HOSTILITY IS IN THE EYE OF THE BEHOLDER: WHY CONGRESS SHOULD DECRIMINALIZE HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT IN THE MILITARY

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ABSTRACT

In 2022, for the first time in American history, Congress enacted legislation criminalizing hostile work environment sexual harassment. More serious types of sexual harassment have long been criminal under the Uniform Code of Military Justice, but hostile work environment harassment is a civil wrong, not a crime, and should not have been made into one.

Section 539D of the National Defense Authorization Act for Fiscal Year 2022 (now listed under Article 134, UCMJ (Sexual Harassment), is both unconstitutional and counterproductive. It violates the Fifth Amendment for vagueness by failing to provide fair notice of what is prohibited, and the First Amendment for overbreadth by punishing a substantial amount of protected free speech. The new punitive article will, perhaps counterintuitively, exacerbate the problem of sexual harassment by: (1) creating disproportionately severe punishment for the offender; (2) increasing antagonism between the offender and offended party; and (3) raising the evidentiary burden of proof for complaints. Treating sexual harassment as a crime rather than inappropriate workplace conduct raises the stakes beyond that which is conducive to actual learning, healing, and, ultimately in this context, effective warfighting.

Accordingly, Congress should repeal Section 539D of the National Defense Authorization Act for Fiscal Year 2022 (Section 539D of the FY22 NDAA) and the President should cancel Executive Order 14062. The Services should also eliminate hostile work environment sexual harassment entirely from the criminal context by removing the punitive language from their regulations in favor of restorative justice, as well as administrative discipline and separation. This is the only way for the United States to make lasting progress toward reducing the problem of sexual harassment in the military.

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The most pressing problem with criminal law today is that we have too much of it.[1]

INTRODUCTION

In 2005, Saturday Night Live performed a sketch satirizing a sexual harassment training video in which attractive and unattractive males—Tom Brady and Fred Armisen, respectively—say the same inappropriate things to their female co-workers but elicit opposite responses: a welcome agreement to go to lunch and a sexual harassment lawsuit.[2] The final frame listed the following steps to avoid sexual harassment claims: "1. Be Handsome, 2. Be Attractive, 3. Don't be Unattractive."[3]

Today, no one would deny that sexual harassment is a problem and should be taken seriously, but the sketch illustrates how relatively minor sexual harassment claims are fundamentally subjective.[4] Such a nebulous and inconsistent standard of conduct has no place in criminal law. Nonetheless, on May 1, 2019, the Acting Secretary of Defense, Patrick M. Shanahan, issued a Memorandum directing the Department to "tak[e] steps to seek a standalone military crime of sexual harassment."[5] Shortly thereafter, in light of the Specialist Vanessa Guillén tragedy—in which a young soldier was sexually harassed, went missing, and was later found murdered—members of the Senate and House of Representatives introduced similar bills purporting to enact a law to criminalize military sexual harassment.[6] In 2021, Congress passed the National Defense Authorization Act for Fiscal Year 2022 ("FY22 NDAA"), specifically criminalizing hostile work environment sexual harassment for the first time in the history of the United States.[7]

Sexual harassment consists of two categories of behavior: (1) abuse of power, known as "quid pro quo" harassment; and (2) conduct that creates an intimidating, hostile, or offensive working environment.[8] The latter is often referred to as "hostile work envi-

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1 DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2007).

2 Saturday Night Live, *Sexual Harassment and You - Saturday Night Live*, YOUTUBE (Oct. 24, 2013), https://www.youtube.com/watch?v=PxuUkYiaUc8 (showing each male character saying, "Hi Lisa, you look pretty hot today. Maybe we should go to lunch sometime," while Brady's character goes further and touches Lisa's breast).

3 *Id.*

4 Hugo Schwyzer, *It's Okay to Call a Guy Creepy*, THE ATLANTIC (June 27, 2013), https://www.theatlantic.com/ sexes/archive/2013/06/its-okay-to-call-a-guy-creepy/277256.

5 SECRETARY OF DEFENSE, ACTIONS TO ADDRESS AND PREVENT SEXUAL ASSAULT IN THE MILITARY 1 (2019).

6 CHRISTOPHER SWECKER ET AL., FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 5–10 (2020), https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_ redacted.pdf; I Am Vanessa Guillén Act, S. 4600, 116th Cong. § 3 (2020); I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. § 3 (2020).

7 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021). There are not even serious calls to make hostile work environment sexual harassment a crime in any other jurisdiction. *See, e.g.*, Sally Kohn, *Sexual Harassment Should be Treated as a Hate Crime*, WASH. POST (Dec. 11, 2017, 6:00 AM) https://www.washingtonpost.com/news/posteverything/wp/2017/12/11/sexual-harassment-should-be-treated-as-a-hate-crime/ ("I don't mean this in the formal, legal sense.").

8 Dianne Avery, *Overview of the Law of Sexual Harassment and Related Claims, in* LITIGATING THE SEXUAL HARASSMENT CASE 3 (Matthew B. Schiff & Linda C. Kramer eds., 2d ed. 2000) (noting the Supreme Court's use of the terms "quid pro quo" and "hostile working environment" in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2077 (2003); AUGUSTUS B. COCHRAN III, SEXUAL HARASSMENT AND THE LAW 55–127 (2004).

ronment" harassment.[9] Exploitative conduct like quid pro quo sexual harassment has long been criminalized under the Uniform Code of Military Justice ("UCMJ"), and Section 539D of the FY22 NDAA does not change or replace any of the existing articles in the UCMJ that cover that type of conduct. This Article focuses on the innovation of hostile work environment harassment as a crime.[10]

This behavior, while inappropriate, is not a crime by nature and should not have been made into one. Section 539D of the FY22 NDAA, and its implementing document Executive Order 14062, are unconstitutionally vague and overbroad.[11] Moreover, criminalization is an ineffective means to address hostile work environment sexual harassment.[12] Accordingly, Congress should repeal Section 539D, and the President should cancel the Executive Order.[13] Furthermore, the Services should eliminate hostile work environment sexual harassment entirely from the criminal context by removing the punitive language from their regulations in favor of implementing restorative justice and administrative discipline and separation.

