

JSC'S INITIAL DRAFT TO COMPLEMENT PROPOSED UCMJ  
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**JSC Recommended Option (Part II)**

**Modifications to Part IV, Manual for Courts-Martial**

**45. Article 120—Rape and carnal knowledge**

a. *Text.*

“(a) Any person subject to this chapter who commits an act of sexual intercourse by force is guilty of rape and shall be punished by death or such  punishment as a court-martial may direct.”

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person-- 

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d)(1) In a prosecution under subsection (b), it is an affirmative defense that--

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.

b. *Elements.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.

c. *Explanation.*

(1) *Rape.*

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(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force, on the victim. Any penetration, however slight, is sufficient to complete the offense. Rape may be committed on a victim of any age. A person under twelve years of age is legally incapable of appraising the nature of sexual intercourse, therefore, there is no requirement to prove that the act of sexual intercourse was committed by force. Sexual intercourse with a person under the age of twelve is rape. Any penetration of a person under the age of twelve, however slight, is sufficient to complete the offense. Depending on the nature of the force used, the status of the victim, or the age of the victim, rape may have varying degrees of punishment.

(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for rape, except for rape of a child who has not attained the age of 12. When raised as an affirmative defense, "consent" means words or overt acts indicating a freely given agreement to the sexual intercourse at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual intercourse shall not constitute consent. A person cannot consent to sexual intercourse if they are substantially incapable of appraising the nature of sexual intercourse due to mental impairment or unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of sexual intercourse. Likewise, a person cannot consent if they are physically unable to decline participation in sexual intercourse or physically unable to communicate unwillingness to engage in sexual intercourse. When raised as a defense, "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in sexual intercourse consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused's actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

(c) *Force and degrees of rape.* There are degrees of rape under Article 120 which recognize variations in the level of force or coercion applied to overcome the victim's will. The maximum punishment is dependent upon the force alleged and proven. The degrees of rape are divided by categories of force listed in subparagraphs (1-8) below. For purposes of this paragraph, force means the act of:

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(1) compelling submission of the victim or overcoming or preventing the victim's resistance by—

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

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

(C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;

(2) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;

(3) rendering the victim unconscious;

(4) administering to the victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim's ability to appraise or control the victim's conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping);

(6) causing bodily harm to the victim;

(7) engaging in sexual intercourse with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(A) appraising the nature of the sexual intercourse;

(B) declining participation in the sexual intercourse; or

(C) communicating unwillingness to engage in the sexual intercourse; or

(8) any force not otherwise specified or alleged.

(d) *Threat of Force*. See subparagraphs, *Force*, (c)(1)(c)(2), (c)(1)(c)(4), and (c)(1)(c)(5) above.

(1) "Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm,

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or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) "Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person's property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age*. For purposes of defining "rape," a person under the age of twelve is legally incapable of appraising the nature of sexual intercourse.

(f) *Character of victim*. See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(g) *Evidence of similar crimes*. See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

(h) *Burden in Affirmative defense cases*. An affirmative defense means any special defense which, although not denying that the accused committed the object acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After a defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The accused may not submit an affirmative defense for sexual intercourse with a person under the age of twelve.

(2) *Carnal knowledge*. Recognizing that all sexual intercourse with a person under the age of 12 is rape, there is a separate offense of "carnal knowledge". "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who is at least 12 years of age but who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense.. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.



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d. *Lesser included offenses.*

(1) *Rape.*

- (a) Article 128--assault; assault consummated by a battery
- (b) Article 134--assault with intent to commit rape
- (c) Article 134--indecent assault
- (d) Article 80--attempts
- (e) Article 120(b)--carnal knowledge

(2) *Carnal knowledge.*

- (a) Article 134--indecent acts or liberties with a person under 16
- (b) Article 80--attempts

e. *Maximum punishment.*

(1) *Rape.*

- (a) When committed under circumstances (c)(1)(c)(1-4) or with a person under 12 years of age. Death or such other punishment as a court-martial may direct.
- (b) When committed under circumstances (c)(1)(c)(5-7). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.
- (c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Carnal knowledge.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specifications.*



(1) *Rape.*

In that \_\_\_ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about \_\_\_ 20 \_\_\_, rape \_\_\_, (a person under the age of 12) (by force, to wit: add appropriate force factors from subparagraph (c)(3))

(2) *Carnal knowledge.*

In that \_\_\_ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about \_\_\_ 20 \_\_\_, commit the offense of carnal knowledge with \_\_\_ a person who had attained the age of 12 but was under the age of 16.

