EXPLOITATION

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I. Introduction

Service members reported 6,290 military sexual assaults (MSAs) in 2020, up from 6,236 in 2019.[1] This number may represent as little as 30 percent of the actual number of MSAs that occurred during that fiscal year.[2] Military sexual assaults erode combat readiness, public trust of the military, lethality, and unit cohesion.[3] The physical and emotional impacts that MSA victims suffer can, and often do, last a lifetime. In 2015 alone, the U.S. Veterans Administration reported 1.3 million outpatient visits for care related to military sexual trauma.[4] As a matter of perception,

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[1] Press Release, U.S. Dep't of Def., Department of Defense Releases Fiscal Year 2020 Annual Report on Sexual Assault in the Military (May 13, 2021), *U.S. Department of Defense*, May 13, 2021, https://www.defense.gov/News/Releases/Release/Article/2606508/department-of-defense-releases-fiscal-year-2020-annual-report-on-sexual-assault/mslkid/department-of-defense-releases-fiscal-year-2020-annual-report-on-sexual-assault; Howard Altman, *In One of First Actions, New Defense Secretary Orders Review of Sexual Misconduct Programs*, MIL. TIMES (Jan. 23, 2021), https://www.militarytimes.com/news/your-military/2021/01/24/in-one-of-first-actions-new-secdef-orders-review-of-sexual-misconduct-programs (citing Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military).

[2] Altman, *supra* note 1.

[3] *See generally* INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY (2021) [hereinafter, IRC REPORT].

[4] Altman, *supra* note 1.

commentators and decision makers have described MSA as "an epidemic,"[5] "a plague,"[6] and "a scourge."[7] Civilian leaders of the Department of Defense (DoD), members of Congress, and the current presidential administration are unequivocal: the amount of sexual misconduct in the military is unacceptable.

The impetus for reform is more pronounced than ever. Within the first forty-eight hours following his confirmation, Secretary of Defense (SecDef) Lloyd Austin tasked senior leadership with assessing which Sexual Assault Prevention and Response (SAPR) programs work, which do not, and to share any novel solutions to the problem.[8] The President echoed SecDef's call for action, ordering a comprehensive ninety-day review of MSA that began on 24 March 2021.[9] The Independent Review Commission (IRC) completed this review in June of 2021.[10] The DoD will fully implement the IRC's eighty-two recommendations.[11]

The prologue to the present has not been promising. While the inability to satisfactorily address MSA has many root causes, inaction is not one of them. More than ten DoD Inspector General engagements have occurred since 2010 to review and improve SAPR.[12] The Secretary of Defense directed more than fifty initiatives to improve prevention and response; the DoD operationalized more than 150 congressional MSA-related provisions;[13] the individual military departments evaluated more than 200 "recommendations from government panels and task forces . . . for applicability to the SAPR mission [set]";[14] and the Government

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[5] *Mission: Ending the Epidemic of Military Rape*, PROTECT OUR DEFENDERS, https://www.protectourdefenders.com/about (last visited Apr. 10, 2023).

[6] Altman, *supra* note 1.

[7] Col William Bowers, How to Eradicate a Scourge (2019) (U.S. Marine Corps University), https://www.usmcu.edu/Portals/218/LLI/CCSPW/Bowers%20Col%20WJ%20-%20How%20To%20Eradicate%20a%20Scourge.pdf?ver=2019-04-26-162157-347.

[8] Memorandum from Sec'y of Def. to Sr. Pentagon Leadership et al., subject: Countering Sexual Assault and Harassment – Initial Tasking (23 Jan. 2021) [hereinafter, SecDef Memo].

[9] *See* IRC REPORT, *supra* note 3, at 3.

[10] *Id.*

[11] Memorandum from Sec'y of Def. to Sr. Pentagon Leadership et al., subject: Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military (22 Sept. 2021); *see also* C. Todd Lopez, "DOD Takes Phased Approach to Implementing Recommendations on Sexual Assault, Harassment," DOD NEWS (July 21, 2021), https://www.defense.gov/Explore/News/Article/Article/2702095/dod-takes-phased-approach-to-implementing-recommendations-on-sexual-assault-har.

[12] IRC REPORT, *supra* note 3, at 12.

[13] IRC REPORT, *supra* note 3, at 12.

[14] IRC REPORT, *supra* note 3, at 12. The Department of the Navy refers to this field as Sexual Assault Prevention and Response (SAPR); the Department of the Army refers to this field as Sexual Harassment/Assault Response and Prevention (SHARP).

Accountability Office has assessed more than sixty different initiatives "to measure prevention and response efforts and to inform future programming."[15] While mobilization on this issue has been significant, the return on investment is underwhelming. As Representative Jackie Speier noted after the publication of yet another assessment of MSA, "We've thrown about $200 million at this problem for eight to [ten] years, and this report suggests it's not working."[16]

Further complicating hopes for progress, military incidence rates roughly match those of comparable civilian populations. That similarity is hardly surprising: "seventy-three percent of military victims are ranks E-1 to E-4—in other words, junior-grade enlisted members whose ages, living situations, and behavior align with those of college students."[17] As law student, Andreas Kuersten, noted in Joint Forces Quarterly, "[T]he military's inability to fix the problem of sexual assault in its ranks is likely, at least in part, a reflection of the military's intimate connection to the broader community where the issue also remains pervasive."[18] Any expectations in this arena must be tempered by the understanding that this problem is not unique to the military.[19] No effort, discipline, approach, or resources can or will eradicate MSA. Even so, the military is held to a higher standard than its civilian counterpart and rightfully so. The DoD must do better.

In an effort to identify a meaningful reform, this paper will apply aspects of problem framing to the sexual assault problem set. Next, it proposes a presidentially-proscribed Article 134 crime: exploitation,[20] before explaining how codifying this new offense will provide more appropriate results for victims, create measured justice for perpetrators, and ensure effective means for facilitating good order and discipline. It will then conclude by proposing a method for implementing the recommended crime.

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[15] IRC REPORT, *supra* note 3, at 12.
[16] Dave Philipps, *'This Is Unacceptable.' Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html (quoting Congresswoman Jackie Speier).
[17] Andreas Kuersten, *Sexual Assault and the Military Petri Dish*, 74 JOINT FORCE Q., no. 3, 2014, at 91, 93.
[18] *Id.*
[19] *See id.*
[20] "Exploitation is the act of selfishly taking advantage of someone . . . in order to profit from them or otherwise benefit oneself." *Exploitation*, DICTIONARY.COM, https://www.dictionary.com/browse/exploitation (last visited Apr. 10, 2023).

II. Framing the Problem

If the first step to solving any problem is recognizing that a problem exists,[21] the next step is to properly understand the problem. As Marine Corps planning doctrine notes, "[N]o amount of subsequent planning can solve a problem insufficiently understood."[22] Past MSA reforms and current attempts at reform appear to be reactionary in nature, rather than the product of deliberate planning.

A. Scope

Military sexual assault is a *wicked problem,*[23] but the critical question is: "Why are [sexual] assaults happening in the first place?"[24] The answer to that question has little to do with military justice. Biology, social dynamics, environment, demographics, education, individual risk calculus, and prevention efforts all play roles more significant than military justice vis-à-vis the causal factors of MSA.[25] Thus, resource allocation and congressional attention should be proportionate. Military justice is not the panacea, yet it has been subject to a significant amount of congressional scrutiny and policy focus. The ability of criminal justice to reduce MSAs is limited; however, military justice can still exert some positive influence on the problem set. It provides the means to target the interrelated concepts of accountability and deterrence. Accountability begets deterrence; deterrence obviates accountability.

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[21] In the opening scene of the first episode of HBO's series, *Newsroom*, Jeff Daniels' character, Will McAvoy, provides a famed speech to a crowd of students in which he states that "the first step in solving any problem is recognizing there is one." Attnjake, *HBO's NEWSROOM Opening Scene "Why America's Not the Greatest Country,"* YOUTUBE, at 4:11 (June 28, 2012), https://www.youtube.com/watch?v=zEyUWKJFER8.

[22] U.S. MARINE CORPS, MCWP 5-1, MARINE CORPS PLANNING PROCESS, at 1-5 (24 Aug. 2010) [hereinafter MCPP].

[23] *See* John C. Camillus, *Strategy as a Wicked Problem*, HARV. BUS. REV., May 2008, at 98; *What's a Wicked Problem?*, STONY BROOK U., https://www.stonybrook.edu/commcms/wicked-problem/about/What-is-a-wicked-problem (last visited Apr. 10, 2023) (explaining that the characteristics of wicked problems are innumerable causes, constant morphing, and lack of a clear answer).

[24] Melinda Wenner Moyer, '*A Poison in the System': the Epidemic of Military Sexual Assault*, N.Y. TIMES MAG. (Oct. 11, 2021), https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html.

[25] *See Risk and Protective Factors,* CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/sexualviolence/riskprotectivefactors.html (last visited Apr. 10, 2023).

1. Accountability

The military justice system does not currently provide sufficient accountability for MSA. Constraints inherent in the system preclude a large proportion of MSA allegations from seeing a courtroom.[26] After a significant delay, those that do see a courtroom result in a significant number of acquittals.[27] The prevalence of acquittals, in the aggregate, is unacceptable. Without meaningful reform that addresses the constraints described below, the military justice system will continue to fail to provide adequate accountability or deterrence.