> To understand the inception and evolution of sexual harassment as a civil wrong and how it came to be a crime for Service members, Part I tracks the historical context of this area of the law. Part II demonstrates that the new punitive article is both unconstitutional and counterproductive. Part III suggests some legal and practical ways to address sexual harassment without the "blunt tool of the criminal law."[14]

I. HISTORICAL CONTEXT

A. Sexual Harassment in the Civilian Workplace

While inappropriate behavior in the workplace is not new, sexual harassment as a legal concept is rather novel.[15] The Civil Rights Act of 1964 proscribed employers from discriminating on the basis of sex, among other things.[16] Sex-based discrimination was—

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9 Avery, *supra* note 8, at 3.

10 *See, e.g.*, UCMJ arts. 92 (1950), 93 (1950), 93a (2019), 120 (2017), 128 (2018), 133 (2021), 134 (2019); National Defense Authorization Act for Fiscal Year 2022 § 539D. The preemption doctrine requires that conduct covered by Articles 80 through 132 UCMJ, be charged thereunder, not under Article 134. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 91.c(5) (2019) [hereinafter MCM 2019]; United States v. Avery, 79 M.J. 363, 366 (C.A.A.F. 2019).

11 *See* Part IIIA.

12 *See* Part IIIB.

13 National Defense Authorization Act for Fiscal Year 2022 § 539D; Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

14 Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607, 613 (2015).

15 COCHRAN III, *supra* note 8, at 27; KERRY SEGRAVE, THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 TO 1993, 1–80 (1994); *see also* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 27 (1979) (noting that the lack of data about sexual harassment prior to the mid-1970s was "not surprising" given that "women would not complain of an experience for which there has been no name.").

16 *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. §§ 2000e-2–2000e-17).

and continues to be in all other United States jurisdictions—a civil liability issue, not a crime.[17] Congressional sponsors of the original bill focused on racial discrimination and did not include "sex" in the text until the last moment on the House floor.[18] After the Civil Rights Act became law, feminist scholars and activists litigated Title VII claims to expand discrimination on the basis of sex to cover all sexually inappropriate workplace behavior.[19] By THE LATE 1970s, THE definition of discrimination had evolved, due in large part to civil rights activists and sympathetic judges.[20] Discrimination on the basis of sex ultimately developed into a new concept of sexual harassment, which included (1) quid pro quo, and (2) hostile work environment harassment.[21]

B. Sexual Harassment in the Military

Several high-profile sexual harassment scandals among Service members have given the American public cause to be concerned about the extent of sexual harassment in the military. In 1988, concurrent with the growing awareness of sexual harassment in the United States generally, the Department of Defense ("DoD") initiated policies to define sexual harassment for its personnel.[22] However, the DoD did not make hostile work environment sexual harassment a crime.[23] Conduct amounting to quid pro quo or severe forms of sexual harassment had already been covered by other punitive (i.e., criminal) articles within the UCMJ for over 70 years.[24] The absence of an explicit punitive prohibition on any form of sexual harassment swiftly changed in 1991 with the infamous "Tailhook Scandal."[25]

In October 1991, Lieutenant Paula Coughlin of the U.S. Navy, attended the annual Tailhook Convention in Las Vegas and suffered horrendous treatment by her fellow officers in the hotel.[26] The actions she described—so called "traditions" of the convention—unambiguously constituted sexual harassment, and in some cases, assault, in violation of then-existing criminal law and DoD policy.[27] To make the problem worse, the admiral to

[17] Iris Hentze & Rebecca Tyus, *Sexual Harassment in the Workplace*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 12, 2021), HTTPS://WWW.NCSL.ORG/LABOR-AND-EMPLOYMENT/SEXUAL-HARASSMENT-IN-THE-WORKPLACE (last visited Jan. 13, 2024); *see, e.g.*, Sally Kohn, *supra* note 7 ("I don't mean this in the formal, legal sense.").

[18] Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 140 (1997).

[19] ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT? FROM THE CAPITOL HILL TO THE SORBONNE 33 (2003).

[20] *Id.* (citing, for example, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)).

[21] *Id*.

[22] Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1, 1–2, 8, 10 (1993) (noting that the Navy and Air Force policies at that time were non-punitive).

[23] *Id.* at 7–8.

[24] *See, e.g.*, UCMJ arts. 92 (1950), 93 (1950), 93a (2019), 120 (2017) (first enacted in 1950), 128 (2018), 133 (2021), 134 (2019).

[25] Kingsley R. Browne, *Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse than the Disease*, 14 DUKE J. GENDER L. & POL'Y 749, 750 (2007) [hereinafter *Military Sex Scandals from Tailhook to the Present*]; Chema, *supra* note 22, at 10.

[26] Chema, *supra* note 22, at 20–21.

[27] *See Military Sex Scandals from Tailhook to the Present*, *supra* note 25, at 751 (explaining that it was not uncommon for a "gauntlet" to form in a hotel passageway when females walked through during which the perpetrators would push the victims through while "grabbing at their buttocks, breasts, and crotches.").

whom Lieutenant Coughlin first reported this abuse "essentially took no action."[28] The Navy began seriously investigating the incident only after Lieutenant Coughlin wrote a letter to the Assistant Chief of Naval Operations.[29] The investigation ultimately identified eighty-three female and seven male victims.[30]

In 1993, in response to growing national interest in this scandal and sexual harassment as a whole, the Secretary of the Navy published a general order which made prohibitions on both quid pro quo and hostile environment sexual harassment punitive.[31] In 1997, Congress specifically defined sexual harassment for administrative purposes within the DoD, but again declined to make it criminal.[32] Civil, rather than criminal, jurisprudence formed the basis for the definition and the implementing DoD Instruction ("DoDI"), creating "a sort of legal Frankenstein."[33]

As subsequent sexual misconduct cases came to light, each of the Services took independent approaches to incorporating the DoDI definition in punitive orders.[34] In 2020, the discovery of an environment permissive of sexual harassment at Fort Hood after the murder of Army Specialist Vanessa Guillén precipitated the Congressional bills introduced to create a specific punitive article for sexual harassment.[35] In 2021, Congress passed the legislation specifically criminalizing hostile work environment sexual harassment—FY22 NDAA.[36] In 2022, the President implemented and interpreted the law in Executive Order 14062.[37]

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28 Chema, *supra* note 22, at 21–22.