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**51. Article 125—Forcible sodomy and sodomy of a child**

a. *Text.*

“(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person by force is guilty of forcible sodomy. Any person found guilty of forcible sodomy shall be punished as a court-martial may direct.”

(b) Any person subject to this chapter who, under circumstances not amounting to forcible sodomy, commits an act of unnatural carnal copulation with a person –

- (1) who is not his or her spouse; and
- (2) who has not attained the age of sixteen years, is guilty of sodomy with a child and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

b. *Elements.*

(1) Forcible Sodomy

- (a) That the accused engaged in unnatural carnal copulation with a certain other person; and
- (b) That the act of unnatural carnal copulation was done by force.

(2) Sodomy of a Child

- (a) That the accused engaged in unnatural carnal copulation with a certain other person;
- (b) That the person was not the accused's spouse; and
- (c) That at the time of the unnatural carnal copulation the person had attained the age of 12 but was under the age of 16.

c. *Explanation.* The offense of sodomy is now divided into three categories. First, forcible sodomy includes unnatural carnal copulation with another person by force or unnatural carnal copulation with a person under the age of twelve. Second, sodomy of a child is unnatural carnal copulation with a person who has attained the age of twelve but has not attained the age of sixteen, regardless of whether or not any level of force or coercion has been applied. Third, unnatural carnal copulation with another person, where force is not applied, may be charged under Article 134, “Sex-related offenses.”

(1) Forcible sodomy.

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

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Depending on the nature of the force or coercion used, the victim's capacity, or the age of the victim, forcible sodomy may have varying degrees of punishment.

(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for forcible sodomy, except for sodomy of a child who has not attained the age of 12. For purposes of "forcible sodomy," an individual under twelve years of age is legally incapable of appraising the nature of sodomy. When raised as an affirmative defense, "consent" means words or overt acts indicating a freely given agreement to the sodomy at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sodomy shall not constitute consent. A person cannot consent to sodomy if they are substantially incapable of appraising the nature of sodomy due to mental impairment or unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of sodomy. Likewise, a person cannot consent if they are physically unable to decline participation in sodomy or physically unable to communicate unwillingness to engage in sodomy. When raised as a defense, "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in sodomy consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused's actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

(c) *Force and Degrees of Forcible Sodomy.* There are degrees of forcible sodomy under Article 125 which recognize variations in the level of force or coercion applied to overcome the victim's will. The maximum punishment is dependent upon the force alleged and proven. The degrees of forcible sodomy are divided by categories of force listed in subparagraphs (1-8) below. For purposes of this paragraph, force means the act of:

- (1) compelling submission of the victim or overcoming or preventing the victim's resistance by—
  - (A) the use or display of a dangerous weapon or object;
  - (B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause the victim to believe it is a dangerous weapon or object; or

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(C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;

(2) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;

(3) rendering the victim unconscious;

(4) administering to victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim's ability to appraise or control the victim's conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)

(6) causing bodily harm to the victim;

(7) engaging in the sodomy with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(A) appraising the nature of the sodomy;

(B) declining participation in the sodomy; or

(C) communicating unwillingness to engage in the sodomy; or

(8) any force not otherwise specified or alleged.

(d) *Threat of force.* See subparagraphs, *Force*, (c)(1)(c)(2), (c)(1)(c)(4), and (c)(1)(c)(5) above.

(1) "Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) "Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm

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than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person's property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age.* For purposes of defining "forcible sodomy," a person under the age of twelve is legally incapable of appraising the nature of the sexual conduct.

(f) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(g) *Evidence of similar crimes.* See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

(h) *Burden in Affirmative defense cases.* An affirmative defense means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After a defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The accused may not submit an affirmative defense regarding consent for unnatural carnal c[REDACTED]lation with a person under the age of twelve. The accused may not submit an affirmative defense of mistake of fact as to age for the offense of sodomy with a person under the age of 16.

d. *Lesser included offenses.*

(1) Forcible Sodomy

- (a) Article 125—sodomy of a child
- (b) Article 134—assault with intent to commit sodomy
- (c) Article 134—sexual related offenses
- (d) Article 134—indecent assault
- (e) Article. 80--attempts



Sodomy of a Child

- (a) Article 134 - indecent acts or liberties with a child
- (b) Article 80—attempts

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e. *Maximum punishment.*

(1) Forcible Sodomy

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) Sodomy of a Child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification.*

(1) Forcible Sodomy.