2. Deterrence

Accountability is vital to deterrence. General deterrence is derived from holding a Service member at personal criminal risk if they choose to break a law, regulation, policy, or violate a custom of the service.[28] The system does not currently hold potential offenders at sufficient risk to deter MSAs. Sentence certainty provides deterrent value; acquittals undermine that value.[29] As law professor Katharine Baker has explained, "[i]f behavior is not punished criminally because it cannot be proved, then the public's understanding of criminal behavior will not change."[30] The efficacy of any military justice reform should be assessed through the overall impact it will have on accountability and deterrence—the only two significant ways military justice contributes to MSA prevention.

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[26] PROTECT OUR DEFENDERS, FACTS ON UNITED STATES MILITARY SEXUAL VIOLENCE (2018) ("In [Fiscal Year] 2017, of the 5,110 unrestricted reports of sexual assault and rape, only 406 (7.9%) cases were tried by court-martial and only 166 [41%] offenders were convicted of a nonconsensual sex offense.").

[27] *Id.* This assertion is also based on the author's experience from 2016-2021 as a senior trial counsel and complex trial counsel responsible for drafting and reviewing hundreds of case analysis memoranda as well as service as a defense counsel at the tactical and strategic levels from 2012-2016 [hereinafter Professional Experience].

[28] *See* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, FED. PROBATION J., Dec. 2016, at 33, 33 (defining "general deterrence").

[29] U.S. DEP'T OF JUST., NAT'L INST. JUST., NATIONAL INSTITUTE OF JUSTICE: FIVE THINGS ABOUT DETERRENCE 1-2 (2016).

[30] Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 223 (2015).

B. Background: Definitions of Sexual Misconduct and Its Treatment Within the Military

From 1775 until the Civil War, military commanders turned Service members accused of capital crimes, including rape, over to civilian prosecuting authorities.[31] Rape became subject to courts-martial in 1863—provided the crime was committed "in [a] time of war, insurrection, or rebellion."[32] The 1950 update to the Uniform Code of Military Justice (UCMJ) criminalized rape under the common law definition, requiring both the use of force and a lack of consent.[33] For the next thirty years, the crime of rape required corroboration, a fresh complaint, and, at trial, it permitted inquiry into the victim's sexual history.[34]

In 1980, the newly-created Military Rules of Evidence (MRE) eliminated the draconian requirements and established the "rape shield law," preventing inquiry into the victim's past sexual history in many circumstances.[35] From 1993 to 2006, there were no substantive changes to rape laws.[36] In 2006, Congress expanded Article 120 to include the criminal concept of sexual assault, focusing on lack of consent vice force or violence.[37] The statute received substantial clarifying revisions in 2011 and 2016.[38] Meanwhile, reforms to the MRE have continued, adding protections for victims and, in theory, making it easier for the Government to carry its burden.[39] The Article 120 procedural reforms are designed, in part, to make it more likely that an MSA case is tried before a court-

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[31] *See* Jennifer Knies, *Two Steps Forward, One Step Back: Why the New UCMJ Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target,* ARMY LAW., Aug. 2007, at 1, 13 (citing American Articles of War (1776), reprinted in WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 964 (2d ed. 1920)).

[32] An Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736 (1863); s*ee also* Knies, *supra* note 31, at 13.

[33] Knies, *supra* note 31, at 13 (citing U.S. DEPT. OF ARMY, THE ARMY LAWYER: HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775-1975, at 203 (1976)).

[34] *See* Knies, *supra* note 31, at 13-15.

[35] Knies, *supra* note 31, at 13-14.

[36] Knies, *supra* note 31, at 14.

[37] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §552, 119 Stat. 3136, 3256-63 (2006).

[38] 10 U.S.C. 920 (Amendments).

[39] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 404a, 412, 413, 513, 514 (2019) [hereinafter MCM].

martial,[40] but procedural reforms have failed to increase the likelihood of conviction in those forums.[41]

C. Constraints Inhibiting Accountability and Deterrence in Military Sexual Assault Cases

1. Sufficient Admissible Evidence

In many MSA cases, lack of accountability and deterrence stems from the prosecutor's inability to present sufficient evidence to meet the burden of proof at trial and then sustain the conviction on appeal. Commentators have recognized how hard it can be to prove nonconsensual sex between acquaintances.[42] In the author's experience, nearly every MSA case must contend with some or all the following hurdles: 1) no third-party eyewitnesses to the actual criminal conduct, 2) intoxication, 3) memory issues, 4) a pre-existing relationship, 5) motives to fabricate, and 6) delayed reporting.[43]

2. Lack of Eyewitnesses

Sexual assault is a private crime; usually the only two individuals present during an MSA are the victim and the accused. Whereas there are often many witnesses to the actions before and after a crime, rarely are there third-party witnesses that can provide a firsthand account of the MSA.[44] Interrogating a suspect is often of little utility, frequently resulting in an invocation or an assertion that the sexual act or contact was consensual.[45] The accused's constitutional right to remain silent can

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[40] These reforms include special victims investigation and prosecution qualification requirements, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 573, 126 Stat. 1653, 1755 (2013); changes to Article 32 hearings, UCMJ art. 32; sexual assault initial disposition authority requirements, U.S. MARINE CORPS, MCO P5800.15A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION para. 1110 (31 Aug. 1999) (C7, 10 Feb. 2014).

[41] *See* PROTECT OUR DEFENDERS, FACTS ON UNITED STATES MILITARY SEXUAL VIOLENCE (2018).

[42] *See, e.g.*, Baker, *supra* note 30, at 223.

[43] *See* Baker, *supra* note 30, at 223.

[44] Baker, *supra* note 30, at 223.

[45] *See* SARAH MICHAL GREATHOUSE ET AL., A REVIEW OF THE LITERATURE ON SEXUAL ASSAULT PERPETRATOR CHARACTERISTICS AND BEHAVIORS 32 (2015).

completely preclude an accused's testimony, while memory issues and motives consistently undermine a victim's.[46]

3. Intoxication and Memory

In MSAs, the accused often utilizes alcohol as "a primary weapon."[47] In fact, in 61 percent of MSAs, alcohol is a factor.[48] Alcohol lowers the inhibitions of individuals under the influence and can cause memory issues.[49] Victims are often in a black-out state—walking, talking, and objectively functioning, but not encoding memories.[50] In these cases, defense attorneys can generate reasonable doubt by highlighting the gap in memory and/or filling that gap with plausible consensual explanations. With a victim's fragmented or non-existent memory and no eyewitnesses, the Government will generally be unable to reach the level of certainty required to obtain and sustain a conviction—in black-out cases, there is inherent reasonable doubt. While the effects of alcohol on a victim, without anything else, may often be sufficient to raise reasonable doubt, other common factors also work against the Government's ability to meet the burden of proof.

4. Pre-existing Relationships between the Victim and the Accused

The victim and the accused often have a pre-existing relationship—the majority of MSAs are committed by acquaintances.[51] Therefore, the frequently-present defense argument is that nearly every interaction between the accused and the victim tended to indicate consent, contributed

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[46] *See infra* notes 47-61 and accompanying text.
[47] Bowers, *supra* note 7, at 5.
[48] Bowers, *supra* note 7, at 5; PSYCH. HEALTH CTR. OF EXCELLENCE, RAPID REVIEW OF ALCOHOL-RELATED SEXUAL ASSAULT/HARASSMENT IN THE MILITARY 1 (2020) (finding that "alcohol use by a victim or alleged offender was a factor in 62% of incidents involving [DoD] women").
[49] Aaron M. White, *What Happened? Alcohol, Memory Blackouts, and the Brain*, 27 ALCOHOL RSCH. & HEALTH 186, 186 (2003).
[50] *See* Hamin Lee, Sungwon Roh, and Dai Jin Kim, *Alcohol Induced Blackout,* 11 INT, J. ENVIRON. RES. PUBLIC HEALTH 2783, 2783 (2009).
[51] Patricia Kime, *Despite Efforts, Sexual Assaults Up Nearly 40% in US Military*, MIILTARY.COM (May 2, 2019), https://www.military.com/daily-news/2019/05/02/despite-efforts-sexual-assaults-nearly-40-us-military.html (stating that 62 percent of sexual assaults are perpetrated by an acquaintance).

to the accused's belief that the victim consented, or both.[52] While pre-existing relationships between the victim and the accused often reduce the likelihood of obtaining a conviction, the victim's relationships to third parties can similarly reduce the likelihood of conviction.

5. Motives to Fabricate

A motive to fabricate is simply a plausible reason why a victim may make a false allegation.[53] There are many reasons an individual may make a false allegation, the most prevalent of which is to preserve a relationship with a third party.[54] The defense may argue that a victim has a motive to fabricate an allegation if it can establish: 1) that a significant relationship existed with a third party, and 2) that said relationship would be damaged if the victim had consented to sexual activity with the accused. A desire to preserve a relationship with a spouse,[55] a parent,[56] or a boyfriend or girlfriend,[57] have all been held to be of sufficient Sixth Amendment significance to permit defense inquiry and argument.[58] It is not difficult to identify at least one individual within the victim's social sphere that may think less of the victim if the sexual activity were consensual.[59] Therefore, the defense is often able to argue that the sexual act or contact was consensual and that the victim is merely fabricating the allegation before the factfinder.

