

Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law

Major Jayson L. Durden*

We learnt as law students in Blackstone that there are things which are malum in se and, in addition to them, things which are merely malum prohibitum; but unhappily in the affairs of real life we find that there are many things which are malum in se without likewise being malum prohibitum. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.¹

I. Introduction

It is 13 December 2013: Congress has passed and the President has signed the National Defense Authorization Act (NDAA). The Act contains a provision that repeals §925 of Title 10, United States Code, the offense of sodomy.²

On 18 July 2014, three friends John, James, and Kate share a night of drinking, discussing Kate's financial difficulties. John and James tell Kate they can help her with her financial issues by offering her five hundred dollars for a night of fun and excitement. After drinking more alcohol, John, James, and Kate engage in an evening of intimate group activities; specifically, they do not have sexual intercourse, but engage in heterosexual and homosexual sodomy. Of the three, John is married. Moreover, they are all active duty servicemembers of the same command. John is a Sergeant First Class (E-7); James is a Sergeant (E-5); and Kate is a Corporal (E-4).

Should John, James, and Kate be concerned that the command will find out? Should the command pursue charges for this private and consensual activity? Does the command have an interest in deterring this type of behavior? Yes: the three servicemembers should be concerned and the command does have an interest in deterring this type of behavior, as the military holds its members to a stricter accountability than society holds civilians.³ Under Article 92 of the Uniform Code of Military Justice (UCMJ), John, James, and Kate can be held criminally accountable for their actions if their conduct is interpreted as prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.⁴ But is an orders violation sufficient to address the actions of these servicemembers?

* Judge Advocate, U.S. Marine Corps. Presently assigned as Associate Professor, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

¹ Parker v. Levy, 417 U.S. 733, 764–65 (1974) (Blackmun, J., concurring) (quoting Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891)).

² Although it is the author's opinion that a repeal of § 925 of Title 10 is likely to occur in the near future, for purposes of this article, the repeal is merely a hypothetical [hereinafter Author's Opinion].

³ Levy, 417 U.S. at 765.

⁴ See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-14 (18 Mar. 2008) (RAR 20 Sept. 2012) [hereinafter AR 600-20]

Despite the beliefs of Congress,⁵ the media,⁶ and the public, the military has rarely prosecuted servicemembers for homosexual conduct or extramarital affairs.⁷ In light of the repeal of "Don't Ask, Don't Tell,"⁸ the Supreme Court's decision in *Lawrence v. Texas*,⁹ and the inevitable repeal of Article 125,¹⁰ will the military still have the ability to

("Relationships between Soldiers of different rank are prohibited if they . . . create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission."); U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS 1990, art. 1165 (3 Sept. 1997) [hereinafter NR 1165] (prohibiting fraternization between enlisted).

When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Prejudice to good order and discipline or discredit to the naval service may result from, but are not limited to, circumstances which –

- a. call into question a senior's objectivity;
- b. result in actual or apparent preferential treatment;
- c. undermine the authority of a senior; or
- d. compromise the chain of command.

Id., para. 2.

⁵ See Norman Kempster, *Lying, Not Adultery, Is Female Pilot's Top Crime*, *AF Says*, L.A. TIMES, May 22, 1997, http://articles.latimes.com/1997-05-22/news/mn-61313_1_air-force (stating that Sen. Tom Harkin (D-Iowa) accused the military of trying to enforce an outdated moralistic legal code).

⁶ See, e.g., Editorial, *The Discharge of Kelly Flinn*, N.Y. TIMES, May 23, 1997, <http://www.nytimes.com/1997/05/23/opinion/the-discharge-of-kelly-flinn.html?pagewanted=print&src=pm>; Meg Greenfield, *Unsexing the Military: The Pentagon Needs to Work Out Sexual Rules That Can Be Announced with a Straight Face*, NEWSWEEK, June 16, 1997, <http://www.questia.com/library/1G1-19482728/unsexing-the-military-the-pentagon-needs-to-work#articleDetails>.

⁷ See Major Joel P. Cummings, *Is Article 125, Sodomy a Dead Letter in Light of Lawrence v. Texas and the New Article 120?*, ARMY LAW., Jan. 2009, at 1, 10–11 (surveying cases involving prejudicial sex acts from 1992 to 2009, concluding that the prejudicial sex acts were not the gravamen of the cases).

⁸ See Don't Ask, Don't Tell Repeal Act of 2010, Pub L. No. 111-321, 124 Stat. 3515 (repealing Policy Concerning Homosexuals in the Armed Forces, 10 U.S.C. § 654 (2010)).

⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰ See Author's Opinion, *supra* note 2.

prosecute and hold accountable those who engage in consensual sexual relationships that are prejudicial to the good order and discipline of the armed forces?¹¹ Judge advocates must be prepared to deal with the gap that may emerge in the UCMJ in the prosecution of prejudicial consensual sex crimes. This article offers possible solutions.

In Part I, this article examines the evolution of sexual crimes in the military in the last ten years; specifically, Congress's focus on reforming nonconsensual sex crimes while neglecting reform of consensual sex crimes. Part II of this article analyzes consensual sex crimes and explains how the military might prosecute these offenses as prejudicial sexual relationships. Part III offers prosecutors novel specifications and elements for prejudicial sexual relationships, possible defense challenges, and probable solutions to proving the prejudicial effect of these offenses.

II. Background

Military law practitioners are familiar with the constant revision of military sex crimes over the past ten years, whether by legislation¹² or by case law.¹³ In 2012, practitioners watched the focus on nonconsensual sex crimes morph from many different UCMJ articles into one.¹⁴ They have seen Article 125 carved up and almost repealed.¹⁵ Yet, they have seen little reform in the way consensual sex crimes that are prejudicial to good order and discipline or service discrediting may be prosecuted.¹⁶

A. Article 120 Reform

In October 2004, the President required the Secretary of Defense to review the UCMJ and the Manual for Courts-Martial (MCM) to determine what changes were required to improve sexual assault issues in the military justice system and to conform "more closely to other Federal laws and regulations that address such issues."¹⁷ The Joint Service Committee (JSC) on military justice conducted a review and found that all sexual crimes could be prosecuted under the system that was in place.¹⁸ The system had over fifty years of jurisprudence and had developed the law in sexual assault cases over the years.¹⁹

Military prosecutors used many UCMJ articles to prosecute nonconsensual sex crimes.²⁰ The implementation of an amended Article 120 in October 2007 combined many of these crimes under one article.²¹ The 2007 Article 120 included touching of the genitalia and anus in the definition of sexual contact.²² This effectively made forcible sodomy punishable as an aggravated sexual contact.²³ The 2007 Article 120 remained in effect until the 2012 amendment to Article 120 was enacted in June 2012.²⁴ The 2012 Article 120 divided sexual crimes into three categories: rape and sexual assault of an adult; rape and sexual assault of a child; and other sexual misconduct.²⁵ The 2012 Article 120 expanded the definition of sexual act to include contact of the penis with the anus or mouth.²⁶ It effectively made forcible sodomy punishable as rape or sexual assault.²⁷ This

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2012) [hereinafter MCM 2012] ("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.").