In that ----- (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ----- 20---, commit sodomy with -- -----, (a person who has not attained the age of 12)(by force, to wit: ----- add force elements from paragraph (c)(1)(c)(1-8) as applicable).

(2) Sodomy of a Child.

In that \_\_\_ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on \_\_\_ or about \_\_\_ 20 \_\_\_, commit the offense of sodomy of a child with \_\_\_ (a person who had attained the age of 12 but was under the age of 16).

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**63. Article 134--(Indecent assault and indecent acts with a child)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) Indecent Assault

(a) That the accused engaged in a sexual act or a sexual contact not amounting to sexual intercourse or sodomy with a certain person;

(b) That the sexual act or sexual contact was done by force or with a child under the age of 12;

(c) That the sexual act or sexual contact was done with the intent to abuse, humiliate, or degrade another person, or to arouse or gratify the sexual desires of any person; and

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

(2) Indecent Act with a Child

(a) That the accused engaged in a sexual act or a sexual contact not amounting to sexual intercourse or sodomy with a certain person;

(b) That the act was done with a child who had attained the age of 12 but was under the age of 16;

(c) That the acts were done with the intent to abuse, humiliate, or degrade another person, or to arouse or gratify the sexual desires of any person; and

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

c. *Explanation.* See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For one of the definitions of "indecent", see paragraph 90 c.

(1) Indecent Assault

(a) *Scope.* Indecent assault includes all sexual acts, as defined by paragraph 62c(3)(a) and those sexual contacts defined by paragraph 62c(3)(b) that do not constitute sexual intercourse or sodomy (other penetrations). These sexual acts include the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. These sexual contacts include the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

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(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for indecent assault, except for indecent assault of a child who has not attained the age of 12. For purposes of “indecent assault” an individual under twelve years of age is legally incapable of appraising the nature of sexual contact or any sexual act not amounting to sexual intercourse or sodomy. When raised as an affirmative defense, “consent” means words or overt acts indicating a freely given agreement to the sexual act at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual act or sexual contact shall not constitute consent. A person cannot consent to a sexual act or sexual contact if they are substantially incapable of appraising the nature of the sexual act or sexual contact due to mental impairment or unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of the sexual act or sexual contact. Likewise, a person cannot consent if they are physically unable to decline participation in the sexual act or sexual contact or physically unable to communicate unwillingness to engage in the sexual act or sexual contact. When raised as a defense, “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual act or sexual contact consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused’s actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

Affirmative Defense. In a prosecution under Indecent Act with a Child, it is an affirmative defense that the person with whom the accused committed the sexual act or sexual contact had at the time of alleged offense attained the age of twelve years and that the accused reasonably believe that the person had at the time of the alleged offense attained the age of 16 years. The accused has the burden of proving this affirmative defense by a preponderance of the evidence.

(c) *Force and degrees of indecent assault.* There are degrees of indecent assault under Article 134 which recognize variations in the level of force applied to the overcome the victim’s will. The maximum punishment is dependent upon the force alleged and proven. The degrees of indecent assault are divided by categories of force listed in subparagraph (1-8) below. For purposes of this paragraph, force means the act of

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(1) compelling submission of the victim or overcoming or preventing the victim's resistance by—

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

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

(C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;

(2) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;

(3) rendering the victim unconscious;

(4) administering to victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim's ability to appraise or control the victim's conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)

(6) causing bodily harm to the victim;

(7) engaging in a sexual act or sexual contact with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(i) appraising the nature of the sexual act;

(ii) declining participation in the sexual act; or

(iii) communicating unwillingness to engage in the sexual act; or

(8) any force not otherwise specified or alleged.

(d) *Threat of Force*. See subparagraphs (c)(1)(c)(2), (c)(1)c(4), and (c)(1)c(5) above.

(1) "Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm,

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or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) “Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)” means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person’s property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age.* For purposes of “indecent assault,” a person under twelve years of age is legally incapable of appraising the nature of sexual acts or sexual contacts.