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[52] Or that the accused had a mistaken but reasonable belief that the victim consented. Professional Experience, *supra* note 27.
[53] *See* MCM, *supra* note 39, M.R.E. 608(c).
[54] *See* Andre W.E.A. DeZutter et al., *Motives for Filing a False Allegation of Rape*, 47 ARCHIVES OF SEXUAL BEHAVIOR 457, 461 (2017) ("The most frequently reported motivation to file a false allegation of rape was the so-called alibi subcategory," in which a victim utilizes the allegation as a cover for other behavior, such as an extramarital affair.).
[55] United States v. Ellerbrock, 70 M.J. 314, 326 (C.A.A.F. 2011).
[56] United States v. Gaddis, 70 M.J. 248, 251 (C.A.A.F. 2011).
[57] *See* United States v. Collier, Crim. App. No. 200601218 at (C.A.A.F. 2009) (This is a larceny/obstruction of justice case which ruled that the Sixth Amendment right to confrontation permitted inquiry into a homosexual relationship between the accused and the victim).
[58] MCM, *supra* note 39, M.R.E. 412(b)(3).
[59] Sexual Stigmatization is "a sexual double standard within sexuality, where men and women engaging in the same sexual conduct are judged differently—with women carrying the stigma." Pantea Farvid, *Sexual Stigmatization*, ENCYC. OF EVOLUTIONARY PSYCH. SCI. (Jan. 1, 2021), https://link.springer.com/referenceworkentry/10.1007/978-3-319-19650-3_2457.

6. Delayed Reporting

The likelihood of a real-time report of sexual assault is small, as it is common for victims to delay reporting.[60] There is a positive correlation between length of delay and reasonableness of doubt in MSA cases.[61] Moreover, no initial report is perfect. No matter what a victim says or does, their actions will be open to scrutiny and argued through the lens of objective hindsight. The defense will fairly exploit delay, inconsistencies, and any counterintuitive behavior to prevent the Government from meeting the burden.

The common evidentiary problems discussed above exist in nearly every MSA case and, individually or collectively, can preclude proof beyond a reasonable doubt (BARD). Full understanding of MSA in the military justice system requires analyzing the interplay between these common evidentiary shortcomings and the applicable burdens of proof.

D. Burden of Proof

Throughout the criminal process, different burdens of proof apply at various decision points. In MSA cases, the available evidence is often insufficient to obtain a conviction for Article 120 offenses. Statutory, procedural, and evidentiary reforms cannot create evidence that does not exist, which is largely why these changes still do not generate acceptable levels of accountability and deterrence.

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[60] Emily Pica et al., *The Impact of Delayed Reporting, Assault Type, Victim Gender, and Victim-Defendant Familiarity on Mock-Jurors' Judgments*, 16 APPLIED PSYCH. IN CRIM. JUST. 258, 261 (2022).

[61] *See id.* at 266.

Probable Cause (>40 percent certainty an offense was committed)[62]	Preponderance (>50 percent certainty an offense was committed)[63]	Beyond a Reasonable Doubt (≥96 percent certainty an offense was committed)[64]
1. Searches 2. Preferral 3. Referral 4. Ethical Prosecution	1. Command Investigation Findings of Fact 2. Non-Judicial Punishment 3. Commanding Officer's Substantiation of Misconduct 4. Initial Review Officer's Determination 5. Most Pre-Trial Motions 6. ADSEP/BOI Members' Determination on Substantiation, Separation, and Characterization	Criminal Trial

Fig 1.[65]

[62] Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 834 (2013) ("Although there is wide variance regarding what [the] percentage is, a significant number of courts and scholars assume that probable cause is within the 40% to 51% range.").

[63] More likely than not. *Preponderance of the Evidence,* CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Apr. 11, 2023).

[64] Jane Goodman-Delahunty & Ryan Essex, *Jury Understanding of Beyond a Reasonable Doubt*, 24 J. OF JUDICIAL ADMIN. 75, 86 (2014). This is an Australian study. There may be slight deviations between an American and Australian quantification of the standard based on culture and other factors; however, this number is a reasonable baseline for assessing the impacts of the constraint imposed by the beyond a reasonable doubt standard (BARD).

[65] Three burdens are applicable in sexual assault cases, probable cause, preponderance, and BARD. Since the focus of this argument is on the delta between probable cause and BARD, preponderance is not addressed.

1. Probable Cause

Probable cause (PC) that a crime was committed plays a vital procedural role in MSA cases. It is the quantum of proof required for military prosecutors to ethically prosecute criminal offenses.[66] It is also the minimum quantum of proof required for a preliminary hearing officer (PHO) and command staff judge advocate (SJA) to recommend referral of a charge.[67] Without PC, a criminal case should never proceed to court-martial. In his 2003 opinion in *Maryland v. Pringle*,[68] Chief Justice Rehnquist attempted to provide clarity on the standard: "[t]he substance of all the definitions of [PC] is a reasonable grounds for belief of guilt."[69] Many courts and scholars estimate PC somewhere between 40 to 51 percent certainty.[70] A 2007 decision from the U.S. Court of Appeals for the Armed Forces clearly articulated in the military context that PC is less than a preponderance.[71] Therefore, military practitioners following precedent understand the PC standard is between 40-50 percent certainty that an offense was committed. The minimum certainty threshold required for a MSA case to proceed to court-martial is the subjective, ambiguous, and low PC burden; the quantum of proof required for a conviction at court-martial is BARD.[72]

2. Beyond a Reasonable Doubt

Although originally proposed by John Adams[73] and subsequently adopted by nearly every criminal jurisdiction, it was not until 1970 that the Supreme Court ruled that proof BARD is required to convict.[74] Similar to the PC standard, American jurisprudence does not provide a precise definition or quantification of BARD. Also contributing to the nebulous

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[66] U.S. DEP'T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, R. 3.8(a)(1) (20 Jan. 2015) [hereinafter ETHICS].
[67] MCM, *supra* note 39, R.C.M. 405(a).
[68] Maryland v. Pringle, 540 U.S. 366 (2003).
[69] *Id.* at 371 (citation omitted).
[70] Goldberg, *supra* note 62, at 834.
[71] U.S. v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007) ("Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence.").
[72] Other standards without significant bearing on sexual assault cases are not addressed in this article (for example, preponderance, clear and convincing, scintilla).
[73] Robert J. McWhirter, *How the Sixth Amendment Guarantees You the Right to a Lawyer, a Fair Trial, and a Chamber Pot*, ARIZ. ATT'Y, Dec. 2007, at 12, 24.
[74] In Re Winship, 397 U.S. 358, 361 (1970).

nature of this concept is each adjudicative body's unique interpretation of the standard in each case.[75] While it is legal error to place a numerical value on the BARD standard in a courtroom, social science has estimated the certainty threshold as high as 96 percent.[76] This quantified level of certainty provides a helpful waypoint to analyze the implications of the burden of proof in MSA cases.

3. Applicable Standards of Proof and Sexual Assault Cases

A military prosecutor must recommend to a convening authority (CA) that cases with less than 40 percent certainty be withdrawn,[77] whereas a prosecutor may ethically prosecute a case that merely meets the PC threshold (40 percent certainty).[78] At an Article 32 preliminary hearing, a PHO will independently assess whether each preferred charge and specification meets the PC threshold.[79] Using the PHO's findings to inform the recommendation, the CA's SJA will also provide an independent assessment as to whether the evidence reaches the PC threshold.[80] A convening authority is not bound by the PC assessment of the prosecutor,[81] PHO, or SJA but generally defers to those assessments.[82]

In many MSA cases, there is sufficient admissible evidence to establish PC, but the admissible evidence is below the BARD threshold. In some cases, the admissible evidence supports a "sufficient certainty window,"[83] meaning despite professional assessments that the evidence is insufficient to establish proof BARD, a reasonable jury could still find the

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[75] In the civilian context, juries are the adjudicative bodies. *See generally* James A. Shapiro & Karl T. Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 LOYOLA U. CHI. L. J. 1029 (2021) (explaining that juries are consistently confused by the BARD standard and its application and how jurisdictions manage the standard and its challenges differently).

[76] Goodman-Delahunty & Essex, *supra* note 64, at 86.

[77] *See* ETHICS, *supra* note 66, R. 3.8(a)(1); Goodman-Delahunty & Essex, *supra* note 64, at 86.

[78] *See* ETHICS, *supra* note 66, R. 3.8(a)(1).

[79] MCM, *supra* note 39, R.C.M. 405.

[80] UCMJ art. 34(a)(1) (2022) ("Before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing.").

[81] Recent reforms have made a prosecutor's decision binding on a convening authority. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 537, 135 Stat. 1541, 1697 (2021).

[82] Professional Experience, *supra* note 27.

[83] For example, a conservative quantification would be equal to or greater than 80 percent certainty.

BARD standard is met. Cases within this window should go to trial. Cases above the PC standard (40 percent certainty) but below a sufficient certainty window (such as an 80 percent certainty), have no reasonable likelihood of obtaining a conviction and should not proceed to court-martial.[84] Referring cases without admissible evidence that exceeds this sufficient certainty window limits future administrative action relative to that accused,[85] does not generate accountability, and provides no deterrent value.

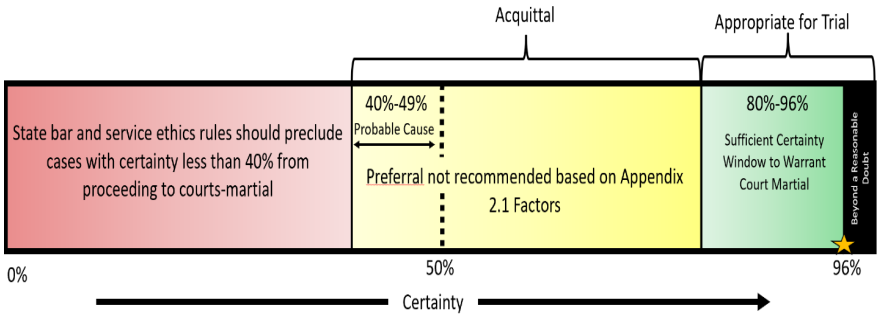

Fig 2.