¹² Most experienced military practitioners have now had to prosecute or defend sexual assault cases under three different Article 120s. See *id.* pt. IV, ¶ 45; MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV, ¶ 45 (2008) [hereinafter MCM 2008]; MANUAL FOR COURTS MARTIAL, UNITED STATES pt. IV, ¶ 45 (2005) [hereinafter MCM 2005].

¹³ *Lawrence*, 539 U.S. at 575 (holding liberty interest protects both consensual homosexual and heterosexual sodomy); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (holding that Appellant's conduct was outside the liberty interest recognized in *Lawrence* because the victim was in the Appellant's chain of command and was a person "who might be coerced" or was "situated in a relationship where consent might not easily be refused").

¹⁴ Compare MCM 2012, *supra* note 11, pt. IV, ¶ 45(b), (c), with MCM 2008, *supra* note 12, pt. IV, ¶¶ 45, 51, and MCM 2005, *supra* note 12, pt. IV, ¶¶ 45, 51, 87, 88, 90.

¹⁵ See Cummings, *supra* note 7, at 2–10; Dwight Sullivan, *The Weirdest Military Justice Story of 2011: The Strange Tale of the Non-Repeal of Article 125* (Jan. 2, 2012), NAT'L INST. OF MILITARY JUSTICE BLOG–CAAFLOG, <http://www.caaflog.com/2012/01/02/the-weirdest-military-justice-story-of-2011-the-strange-tale-of-the-non-repeal-of-article-125-warning-includes-offensive-material/>.

¹⁶ While little reform has taken place in this area, numerous options have been offered. See SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 289–93, 318–24 (Feb. 2005) [hereinafter SEX CRIMES AND THE UCMJ], available at http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (discussing the option to create a comprehensive Article 134 offense for consensual sexual crimes).

¹⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811, 1920 (2004).

¹⁸ SEX CRIMES AND THE UCMJ, *supra* note 16, at 1.

¹⁹ *Id.* at 2.

²⁰ See MCM 2005, *supra* note 12, pt. IV, ¶ 45 (rape and carnal knowledge), ¶ 51 (forcible sodomy), ¶ 63 (indecent assault), ¶ 87 (indecent acts or liberties with a child), ¶ 88 (indecent exposure) and ¶ 64 (assault with intent to commit rape).

²¹ Compare MCM 2008, *supra* note 12, pt. IV, ¶ 45, with MCM 2005, *supra* note 12, ¶¶ 45, 51, 63, 87, 88.

²² MCM 2008, *supra* note 12, pt. IV, ¶ 45.

²³ See Cummings, *supra* note 7, at 2, 13, 15–17 (analyzing the language of the 2007 Article 120 and how it includes punishment for forcible sodomy-type offenses).

²⁴ See Exec. Order No. 13,593, 76 Fed. Reg. 78,451 (Dec. 16, 2011).

²⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 45(b), (c).

²⁶ *Id.* pt. IV, ¶ 45.

rewrite of Article 120 eliminated the offense of indecent act.²⁸ It made forcible sodomy chargeable under Article 120, questioning the applicability of Article 125.

B. Article 125 Repeal

The introduction to this article assumes the repeal of Article 125, and there is good reason for this assumption.²⁹ The lower military courts struggled with whether a conviction for private, heterosexual, noncommercial, consensual adult sodomy could stand.³⁰ For instance, the Air Force Court of Military Review tried unsuccessfully to add the additional factor that the Government must have a compelling interest that justifies prosecution.³¹ In 1986 with the case of *Bowers v. Hardwick*, the Supreme Court answered the question of whether the Government could prosecute acts of private, homosexual, noncommercial, consensual adult, sodomy.³² *Bowers* held that a Georgia Statute criminalizing homosexual sodomy did not violate the fundamental rights of homosexuals.³³ In 2003, the Supreme Court decided *Lawrence v. Texas*, holding that a Texas Statute criminalizing homosexual sodomy furthered no legitimate state interest that could justify intrusion into individuals' personal and private lives.³⁴ This case overruled *Bowers*,³⁵ leaving military practitioners with an

unresolved question. What effect would this ruling have on Article 125, an article prohibiting heterosexual and homosexual sodomy? An answer came in short time.

The United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Marcum*³⁶ on 23 August 2004. The CAAF identified a tripartite framework, what would come to be known as the *Marcum* factors, for addressing *Lawrence* challenges in the military context and on a case-by-case basis:³⁷

(1) Was the accused's conduct covered by the liberty interest identified by the Supreme Court?³⁸

(2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis of *Lawrence*?³⁹

(3) Were there any additional factors relevant solely in the military context that affected the nature and reach of the *Lawrence* liberty interest?⁴⁰

In *Marcum*, the appellant non-commissioned officer (E-6) was found guilty of non-forcible sodomy with a subordinate senior airman (E-4) who he supervised and rated. Since the conduct involved private, consensual activity between adults, the first factor was satisfied. The CAAF then continued its analysis of the appellant's conduct by applying the second factor. An Air Force Instruction regulating relationships between servicemembers of different rank shed light on the court's analysis, finding that as a subordinate servicemember, the E-4 was a person "who might be coerced or was situated in a relationship where consent might not easily be refused."⁴¹ As such, the appellant's conduct was not in fact covered by the liberty interest identified by the Supreme Court. Analysis under the third factor became an unnecessary step, and the court found Article 125 was constitutional as applied to appellant.⁴²

²⁷ *Id.*

²⁸ *Id.* pt. IV, ¶ 45(b), (c), 90.

²⁹ See S. 1867, 112th Cong. § 551(d) (2011) ("Repeal of Sodomy Article-Section 925 of such title (Article 125 of the Uniform Code of Military Justice) is repealed."); Sullivan, *supra* note 15, at 1 (discussing the differences between the Senate version of the 2011 National Defense Authorization Act and the House version; specifically, the fact that the Senate version contained a provision repealing sodomy, but the House version did not).

