (CWA) and the Endangered Species Act (ESA).[245] The CWA mandated that the Environmental Protection Agency (EPA) must turn over certain permitting powers to state authorities upon a showing of nine listed criteria.[246]

The ESA, a later act, mandated that every federal agency, like the EPA, ensure that any action it takes not jeopardize the continued existence of endangered or threatened species.[247] The nine CWA criteria which triggered mandatory permit authority transfer did not include a "no jeopardy" factor.[248] Under a theory of implied repeal, the Supreme Court addressed whether the ESA added a tenth criterion that the EPA must find before transferring permit authority to a state.[249]

The Supreme Court held that "'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal is clear and manifest.'"[250] "'An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict' or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.'"[251] The Supreme Court did not find irreconcilable conflict between the two statutes. The Court interpreted the ESA to apply to only discretionary actions of the EPA.[252] When the CWA mandates a certain action under specific circumstances, the ESA does not require an additional finding that the action will not jeopardize any endangered or threatened species.[253]

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[243] 1A SUTHERLAND STAT. CONST. § 22:22 (7th ed. 2007) (discussing implied repeals); *see* Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2532 (2007); Watt v. Alaska, 451 U.S. 259 (1981); Morton v. Mancari, 417 U.S. 535, 551 (1974); Posadas v. Nat'l City Bank, 296 U.S. 497 (1936); Chase v. United States, 256 U.S. 1 (1921).

[244] *Nat'l Assoc. of Home Builders*, 127 S. Ct. at 2532.

[245] *Id.* at 2525.

[246] *Id.*

[247] *Id.* at 2526.

[248] *Id.*

[249] *Id.*

[250] *Id.* at 2532 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)).

[251] *Id.* (quoting Branch v. Smith, 538 U.S. 254, 273 (2003)).

[252] *Id.* at 2534. The court did not reach the issue of whether the Endangered Species Act was intended to replace the Clean Water Act. The two statutes have different purposes and were passed only one year apart. *Id.* at 2525–26.

[253] *Id.* at 2534–35.

The Supreme Court found that the lower appellate court construed the ESA to effectively repeal the nine listed criterion in the CWA. The lower court modified the CWA by requiring a tenth factor prior to the EPA's transfer action.[254] In reversing the lower court, the Supreme Court reiterated a presumption against implied repeals.[255]

The doctrine of implied repeal helps answer the question of the previous section. Did Congress give trial counsel a choice in either Article 120 or Article 125?[256] Or did Article 120 repeal nonconsensual sodomy by implication leaving only consensual sodomy in Article 125? If the doctrine of implied repeal applies, the prosecution cannot choose nonconsensual sodomy because it no longer exists. The inquiry starts with a presumption against implied repeal as reiterated in *Home Builders*.

Even with this presumption in mind, the doctrine of implied repeal arguably makes nonconsensual sodomy a dead letter. According to *National Association of Home Builders*, implied repeal happens under either of two circumstances; irreconcilable conflict or clear substitution.[257] In applying this doctrine, courts should give effect to both Article 120 and Article 125 unless it creates an irreconcilable conflict or unless Article 120 is clearly intended as a substitute.

In this situation, however, implied repeal cannot be based on the irreconcilable conflict. If a trial counsel ignores Article 120 and charges only Article 125, the court avoids the potential conflicts of multiplicity and multiplication. This interpretation to allow one article or the other gives effect to both Article 120 and Article 125. As discussed in the previous section, this is well grounded in judicial deference. Since an interpretation is possible which gives effect to both statutes, one of the required circumstances is not present. Grounds based on irreconcilable conflict do not overcome the presumption against implied repeal.

Even in the absence of an irreconcilable conflict, implied repeal may occur if Article 120 is clearly intended as a substitute.[258] Even though Congress left Article 125 on the books, the overall intent of Article 120 is to replace the old regime. Congress rejected the first JSC recommendation to keep the old regime. As their second preference, the JSC drafters of Option 5 expressed the intent to substitute federal law for the common law.[259]

In taking this recommendation, Congress arguably adopted the JSC's intent for Article 120's substitution for all nonconsensual sex crimes.[260] The intent for substitution would extend only so far as the actual substitution of Article 120 over Article 125. In other words, Congress may have intended to replace forcible and underage sodomy, but not consensual sodomy.[261]

Even without this intention on the record, the intent to substitute in Option 5 is arguably clear enough to overcome the presumption against implied repeal.[262] Recalling the legislative history of Article 120, the drafters of Option 5 intended to substitute Article 120 for all sexual assault crimes.[263] When Congress enacted Option 5, it adopted the intent of the JSC.