29 *Id.* at 21.

30 Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 587 (2014).

31 Chema, *supra* note 22, at 23–25. The Secretary of the Navy's response was likely more a messaging tactic than filling a gap in the law, since 140 officers were ultimately referred for disciplinary action under existing rules. Dana Michael Hollywood, C*reating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 202 n.47 (2007).

32 Rather, Congress defined the type of conduct it required the Secretary of Defense to investigate and report. *See* 29 C.F.R. § 1604.11; National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 343, 111 Stat. 1629 (1997), 10 U.S.C. § 1561.

33 Hollywood, *supra* note 31, at 172 (referring to the definition of sexual harassment then listed in DoDI 1350.2, a predecessor to DoDI 1350.02 and DoDI 1020.03); U.S. DEP'T OF DEF., INSTRUCTION 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES 3 (Feb. 8, 2018) (Change Two effective December 20, 2022), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/102003p.PDF.

34 MCM 2019, *supra* note 10, at pt. IV, ¶ 18c(1)(a); *see, e.g.*, U.S. Navy Regulations § 1166 (1990); U.S. DEP'T OF ARMY, REGUL. 600-20, ARMY COMMAND POLICY para 7-7I (July 24, 2020) [hereinafter ARMY REGUL. 600-20], https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN32931-AR_600-20-004-WEB-6.pdf.

35 SWECKER ET AL., *supra* note 6, at 114; I Am Vanessa Guillén Act, S. 4600, 116th Cong. § 3 (2020); I Am Vanessa Guillén Act of 2020, H.R. 8270 116th Cong. § 114 (2020).

36 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021).

37 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

II. PROBLEMS WITH CRIMINALIZATION

A. The New Punitive Article is Unconstitutional

Section 539D of the FY22 NDAA violates the Constitution for both vagueness and overbreadth. This new law fails to provide fair notice of what is prohibited and punishes a substantial amount of protected free speech.[38] Unlike other crimes that have counterparts in tort law such as battery, "sexual harassment is very much an evolving, controversial, and unsettled area of the law."[39] Even as early as 1993, military criminal law practitioners recognized that the ambiguity of sexual harassment rules in civil litigation "have been magnified in the indiscriminate adaptation of the concept into military criminal law."[40] As Judge Erdmann of the Court of Appeals for the Armed Forces ("CAAF") admonished, "[g]iven this shift from an employment violation to a federal criminal violation, I believe that we must carefully scrutinize offenses which criminalize conduct that would not be criminal in the civilian world."[41]

1. Vagueness

Nullum crimen sine lege is the universal principle of legality—that there can be no crime without law—and therefore a state must establish its proscriptive statutes in a "precise and clear manner."[42] Criminal laws must be even more precise than civil codes, given the severe consequences of a federal conviction.[43] Notwithstanding the deference that the Supreme Court has historically offered the military justice system, a law specific to the military is unconstitutionally vague if it does not provide a Service member of ordinary intelligence fair notice of what is prohibited, or if it is so standardless that it authorizes or encourages discriminatory enforcement.[44] Section 539D of the FY22 NDAA fails both of these tests.

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38 U.S. CONST. amends. I, V; Parker v. Levy, 417 U.S. 733, 752 (1974); Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (citing Broadrick v. Oklahoma, 413 U.S. 601, 615, (1973)); United States v. Pope, 63 M.J. 68, 73 (C.A.A.F. 2006); United States v. Olivares, No. 201800125, 2019 CCA LEXIS 97, at *10 (N-M Ct. Crim. App. Mar. 7, 2019) (citing United States v. Williams, 533 U.S. 285, 304 (2008)); United States v. Rundle, ARMY MISC 20190158, 2019 CCA LEXIS 236, at *6 (A. Ct. Crim. App. May 17, 2019) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

39 Chema, *supra* note 22, at 11.

40 *Id.* (referring to SEC'Y OF THE NAVY INSTRUCTION 5300.26B, POLICY ON SEXUAL HARASSMENT (Jan. 6, 1993)). Much of Lieutenant Commander Chema's criticism of the Instruction prohibiting, among other things, hostile work environment sexual harassment, is applicable to Section 539D of the FY22 NDAA.

41 United States v. Goodman, 70 M.J. 396, 402 n.1 (C.A.A.F. 2011) (Erdmann, J., dissenting).

42 Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability*, 1994 WIS. L. REV. 29, 30 (1994); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U.L. REV. 241, 244 (2002).

43 *Pope*, 63 M.J. at 76 (Erdmann, J., dissenting) (quoting United States v. Gaudreau, 860 F.2d 357, 359–60 (10th Cir. 1988)); *see, e.g.*, Long v. State, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) (en banc) ("The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed.").

44 Parker v. Levy, 417 U.S. 733, 752 (1974); *Pope*, 63 M.J. at 73 (noting in other words that "a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed."); United States

a. Fair Notice

Appellate scrutiny of vagueness concerning sexual harassment has been limited. The military courts of criminal appeals have exclusively found that the conduct in question was so far beyond the line of acceptability that vagueness challenges were inapplicable.[45] As seen through the discussion of its language later in this Article, Section 539D of the FY22 NDAA has now opened the aperture of potential criminal conduct in a way that does not give fair notice to Service members and will thus invite further litigation on this issue.