³⁰ See *United States v. Fagg*, 33 M.J. 618 (A.F.C.M.R. 1991) (holding that the constitutional right of privacy extends to heterosexual, noncommercial, private acts of oral sex between consenting adults); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (affirming conviction for heterosexual, noncommercial, private acts of oral sex between consenting adults); *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991) (holding that that right to privacy was not violated by court-martial for heterosexual sodomy consisting of anal intercourse between consenting adults who were married, but not to each other); *United States v. McFarlin*, 19 M.J. 790, 792 (A.C.M.R. 1985) (governmental interest in military necessity was sufficient to limit freedom to engage in heterosexual, noncommercial, private, and consensual acts of sodomy with subordinates).

³¹ *United States v. Fagg*, 34 M.J. 179 (CMA 1992) (reversing the Air Force Court of Military Review, holding that the statute proscribing sodomy was constitutional with respect to accused's conviction for private, heterosexual, noncommercial, consensual oral sex act).

³² 478 U.S. 186 (1986).

³³ *Id.* at 198.

³⁴ 539 U.S. 558, 578 (2003).

³⁵ *Id.* at 578.

³⁶ 60 M.J. 198 (C.A.A.F. 2004).

³⁷ Although the three-part test is collectively referred to as the "Marcum Factors," the first question is a threshold inquiry before you can apply the next two "factors."

³⁸ *Id.* at 207. The Supreme Court ruled in *Lawrence* that "private, consensual, sexual conduct, including sodomy, is a constitutionally protected liberty interest." *Id.* at 202. Thus, another way to state this same question is—did the conduct involve private, consensual, sexual activity between adults? *Id.* at 207.

³⁹ *Id.* ("For instance, did the conduct involve minors? Did it involve public conduct or prostitution? Did it involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused?").

⁴⁰ *Id.* at 208.

⁴¹ *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

⁴² *Id.*

Shortly thereafter, in September 2004, the CAAF decided *United States v. Stirewalt*.⁴³ This case involved an enlisted appellant who engaged in sodomy with a senior commissioned officer; consequently, this relationship effected military interests of good order and discipline. The CAAF held that Article 125 was constitutional as applied to appellant because it fell squarely under the third *Marcum* factor.⁴⁴ In essence, *Lawrence* and *Marcum* added an element to the crime of consensual sodomy. The Government could no longer just prove the element of sodomy,⁴⁵ it had to show the military judge⁴⁶ a *Marcum* factor as a legal prerequisite.⁴⁷

The *Marcum* decision had no effect on the prosecution of forcible sodomy under Article 125 because forcible sodomy is not conduct covered as a liberty interest identified by the Supreme Court in *Lawrence*.⁴⁸ The Government continued to prosecute forcible and consensual sodomy with a *Marcum* factor under this article. This continued until Congress broadened the definitions, expanding the type of conduct criminalized under the 2007 Article 120.⁴⁹ Some

practitioners questioned the applicability of Article 125 for forcible sodomy.⁵⁰ While the 2007 Article 120 allowed for prosecution of sodomy-type offenses, it left lingering questions about the relationship between Article 120 and Article 125. In contrast, the 2012 Article 120 made it clear that sodomy offenses could be charged as rape.⁵¹

If forcible sodomy can be charged under the 2007 and the 2012 Article 120, why is Article 125 still part of the UCMJ? According to some, Congress did not repeal Article 125 because of a concern over bestiality.⁵² The President will likely address that concern with a new Article 134 offense that includes bestiality.⁵³ Thus, with forcible sodomy covered by Article 120,⁵⁴ and bestiality covered under Article 134,⁵⁵ Congress will likely do what it intended to do in 2011⁵⁶ and repeal Article 125. Should this occur, Congress will create a gap in the law relating to the prosecution of other prejudicial sexual relationships.

C. Prejudicial Sexual Relationships

While there has been a considerable amount of legal reform in nonconsensual sex crimes in the military, Congress has not proposed any reform to crimes that are

⁴³ 60 M.J. 297 (C.A.A.F. 2004).

⁴⁴ *Id.* at 304.

In *Marcum*, we noted that due to concern for military mission accomplishment, “servicemembers, as a general matter, do not share the same autonomy as civilians.” We consider Stirewalt’s zone of autonomy and liberty interest in light of the established Coast Guard regulations and the clear military interests of discipline and order that they reflect. Based on this analysis, we conclude that Stirewalt’s conduct fell outside any protected liberty interest recognized in *Lawrence* and was appropriately regulated as a matter of military discipline under Article 125.

Id. (quoting *Marcum*, 60 M.J. at 206).

⁴⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 51b(1) (“That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.”).

⁴⁶ While this was the state of the law from September 2004 to May 2013, this inquiry is now within the purview of the finder of fact. *See infra* note 85.

⁴⁷ *See* *United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App. Jan. 26, 2012) (unpublished) (stating that *Marcum* factors are a question of law to be determined by the military judge, not questions of fact to be determined by the finder of fact); *United States v. Harvey*, 67 M.J. 758, 763 (A.F. Ct. Crim. App. 2009) (holding that the military judge did not abuse his discretion by not instructing members on the *Marcum* analysis).

⁴⁸ *See Marcum*, 60 M.J. at 206–08 (forcible sodomy does not get past the first *Marcum* factor, as it is not consensual conduct); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 51 (2002) [hereinafter MCM 2002]. *See also* *United States v. Whitaker*, 72 M.J. 292,293 (C.A.A.F. 2013); *United States v. Brown*, No. 201300020, 2013 WL 5842240 (N-M. Ct. Crim. App. Oct. 31, 2013) (unpublished) (holding that the *Lawrence* analysis was not at issue with respect to forcible sodomy).

⁴⁹ MCM 2008, *supra* note 12, pt. IV, ¶ 45e, h, t(2). Aggravated sexual contact is defined as sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act. *Id.* pt. IV, ¶ 45e. Abusive Sexual Contact is defined as sexual contact with or by another person, if to do so would violate subsection (c) (aggravated

sexual assault), had the sexual contact been a sexual act. *Id.* pt. IV, ¶ 45h. Sexual Contact is defined as 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. *Id.* pt. IV, ¶ 45t(2).

⁵⁰ *See Cummings*, *supra* note 7, at 13–18 (outlining the new language in the 2007 Article 120 and making an argument for a possible Double Jeopardy issue if both forcible sodomy and aggravated or abusive sexual contact are charged).