The delta between PC (40 percent certainty) and BARD (96 percent certainty) is the single greatest contributor to the lack of accountability and deterrence in MSAs.[86] It is relatively easy to reach 40 percent certainty in MSA cases. Identity is rarely an issue and admissions, DNA evidence, or both, often substantiate a sexual contact or act. In theory, merely an allegation by a victim can satisfy the PC standard.

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[84] *See* MCM, *supra* note 39, app. 2.1, § 2.1(h).

> In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the commander or convening authority should consider, in consultation with a judge advocate, . . . [w]hether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.

MCM, *supra* note 39, app. 2.1, § 2.1(h).

[85] *See e.g.* U.S. MARINE CORPS, ORDER 1900.16 CH. 2, SEPARATION AND RETIREMENT MANUAL para. 6106(1)(a) (15 Feb. 2019) (stating that Marines "may not be separated [for] . . . conduct that has been the subject of military . . . judicial proceedings (including summary court-martial) resulting in an acquittal or action having the effect of acquittal" except for in limited circumstances).

[86] *See* U.S. DEP'T OF JUST., NAT'L INST. JUST., NATIONAL INSTITUTE OF JUSTICE: FIVE THINGS ABOUT DETERRENCE 1-2 (2016) (explaining that the certainty of punishment is a more powerful deterrent to crime than the punishment itself).

By way of example, assume a victim asserts that an accused had non-consensual sexual intercourse with them. Also assume the accused denied the act or invoked the right to remain silent. Absent credibility considerations, the evidence supports a 50 percent likelihood that the crime occurred. This allegation alone exceeds the PC threshold of 40 percent certainty. Under these facts, however, there is no likelihood of obtaining or sustaining a conviction at the BARD threshold. Tweaking the assumptions often yields the same result: assume that the accused admitted to the intercourse (which is corroborated by DNA) but asserted that the victim consented. This case may survive a PC assessment and proceed to trial, but there is a small likelihood of obtaining a conviction. Stacking the ever-present memory issues, pre-existing relationships, motives to fabricate, and delayed reports on top of a case barely at the PC threshold will move the factfinder away from, not towards, BARD. The author's professional experience suggests that these are common scenarios that contribute to current MSA prosecution statistics.[87]

The current MSA conviction rate supports the assertion that the delta between 40 percent certainty and a sufficient certainty window is the primary problem. Former Colorado Attorney General, John Suthers, defined a competent prosecution office as one with a conviction rate between 85-90 percent.[88] The number of preferred cases and percentage of convictions indicate that the military is already over-prosecuting MSAs. This assertion is supported by the findings of the 2020 Defense Advisory Committee Report, which noted that a review of 517 preferred cases from 2017 assessed that 41.2 percent of those cases did not have sufficient admissible evidence to obtain a conviction.[89] Eliminating these 213 cases from the sample set still only yields a conviction rate of 63 percent—far below the benchmark conviction rate of 85-90 percent.[90]

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[87] Professional experience, *supra* note 27.

[88] JOHN W. SUTHERS, NO HIGHER CALLING, NO GREATER RESPONSIBILITY 82 (2008) ("Overall, a conviction rate of at least 85 to 90 percent (meaning 85-90 percent of all cases filed result in a guilty plea or conviction at trial) would be typical of a competent prosecutor's office.").

[89] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017, at 54 (2020) [hereinafter DAC-IPAD].

[90] Percentage means out of 100. *Percent*, MERRIAM-WEBSTER (Apr. 3, 2023), https://www.merriam-webster.com/dictionary/percent. On average, out of any 100 cases in 2017, 6.4 went to trial, 2.6 of those were deemed to have insufficient evidence, 2.4 of those cases resulted in convictions. Therefore, 1.4 of those cases were properly at a court-martial even though there was not a conviction: 2.4 (convictions) / (6.4 (trials) - 2.6 (trials without merit) = 63 percent.

Thus, counsel inexperience, CA prosecutorial discretion, and other military-specific prosecution nuances are not the cause of, nor a significant contributing factor to, the low conviction rate. Many more MSA prosecutions are moving forward than what is merited by accepted prosecution practice, standards, and regulations.[91] In a substantial number of MSA cases, military prosecutors are simply unable to present a sufficient quantum of admissible evidence for a member's panel to determine the Government proved a case BARD. Regardless of the training, education, experience, and resources provided to military prosecutors, previous and present reforms will not appreciably increase convictions in cases without enough evidence. To be clear, the desired goal is not convictions without sufficient evidence, rather the desired end state is to identify actions that should be criminal based on the propensity to cause harm, and then deter and punish those actions.

The filter for cases that reach PC but lack sufficient certainty to merit a court-martial is prosecutorial discretion—historically exercised by general court-martial CAs.[92] Prior to exercising prosecutorial discretion, a CA receives advice from the command's SJA.[93] In the military justice system, SJA advice is informed by a prosecutorial review of the available, admissible evidence and its application to the factors in Appendix 2.1 to the UCMJ.[94] Through those factors, prosecutors analyzing a fact pattern make a non-binding recommendation to the CA, via the SJA, recommending for or against referral.[95] Where a recommendation advises against referral, a CA may close a case, pursue administrative action, or prefer the charges despite the recommendation.[96] Public perception, political pressure, and a desire to pursue justice for victims can detract from the weight of a prosecutor's recommendation in MSA cases.[97] It has been the author's experience that if there is a willing victim and PC, a case will likely go forward.[98] However, referring cases with 40-79 percent

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[91] *See, e.g.*, U.S. DEP'T OF JUST., JUST. MANUAL §9-27-220 (2023).
[92] Recent reforms will transfer prosecutorial discretion from line officers to senior military prosecutors. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 537, 135 Stat. 1541, 1697 (2021).
[93] UCMJ art. 34(a)(1) (2022).
[94] MCM, *supra* note 39, app. 2.1, § 2.1 (including *inter alia*: the views of the victim, the ultimate harm, and whether there is sufficient admissible evidence).
[95] In the Marine Corps, there were, at a minimum, three attorneys behind each case analysis memorandum—a special victim investigation prosecution (SVIP)-qualified counsel, a civilian litigation attorney advisor with significant civilian experience, and the regional trial counsel (an experienced SVIP-qualified attorney serving in an 0-5 billet). Professional Experience, *supra* note 27.
[96] MCM, *supra* note 39, R.C.M. 306.
[97] Professional Experience, *supra* note 27.
[98] Professional Experience, *supra* note 27.

certainty fails to generate justice for victims, does not hold an accused accountable, and siphons resources from cases that merit prosecution. Low conviction rates mean prosecutors are recommending cases proceed that should not, and CAs are referring cases that they should not.[99]

Congress has indicated disapproval with the military's current conviction rate (or batting average[100] for the purposes of the following analogy).[101] Equating cases with 40-79 percent certainty to balls, and cases with greater than 80 percent certainty to strikes, there are not enough good pitches amongst the allegations to generate an acceptable batting average. Any reforms that result in swinging at more bad pitches will not increase the batting average. In the aggregate, previous and proposed reforms have not, and will not, appreciably increase the number of strikes. Providing more resources to batters—training, experts, funding, etc.—will not have a positive impact on the batting average if the batters are still swinging at balls. Even the greatest hitters in the world must be thrown strikes.

E. The Constitution

There are two significant constitutional constraints applicable to all military justice reforms. First, the BARD standard is the constitutionally-required standard at a court-martial.[102] There is good reason for this burden: "The heightened standard of proof in criminal trials is crafted to allocate the risk of error to the state in order to protect the defendant from wrongful conviction."[103] Authorities that wish to avoid this high burden may do so administratively. An administrative separation from the service requires only a preponderance of the evidence (50.1 percent

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[99] *See* DAC-IPAD, *supra* note 89, at 3; SUTHERS, *supra* note 88, at 82.

[100] In baseball, a batting average, "[o]ne of the oldest and most universal tools to measure a hitter's success at the plate, . . . is determined by dividing a player's hits by his total at-bats." *Batting Average (AVG)*, MLB, https://www.mlb.com/glossary/standard-stats/batting-average (last visited Apr. 11, 2023).

[101] Rebecca Burnett, *U.S. Senate Committee on Armed Services Investigates Sexual Assault in the Military*, DC NEWS NOW (July 8, 2022, 7:20 PM), https://www.dcnewsnow.com/news/local-news/washington-dc/u-s-senate-committee-on-armed-services-investigates-sexual-assault-in-military ("According to Senator Kristen Gillibrand, chair of the United States Senate Committee on Armed Services, U.S. service members are more likely to be sexually assaulted than shot in the line of duty. Sexual assaults have doubled, yet the rate of prosecution and conviction have halved.").

[102] U.S. CONST. art. I, § 8, cl. 5.

[103] Casey Reynolds, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 L. & PSYCH. REV. 229, 229 (2013).

certainty misconduct was committed).[104] In fact, many cases with proof in the 40-79 percent range would be more adequately addressed via administrative means.[105] Second, an accused must be permitted to put on a defense, meaning they must be allowed to question the Government's witnesses, bring their own witnesses, offer alternative theories, and access evidence that may invade victim privacy, among other rights.[106] Any reform to military justice that does not respect these constitutional requirements is a non-starter.