In *United States v. Pope*, the CAAF denied a challenge to an Air Force recruiting order prohibiting sexual harassment.[46] The facts are hardly debatable as a case of severe sexual harassment. Staff Sergeant Keith Pope of the U.S. Air Force, a thirty-five-year-old male, made sexual statements and gestures toward three applicants between the ages of sixteen and eighteen years old, and was convicted of several charges, including violations of Articles 92, 93, and 128 of the UCMJ.[47] The CAAF concluded that Staff Sergeant Pope was adequately on notice that his conduct was criminal because the applicable order stated that recruiters must be "totally professional in their relationships with applicants," and all recruiters receive a brief on the topic at initial recruiter training.[48]

Problematically, the CAAF conflated the generally prohibited conduct portion of the order with the hostile work environment portion, holding simply that "a reasonable person would have been on notice that misconduct of the sort engaged in by [Staff Sergeant Pope] was subject to criminal sanction."[49] As the dissent noted, it is not material whether Staff Sergeant Pope himself violated the order, but "whether the [order] was adequate to inform him what conduct would be prohibited and whether the [order] provides adequate enforcement standards."[50] Moreover, the CAAF did not address how "unwelcome" conduct could ever be objective, or further define either "conduct of a sexual nature," or "intimidating, hostile, or offensive environment."[51] As discussed below, Section 539D of the FY22

v. Olivares, No. 201800125, 2019 CCA LEXIS 97, at *10 (N-M Ct. Crim. App. Mar. 17, 2019) (citing United States v. Williams, 533 U.S. 285, 304 (2008)); United States v. Rundle, ARMY MISC 20190158, 2019 CCA LEXIS 236, at *5 (A. Ct. Crim. App. May 17, 2019) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)).

45 *See, e.g.*, *Pope*, 63 M.J. at 73; *see also Olivares*, No. 201800125, 2019 CCA LEXIS 97, at *9–10; United States v. Da Silva, No. ACM 39599, 2020 CCA LEXIS 213, at *18 (A.F. Ct. Crim. App. June 25, 2020).

46 *Pope*, 63 M.J. at 71 (quoting AIR EDUC. & TRAINING COMMAND, INSTRUCTION 36-2002, RECRUITING PROCEDURES FOR THE AIR FORCE, ¶ 1.1.2.2.5.5 (Apr. 18, 2000)).

47 *Id.* at 69–71. Staff Sergeant Pope's conduct included asking the eighteen-year-old about her past relationships, informing her that he was looking at a picture that was "not the kind you take home to your grandmother," asking her to come to his house "to take pictures of her," and "look[ing] her up and down." *Id.* at 71. In reference to the seventeen-year-old's eyebrow ring, Staff Sergeant Pope said, "that's driving me crazy, that [sic] so sexy." *Id.* He told the sixteen-year-old applicant that she was "pretty," that she "had a lot going for [her]," and placed his hand on her knee "for a couple of seconds" in a vehicle returning from the Air Force entrance exam. *Id.* at 70–71. The court-martial convicted Staff Sergeant Pope of violating Articles 92, 93 and 128, UCMJ. *Id.* at 69.

48 *Id.* at 74 ("It was not necessary for the Air Force recruiting instruction to identify every possible nook and cranny in the line of conduct, for the line is straight and narrow.").

49 *Id.*

50 *Id.* at 79 (Erdmann, J., dissenting).

51 *Id.* at 77 (Erdmann, J., dissenting).

NDAA and Executive Order 14062 similarly fail to define these terms.[52] The analysis in *Pope* does not, therefore, ameliorate the new punitive article's vagueness.

The Navy and Marine Corps Court of Criminal Appeals ("NMCCA") similarly conflated the issues when it heard a vagueness argument against Article 1166 of the United States Navy Regulations, prohibiting "sexual harassment" without further definition.[53] While aboard a U.S. Navy destroyer, Sonar Technician (Surface) Second Class (STG2) Olivares, U.S. Navy, was charged with wrongfully sexually harassing a female peer.[54] The court did not distinguish whether the alleged conduct constituted quid pro quo or hostile environment sexual harassment.[55]

This conclusion failed to state whether the alleged conduct itself would in fact constitute sexual harassment. The court acknowledged its unwillingness to decide the issue, stating immediately thereafter that "we leave to the trier of fact . . . whether [the alleged actions] constitute sexual harassment."[56] Thus, *United States v. Olivares* is only relevant for an additional example of an accused whose alleged conduct was so far afield that he could not complain of a lack of fair notice.[57]

Section 539D of the FY22 NDAA will invite constitutional vagueness challenges in ways not yet considered by military courts. The elements of the new article with regard to hostile environment sexual harassment include:

> (1) [t]hat the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
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> (2) [t]hat such conduct was unwelcome;
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> (3) [t]hat, under the circumstances, such conduct—
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> . . .
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> (C) [w]as so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
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> (4) [t]hat, under the circumstances, the conduct of the accused was either—
>
> (A) to the prejudice of good order and discipline in the armed forces;

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52 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

53 United States v. Olivares, No. 201800125, 2019 CCA LEXIS 97, at *9–10 (N-M Ct. Crim. App. Mar. 17, 2019).

54 The alleged harassment was a statement to the effect of, "let me see that ass," and, "wrongfully kissing her and touching her buttocks." *Olivares*, No. 201800125, 2019 CCA LEXIS 97, at *11.