⁵¹ MCM 2012, *supra* note 11, pt. IV, ¶ 45g(1)(A) (defining sexual act as contact between the penis and the vulva or anus or mouth).

⁵² *See* S.1867, 112th Cong. § 551(d) (2011) (repealing Article 125); National Defense Authorization Act for Fiscal Year 2011, 41 U.S.C. § 403(12)(E) (2011) (did not include repeal of Article 125); Sullivan, *supra* note 15, at 4 (arguing that had Jay Carney, the White House Press Secretary, not received the question of whether the President supports bestiality in the armed forces and the chaos that ensued, that Article 125 would have been repealed in the 2011 National Defense Authorization Act).

⁵³ *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 61 of the UCMJ from Abusing Public Animal to Animal Abuse including Sexual acts with Animals).

⁵⁴ *See Cummings*, *supra* note 7.

⁵⁵ *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. at 64,854, 64,865.

⁵⁶ *See* S. 1867, 112th Cong. § 551(d) (2011) (stating “Repeal of Sodomy Article- Section 925 of such title (Article 125 of the Uniform Code of Military Justice) is repealed).

consensual, but threaten good order and discipline or are service discrediting such as adultery, bigamy, wrongful cohabitation, indecent acts, prostitution, and others. These crimes were charged under Article 134⁵⁷ and can still be charged under Article 134, with the exception of indecent acts.⁵⁸ Consensual sodomy with a *Marcum* factor, however, was charged under Article 125.⁵⁹ With the possible coming repeal of Article 125, how will the Government charge sodomy that is service discrediting or prejudicial to good order and discipline in the future?

III. Where's the Sodomy?

A repeal of Article 125 and the absence of the crime of indecent acts in the UCMJ will leave a gap in the prosecution of prejudicial sexual relationships. This section will define adultery, prostitution, indecent acts, and sodomy and then explain why the conduct of the three servicemembers in the hypothetical does not fit into any of these definitions.

A. Adultery

The UCMJ lists adultery under Article 134.⁶⁰ The elements of adultery are:

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁶¹

The key term is sexual intercourse. According to the Military Judge's Benchbook, sexual intercourse is "any penetration, however slight, of the female sex organ by the

⁵⁷ MCM 2005, *supra* note 12, pt. IV, ¶ 62 (Adultery), ¶ 65 (Bigamy), ¶ 69 (Wrongful Cohabitation), ¶ 88 (Indecent Exposure), ¶ 89 (Indecent Language), ¶ 90 (Indecent Acts with Another), ¶ 97 (Pandering and Prostitution).

⁵⁸ MCM 2012, *supra* note 11, pt. IV, ¶¶ 45(b), (c), 90 (no longer listing indecent act in any of these punitive articles).

⁵⁹ MCM 2005, *supra* note 12, pt. IV, ¶ 51.

⁶⁰ MCM 2012, *supra* note 11, pt. IV, ¶ 62.

⁶¹ *Id.*

penis."⁶² In the hypothetical posed in the introduction, John, James, and Kate engage in a night of intimate activities, but only homosexual and heterosexual sodomy take place. Technically, a female sex organ has not been penetrated by a penis, so no sexual intercourse occurred. Applying the actual physical details of the hypothetical to the elements above and the Military Judge's Benchbook, these servicemembers could not be charged with adultery.

B. Prostitution

Prostitution has been referred to as the "oldest profession" in the world.⁶³ In the United States, prostitution is illegal in all states but one.⁶⁴ Many of these states have criminal statutes that include not only sexual intercourse, but also sexual acts and sexual contact for money as an act of prostitution.⁶⁵ Most of these statutes also criminalize solicitation of a prostitute and pandering.⁶⁶ The military includes prostitution as a violation of the UCMJ under Article 134,⁶⁷ as well as forcible pandering under the 2007 and 2012 Article 120.⁶⁸ Under Article 134, a servicemember can be prosecuted for prostitution, patronizing a prostitute, and pandering.⁶⁹ While most states criminalize any sexual act performed for compensation, Article 134 defines prostitution with the following elements:

(1) That the accused had sexual intercourse with another person not the accused's spouse;

(2) That the accused did so for the purpose of receiving money or other compensation;

⁶² U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-62-1d, at 691 (1 Jan. 2010) [hereinafter BENCHBOOK].

⁶³ RONALD B. FLOWERS, THE PROSTITUTION OF WOMEN AND GIRLS 5 (1998).

⁶⁴ PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN OUR FREE COUNTRY 631-32 (1996). For a comprehensive list of all state statutes, see *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Oct. 30, 2013). Prostitution is only legal in eleven of seventeen counties in Nevada. *Id.*

⁶⁵ See KY. REV. STAT. ANN. § 529.010 (West); WASH. REV. CODE ANN. § 9A.88.060 (West); TENN. CODE ANN. § 39-13-512 (West); ALA. CODE § 13A-12-110 (West); N.J. STAT. ANN. § 2C:34-1 (West); MINN. STAT. ANN. § 609.321 (West).

⁶⁶ MCWILLIAMS, *supra* note 64.

⁶⁷ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

⁶⁸ *Id.* pt. IV, ¶ 45c(a), (b); MCM 2008, *supra* note 12, pt. IV, ¶ 45(a)(l).

⁶⁹ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

(3) That this act was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁷⁰

Only sexual intercourse for compensation is punishable as prostitution under Article 134.

Using the qualifying acts to analyze the hypothetical, John, James, and Kate only engaged in sodomy with one another; specifically, no vagina was penetrated by a penis, meaning no sexual intercourse occurred. This is not an oversight: the prostitution article specifically states that “sodomy for money or compensation is not included,” with follow-on instructions to charge as sodomy.⁷¹ Under the same analysis as Part B above, since sexual intercourse did not occur, the servicemembers in the hypothetical could not be charged with prostitution.⁷²

C. Indecent Act

Indecent acts have been prosecuted in the military for over two decades.⁷³ Prior to the 2007 Article 120, “Indecent Act with Another” was found under Article 134 and required a finding that conduct was to the prejudice of good order and discipline or service discrediting.⁷⁴ In 2007, “Indecent Act” was revised and moved under Article 120, removing the requirement to prove prejudice to good order and discipline or service discrediting.⁷⁵ The UCMJ has defined “indecent” as “a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”⁷⁶ Military case law shows that consensual sexual acts can be considered indecent.⁷⁷ Even more so, the cases suggest that consensual

⁷⁰ *Id.*

⁷¹ MCM 2012, *supra* note 11, pt. IV, ¶ 97(c).