F. Sex Offense Registration

Sex offense registration is a significant civil disability that limits employment, housing options, and other civil liberties.[107] Convictions for Article 120, UCMJ offenses often require sex offense registration.[108] While the factfinder may not be aware of the specific requirements of sex offense registration, the severity of this collateral consequence is common knowledge. The criminal justice system recognizes the weight sex offender status carries in these cases: "Because of the duration of these requirements, and the stigma attached to the public notification and access to this type of criminal record, the requirement to register for a sexual offense conviction is often one of the most substantial and adversarial parts of the sentence imposed."[109] Given the significance of this collateral consequence, there is a distinct possibility that some panel members may adopt an interpretation of BARD that is more favorable to the accused. If occurring, this is an incorrect application of the burden of proof; however, the phenomenon should be recognized as a potential contributor to low conviction rates in these cases. A low conviction rate and the severe

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[104] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 3-10(b) (1 Apr. 2016); U.S. MARINE CORPS ORDER.1900.16, MARINE CORPS SEPARATIONS MANUAL para. 6319 (15 Feb. 2019).
[105] *See generally* Baker, *supra* note 30.
[106] *See* S. DOC. NO. 103-6, SIXTH AMENDMENT – RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS (1992).
[107] Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 785-93 (2016).
[108] *Military Convictions Under SORNA*, SMART: OFF. OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, https://smart.ojp.gov/sorna/military-convictions (last visited Apr. 12, 2023) ("Title I of the Adam Walsh Child Protection and Safety Act of 2006, the Sex Offender Registration and Notification Act (SORNA), specifically includes certain Uniform Code of Military Justice (UCMJ) convictions in its definition of 'sex offense.'").
[109] MIL. JUST. INT'L, POST COURT-MARTIAL CONVICTION SEX OFFENDER REGISTRATION (n.d.), https://www.militaryjusticeinternational.com/documents/MJISRegBrochure.pdf.

collateral consequence of sex offense registration disincentivizes pleas and encourages defendants to take the case to trial.

G. Problem Statement

How can military justice provide appropriate accountability for, and deterrence of, actions that cause military sexual trauma?

The problem statement is adjudication-agnostic. Regardless of whether an MSA is substantiated, unsubstantiated, or results in a conviction or an acquittal, there are too many individuals (military and civilian) suffering the mental and physical effects of MSA.

III. Effective Strategies

A course of action (COA) must be suitable, feasible, acceptable, and complete.[110] Adapting pre-existing criminal frameworks and extracting portions of successful strategies is a viable starting point for COA development.[111] Two historical COAs provide SAPR components that have the potential to increase accountability and deterrence: The Marine Corps's Bystander Intervention Program[112] and the 6th Marine Corps Recruiting District's (MCD) Operation RESTORE VIGILANCE (RV).[113] Additionally, Articles 120 (Sexual Assault),[114] 128A (Maiming),[115] 130 (Stalking),[116] 133 (Conduct Unbecoming),[117] and 134 (the General Article)[118] provide precedent and inform statutory drafting for criminalizing conduct that can, and should, be adapted as part of a viable approach to MSA reform.

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[110] *See* MCPP, *supra* note 22, at 3-1. This paper only proposes one COA; the criterion of "distinguishable" has been omitted.
[111] *See* MCPP, *supra* note 22, at 3-2 to 3-3.
[112] *See infra* notes 119-140 and accompanying text.
[113] *See infra* notes 141-164; *see also* Bowers, *supra* note 7.
[114] UCMJ art. 120 (2022) ("Rape and sexual assault generally").
[115] UCMJ art. 128a (2022) ("Maiming").
[116] UCMJ art. 130 (2022) ("Stalking").
[117] UCMJ art. 133 (2022) ("Conduct unbecoming").
[118] UCMJ art. 134 (2022) ("General article").

A. Bystander Intervention

All Marines are required to attend annual sexual assault prevention briefs.[119] The Marine Corps tailors the briefs by audience.[120] The relevant precedent for COA development is the "Step Up"[121] brief for Marines in the E-1 to E-3 ranks and "Take a Stand"[122] brief for Marines in the E-4 to E-5 ranks. "Step Up," has a short education block followed by three vignettes.[123] After the first video, Marine participants are asked to identify warning signs of sexual violence.[124] The second video shows a bystander intervening and preventing sexual assault.[125]

"Take a Stand" training is a three-hour training block for newly promoted Marine non-commissioned officers.[126] The training is approximately three hours and consists of six video segments.[127] In the fourth video segment, "Sexual Assault Prevention," participants are taught to recognize situations with an increased risk of sexual assault. With the aid of video segments, the instructor educates on the techniques that those likely to be accused of sexual assault employ, such as coercion, alcohol, and misuse of authority.[128] During this segment, the facilitator also leads discussion on risk reduction techniques, such as a buddy system and drinking responsibly.[129] Finally, the instructor uses a video and discussion points to reinforce bystander intervention strategies to prevent sexual assault.[130] By the end of the training, all E-1 to E-5 Marines are taught to intervene by directing, distracting, and delegating.[131]

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[119] *See* DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES encls. 2, 10 (9 Apr. 2021) [hereinafter DoDI 6495.02]; U.S. MARINE CORPS, ORDER 1752.5C, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM encl. 1, para. 8(a)(b) (3 June 2019).
[120] *See* DoDI 6495.02, *supra* note 119, encl. 10.
[121] Marine Administrative Message, 391/18, R 121650Z July 18, Requirements for Sexual Assault Prevention and Response Training, para. 6.A (12 July 2018) [hereinafter MARADMIN 391/18].
[122] *Id.* para. 6.B; COREEN FARRIS ET AL., MEASURES OF PERFORMANCE AND EFFECTIVENESS FOR THE MARINE CORPS' SEXUAL ASSAULT PREVENTION PROGRAMS 23 (2019).
[123] FARRIS ET AL., *supra* note 122, at 24.
[124] FARRIS ET AL., *supra* note 122, at 24.
[125] FARRIS ET AL., *supra* note 122, at 24.
[126] FARRIS ET AL., *supra* note 122, at 24.
[127] FARRIS ET AL., *supra* note 122, at 25.
[128] FARRIS ET AL., *supra* note 122, at 25.
[129] FARRIS ET AL., *supra* note 122, at 25.
[130] FARRIS ET AL., *supra* note 122, at 25.
[131] U.S. Marine Corps, SAPR Program Overview PowerPoint (n.d.), https://www.mcieast.marines.mil/Portals/33/Documents/Adjutant/3.%20SAPR%20Program%20Overview.ppt.

Directing involves calling out "threatening or inappropriate behavior."[132] This action prevents individuals from being desensitized to these behaviors and stops the escalation of behaviors that can lead to MSA. Distracting requires the bystander to extricate the potential victim from the situation.[133] Delegating involves appointing someone else to help intervene.[134] Marine Corps Community Services asserts that "[b]ystander intervention is one of the most effective ways to interrupt a potential sexual assault."[135] The success of this program depends on the moral courage of third parties to intervene.[136]

"Take a Stand" and "Step Up" are predicated on the existence of objectively verifiable behaviors that lead to MSAs. These behaviors are readily identifiable and collectively referred to as "grooming," which is discussed in detail below.[137] These programs train and implore Marines to intervene when they witness grooming. While these programs have had success,[138] there are some fundamental flaws to this approach. First, the target audience is neither the potential perpetrator nor even the victim. The program attempts to turn a disinterested third party into an interested party despite the lack of a legal duty to intervene. Second, the behaviors bystanders are supposed to intervene and stop are generally not, individually or collectively, criminal.[139] In effect, the Marine Corps asks Marines to run interference on their friends' and colleagues' romantic pursuits to reduce the probability of future sexual misconduct.

If conduct that increases the likelihood of MSA is: 1) objectively identifiable, 2) inappropriate, and 3) worthy of bystander intervention, then it might well be wise to criminalize that conduct in a manner commensurate with the seriousness of the offense to hold the perpetrator accountable. Criminalizing unreasonable sexual pursuit permits commanders to hold an accused accountable for actions that are objectively identifiable, are proven to increase the likelihood of MSA, and

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[132] MCCS, *Master the Three "D"s of Bystander Intervention*, https://lejeunenewriver.us mc-mccs.org/news/master-the-3-ds-of-bystander-intervention (last visited Apr. 12, 2023) [hereinafter *3Ds*].
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *See infra* notes 146-148 and accompanying text.
[138] *3Ds*, *supra* note 132 ("In a recent survey, of the 4 percent of Junior Enlisted respondents who observed a high-risk situation that they believed was or could have led to sexual assault, 86 percent intervened.").
[139] *See 3Ds*, *supra* note 132. There may be some very low-level offenses that would likely never be charged (such as drunk and disorderly, underage drinking) but nothing that compels a preventive blitz by nineteen-year-old bystanders.

are often open and notorious. Criminalizing these behaviors also permits commanders to establish an articulated standard of conduct, train to that standard, and hold bystanders that fail to intervene accountable.[140] From a macro perspective, a statute criminalizing MSA gateway behaviors through a sexual assault lens will help generate accountability and deterrence. While the Bystander Intervention program provides institutional recognition of the precursor behaviors, a case study from the 6th MCD provides a proof of concept.