To the extent Congress did not enact Option 5, the intent to substitute is not contradicted. Perhaps Congress did not want to re-open the 1993 debate over sexual orientation in the military.[264] Such a debate may have risked derailing the effort to

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[254] *Id.* at 2533.

[255] *Id.*

[256] Congress arguably wanted prosecutors to have a choice in prosecution. The definition of Article 120, Indecent Conduct, references Article 125, Sodomy. MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B).

[257] *Nat'l Assoc. of Home Builders*, 127 S. Ct. at 2532.

[258] *Id.*

[259] SEX CRIMES AND THE UCMJ, *supra* note 2, at 251.

[260] *Id.* ("[Article 120] replaces the current military rape, carnal knowledge, sodomy, indecent assault, indecent acts and liberties with a child, indecent acts with another, indecent exposure and forcible pandering under Articles 120, 125, and 134, UCMJ, with new offenses that more specifically describe the same sexual misconduct."). Given the context of this list, Article 120 does not replace consensual sodomy.

[261] The cross reference to Article 125, Sodomy in the definition of Article 120, Indecent Conduct, does not undermine this theory. Congress intended consensual sodomy to continue to be prohibited. This may be why sodomy is referenced in the new Article 120. *See* MCM, *supra* note 3, pt. IV, ¶ 45a(t)(12)(B).

[262] *Nat'l Assoc. of Home Builders*, 127 S. Ct. at 2532.

[263] SEX CRIMES AND THE UCMJ, *supra* note 2, at 1–4, 251.

[264] *See* United States v. Wilson, 66 M.J. 39, 50 (C.A.A.F. 2008) (Effron, C.J., dissenting).

reform sexual assault crimes. This debate may have been reopened if Congress took the JSC recommendation to repeal Article 125. Whatever the reason, this silence does not contradict the intent of Option 5 to substitute all sexual assault crimes elsewhere with Article 120.

IV. The Intersection of Article 120 and of Article 125

A. Understanding Implied Repeal in Light of *Marcum*'s Effect

The case for implied repeal of nonconsensual sodomy is stronger after considering the vitality of consensual sodomy crimes. As discussed above, recent developments in privacy rights have little effect on the military prohibition of prejudicial sexual conduct. In 2005, Congress may be presumed to know that the CAAF limited the impact of *Lawrence* through *Marcum* the year prior. The JSC report, as noted earlier, recommended capturing these developments by reforming consensual sex crimes.[265] Recall that despite the recommendation to reform both, Congress only acted on the part of Option 5 dealing with a substitute set of sexual assault crimes.

Understanding that Article 125 also punished consensual conduct, Congress limited its reform to nonconsensual sex crimes. Since Article 120 is clearly intended to replace all sexual assaults, courts should only give effect to Article 125's consensual sodomy. Although an act of judicial activism, this defers to congressional intent for the new Article 120 to reform sexual assault prosecutions with a substitute set of laws.[266] Congress stopped short of reforming consensual sex crimes when it declined to repeal Article 125. In giving only consensual sodomy effect, courts would be consistent with the scope of the reform.

In summary, a reconcilable answer to last section's four questions concerning the overlap is that Congress understood Article 125 included both consensual and nonconsensual crimes but only sought to reform the latter.[267] If charging forcible or underage sodomy, the Government would have difficulty arguing that Congress intended its sexual assault reforms to be ignored. Thus despite the presumption against implied repeal, Article 120 repeals by implication Article 125's nonconsensual sodomy, but not consensual sodomy.

B. The Consensual Sodomy Alternative

In addition to the legal reasons for choosing Article 120 over Article 125, practical reasons also dictate abandoning underage and forcible sodomy prosecutions under Article 125. By disregarding nonconsensual sodomy crimes, trial counsels may avoid the issues of multiplicity, unreasonable multiplication and implied repeal. However, military justice practitioners cannot simply ignore Article 125 when charging under Article 120.

Consensual, adult sodomy which is prejudicial to good order and discipline is still a crime under Article 125.[268] Practitioners must understand the intersection of Article 120 and Article 125 if a case involves a defense of consent, mistaken consent or mistaken age. These defenses may convert the charged nonconsensual misconduct into consensual misconduct.

> When we are dealing with an article of the code in which age is not an element of the offense, such as Article 125, we should exercise great caution in drawing substantive inferences from congressional inaction. The problem with such speculation, particularly in the absence of legislative history setting forth a reason for the inaction, is that there are many reasons why Congress may not act on a particular aspect of a legislative proposal. If one were to speculate with respect to Article 125, UCMJ, for example, such speculation could include the possibility that congressional inaction resulted from concern that amending the sodomy statute would run the risk of reopening the highly contentious debate that occurred in 1993 regarding sexual orientation in the military. *See* H.R. Rep. No. 103-200, at 287–90 (1993). In the circumstances of the present case, however, we need not rely on speculation about this or any other reason for legislative inaction. The majority opinion does not establish that the legislative record provides a sufficient foundation to permit reliance on congressional inaction as a basis for deciding the case before us.