⁷² This may confuse some practitioners since an act of prostitution for forcible pandering is defined as “a sexual act, sexual contact or lewd act” in the 2007 version of Article 120 and as “a sexual act or sexual contact” in the 2012 version of Article 120. *See id.* pt. IV, ¶ 45c(a), (b); MCM 2008, *supra* note 12, pt. IV, ¶¶ 45(a), (t)(13). But the definition of prostitution for consensual acts only includes sexual intercourse. MCM 2012, *supra* note 11, pt. IV, ¶ 97.

⁷³ SEX CRIMES AND THE UCMJ, *supra* note 16, at 291.

⁷⁴ MCM 2005, *supra* note 12, pt. IV, ¶ 90.

⁷⁵ MCM 2008, *supra* note 12, pt. IV, ¶ 45(a), (k).

⁷⁶ MCM 2012, *supra* note 11, pt. IV, ¶ 45c (c)(6).

⁷⁷ *See* United States v. Carreiro, 14 M.J. 954, 958–59 (A.C.M.R. 1982); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978); United States

sexual acts performed in the presence of others can be considered indecent, even if others are engaged in the same conduct.⁷⁸ In addition, the term “wrongful” had also been removed from the elements. After this change, the Government only needed to prove the following two elements:

(1) That the accused engaged in certain conduct; and

(2) That the conduct was indecent conduct.⁷⁹

A military practitioner looking through the 2012 MCM will notice that “indecent act” is no longer included under Article 120 or Article 134.⁸⁰ In fact, it is not in the current UCMJ anywhere.⁸¹

Examining circumstances of the hypothetical, John, James, and Kate did engage in various sexual acts in a group setting and at the same time. Applying those facts to the law, it would be easy to conclude that John, James, and Kate engaged in indecent acts. However, because “Indecent Act” is no longer an enumerated article in the UCMJ, the servicemembers could not be charged.⁸²

D. Sodomy

The 2012 MCM defines sodomy as unnatural carnal copulation with another person or animal.⁸³ The UCMJ allows sodomy to be charged under three different theories: forcible, underage, and consensual or non-forcible.⁸⁴ Under

v. Woodard, 23 M.J. 514 (A.F.C.M.R. 1986), *vacated on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987); *see also* Major Eugene R. Milhizer, *Indecent Acts as a Lesser-Included Offense of Rape*, ARMY LAW., May 1992, at 4.

⁷⁸ *See* United States v. Brundidge, 17 M.J. 586(A.C.M.R. 1983); United States v. Scoby, 5 M.J. 160 (C.M.A. 1978); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983); United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); *see also* Milhizer, *supra* note 77 at 3-4.

⁷⁹ MCM 2008, *supra* note 12, pt. IV, ¶ 45(b)(11).

⁸⁰ *See* MCM 2012, *supra* note 11, pt. IV ¶¶ 45c, 90.

⁸¹ *Id.*

⁸² *See* Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865-64,866 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 90 from Deleted to Indecent Conduct and stating that Indecent Conduct includes offenses previously prescribed by Indecent Acts with Another).

⁸³ MCM 2012, *supra* note 11, pt. IV, ¶ 51c (“It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or animal; or to place that person’s sexual organ in the mouth or anus of another person or 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.”).

⁸⁴ *Id.*; *see also* Cummings, *supra* note 7, at 1 (explaining Article 125 of the 2008 MCM).

the third theory (consensual), the Government need only prove one element:

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.⁸⁵

Going back to the hypothetical scenario, the Government could readily prove this crime. John and James engaged in homosexual sodomy with one another and heterosexual sodomy with Kate. Applying that to the element above, they could be charged with sodomy. The Government would then have to plead which *Marcum* factor existed in the conduct that is charged.⁸⁶ The service regulations that forbid fraternization between enlisted ranks would give the Government the military nexus⁸⁷ and allow the Government to show the military judge a *Marcum* factor existed, thus permitting the prosecution of consensual sodomy.⁸⁸ Under the sentencing rule, the Government would also have an aggravating factor that the sodomy was for compensation.⁸⁹ Note, however, that because the hypothetical presumes that Article 125 has been repealed, the possibility of prosecuting consensual sodomy is foreclosed for the Government.

IV. Prosecution

Based on the analysis above, the Government cannot prosecute the servicemembers for adultery, prostitution, indecent acts, or sodomy. The Government can move forward with order violations for John, James, and Kate under Article 92, but the Government could move forward with order violations if the three played golf together every weekend.⁹⁰ Article 92 does not adequately capture the sexual nature and intimacy of these offenses. The Government should be able to prosecute these three members for their sexual conduct's prejudicial effect on good order and discipline. The below section provides some

⁸⁵ MCM 2012, *supra* note 11, pt. IV, ¶ 51. In order to get the charge in front of a finder of fact, the Government will also have to show the military judge that the behavior falls within the tripartite framework for addressing *Lawrence* challenges, otherwise known as the *Marcum* factors. See *United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16 (N-M. Ct. Crim. App. Jan. 26, 2012) (unpublished). See also *United States v. Castellano*, 72 M.J. 217, 223 (C.A.A.F. 2013) (holding that *Marcum* factors are to be pled in the specification, instructed upon the members, and determined by the trier of fact). These factors, which act as aggravators, are not questions of law to be decided by the military judge. *Id.*

⁸⁶ *Id.*

⁸⁷ See AR 600-20 and NR 1165, *supra* note 4.

⁸⁸ *Marcum*, 60 M.J. at 206–08 (finding the appellant's behavior fell into the second factor, CAAF held that Article 125 was constitutional as applied to Appellant).

⁸⁹ MCM 2012, *supra* note 11, R.C.M. 1001(b)(4).

⁹⁰ AR 600-20, *supra* note 4; NR 1165, *supra* note 4.

suggestions for potential charges once Article 125 is repealed.

A. Charges

Article 134, UCMJ, allows the Government to charge “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital”⁹¹ Under this article, the Government can charge offenses not covered by Articles 80 through 132, UCMJ.⁹² Since these crimes are not enumerated in the UCMJ, the Government must draft novel specifications.⁹³ The easiest fix for the potential gap in the UCMJ would be to change the term sexual intercourse to sexual act in both the adultery and prostitution elements.⁹⁴ Although a new enumerated Article 134 offense covering all prejudicial sexual relationships could be helpful,⁹⁵ without a change in terms and in the absence of a comprehensive Article 134, the military practitioner is left to draft novel specifications. Below are some possible sample specifications addressing the misconduct that occurred among John, James, and Kate.