55 However, the court stated generally that STG2 Olivares was on notice that "*to the extent* this conduct amounted to unwelcome sexual advances or requests for sexual favors, *or* verbal or physical conduct of a sexual nature that unreasonably interferes with an individual's performance *or* creates an intimidating, hostile, or offensive work environment, such conduct was proscribed by the regulation." *Id.*

56 *Id.*

57 *See id.*

> (B) 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.[58]

The implementing Executive Order goes on to explain that "other conduct of a sexual nature" is "dependent upon the circumstances" and "may include conduct that, without context, would not appear to be sexual in nature."[59] Additionally, "the belief or perception [of an intimidating, hostile, or offensive working environment] need not be formed contemporaneously with the actions that gave rise to that belief or perception."[60] To put it succinctly, the newly prohibited conduct includes subjectively unwelcome behavior that does not necessarily appear sexual in nature and might not even be perceived as offensive at the time of the act.[61]

Judge Erdmann, dissenting in *Pope*, called the sexual harassment prohibition in that case "constitutionally troublesome" because of its ambiguity and highlighted the precariousness of the prohibition by comparing it with the civil system.[62] Accordingly, appellate scrutiny of this issue is useful to note some types of behavior that unequivocally cross the line, but does not address Judge Erdmann's constitutional concerns.

The term "unwelcome" does not inform Service members of ordinary intelligence what conduct is prohibited.[63] Especially with sexual or romantic interactions, the same conduct may be unwelcome to different people at different times.[64] Even if Service members could predict whether a particular colleague or third-party bystander would find a comment or gesture unwelcome, the objective backstop of the "reasonable person" is a notoriously moving target in this area of human interaction.[65] In the context of hostile work environment sexual harassment, some have argued that "a reasonable person standard is meaningless," while others suggest that a "reasonable woman" or "reasonable heterosexist," standard would be closer to an appropriate test.[66] Federal courts are similarly inconsistent on the meaning of the ostensibly objective prong of hostile work environment sexual

58 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D(b), 135 Stat. 1541 (2021).
59 Exec. Order 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022).
60 *Id.* at 4786.
61 *Id.* at 4784–86.
62 United States v. Pope, 63 M.J. 68, 77–78 (C.A.A.F. 2006) (Erdmann, J., dissenting) (citing 29 C.F.R. § 1604.11(a) (2005) and EEOC NOTICE NO. N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990)).
63 National Defense Authorization Act for Fiscal Year 2022 § 539D(b).
64 *See, e.g.*, Saturday Night Live, *supra* note 2.
65 Julie A. Seaman, *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 402 n.264, 433 (2005).
66 *See id.* at 402; Kingsley R. Browne, *An Evolutionary Perspective On Sexual Harassment: Seeking Roots in Biology Rather than Ideology*, 8 J. CONTEMP. LEGAL ISSUES 5, 31 (1997) [hereinafter *An Evolutionary Perspective On Sexual Harassment*]; E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 76 (1997).

harassment.[67] As one federal district court recently noted, "[a]n evaluation of the level of conduct required [to prove sexual harassment] is to some degree inescapably subjective."[68]

Moreover, whereas "[t]ypically social norms change slowly," sexual interactions are often subject to interpersonal miscommunication and rapid cultural shifts.[69] This is especially true "with respect to harassment because community mores have undergone significant revision in recent years."[70] Indeed, social norms have shifted so dramatically since the beginning of the #MeToo movement in 2017 that many potential offenders may not realize their statement or conduct is even rude or inappropriate, much less criminal.[71] This type of change in society's level of acceptable behavior, particularly in the category of hostile work environment sexual harassment, has been difficult for courts to apply.[72] This is particularly true because many sexual harassment perpetrators tend to be "'older men trying to clown around, or even to be amorous, but failing to understand that mores have changed.'"[73] Indeed, "[d]istinguishing between flirtation or boorish behavior versus illegal harassment in the workplace often turns on questions of perspective."[74] This is inherently a subjective standard.

Whereas grossly inappropriate sexual behavior, like that in *Pope* and *Olivares*, will be easy for criminal courts to dispose of, the problematic constitutional challenges will come from the minor sexual harassment cases that would not have been criminal, but for the new punitive article. Some proponents actually praise this ambiguity because it acknowledges that the wrongfulness is in the eye of the victim, which should provide more flexibility in addressing the issue.[75] This perspective is reasonable in a restorative justice framework, addressed below, but it is wholly anathema to criminal law.[76]

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67 *Compare* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998) (applying a "reasonable person in the plaintiff's position" standard to a male on male case), *with* Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 436 n.3 (2d Cir. 1999) (explicitly rejecting the "perspective of the particular ethnic or gender group" in favor of the "reasonable person who is the target of discrimination.").

68 Smith v. RB Distrib., 515 F. Supp. 3d 311, 320 (E.D. Pa. 2021).

69 Joan C. Williams et al., *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 142 (2019); Meredith J. Duncan, *Sex Crimes and Sexual Miscues: the Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1117 (2007); *see also An Evolutionary Perspective On Sexual Harassment*, *supra* note 66, at 24 ("Because men tend to interpret friendly behavior as reflecting sexual interest and women tend to interpret sexually interested behavior as mere friendliness, there is much room for misunderstanding in individual encounters.").

70 Smith v. RB Distribution, 515 F. Supp. 3d 311, 320 (E.D. Pa. 2021).

71 Joan C. Williams et al., *supra* note 69 at 196 (noting that this rapid shift "is a norm cascade," and accordingly, "[j]udges should step out of the way and let the jury system do its work, updating the law on sexual harassment in the light of the norm cascade represented by # MeToo.").

72 *Id.* at 152.

73 Schultz, *supra* note 8, at 2100 (quoting Laurie R. Jones, *in* Telephone Interview by Matthew Heimer with Laurie R. Jones, J.D., Senior Consultant, InterActive Training Solutions (ITS) (July 24, 1998)).