Id.

[265] SEX CRIMES AND THE UCMJ, *supra* note 2, at 289.

[266] *Id.* at 251.

[267] *Id.* at 1–4.

[268] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

If these defenses to Article 120 are successful, the accused may still violate Article 125. Article 120 does not list sodomy as a lesser included offense[269] nor does it punish consensual, adult, private conduct.[270] The prosecution may have an alternate theory of the case involving consent of the alleged victim. For these reasons, Articles 120 and 125 may still be on a charge sheet for the same conduct.

This alternative theory of the case based on the victim's consent (or the perception of consent) is generally not an unreasonable multiplication of the charges under the *Quiroz* test mentioned earlier.[271] The above discussion of unreasonable multiplication of the charges did not address when the Government is only charging Article 125 in the alternative to Article 120. In this situation, the Government would move to dismiss the consensual sodomy charge if the fact-finder convicted the accused of sexual contact. If the accused successfully defended the sexual contact offense, then the Government would be able to prove that the conduct was still a crime.

Without charging consensual sodomy in the alternative, the Government would risk decriminalizing conduct when using Article 120. Prior to Article 120's reform, the accused may still have committed a crime even if he or she had a defense to nonconsensual sodomy. Recall that since consensual sodomy is a lesser included offense of nonconsensual sodomy, the Government did not have to charge it separately as an alternate theory of the case. When charging under the new Article 120, however, Government should consider charging consensual sodomy in the alternative. If consent, mistaken consent or mistaken age is a possibility with Article 120, the prosecution must charge Article 125 to prevent prejudicial misconduct escaping punishment.

C. Missed Opportunity for Reforming Consensual Sex Crimes

Despite the need for a lesser included offense, practitioners should embrace the new Article 120. When Congress enacted comprehensive reform of sexual assault crimes, it intended for those new offenses to be used. Unfortunately, Congress passed on reforming consensual sexual misconduct.[272] In silently doing so, lawyers have the dilemma of speculating on the significance of what Congress does not do.[273]

This dilemma would have been avoided had Option 5 been fully implemented. After repealing Article 125, Option 5 called for the President to create a new Article 134 offense. This new offense would capture all consensual sexual conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.[274] Consensual sodomy still punishable after *Lawrence* and *Marcum* would have been incorporated into "Prejudicial Sexual Relationships" in the proposed Article 134 offense.[275]

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[269] MCM, *supra* note 3, pt. IV, ¶ 45d, e.

[270] *Id.* pt. IV, ¶ 45a(o)(2) ("[I]t is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years."); *id.* pt. IV, ¶ 45a(r) ("Consent and mistake of fact as to consent . . . are an affirmative defense for the sexual conduct in issue in a prosecution under . . . subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).").

[271] MCM, *supra* note 3, R.C.M. 307(c)(4) discussion ("There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses.").

[272] Like a gorilla in the living room that no one wants to talk about, the military's prosecution of consensual sodomy touches near the political topic of homosexuals in the military. It is possible that Congress avoided Article 125's repeal to prevent a distraction to reforming sexual assault crimes. *See* 10 U.S.C. § 654 (2000).

[273] This dilemma may remind some of the dog that did not bark in the Sherlock Holmes story, *Silver Blaze*. SIR ARTHUR CONAN DOYLE, SILVER BLAZE, *in* THE MEMOIRS OF SHERLOCK HOLMES, 7–34 (Penguin Books 1950) (1894). In this detective story, Silver Blaze is a race horse who is missing and whose trainer has been killed out on the moor under suspicious circumstances. *Id.* During the night of the crime, the guard dog in the barn does not bark. *Id.* Holmes then deduces the dog knew the horse thief. *Id.* Holmes uses this fact, in part, to solve the crime. *Id.* Lawyers must be like Sherlock Holmes and deduce the significance of congressional silence.

[274] SEX CRIMES AND THE UCMJ, *supra* note 2, at 318–24 (recommending in Option 5 replacing Article 125, in part, with a new Article 134 offense called "Prejudicial Relationships Involving Sexual Activity").

[275] *Id.* at 318. "Prejudicial Sexual Relationships" proposed seven crimes including one catch all crime.

> (1) Prejudicial sexual act (includes sodomy), sexual contact, or lewd act.
>
> (a) That the accused engaged in a sexual act (includes sodomy), sexual contact or lewd act with a certain person; and
>
> (b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

Id.