1. Adultery

Had sexual intercourse occurred between John and Kate, they could have been charged with adultery.⁹⁶ Recalling the hypothetical, the two only engaged in sodomy. James and Kate are not married to other people, so the sodomy between them would not be covered under an adultery theory. Because adultery is still defined as sexual intercourse between a male and female, the sodomy between John and James would also not be covered under an adultery theory. The following specification and elements could cover John and Kate's misconduct; now that the Government recognizes marriage between two men,⁹⁷ the

⁹¹ MCM 2012, *supra* note 11, pt. IV, ¶ 60.

⁹² *Id.* ¶ 60(c)(5).

⁹³ See MCM 2012, *supra* note 11, pt. IV, ¶ 60(c)(6) (explaining how to draft charges under an Article 134 theory); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).

⁹⁴ This change has already been made for sexual assault, rape, and forcible pandering. See MCM 2012, *supra* note 11, pt. IV, ¶ 45.

⁹⁵ SEX CRIMES AND THE UCMJ, *supra* note 16, at 289–92 (outlining a reform for prejudicial sexual relationships similar to the reform of forcible sexual crimes).

⁹⁶ MCM 2012, *supra* note 11, pt. IV, ¶ 62.

⁹⁷ Prior to June 2013, the Defense of Marriage Act, 1 U.S.C. § 7 (1996) defined marriage as the following:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various

following would also cover adulterous sodomy between John and James.

In that _____ (personal jurisdiction data), (a married man) (a married woman) did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) to wit: (sodomy) (other) with _____, a (married) (woman/man) not (his/her wife) (her/his husband) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements⁹⁸ –

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

2. Prostitution

If John, James, and Kate had engaged in sexual intercourse, they could be charged with prostitution and patronizing a prostitute.⁹⁹ Recalling the hypothetical, the three only engaged in sodomy. The current prostitution charge does not cover their misconduct. The Government could charge the following specifications and elements:

administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

In June 2013, the Supreme Court held the Defense of Marriage Act’s definition of marriage unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment. *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

⁹⁸ SEX CRIMES AND THE UCMJ, *supra* note 16, at 319 (outlining a proposed new adultery charge and the terminal elements).

⁹⁹ MCM 2012, *supra* note 11, pt. IV, ¶ 97.

Prostitution Specification for Kate –

In that _____ (personal jurisdiction), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) (sexual contact) to wit: (sodomy) (other) with _____, for the purposes of receiving (money) (_____) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused wrongfully engaged in a sexual act, or sexual contact, with another person;
- (2) That the accused did so for the purposes of receiving money or other compensation; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

Patronizing a Prostitute Specification for John and James –

In that _____ (personal jurisdiction data), did (at/on board-location), (subject matter jurisdiction data, if required), on or about _____, wrongfully induced, enticed, or procured _____, a person not (his) (her) spouse, to engage in a (sexual act) (sexual contact) to wit: (sodomy) (other) in exchange for (money) (_____) and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused engaged in a sexual act, or sexual contact, with another person not the accused’s spouse;
- (2) That the accused induced, enticed, or procured such person to engage in a sexual act or a sexual contact in exchange for money or other compensation;
- (3) That this act was wrongful; and

(4) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

3. Indecent Act

John, James, and Kate engaged in sexual acts in front of one another. Case law supports that this type of conduct is considered indecent.¹⁰⁰ “Indecent act” is not currently an enumerated offense in the UCMJ.¹⁰¹ The italicized language below is for conduct that occurred in the hypothetical. Case law has supported many other acts as indecent.¹⁰² Here are sample specification and elements:

Specification –

In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____, wrongfully commit an indecent act, to wit: *engage in sodomy and sexual contact with a (woman)(man) with a third person(s) present in the same room*, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

- (1) That the accused committed a certain wrongful act with a certain person;
- (2) That the act was indecent; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

4. Sodomy

The conduct between John and James is most analogous to adultery, but the military still defines adultery as between a man and a woman.¹⁰³ With the possible repeal of Article 125, how the military holds accountable those servicemembers who are married and engage in sodomy with members of the opposite or same sex is yet unknown. The following sample specification and elements would not only apply to the hypothetical given in this article, but to many other scenarios, such as heterosexual sodomy between non-married servicemembers that rises to the level of prejudicial to good order and discipline or service discrediting conduct.¹⁰⁴

Specification –

In that _____ (personal justification data), did at/on board-location), (subject-matter jurisdiction data, if required), on or about _____, wrongfully engage in a (sexual act) (sexual contact) to wit: (sexual intercourse) (sodomy) (other) with _____ and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

Elements –

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

¹⁰⁰ See *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956) (holding that consensual fornication in a hotel room while another couple was present constituted an indecent act); *United States v. Hickson*, 22 M.J. 146, 154–55 (C.M.A. 1986) (stating that open and notorious sexual activity is a crime).

¹⁰¹ See MCM 2012, *supra* note 11, pt. IV, ¶¶ 45, 45(b), (c), 90.

¹⁰² See *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986) (finding accused guilty of indecent acts for heavy petting with a sixteen-year-old); *United States v. Sanchez*, 11 C.M.A. 216, 29 C.M.R. 32 (1960) (finding accused guilty of indecent act for engaging in sexual acts with a chicken).

¹⁰³ See MCM 2012, *supra* note 11, pt. IV, ¶ 62.

¹⁰⁴ While the Government could charge a number of different offenses under this specification, it is important to remember that purely private sexual encounters between unmarried persons are usually not prosecutable. See *United States v. Izquierdo*, 51 MJ 421, 423 (C.A.A.F. 1999) (holding when the accused and a female engaged in sexual intercourse in the accused’s barracks room, the door was closed and nobody else was in the room, was insufficient to sustain conviction for committing indecent acts with another); *United States v. Leak*, 58 MJ 869, 878 (A. Ct. Crim. App. 2003) (holding that sexual intercourse in a locked office between E-6 and E-4 between classes at NCO Academy not open and notorious to sustain conviction for indecent acts); *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994) (stating private heterosexual intercourse between consenting adults is not intrinsically indecent).

B. Potential Difficulties with Novel Specifications

There are many difficulties with charging a novel specification. A trial counsel needs to understand everything is not punishable.¹⁰⁵ When charging a novel specification, trial counsel should be aware and ready to argue two additional important concepts. First, was the accused on proper notice that his conduct was criminal? Second, what will be the maximum punishment for this novel specification?