74 Avery, *supra* note 8, at 7.

75 Schwyzer, *supra* note 4.

76 Practitioners who will litigate this issue should note that the Supreme Court recently expanded the opportunity for facial vagueness challenges, clarifying that claims no longer fail "merely because there is some conduct that falls within the provision's grasp." Johnson v. United States, 576 U.S. 591, 602 (2015); *see infra* Part IIIB.

b. Discriminatory Enforcement

Criminalizing conduct that is "unwelcome," and especially that which "would not appear to be sexual in nature" will encourage "seriously discriminatory enforcement."[77] While there exists no evidence that military investigators, commanders, or prosecutors as a whole have acted out of intentional animus, this vague provision does present an arbitrary enforcement problem.[78]

Bringing sexual harassment complaints into the criminal law will naturally tend to exacerbate the disparate impact the military justice system has upon marginalized groups.[79] With regard to sexual harassment, white females who "enjoy sexual banter and flirtation with their white male coworkers may regard the same conduct as a form of sexual harassment when it comes from men of color."[80] Similarly, heterosexual males who might "willingly engage in sexual horseplay with men whom they regard as heterosexual," tend to perceive the same conduct from openly homosexual males as sexual harassment.[81] These findings from the civilian sector are consistent with a recent study by the United States Government Accountability Office which discovered that Black and Hispanic Service members were statistically more likely than white Service members to be the subjects of recorded investigations and were more likely to be tried in criminal courts.[82]

This problem is not unique to the military and should be concerning to lawmakers any time they create a new crime.[83] Accordingly, when Congress criminalized hostile work environment sexual harassment, it should have considered the individuals most likely to suffer from discriminatory enforcement.

The new punitive article adds an additional layer of arbitrary enforcement by allowing complaints to be submitted by third parties who observe or overhear potentially consensual interactions and perceive them to be unwelcome.[84] This idea stems from the Equal Employment Opportunity Commission guidelines which explicitly provide for

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77 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107); United States v. Williams, 533 U.S. 285, 304 (2008).

78 AIR FORCE INSPECTOR GEN., REPORT OF INQUIRY (S8918P): INDEPENDENT RACIAL DISPARITY REVIEW 3–4, 131 (2019), https://www.af.mil/Portals/1/documents/ig/IRDR.pdf ("While the data show race is a correlating factor, it does not necessarily indicate causality, and the data do not address why racial disparities exist in these areas. It is important the reader appreciate the identification of racial disparity does not necessarily equate to either racial bias or racism.").

79 *See generally id*. (exploring racial disparity in the Air Force). *See* INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FOR THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY, APPENDIX B: REBUILDING BROKEN TRUST: RECOMMENDATIONS FOR ACCOUNTABILITY IN THE MILITARY JUSTICE SYSTEM 49 n.102 (2021) [hereinafter HARD TRUTHS, APP. B] (explaining the racial disparities in investigations and enforcement); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 38–39 (2019) [hereinafter GAO-19-344] (discussing race and gender disparities in investigations, disciplinary actions, and punishment for servicemembers).

80 Schultz, *supra* note 8, at 2067.

81 *Id.* at 2193.

82 HARD TRUTHS, APP. B, *supra* note 79, at 49 n.102; GAO-19-344, *supra* note 79, at 38.

83 *See* Hugh McClean, *Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge*, 121 COLUM. L. REV. 2203, 2267 (2021) ("The criminal legal system disproportionately affects people of color, predominantly Black and brown people, whose criminal records are subsequently used to formally and informally exclude them in the contexts of employment, licenses, permits, housing, public benefits, and civil rights.").

84 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

"anyone affected by the offensive conduct" to bring a Title VII claim.[85] In the private sector, third-party claims are common where the actual recipients "did not even object (or voiced only vague objections)."[86]

This framework is logical in the civil context where courts must determine the liability of the employer organization, rather than the specific criminal culpability of one particular individual.[87] In fact, most federal jurisdictions have held that supervisors who commit sexual harassment may be subject to discipline or termination by the organization, but cannot be held liable in their individual capacities under Title VII.[88] Because section 539D of the FY22 NDAA does not provide the average Service member fair notice of what is prohibited and will lead to discriminatory enforcement, it is unconstitutionally vague.[89]

2. Overbreadth

Whereas the Fifth Amendment generates the vagueness doctrine, First Amendment jurisprudence provides that a criminal law is overbroad when, in relation to its otherwise legitimate sweep, the statute "punishes a substantial amount of protected free speech."[90] While speech in the military is of a "different character" and requires a "different application of those protections," protections still do exist.[91] Judicial scrutiny of Article 134, UCMJ, "applies with even greater force to constitutionally protected activity, such as verbal expression."[92] Here, the new punitive article is unconstitutionally overbroad because

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85 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-2, FACT SHEET: SEXUAL HARASSMENT DISCRIMINATION (Jan. 15, 1997), https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination (last visited Nov. 4, 2023).

86 Schultz, *supra* note 8, at 2131.

87 The Supreme Court has not yet considered a challenge to bystander harassment under Title VII. *See* Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. 501, 509 (1999).

88 *See* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1606–07 (2018).

89 Some suggest that prosecutorial discretion naturally provides "upfront protection against bloated dockets, overcriminalization, and wrongful conviction." *See*, *e.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 232 (2018) [hereinafter PUNISHMENT WITHOUT CRIME]. However, this would be extraordinarily unusual in the military justice system, if even possible. Appendix 2.1 of the Manual for Courts-Martial provides disposition guidance for charging decisions and clearly omits any reference to the wisdom or prudence of a given statute. MCM 2019, *supra* note 10, at app. 2.1. Additionally, whereas most other criminal jurisdictions and the American Bar Association require a prosecutor to only prosecute cases for which they can obtain and sustain a conviction, the military requires only probable cause. *See* U.S. DEP'T OF ARMY, REGUL. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS rule 3.8 (June 28, 2018), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3662_R27_26_FINAL.pdf; U.S. DEP'T OF NAVY, JAG INSTRUCTION 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL rule 3.8 (Jan. 20, 2015), https://www.pendleton.marines.mil/Portals/98/Docs/Western%20Judicial%20Circuit/JAGINST_5803_1E_Rules_for_Professional_Conduct.pdf; CRIM. JUST. STANDARDS 3.0–4.3 (AM. BAR ASS'N 2017).