(f) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to the alleged character of the victim of an indecent assault.

(g) *Evidence of similar crimes.* See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

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

d. *Lesser included offenses.*

(1) Indecent Assault

- (a) Article 128--assault consummated by a battery; assault
- (b) Article 134—indecent acts or indecent liberties
- (c) Article. 134—sexual related offenses
- (d) Article 80—attempts

(2) Indecent Acts with a Child



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- (a) Article 128--assault consummated by a battery; assault
- (b) Article 134--indecent acts
- (c) Article 134-- indecent liberties with a child
- (d) Article 80-- attempts

e. *Maximum punishment.*

(1) Indecent Assault when conviction is for sexual act (penetration).

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7) or with a child who has attained 12 years of age but has not attained 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) Indecent Assault when conviction is for sexual contact (non-penetration).

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7) or with a child who has attained 12 years of age but has not attained 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) Indecent acts with a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification.*

(1) Indecent Assault.

In that ----- (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ----- 20---, commit an indecent assault upon -----, to wit: (type of sexual contact or penetration sexual act) (a child under the age of 12) (by force, to wit: (add forcible indecent assault elements from paragraph (c)(1)(c)(1-8) as applicable) with intent to (abuse)(humiliate)(harass) (degrade)\_\_\_\_\_ or (arouse or gratify the (lust)(sexual desire) of \_\_\_\_\_).

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(2) Indecent Acts with a child.

In that \_\_\_ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about \_\_\_ 20 \_\_\_, commit an indecent act (with (upon the body of) \_\_\_\_\_, a person who has attained the age of 12 but has not attained the age of 16 years, by (type of sexual contact or sexual act - penetration) , with intent to (abuse)(humiliate)(harass)(degrade)\_\_\_\_\_or (arouse or gratify the (lust)(sexual desire) of \_\_\_\_\_).

**[NOTE: The offenses of “Assault with intent to commit rape and sodomy”, in violation of Article 134, UCMJ, currently found in the Manual for Courts-Martial at Part IV, paragraph 64, would be re-aligned with the above offenses due to the fact that they are sexual in nature and involve acts of assault.]**

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**62. Article 134**—(Sex-related offenses)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Adultery.*

- (a) That the accused wrongfully had sexual intercourse with a certain person;
- (b) That, at the time of the sexual intercourse, the accused or the other person was married to someone else; and
- (c) That, r the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces

(2) *Sodomy, sexual act or sexual contact.*

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

(3) *Prostitution.* 

- (a) That the accused wrongfully engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with ther person;
- (b) That the accused did so for the purpose of receiving money or other compensation; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(4) *Patronizing a prostitute.*

- (a) That the accused engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with another person not the accused's spouse;
- (b) That the accused induced, enticed, or procured such person to engage in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact in exchange for money or other compensation;
- (c) That this act was wrongful; and
- (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(5) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging a sexual act, sexual contact or lewd act.*

- (a) That the accused compelled, induced, enticed, procured, arranged, or received consideration for arranging with another person to engage in

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sexual intercourse, unnatural carnal copulation, sexual act or sexual contact for hire and reward; and

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

(6) Public offenses. *Engaging in sexual intercourse, sodomy, sexual act or sexual contact with another person knowing that a third person is present in the same room or in a public place.*

(a) That the accused wrongfully engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with a certain person;

(b) That, at the time of the sexual intercourse, unnatural carnal copulation, sexual act or sexual contact, the accused knew a third person was present in the same room; or

 (c) That, at the time of the sexual intercourse, unnatural carnal copulation, sexual act or sexual contact, the accused was in a public place; and

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

c. *Explanation.*

(1) *Nature of the offenses.* These offenses are clearly unacceptable conduct, and reflect adversely on the military as prejudicial to good order and discipline or service discrediting. "Sex-related offenses" may encompass those acts historically recognized as

(a) "Indecent Acts"

 (b) "Adultery"—the act of a married individual having sexual intercourse with someone other than his spouse or the act of an unmarried individual having sexual intercourse with a married individual;

(c) "Consensual" sodomy-nsensual unnatural carnal copulation between individuals; and

(d) "Bestiality"unnatural carnal copulation with an animal; and

if such acts are *prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.*

(2) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, these offenses must either be directly prejudicial to good order and discipline or service discrediting. Conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit



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or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member. These offenses may also 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 conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While conduct that is private and discreet in nature, may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces:

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

In a prosecution under paragraph 62, it is an affirmative defense that the accused and the other person engaged in the sexual act or sexual contact are married to each other. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. The

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accused has the burden of proving an affirmative defense under paragraph 62 by a preponderance of the evidence.