1. Notice

When drafting a novel specification, trial counsel must remember that the reason for drafting the specification and elements is because it is not already enumerated as a crime. Article 134 allows the charging of conduct that is “illegal solely because, in the *military context*, its effect is prejudice to good order or to discredit the service.”¹⁰⁶ This raises an issue as to whether the accused was on notice that the conduct was criminal.¹⁰⁷ If not on notice, the accused can raise a violation of due process under the Fifth Amendment to the United States Constitution.¹⁰⁸ The U.S. Court of Military Appeals, precursor to the CAAF, used factors such as time in service, rank, status, and whether the UCMJ had been explained to the accused under Article 137, UCMJ, to determine if an accused was on “fair notice that conduct prejudicial to good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces were punishable.”¹⁰⁹ The military practitioner should be ready to answer the notice issue raised when charging novel specifications.

2. Maximum Punishment

The merits have just finished for John at a special court-martial. The panel returned with a finding of guilty to the offense of prejudicial sexual relationship. The judge asks what the maximum punishment is for this offense. The Government states the jurisdictional maximum for the

special court-martial;¹¹⁰ the defense counsel states four months’ confinement and forfeiture of two-thirds pay per month for four months. The Government argues the language of the MCM, which provides:

For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.¹¹¹

The defense then argues that the maximum punishment is four months of confinement and forfeitures of two-thirds pay for four months under the case of *United States v. Beauty*.¹¹² The defense first contends that the offense is not listed in the MCM. The Government would have to concede this point because it is a novel specification. The defense then argues that these offenses are not included in or closely related to another offense in Part IV of the MCM. Ultimately, the Government would have to find articles that are closely related to these prejudicial sexual relationships, i.e., sodomy with a married man is closely related to adultery and sodomy for money is closely related to prostitution.¹¹³ A trial counsel who fails to counter this argument may end up with a conviction, but no meaningful punishment.

¹⁰⁵ See Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 MIL. L. REV. 128 (2004) (discussing notice of specific conduct with regard to prosecutions of indecent acts); Andrew Tilghman, *Military High Court Debates Sex Tape Case*, MARINE CORPS TIMES, Dec. 3, 2012, at 9 (quoting Judge Charles E. Erdmann, “If you have more than two [people], does that mean it is always . . . indecent?”).

¹⁰⁶ *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988).

¹⁰⁷ *United States v. Guerrero*, 33 M.J. 295, 297 (C.M.A. 1991) (holding that an accused must be on notice that the actions were criminal).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 298.

¹¹⁰ See MCM 2012, *supra* note 11, R.C.M. 201(f)(2)(B) (stating any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than one year).

¹¹¹ *Id.* R.C.M. 1003(c)(1)(B)(i).

¹¹² 70 M.J. 39 (2011).

¹¹³ *Id.* at 45 (citing *United States v. Melville*, 8 C.M.A. 597, 600–02 (1958)) (holding that the then-unlisted offense of wrongful cohabitation was a general disorder not “closely related” to the offense of adultery, and that therefore the maximum legal sentence was the four months’ confinement authorized for general disorders instead of the one-year penalty imposed for adultery); *United States v. Oakley*, 7 C.M.A. 733, 736 (1957) (holding that the unlisted offense of solicitation of another to administer poison is a separate substantive offense under Article 134, UCMJ, not closely related to the listed offenses of solicitation to desert or to commit mutiny, and is thus punishable only as a simple disorder with a maximum punishment of four months’ confinement and forfeiture of two-thirds pay for a like period); *United States v. Blue*, 3 C.M.A. 550, 552, 556 (1953) (holding that although the MCM sets out a maximum punishment of three years of confinement for the listed Article 134, UCMJ, offense of making, selling, or possessing official documents with intent to defraud, the mere wrongful possession of a false pass is a simple military disorder under Article 134, UCMJ, which carries a maximum sentence of four months).

C. Proving the Charges

When proving novel specifications, the practitioner must prove the elements: the conduct was wrongful and was prejudicial to good order and discipline, service discrediting, or both.

1. Wrongful

Trial counsel must not only prove that the acts occurred, but also that the acts were wrongful for it to be a criminal offense. The term “wrongfully” places a mental component in the elements that must be proven beyond a reasonable doubt.¹¹⁴ “Wrongfulness” has been defined by the courts as having two components: the accused had the mens rea and the lack of a defense.¹¹⁵ Consequently, these prejudicial sexual relationships are not strict-liability crimes and the wrongfulness can be negated by an excuse or justification.¹¹⁶

The military justice practitioner must be cognizant of the effect this can have on trial because the accused can raise a mistake of fact or law defense.¹¹⁷ Trial counsel must charge the acts as general intent or specific intent crimes. The decision to charge as general or specific intent will have an effect on the instructions given to the panel. The Government should argue that the crimes are general intent.¹¹⁸ Trial counsel must then prove beyond a reasonable doubt that the mistake was not reasonable if the accused raises that defense.¹¹⁹

Concerning the hypothetical, the government would have to prove the wrongfulness of John, James, and Kate engaging in these sexual acts. The government could use the order forbidding fraternization between ranks to show the wrongfulness of this conduct. Other facts the government

could introduce is the marital status of John and any other orders that may have been violated during this conduct.

2. Prejudice to Good Order and Discipline

Case law clearly indicates that servicemembers can only be punished for actions that are “directly and palpably” prejudicial to good order and discipline.¹²⁰ The prejudice to good order and discipline cannot be indirect or remote.¹²¹ In such a case, the military judge will instruct the members as follows:

With respect to “prejudice to good order and discipline,” the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as prejudicial in some indirect or remote sense; however, only those acts in which the prejudice is reasonably direct and palpable is punishable under this Article.¹²²

Trial counsel must convince the factfinder that the misconduct is legitimately prejudicial to good order and discipline and not “solely the result of personal fears, phobias, biases, or prejudices of the witnesses.”¹²³ Not all inappropriate sexual relationships are prejudicial.¹²⁴

In the hypothetical presented, the Government will want to show the effect this conduct had within the unit. One piece of evidence the Government may present is how junior servicemembers and other non-commissioned officers feel about the non-commissioned officers in general after this

¹¹⁴ MCM 2012, *supra* note 11, pt. IV, ¶ 62b(1).

¹¹⁵ Major William T. Barto, *The Scarlet Letter and the Military Justice System*, ARMY LAW., Aug. 1997, at 6 (quoting *United States v. King*, 34 M.J. 95, (C.M.A. 1992)) (“[T]he wrongfulness of the act obviously relates to mens rea and lack of a defense, such as excuse or justification.”).