"Prejudicial Sexual Relationships" also would have captured consensual sexual conduct that does not rise to the level of an act of sodomy but is still prejudicial or service discrediting.[276] Since sodomy requires copulation of the mouth and genitals or genitals and anus, any other consensual sexual act is not directly punishable under Article 125.[277] Based on other authorities, relationships resulting from the conduct may still be punishable.[278] The proposed consolidation would have allowed a person to look in one place and have a better understanding of what conduct was punishable. The military missed an opportunity to codify the development of privacy rights from case law.[279]

Even without reforming consensual sodomy, the President may still correct the current problem by removing nonconsensual sodomy from Article 125. Under Articles 36 and 56 of the UCMJ, the President may set different maximized punishments for an offense based on specific facts.[280] Under this authority, the President created forcible sodomy, sodomy with a child under age twelve and sodomy with a child over twelve but less than sixteen years old.[281] Using this same authority, the President may eliminate these sentence enhancing elements. Such an action would prune the dead branches from Article 125 or at least eliminate any debate on that issue.

V. Conclusion

Since Article 120 did not affect consensual sodomy, Article 125 is "only mostly dead."[282] However until officially addressed, the implied repeal of non-consensual sodomy is an open question. In contrast, consensual sodomy is alive to the extent the charged conduct is prejudicial to good order and discipline. As shown in the survey above, the *Lawrence* right to privacy only reaches conduct which is generally not the gravamen of the case. Since only prejudicial sodomy is typically prosecuted, the consensual sodomy prohibition is mostly alive.

Even though Congress meant for Article 120 to replace most of Article 125, military justice practitioners should expect to see sodomy charged in the alternative to many sexual contact offenses. Absent evidence of physical force in sexual assaults, trial counsel may want to preserve the lesser included offense of consensual sodomy. If a consent defense is successful, would the conduct still be prejudicial to good order and discipline? If so, trial counsel risk decriminalizing conduct without charging Article 125 in the alternative to Article 120.

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[276] *Id.* at 253 (recommending the Article 120 definitions be incorporated into "Prejudicial Relationships Involving Sexual Activity" which expands the zone of punishable conduct).

[277] Article 134, UCMJ clause 1 or clause 2 may potentially capture consensual sexual conduct which is prejudicial to good order and discipline or of a nature to discredit the armed forces but does not rise to the level of an act of sodomy. *See* MCM, *supra* note 3, pt. IV, ¶ 60b. For example, it is not settled if it is unnatural carnal copulation when a person uses his or her tongue to penetrate into another person's anus. If this consensual act is not sodomy, then it is possible to be punished under the General Article, Article 134 assuming it is also prejudicial. As another example, if a subordinate used her hand to masturbate a superior, Article 134 may reach the conduct but not Article 125.

[278] *See id.* pt. IV, ¶ 83b (criminalizing officer and enlisted fraternization); AR 600-20, *supra* note 69, para. 4-16 (punishing certain relationships under Article 92, UCMJ for violation of a lawful general regulation).

[279] Trial counsels should consider charging consensual sodomy to include the element of criminality:

> Sample specification. In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20__, wrongfully commit sodomy with _____.

Here the word "wrongfully" is added to Article 125 to allege prejudice to good order and discipline as suggested by RCM 307. *See* MCM, *supra* note 3, R.C.M. 307 discussion (c)(3)(G)(ii).

> If the alleged act is not itself an offense but is made an offense either by applicable statute (including Article 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as "wrongfully," "unlawfully," or "without authority" (depending on the nature of the offense) should be used to describe the accused's acts.

Id.

[280] UCMJ arts. 36, 56 (2008).

[281] *Compare* MCM, *supra* note 3, pt. IV, ¶ 51a, *with id.* pt. IV, ¶ 51b (showing the elements for forcible and underage sodomy are not in the statute but are created by the President).

[282] "[Y]our friend here is only mostly dead. There's a big difference between mostly dead and all dead. . . . Now mostly dead, he's still slightly alive." THE PRINCESS BRIDE (20th Century Fox 1987) (quoting actor Billy Crystal playing the role of Miracle Max). I chose this quote, in part, because the phrase "mostly dead" is a contradiction in terms which underscores the complicated state of Article 125.

After sorting through this confusion, the Government should let Article 120 do the work Congress intended for all sexual assaults. Article 125 remains only to punish consensual conduct prejudicial to good order and discipline. If charging Article 125, trial counsels should be prepared for the *Marcum* analysis. Such a prepared trial counsel will then understand the difference between mostly dead and all dead.