90 Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

91 Parker v. Levy, 417 U.S. 733, 758 (1974). *But see* United States v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996) (Service members enjoy the First Amendment right to free speech, but this must be balanced with the "paramount consideration of providing an effective fighting force for the defense of our Country.").

92 United States v. Peszynski, 40 M.J. 874, 879 (N-M.C.M.R. 1994) (*rev. denied*, United States v. Peszynski, 44 M.J. 270 (C.A.A.F. 1996)) (citing United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972)).

it criminalizes non-criminal expression and expands the criminal scope of the workplace beyond that which military precedent has established.

a. Non-Criminal Conduct

A military prohibition on speech under Article 134, UCMJ, must have a "clear and objective standard by which to identify it as criminal and thereby distinguish it from non-criminal expression."[93] Section 539D is neither clear nor objective, as discussed above, and renders a significant amount of non-criminal expression unlawful.[94] Its broad prohibition includes common workplace expression among peers, whether welcome or not.[95] Even where the recipient welcomes the conduct, Section 539D criminalizes expression of which a third party disapproves.[96]

The increasing correlation of consensual workplace romance and sexual harassment is problematic under Section 539D for several reasons.[97] First, innocent attempts to express a romantic notion in the workplace may result in "unwelcome" conduct that the Saturday Night Live sketch mentioned in Part I hyperbolized.[98] Additionally, the CAAF has noted that Service members are not generally precluded from engaging in sexual conversations with colleagues, "given the variety of comments that are likely to be made in conversations between officers of the opposite sex who may have relationships ranging from casual acquaintance through dating, courtship, and marriage."[99] Some have even argued that workplace sexuality is a positive, "dynamic force that finds life in social relations shaped in institutional spaces."[100] Under the new punitive article, a Service member may now be criminally liable if they attempt to initiate workplace flirtation or discuss a sexual topic with a recipient who finds it unwelcome either in the moment or "at any time" thereafter.[101]

Similarly, workplace relationships that begin amicably and end poorly are likely to create conditions for claims of hostile work environment sexual harassment.[102] These emotions are naturally "intensified when they are forced into frequent contact with each other."[103] This is especially true given that the "belief or perception" of a hostile working

93 *Id.*
94 *See supra* Part IIA(1).
95 *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021).
96 *See id.*
97 *See* Schultz, *supra* note 8, at 2120 (citing Charles A. Pierce & Herman Aguinis, *Bridging the Gap Between Romantic Relationships and Sexual Harassment in Organizations*, 18 J. ORG. BEHAV. 197 (1997), as an example of psychological scholarship).
98 Saturday Night Live, *supra* note 2.
99 United States v. Brown, 55 M.J. 375, 384 (C.A.A.F. 2001).
100 Schultz, *supra* note 8, at 2070, 2187 (asserting that "contrary to conventional wisdom," workplace romance can actually have positive effects on a workplace).
101 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4786 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).
102 Schultz, *supra* note 8, at 2124 (quoting a senior consultant at a Los Angeles-based Human Resources firm: "when relationships go sour, people's emotions take over and they start to do things").
103 *Id.* at 2121 (noting the common negative effects that "dissolved hierarchical relationships" have in terms of harassment claims).

environment, "need not be formed contemporaneously with the actions that gave rise to that belief or perception."[104] Thus, an individual may find certain comments welcome or neutral at one point during the relationship, then decide afterward that the previous comments were actually unwelcome.[105]

Additionally, consensual interactions between two Service members may offend third-party bystanders—who are now presumably victims in their own right.[106] Consider, for instance, a captain who makes a statement implying romantic interest with another captain in front of another officer.[107] Even if the recipient unequivocally welcomes these comments, if the third party witnessed them and found the interaction offensive, Section 539D would prohibit the expression as a criminal act.[108] On the other hand, if the third party was jealous of the attention from a more senior peer, these statements could also become criminal.[109]

If the private sector is any indicator for trends in limitations on speech, "significant overreaching is occurring."[110] Because hostile workplace environment sexual harassment is so ambiguous, employers frequently and unnecessarily censor conduct "well before the legal threshold is met."[111] In fact, "many companies are punishing benign forms of sexual conduct that would not amount to sexual harassment or sex discrimination under the law."[112] Given recent Congressional scrutiny, the military may have a greater incentive to do the same.

However, civil jurisprudence uses a higher objective standard than the military to help narrow the scope of conduct rising to hostile work environment sexual harassment—the alleged conduct must be so objectively severe or pervasive as to alter the conditions of the victim's employment.[113] This is "to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"[114] For instance, some courts have

[104] Exec. Order No. 14062, 87 Fed. Reg. at 4786.

[105] *See, e.g.*, United States v. Brown, 55 M.J. 375, 384 (C.A.A.F. 2001).

[106] *See, e.g.*, ARMY REGUL. 600-20, *supra* note 34, at para. 4-14 (July 24, 2020), https://armypubs.army.mil/epubs/ DR_pubs/DR_a/ARN32931-AR_600-20-004-WEB-6.pdf; *see also* Schultz, *supra* note 8, at 2121 (discussing workplace romance in the public sector).

[107] *See, e.g.*, *Brown*, 55 M.J. at 375. An Air Force nurse who had been at a location the longest and thereby exercised some de facto leadership made several sexual comments, including a potential attempt at romance, to two junior company grade officers. *Id.* at 381. The government charged a violation of Article 133, UCMJ, and presented evidence that the accused violated an Air Force pamphlet prohibiting sexual harassment. *Id.* The CAAF found the evidence to be insufficient given the context of the conversations and the prolific sexual atmosphere of that work environment. *Id.*

[108] *See* Exec. Order No. 14062, 87 Fed. Reg. at 4786 (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

[109] *See Brown*, 55 M.J. at 388 (Sullivan, J., concurring) (noting that "the comments may not be appropriate, but in this case, they are not criminal," and a "different result might have been obtained if a strict superior-subordinate relationship was the backdrop for these comments").

[110] Schultz, *supra* note 8, at 2088.

[111] *Id.* at 2086.