(3) *Definitions.* For purposes of this paragraph the following definitions apply:

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

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

(c) *Sodomy.* See paragraph 51 (c)(1) for the definition of unnatural carnal copulation (sodomy).

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d. *Lesser included offenses.*

(1) *Adultery.*—Article 80—attempts

(2) *Sodomy, Sexual act and Sexual contact.*—Article 80—attempts

(3) *Prostitution.*—Article 80—attempts

(4) *Patronizing a prostitute.*—Article 80—attempts

(5) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual act, or sexual contact.*—Article 80—attempts

(6) *Engaging in a sexual intercourse, unnatural carnal copulation, sexual act or, al contact with another person knowing that a third person is present in the same room or in a public place.*—Article 80—attempts

e. *Maximum punishment.*

(1) *Adultery.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

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(2) *Sodomy, Sexual act and sexual contact.*

(a) When involving a prisoner or detainee. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(b) In a public place or knowingly in the presence of a third party. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.

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(c) All other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(3) *Prostitution.*

(a) *Patronizing a prostitute and prostitution.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(b) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual act or sexual contact.*

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(4) *Engaging in sexual intercourse, unnatural carnal copulation, sexual act or, sexual contact with another person knowing that a third person is present in the same room or in a public place.* Dishonorable discharge, forfeiture of all pay and allowances and confinement for three years.

f. *Sample specifications.*

(1) *Adultery*

In that \_\_\_\_\_ (personal jurisdiction data)(a married man/a married woman), did, (at/on board – location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_ 20\_\_\_\_, wrongfully have sexual intercourse with \_\_\_\_\_, a (married) (woman/man) not (his wife)(her husband).

(2) *Sodomy, sexual act, or sexual contact.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_ 20 \_\_\_\_, engage in a (unnatural carnal copulation)(sexual act) (sexual contact) with \_\_\_\_\_ (a prisoner or detainee) (in a public place) (in the presence of a third party) by \_\_\_\_\_.

(3) **Prostitution-related offenses.**

(a) *Prostitution.*

In that \_\_\_\_\_(personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_20\_\_\_\_, engage in (sexual intercourse)(unnatural carnal copulation)(sexual act) (sexual contact) with \_\_\_\_\_, a person not (his) (her) spouse, for the purpose of receiving (money) (\_\_\_\_\_).

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*(b) Patronizing a prostitute.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_, wrongfully induced, enticed, or procured \_\_\_\_\_, a person not (his) (her) spouse, to engage in (sexual intercourse)(unnatural carnal copulation)(sexual act) (sexual contact) in exchange for (money) (\_\_\_\_\_).

*(c) Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual acts or contacts.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_, (compel) (induce) (entice) (procure) \_\_\_\_\_ to engage in (sexual intercourse) (unnatural carnal copulation) (sexual act) (sexual contact) for hire and reward.

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_, (arrange for) (receive valuable consideration, to wit: \_\_\_\_\_ on account of arranging for) \_\_\_\_\_ to engage in (sexual intercourse)(unnatural carnal copulation) (sexual act) (sexual contact) with \_\_\_\_\_.

*(4) Public offenses. Engaging in sexual intercourse, unnatural carnal copulation, sexual act or, sexual contact with another person knowing that a third person is present in the same room or in a public place.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board – location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_, wrongfully engage in (sexual intercourse)(unnatural carnal copulation)(sexual act)(sexual contact) (to wit: (description of sexual act/contact)) with \_\_\_\_\_ a (woman)(man)(with a third person(s) present in the same room)(in a public place).

[NOTE: Additional sex-related offenses which do not include force provisions, such as “indecent acts,” “indecent exposure,” “indecent language,” “wrongful cohabitation,” “fraternization,” and indecent liberties with a child” will be re-aligned under this paragraph to consolidate all sexually related offenses in one location in the MCM.]