B. RESTORE VIGILANCE (RV)

From 2008 to 2012, the 6th MCD averaged ten substantiated MSAs per year.[141] In 2012, the 6th MCD promulgated Operation RV, a comprehensive and creative campaign plan aimed at eradicating sexual assault.[142] By 2014, this command of 820 Marines and 7,084 future Marines had no substantiated incidences of recruiter/applicant sexual misconduct.[143] At its core, RV is a command policy targeting the gateway actions to MSA.[144]

RESTORE VIGILANCE's approach to eliminating MSA consisted of four stages: (1) educate stakeholders, (2) attack the conditions that permit sexual misconduct, (3) shield the vulnerable population, and (4) create a culture of accountability.[145] Stage (2) is particularly relevant to the proposed military justice reform: "Wage an all-out 'war' against the conditions in which sexual misconduct can occur."[146] Additionally, Stage (2) consisted of three specific tactics that eliminated or degraded identified precursors to recruiter/applicant sexual misconduct—isolation, texting, and normalizing[147] (in other words, "grooming").

Grooming in the context of MSA, consists of the "manipulative behaviors that the abuser uses to gain access to a potential victim, coerce

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[140] *See* U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS art. 1137 (1990) ("Persons in the naval service shall report as soon as possible to superior authority all offenses under the Uniform Code of Military Justice which come under their observation. . . .").
[141] Bowers, *supra* note 7, at 1.
[142] U.S. MARINE CORPS, CAMPAIGN PLAN 01-03, 6TH MCD OPERATION "RESTORE VIGILANCE" CAMPAIGN PLAN (18 Sept. 2012) [hereinafter CP 01-03].
[143] Bowers, *supra* note 7, at 4. There was one instance of sexual misconduct—a consensual sexual relationship between a recruiter and a poolee. Bowers, *supra* note 7, at 4.
[144] *See* Bowers, *supra* note 7, at 1.
[145] Bowers, *supra* note 7, at 1-4.
[146] Bowers, *supra* note 7, at 2.
[147] Bowers, *supra* note 7, at 2.

them to agree to the abuse, and/or reduce the risk of being caught."[148] These behaviors include, but are not limited to: (1) "[g]aining access and isolating the victim," (2) victim selection, (3) "[t]rust development and keeping secrets," (4) "[d]esensitization to touch and discussion of sexual topics," and (5) "[a]ttempts by abusers to make their behavior seem natural."[149] Without compromising the mission and in a legally permissible manner, 6th MCD effectively eliminated the ability to isolate a victim and significantly degraded potential offenders' ability to execute the remaining behaviors.

To combat the ability for potential offenders to isolate victims, the command instituted a "Two-Person Integrity" (TPI) policy requiring two recruiters during contact with an applicant.[150] Exceptions to the TPI policy required waivers, additional oversight, and follow-up.[151] With the policy in place, the commander could hold violators administratively or criminally accountable for simply being in a one-on-one situation.[152] Flanking the problem from the other side of the equation, the TPI policy deters sexual misconduct by educating applicants, enabling them to recognize and report violations of the policy, and establishing direct command liaison. This strategy holds potential perpetrators at punitive risk. No recruiter could effectively insulate from the risk that the command would become aware of a TPI violation. The TPI policy was a masterstroke that eliminated a necessary tool of sexual predators—isolation.

To degrade recruiters' ability to groom via behaviors (2)-(5) above, the 6th MCD banned "all forms of communication on personal devices between Marines and applicants."[153] This measure specifically targeted texting.[154] The 6th MCD recognized, "texting is an unsupervised, informal, and dangerous mode of communication that can easily be misunderstood and manipulated by predators."[155] During the course of text message conversations in MSA situations, offenders can probe to assess boundaries, hide behind ambiguity, maintain engagement, and can communicate things that are not socially acceptable via other communication methods. Without the ability to privately text with applicants, it becomes exponentially more difficult for potential offenders

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[148] *Grooming: Know the Warning Signs*, RAINN (July 10, 2020), https://www.rainn.org/news/grooming-know-warning-signs.
[149] *Id.*
[150] Bowers, *supra* note 7, at 2.
[151] CP 01-03, *supra* note 142, para. 3(b)(2)(a).
[152] *See infra* notes 177-179 and accompanying text.
[153] Bowers, *supra* note 7, at 2.
[154] Bowers, *supra* note 7, at 2.
[155] Bowers, *supra* note 7, at 2.

to: (2) effectively select a victim, (3) develop the type of trust required, (4) desensitize the victim to discussion of sexual topics, and (5) normalize a potential perpetrator's behavior.

The 6th MCD also targeted behavior normalization by tasking the command with identifying and stopping "inappropriate language, dress, and juvenile behavior."[156] The 6th MCD identified that potential sexual predators were often "narcissistic, sociopathic, hyper-masculine," and violent.[157] By recognizing these character traits, the 6th MCD was able to prevent introduction of those inappropriate behaviors into the environment. Without the ability to introduce and exploit these behaviors, potential predators were unable to pollute the environment and desensitize subordinates, peers, superiors, and victims to behavior consistent with sexual predators.[158]

While there were no sexual misconduct allegations within the 6th MCD in 2014, nine Marines were relieved for violating RV policies.[159] Of the nine that were relieved:

> [two] Marines . . . [were] communicating with female applicants on their personal devices; three Marines . . . [were] inviting Marines to their personal residences to consume alcohol; one Marine . . . [was] communicating with a female applicant in an unprofessional manner on social media; one Marine . . . [was] violating a military protective order with a female applicant; and two Marines . . . [were] violating the TPI policy.[160]

Proving a negative is impossible. However, ten instances of sexual misconduct per year reduced to zero, coupled with the nine Marines relieved for violating RV policies, indicates that the 6th MCD identified and implemented a viable approach to preventing MSA. One can infer that some of those relieved were on a path to unwelcome sexual conduct.[161] The commanding officer of the 6th MCD recognized that the lack of sexual misconduct "does not necessarily mean that 6th MCD had no sexual predators within [its] ranks";[162] however, the lack of reported crimes does

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[156] Bowers, *supra* note 7, at 2.
[157] Bowers, *supra* note 7, at 5.
[158] Bowers, *supra* note 7, at 2.
[159] Bowers, *supra* note 7, at 2.
[160] Bowers, *supra* note 7, at 4.
[161] *See* Bowers, *supra* note 7, at 4 ("It is my belief that at least some of these Marines were on the trajectory towards committing an act of sexual misconduct—to include possibly assault—against some of our future Marines.").
[162] Bowers, *supra* note 7, at 4.

indicate that the 6th MCD was outpacing and outmaneuvering them. While the relieved Marines' careers were jeopardized, within the 6th MCD, there were no victims of MSA, there were no MSA courts-martial, there were no MSA convictions, and no Marines were required to register as sex offenders. From an accountability and deterrence perspective, the end state achieved by the 6th MCD is an end state that should satisfy all stakeholders.

The success of this program begs the question: "Why has this campaign plan not been implemented throughout the DoD?" Unfortunately, RV is not plug-and-play.[163] The unique relationship between a recruiter and an applicant affords recruiting district commanding officers more latitude to regulate Service member conduct than is currently afforded commanding officers in other contexts.[164] However, RV offers a valuable proof-of-concept were commanders in other contexts provided similar tools.

C. Existing Precedent from Law and Statute

Bystander intervention and RV inform the tactics and efficacy of addressing precursor behaviors to MSA. Existing precedent, statutes, and discussion provide vetted language, definitions, and strategies that can be adapted to provide an additional tool to combat MSA through Article 134, UCMJ. Article 120 provides the necessary definitions for "sexual act" and "sexual contact."[165] Language from Article 130, stalking, can be adopted to criminalize a course of conduct—the necessary continuity of purpose being the intent to commit a sexual act or contact.[166] Article 133, conduct unbecoming an officer, enables the military to define an acceptable standard of conduct for a class of Service members (such as officers) and criminalize acts and omissions that fail to meet that standard.[167] Some criminal statutes permit the ultimate harm to serve as proof of intent to commit a crime.[168] Finally, and importantly, criminalizing precursor behaviors to MSA is unconstitutional absent a military nexus, since these behaviors are not criminal in other contexts. The use of Article 134 to

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[163] *See* Gregg Curley, *New Ideas to Prevent Sexual Assault in the Military*, 148 PROCEEDINGS 1430 (2022).
[164] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-15(b) (24 July 2020) (delineating specific actions that are prohibited "between recruiters and prospects, applicants, and/or recruits").
[165] UCMJ art. 120 (2022).
[166] UCMJ art. 130 (2022).
[167] UCMJ art. 133 (2022).
[168] *See* UCMJ art. 128a (2022).

criminalize this conduct provides the mechanism for ensuring the military nexus and, therefore, the constitutionality of the crime.[169]

D. Proposed Course of Action: Criminalize Precursor Behaviors to Sexual Assault

Criminalization of precursor behaviors can be accomplished with four elements: (1) That the accused wrongfully engaged in a course of conduct directed at a specific person;[170] (2) The course of conduct [was intended to] [did] result in a sexual contact or sexual act as described in section 920(g) of this title (article 120(g));[171] (3) That, under the circumstances, the course of conduct was unreasonable; and, (4) That, under the circumstances, the conduct of the accused was either: (a) to the prejudice of good order and discipline in the armed forces; (b) was of a nature to bring discredit upon the armed forces; or (c) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

This proposed COA addresses multiple problems inherent in the current MSA framework. First, it permits criminal liability for MSA while eliminating questions of consent or mistake of fact. Second, the proposed statute recognizes evidentiary limitations and addresses provable conduct. Third, it enables criminalization of conduct that occurs prior to the MSA and often has corroborating witnesses and evidence. Fourth, the proposed statutory language targets non-registerable conduct.

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[169] UCMJ art. 134 (2022). The text of Article 134 reads:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.

Id.

[170] *See* UCMJ art. 130 (2022) ("Stalking"); MCM, *supra* note 39, pt. IV, ¶ 80.

[171] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.