¹¹⁶ *Id.*

¹¹⁷ MCM 2012, *supra* note 11, R.C.M. 916(j); *United States v. Fogarty*, 35 M.J. 885, 892 (A.C.M.R. 1992) (stating the defense of mistake of fact requires that one hold an incorrect belief of the true circumstances). To raise the possibility of the mistake of fact defense, one would have had to believe at the various times he had intercourse with a married woman that she was single. *Id.* MCM 2012, *supra* note 11, R.C.M. 916(l) (stating that mistake of fact as to law is ordinarily not a defense, but the discussion lists two situations that could apply to an adultery case, first that the accused, because of a mistake as to separate non-penal law, lacks the criminal intent or state of mind to establish guilt and secondly when an accused has an incorrect belief based on the reliance on the decision or pronouncement of an authorized public official or agency).

¹¹⁸ BENCHBOOK, *supra* note 62, para. 3-62-1d, at 694.

¹¹⁹ *Id.* para. 5-11-2, at 902-03.

¹²⁰ *Parker v. Levy*, 417 U.S. 733, 753 (1974).

¹²¹ *Id.*

¹²² BENCHBOOK, *supra* note 62, para. 3-60-2A(d), at 682.

¹²³ *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991).

¹²⁴ In an adultery case, the judge will instruct the members, “Not every act of adultery constitutes an offense under the Uniform Code of Military Justice.” BENCHBOOK, *supra* note 62, para. 3-62-1(d), at 692; *United States v. Izquierdo*, 51 MJ 421, 423 (C.A.A.F. 1999) (holding when the accused and a female engaged in sexual intercourse in the accused’s barracks room, the door was closed and nobody else was in the room, was insufficient to sustain conviction for committing indecent acts with another); *United States v. Leak*, 58 MJ 869, 878 (A. Ct. Crim. App. 2003) (holding that sexual intercourse in a locked office between E-6 and E-4 between classes at NCO Academy was not open and notorious to sustain conviction for indecent acts); *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A.1994) (stating private heterosexual intercourse between consenting adults is not intrinsically indecent); *United States v. Carr*, 28 M.J. 661, 666 (N.M.C.M.R. 1989) (holding that sexual intercourse consummated on a public beach after midnight in unlighted area where visibility was poor and under the circumstances the act was unlikely to be seen by others would not support conviction for committing indecent act by fornicating in public); *United States v. Hickson*, 22 M.J. 146 (C.M.A.1986) (holding that private sexual intercourse between unmarried persons is not punishable).

event. Trial counsel must look at all the relevant factors and be ready to prove how the misconduct is prejudicial.¹²⁵

3. Service Discrediting

Trial counsel must not presume that the element of service discrediting will be met simply because of the nature of the offense. The Supreme Court has determined that the “use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact.”¹²⁶ The Government must prove every element beyond a reasonable doubt. The courts have been somewhat unclear on how the Government is to prove this element.¹²⁷ It is clear that the public does not need to have actual knowledge of the act.¹²⁸ How others became aware of the misconduct may determine whether it is service discrediting.¹²⁹ The determination as to whether the conduct is service discrediting rests with the trier of fact, and the trial counsel should put on evidence as to how the circumstances surrounding the act make it service discrediting.¹³⁰

In the hypothetical presented, the Government would want to focus on the difference in ranks, the supervisor relationship, and the money exchanged for the sexual acts. Based on that evidence, the government can argue that James, John, and Kate’s actions were service discrediting.

V. Conclusion

The possible repeal of sodomy combined with the removal of indecent acts from the UCMJ will leave a gap in the way the military prosecutes prejudicial consensual sex crimes. This article offered solutions for the military justice practitioner to address these issues. The simple fix for this gap is a rewrite of the elements for adultery and prostitution

and the placing of indecent acts back into the UCMJ.¹³¹ One day the trial counsel may have these options available, but for now the Government will have to figure out a way to get the mission completed. Article 134, UCMJ gives the trial counsel the ability to charge this misconduct. When determining how to properly charge these offenses, it is important to ensure the Government can prove the wrongfulness of the acts, and either the prejudice to good order and discipline or that the acts were of a nature to bring discredit upon the armed forces. One only need look at the headlines to understand how important the issues of prejudicial sexual relationships are to the effectiveness of the military.¹³² The main purpose of the military justice system is to assist in maintaining good order and discipline, which in turn helps strengthen national security.¹³³ The Government must have the option to hold criminally accountable those who engage in prejudicial sexual relationships.

¹²⁵ See *Guerrero*, 33 M.J. at 298 (stating not all cross-dressing is per se prejudicial to good order and discipline, but rather the factors surrounding the events, for example the time, the place, the circumstances, and the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is to the prejudice of good order and discipline); BENCHBOOK, *supra* note 62, para. 3-60-2A(d), at 682 (“[C]onduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline.”).

¹²⁶ *United States v. Phillips*, 70 M.J. 161, 164–65 (C.A.A.F. 2011) (citing *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)); see also *Cnty. Court of Ulster County v. Allen*, 442 U.S. 140, 156–60 (1979).

¹²⁷ *Phillips*, 70 M.J. at 166.

¹²⁸ *Id.* at 165.

¹²⁹ *Id.* at 166.

¹³⁰ *Id.*

¹³¹ The Department of Defense has proposed placing Indecent Conduct in the MCM to replace Indecent Act. See Manual for Courts-Martial; Proposed Amendments; Notice, 77 Fed. Reg. 64,854, 64,865–64,866 (Oct. 23, 2012) (to be codified 32 C.F.R. pt. 152) (proposing changing paragraph 90 from Deleted to Indecent Conduct and stating that Indecent Conduct includes offenses previously prescribed by Indecent Acts with Another).

¹³² See Andrew Tilghmann, *Corrosive Conduct*, ARMY TIMES, Nov. 26, 2012, at 10–11 (outlining the alleged misconduct of numerous general officers, to include General David Petraeus’s alleged affair and improper conduct, General John Allen’s alleged inappropriate relationship with a married woman, Brigadier General Jeffery Sinclair’s alleged inappropriate relationships with subordinates, and General Cartwright’s alleged inappropriate relationship with a subordinate); Molly Hennessy-Fiske, *Air Force Defends Handling of Sex Scandal*, L.A. TIMES (Jan. 23, 2013), <http://articles.latimes.com/2013/jan/23/nation/la-na-lackland-hearing-20130124>.

¹³³ MCM 2012, *supra* note 11.