Therefore, the associated punishments and lack of sex offense registration will remove an incentive for the defense to try the case. Last, this offense will increase MSA accountability and deterrence.

1. Benefits to the Proposed Crime of Exploitation

Every category of stakeholder stands to gain from an exploitation framework. The proposal provides more adjudication options for victims. An accused may plead to a substantial MSA-related offense that does not require sex offense registration. Prosecutors would be armed with a criminal framework that, in many cases, is more likely to obtain a conviction. The crime furnishes the accountability and deterrence that Congress seeks.[172] It affords a means for CAs to remove sexual predators from the ranks. It provides SAPR professionals standards to which they can train. As is, an accused facing MSA charges often weighs the likelihood of two outcomes: felony conviction (requiring sex offense registration and a punitive discharge) or acquittal. Exploitation would prevent misconduct from slipping through the current all-or-nothing MSA paradigm while capping punishment at a level commensurate with the offense.

2. Drawbacks to the Proposed Crime of Exploitation

Certainly, there are drawbacks to the proposed crime. First, there is a perception that Congress has already over-criminalized MSA. Until 2007, MSA was absent from the UCMJ.[173] Now, the MCM contains pages of statutes, and there are volumes of case law on the subject.[174] However, the proposed crime is not targeting sexual conduct *per se*, but rather the gateway actions—those things a Service member does or fails to do that enable them to "take advantage" of a victim.

Under this proposal, Service members remain free to pursue sexual gratification. It is only when that pursuit of sexual gratification falls below the standard of conduct expected of a Service member that the actions become criminal. The gravamen of this crime is the course of conduct vice

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[172] *See, e.g.*, Michel Paradis, *Congress Demands Accountability for Service Members*, LAWFARE (June 1, 2021, 9:28 AM), https://www.lawfareblog.com/congress-demands-accountability-service-members.

[173] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §552, 119 Stat. 3136, 3256 (2006) (revising Article 120 to include sexual assault).

[174] *See* MCM, *supra* note 39, pt. IV, ¶ 60.

the ultimate sexual act; therefore, registration is not appropriate based solely on a conviction for this charge. The lack of a registration requirement for this misconduct is an appropriate outcome.

Lastly, there will likely be constitutional challenges to the proposed crime (e.g., void for vagueness, notice, or overbreadth). However, there is no reason to fear challenges if the language is appropriately drafted, Service members are provided adequate notice of the applicable standard of conduct, and the crime is properly charged. There is already established precedent from other presidentially-prescribed Article 134 crimes that have already survived these constitutional challenges.

IV. COA Implementation

There are four practical ways that courses of conduct preceding an MSA allegation may be criminalized. First, Congress can pass a statute criminalizing the conduct. Second, service secretaries or subordinate flag commanders can issue general orders prohibiting the conduct. Third, the General Article may be used to criminalize conduct on a case-by-case basis.[175] The fourth, and most effective and appropriate method of criminalization, is for the President to proscribe the misconduct under an enumerated Article 134 chapter.

The most obvious way to criminalize conduct is to do so via an enumerated statute. However, enumerated articles do not require a military nexus[176]—an important component in criminalizing exploitation. Senior flag officers and service secretaries can regulate behavior, even otherwise lawful personal behavior, if there is a specific military purpose for doing so.[177] There are multiple reasons why promulgating orders is not the appropriate manner to criminalize exploitation. First, there would be disparate policies across the services. Second, much of the individual conduct at issue is otherwise legal—it is: 1) the articulated standard of conduct, 2) the intent accompanying the acts, and 3) the military nexus that would render this otherwise-legal conduct unlawful. Taking legal behavior and making it illegal can certainly be accomplished via orders—

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[175] UCMJ art. 134 (2022).
[176] *See, e.g.*, UCMJ art. 130 (2022).
[177] *See* U.S. v. Moore, 58 M.J. 466, 467-68 (2003); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 2-4(C) (8th ed. 2012) [hereinafter, PRACTICE AND PROCEDURE].

for example, the possession of drug paraphernalia[178] or using lawful products for unlawful purposes (such as huffing).[179] However, those behaviors do not have constitutional implications. Individual commanders issuing orders banning exploitation will lead to confusion, notice issues, and sub-optimal results.

The General Article can render conduct criminal even if it is not specifically criminalized by Congress—it is a catch-all punitive article.[180] The General Article has existed in military criminal law, in some form, since the Revolution[181] and because of due process concerns and *ex post facto* issues,[182] is a broad grant of power that is constitutional only in the military context.[183] The same equities that render the catch-all provision constitutional justify enhanced regulation and criminalization of exploitation—specifically, the impact MSA has on good order and discipline, morale, esprit de corps, and national defense.[184]

While Article 134 is facially broad and vests prosecutors with the ability to "invent" crimes, there are limits to what prosecutors can attempt to criminalize under this article[185]—and limited returns to the effort, since different judges and commanders will be variably receptive to the approach. Conduct must directly affect good order and discipline or have the potential to damage the reputation of the service.[186] The proposed criminal language proscribes conduct that would otherwise be legal, although morally questionable. Therefore, any General Article charge would require a factual showing of the conduct's deleterious impact on good order and discipline.[187] If conduct is not prejudicial to good order and discipline, it can still bring discredit on the service—"lowering the civilian community's esteem or bringing the armed forces into

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[178] *See, e.g.*, Headquarters, U.S. South Command, Gen. Order No. 1 (22 Feb. 2021) ("Prohibited Activities for Personnel within the United States Southern Command (USSOUTHCOM) Area of Responsibility (AOR)").

[179] *See, e.g.,* Memorandum from Commanding Gen., Headquarters, Joint Readiness Training Ctr. And Fort Polk, Subject: Joint Readiness Training Center (JRTC) and Fort Polk Policy 12 – Prohibiting Possession of Drug Paraphernalia and Inhalant Abuse paras. 7(a), 8 (12 Apr. 2022) (declaring that huffing is prohibited and that "[t]his policy memorandum constitutes a lawful general order issued under my authority as a General Court-Martial Convening Authority").

[180] PRACTICE AND PROCEDURE, *supra* note 177, § 2-6(A).

[181] DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 7.3 (3d ed. 2020) [hereinafter MILITARY CRIMES AND DEFENSES].

[182] *Id.* § 7.1.

[183] *See* Parker v. Levy, 417 U.S. 733, 756 (1974).

[184] *See* MCM, *supra* note 39, pt. IV, ¶ 91(c).

[185] *See* MILITARY CRIMES AND DEFENSES, *supra* note 181, § 7.1.

[186] PRACTICE AND PROCEDURE, *supra* note 177, §§ 2-6(B), (C).

[187] United States v. Poole, 39 M.J. 819, 821 (A.C.M.R. 1994).

disrepute."[188] Of course, the conduct can be both prejudicial to good order and discipline and service-discrediting.[189] The greatest bar, however, to utilizing the General Article is the notification requirement.

For an Article 134 offense to be constitutional, an accused must have fair notice that the conduct is chargeable as a violation of Article 134, as well as notice of the standard applicable to the forbidden conduct.[190] Criminalizing exploitation via the General Article will fail in this regard. Without a defined standard, individual prosecutors could charge the course of conduct in an ad hoc fashion and accused Service members would not have knowledge of the standard. Localized orders could proscribe the conduct and articulate the standard, but charging localized orders should be done via Article 92, UCMJ vice as a violation of the General Article.[191] The Court of Appeals for the Armed Forces has determined that notice of the criminal conduct can come from "the [MCM], federal law, state law, military case law, military custom and usage, and military regulations."[192] To render the standard universally applicable across the service and notify the entire force, a presidentially-proscribed Article 134 crime is the appropriate mechanism for criminalization.

Following the General Article in the MCM, there are sixteen enumerated crimes under Article 134.[193] These crimes still fall under the General Article, but the President has exercised authority under Article 36, UCMJ to provide clarity and notice by defining elements, maximum punishments, and model specifications for common disorders and neglects.[194] Presidentially-articulated crimes under the General Article

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[188] PRACTICE AND PROCEDURE, *supra* note 177, § 2-6(C).
[189] MCM, *supra* note 39, pt. IV, ¶ 91(c)(6)(a).
[190] MILITARY CRIMES AND DEFENSES, *supra* note 181, § 7.3[3][c][i].
[191] *See* UCMJ, art. 92 (2022) ("Failure to obey order or regulation.").
[192] MILITARY CRIMES AND DEFENSES, *supra* note 181, § 7.3[3][c][i] (citing United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)).
[193] MCM, *supra* note 39, pt. IV, ¶¶ 92-108 (including straggling, dishonorably failing to pay debts, and child pornography). In addition, in January 2022, President Biden signed an executive order making sexual harassment an offense under Article 134 of the UCMJ. Exec. Order No. 14062, 87 Fed. Reg. 4763 (Jan. 31, 2022).
[194] UCMJ art. 36 (2022).

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided

ensure enumerated crimes under Article 134 are not constitutionally overbroad:

> Each article has been construed . . . so as to limit its scope, thus narrowing the very broad reach of the literal language of the articles, and at the same time supplying considerable specificity by way of examples of the conduct that they cover.[195]

Presidential language will accomplish four things. First, it will articulate to the entire force a legally enforceable standard of conduct (see Appendix A). Second, presidential language included in the MCM will satisfy the requirement of placing every military member on notice of the criminal conduct. Third, the President may set the maximum punishments. Fourth, presidentially-proscribed Article 134 crimes require a military nexus. This nexus is vital to ensure that behavior, which may have constitutional implications in the civilian context, can be properly regulated in the military context.

V. Maximum Punishments

Individuals charged with and convicted of exploitation are guilty of unreasonable advances towards potential sexual partners that are prejudicial to good order and discipline or service discrediting. In other words, the actions in pursuit of sexual gratification fell below the standards expected of members of the military.[196] The maximum punishments associated with the crime should correlate to the ultimate harm of the crime. Exploitation that does not result in a sexual act or a sexual contact, should have a low maximum punishment.[197] Even the most egregious cases that lack physical contact should not exceed the summary court-martial sentence limitations. This punishment scheme

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> in chapter 47A of this title, be contrary to or inconsistent with this chapter.

Id. art. 36(a).

[195] MILITARY CRIMES AND DEFENSES, *supra* note 181, § 7.3.

[196] *See* UCMJ art. 133 (2022) ("Conduct unbecoming an officer"). See MCM, *supra* note 39, pt. IV, ¶ 90 for an articulated standard of conduct. The President would have to do the same for this proposed statute and make it applicable to all Service members.

[197] The author recommends thirty days' confinement with no punitive discharge is an appropriate maximum punishment.

will ensure that most exploitation cases without contact, which are minor infractions, are adjudicated via non-judicial punishment, administrative separation, summary courts-martial, or counseling—an appropriate level given the ultimate harm and nature of the crime. Exploitation resulting in sexual contact or sexual act(s) leads to far greater harm than an exploitation without contact. An individual convicted of these subclasses of the crime has exhibited behaviors associated with sexual predation and should face a larger quantum of punishment.[198] A more severe punishment framework for contact cases permits flexibility when the sentencing authority applies the facts to the law and sentencing factors, but can also permit or mandate a punitive discharge where appropriate. The sentencing scheme in these cases should strike a balance between meriting or requiring a punitive discharge with recognition that this crime is not sexual assault, but rather, pursuit of sexual gratification that falls below military community standards.

VI. Conclusion

"Left of bang," military justice only contributes to MSA prevention via deterrence. "Right of bang," military justice is a mechanism to provide accountability for MSA. If Congress, DoD leaders, and commanders want to reduce MSAs and correlated military sexual trauma, targeting precursor behaviors via training and appropriate criminal liability is an effective means of doing so. Exploitation holistically and effectively targets the precursor behaviors, thereby increasing deterrence of, and accountability for, MSA. The proposed statute can pass constitutional muster, does not radically change the military justice system, provides a relief valve for victims and the accused, and provides measured justice for accused Service members.

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[198] The author recommends six months' confinement and a bad conduct discharge for "sexual contact" and twelve months' confinement and a mandatory bad conduct discharge for "sexual act."

Appendix A: Proposed 134 Presidential Language

99. Article 134—(Exploitation)

a. *Text of statute*. See paragraph 91.

b. *Elements*.

(1) *Exploitation*.

(a) That the accused wrongfully engaged in a course of conduct directed at a specific person;[199]

(b) The course of conduct was intended to result in a sexual contact or sexual act as described in section 920(g) of this title (article 120(g));[200]

(c) That, under the circumstances, the course of conduct was unreasonable; and,

(d) That, under the circumstances, the conduct of the accused was either:

(i) to the prejudice of good order and discipline in the armed forces;

(ii) was of a nature to bring discredit upon the armed forces; or

(iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Exploitation resulting in sexual contact*.

(a) That the accused wrongfully engaged in a course of conduct directed at a specific person;[201]

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[199] *See* UCMJ art. 130 (2022) ("Stalking"); MCM, *supra* note 39, pt. IV, ¶ 80.
[200] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.
[201] *See* UCMJ art. 130 (2022) ("Stalking"); MCM, *supra* note 39, pt. IV, ¶ 80.

(b) The course of conduct was intended to result in a sexual contact or sexual act as described in section 920(g) of this title (article 120(g));[202]

(c) That, under the circumstances, the course of conduct was unreasonable;

(d) The conduct resulted in a sexual contact as described in section 920(g) of this title (article 120(g)).[203]

(e) That, under the circumstances, the conduct of the accused was either:

(i) to the prejudice of good order and discipline in the armed forces;

(ii) was of a nature to bring discredit upon the armed forces; or

(iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(3) *Exploitation resulting in a sexual act*.

(a) That the accused wrongfully engaged in a course of conduct directed at a specific person;[204]

(b) The course of conduct was intended to result in a sexual contact or sexual act as described in section 920(g) of this title (article 120(g));[205]

(c) That, under the circumstances, the course of conduct was unreasonable;

(d) The conduct resulted in a sexual act as defined in section 920(g) of this title (article 120(g)).[206]

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[202] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.
[203] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.
[204] *See* UCMJ art. 130 (2022) ("Stalking"); MCM, *supra* note 39, pt. IV, ¶ 80.
[205] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.
[206] UCMJ art. 120 (2022) ("Rape and sexual assault generally"); MCM, *supra* note 39, pt. IV, ¶ 60.

(e) That, under the circumstances, the conduct of the accused was either:

(i) to the prejudice of good order and discipline in the armed forces;

(ii) was of a nature to bring discredit upon the armed forces; or

(iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation*.

(1) The term "conduct" means conduct of any kind, including but not limited to, isolating an individual; persisting despite affirmative lack of consent to the conduct; underage or excessive alcohol consumption; use of illegal substances; orders violations; violations of customs of the service; providing alcohol or other illegal substances; gaining access; setting conditions to permit access; encouraging unlawful conduct; exerting pressure from rank, status, or billet; and violations of other statutes, rules, regulations.

(2) The term "course of conduct" means—

(a) a pattern of conduct composed of repeated acts evidencing a continuity of purpose;

(b) Unreasonable re-engagement without a sufficient lapse of time or cooling off period;[207] or,

(c) Continuing interaction beyond the point at which continued interaction with the individual is not objectively reasonable.

(3) This paragraph prohibits courses of conduct which seriously compromise the Service member's character, or action, or behavior in an unofficial or private capacity which, in dishonoring or disgracing the Service member, seriously compromises the person's standing as a member of the Armed Forces. There are certain moral attributes common to the ideal Service member, a lack of which is indicated by acts of dishonesty, harassment, unfair dealing, indecency, indecorum, lawlessness, injustice, maltreatment, or cruelty. Not everyone is or can be

[207] *See*, Maryland v. Shatzer, 559 U.S. 98, 124 n.7 (2010) (discussing reengaging with counsel, where factors considered included the amount of time to re-acclimate to normal life, consult with friends and counsel, and shake off residual effects of prior custody).

expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity, below which the personal standards of a Service member cannot fall without seriously compromising the person's standing as Service member or the person's character as a Service member. This Article prohibits courses of conduct, by Service members, with the aim of resulting in sexual conduct, which, taking all the circumstances into consideration, is thus compromising.[208]

(4) *Exploitation as a separate offense*. Exploitation is a separate and distinct offense from a sexual assault, and both the exploitation and the consummated offense that was its object may be charged, tried, and punished. The commission of the intended offense may satisfy the intent element of the exploitation charge.

(5) Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. To constitute an offense under the UCMJ, the exploitation must either be directly prejudicial to good order and discipline or service discrediting, or both. Exploitation that is directly prejudicial to good order and discipline includes conduct that has an obvious and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a Service member, or both. Exploitation may be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes exploitation that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While exploitation that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. All relevant circumstances, including but not limited to the following factors, should be considered when determining whether exploitation is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, or both:

(a) The accused's marital status, military rank, grade, or position;

(b) The victim's marital status, military rank, grade, and position, or relationship to the armed forces;

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[208] *See* UCMJ art. 133 ("Conduct unbecoming an officer and a gentleman"); MCM, *supra* note 39, pt. IV, ¶ 90.

(c) The military status of the accused's spouse or the spouse of the victim, or their relationship to the armed forces;

(d) The impact, if any, of the course of conduct on the ability of the accused or the victim or the spouse of either to perform their duties in support of the armed forces;

(e) The negative impact of the course of conduct on the unit or organization of the accused, or the victim, such as a detrimental effect on unit or organization morale, operational readiness, teamwork, loss of trust, efficiency, or reputation;

(f) The misuse, if any, of Government time and resources to facilitate the course of the conduct; and,

(g) The flagrancy of the course of conduct, such as whether any notoriety ensued; and whether the course of conduct included other violations of the UCMJ.

d. Maximum punishment.

(1) *Exploitation.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Exploitation resulting in a sexual contact.* Confinement for 6 months, forfeiture of two-thirds pay per month for 6 months and a bad conduct discharge.

(3) *Exploitation resulting in a sexual act.* Confinement for 12 months and forfeiture of two-thirds pay per month for 12 months. Mandatory minimum dismissal or bad conduct discharge.

e. Sample specification.

(1) *Exploitation.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), with the intent to engage in a (sexual act) (sexual contact), wrongfully engage in a course of conduct to wit:_____ directed at _____, after a reasonable person would have ceased said conduct, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

(2) *Exploitation resulting in sexual contact.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), with the intent to engage in a (sexual act) (sexual contact), wrongfully engage in a course of conduct, to wit:_____ directed at _____, after a reasonable person would have ceased said conduct, the course of conduct resulted in (a sexual contact)(sexual contacts), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

(3) *Exploitation resulting in sexual act.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), with the intent to engage in a (sexual act) (sexual contact), wrongfully engage in a course of conduct to wit:_____ directed at _____, after a reasonable person would have ceased said conduct, the course of conduct resulted in (a sexual act)(sexual acts)(sexual contacts and sexual acts), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).