[112] *Id.* at 2088.

[113] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998); Hernández v. Wilkinson, 986 F.3d 98, 102 (1st Cir. 2021); Smith v. Rock-Tenn Servs., 813 F.3d 298, 307 (6th Cir. 2016); Zetwick v. Yolo, 850 F.3d 436, 443 (9th Cir. 2017) (citing Joiner v. Wal-Mart Stores, Inc., 114 F. Supp. 2d 400, 409 (W.D.N.C. 2000)).

[114] *Oncale*, 523 U.S. at 81.

found that "flirting, hugging, and even kissing in the workplace are very ordinary things that people do and are not *per se* intimidating, hostile, humiliating, or offensive."[115]

The alleged conduct must be objectively more than this ordinary socializing. The altered conditions requirement is not present in either Section 539D of the FY22 NDAA or Executive Order 14062.[116] This concept may work in the civil context where courts consider "conditions of employment" to determine employer liability, but it does not directly translate to the criminal context, much less the subset of military justice.[117] Therefore, criminalization of expression that does not alter the conditions of employment, and is not otherwise subject to prosecution by another article under the UCMJ, violates the First Amendment.

As with vagueness, military appellate courts' scrutiny of sexual harassment with regard to overbreadth is somewhat limited. The CAAF in *Pope* dismissed an overbreadth challenge in a rather conclusory manner, holding that intimidating, hostile, or offensive conduct of a sexual nature by recruiters undermines the effectiveness of the U.S. Armed Forces and is, therefore, not protected by the First Amendment.[118] However, the court's reasoning was essentially circular: speech that amounts to hostile environment harassment is not protected by the First Amendment because hostile environment harassment is not protected by the First Amendment.[119] Congress's authority to curtail Service members' otherwise protected speech has not been clearly established as neither the Supreme Court nor CAAF have addressed the issue directly.[120]

In *United States v. Peszynski*, the Navy and Marine Corps Court of Military Review ("NMCMR") considered a vagueness challenge to sexual harassment as charged under Article 134 of the UCMJ.[121] Aviation Electronics Technician Second Class ("AT2") Peszynski worked in his off-duty time at a Pizza Hut on base and, over the course of several months, made sexual comments to and physically touched three female coworkers.[122] The trial judge described the elements to the court-martial members only as "repeated unwelcome comments and gestures of a sexual nature and repeated and unwelcome physical

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115 *Zetwick*, 850 F.3d at 443 (citing *Joiner*, 114 F. Supp. 2d at 409) (noting that these actions can create a hostile or abusive workplace when they are unwelcome and pervasive).

116 *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021); Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107); see *supra* Part III(A)(1)(a) for relevant language of Section 539D of the FY22 NDAA (showing that there is no "altered conditions" requirement).

117 Hollywood, *supra* note 31, at 172 ("[W]hen civilian terms are applied to the military, they lose their meaning because they have different purposes, remedies, and penalties.").

118 United States v. Pope, 63 M.J. 68, 74–75 (C.A.A.F. 2006).

119 *Id*.

120 Ross G. Shank, Note, *Speech, Service and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 VAND. L. REV. 1093, 1146 n.164 (1998). In *United States v. Wilcox*, 66 M.J. 442, 445 C.A.A.F. 2008), the CAAF considered and sidestepped an overbreadth challenge to a speech-related offense under Article 134, UCMJ. Private First Class Wilcox was convicted of advocating racial intolerance and anti-government ideas on the Internet "which conduct was, under the circumstances, prejudicial to good order and discipline and service discrediting." *Id.* at 448. The CAAF held that if the speech in question was actually protected by the First Amendment, the government must still demonstrate a direct and palpable connection to the military mission or military environment. *Id*. at 449.

121 United States v. Peszynski, 40 M.J. 874, 876 (N-M.C.M.R. 1994).

122 *Id.* One of the coworkers was a third-class petty officer, but not in the same unit as the accused, and the other two were civilian spouses of active-duty Service members. *Id.* at 886.

contact with [the alleged victim]," and the terminal element of Article 134 of the UCMJ.[123] The NMCMR found that the trial judge gave no instructions communicating any standard "by which to distinguish non-criminal from criminal behavior," in stark contrast to the elements described by Article 93 (Maltreatment), UCMJ, and set aside the applicable specifications.[124] The court further noted that this objective requirement "assures that innocent behavior will not be trapped within the scope of the offense."[125]

In the same way, Section 539D, as implemented by Executive Order 14062, fails to distinguish non-criminal from criminal behavior by subjectively proscribing innocent behavior like romantic expression among peers and expression of which a third party disapproves.[126] Accordingly, Section 539D prohibits a substantial amount of protected free speech in violation of the First Amendment.

b. Expansion of "Workplace"

In addition to widening the net to capture non-criminal speech, Section 539D of the FY22 NDAA and Executive Order 14062 dramatically expand the time and space in which a Service member's conduct may come under criminal scrutiny. The military workplace is already "far more expansive" than its civilian analogue and Executive Order 14062 inappropriately widens it further.[127] In implementing and interpreting Section 539D, the Executive Order added language reversing military jurisprudence on the concept of "working environment."[128] This is consistent with the 2019 Sexual Assault Accountability and Investigation Task Force recommendation to create a sexual harassment punitive article which should "encompass misconduct that occurs not only in the workplace, but also anywhere members live work, train, and socialize."[129] Notwithstanding its laudable intent, this expansion violates the First Amendment.

In *United States v. Braimer*, the NMCCA held that although the prohibition on sexual harassment does not extend to off-duty, non-military related contexts, "off-base conduct at a private residence can meet this threshold if it is linked to the workplace."[130] Chief Intelligence Specialist ("ISC") Braimer, while serving aboard the USS DONALD COOKE (DDG 66), made sexual statements and gestures toward a sailor junior in rank while on liberty, staying in a private hotel at his own expense, and drinking at the hotel bar

[123] *Id.* at 876. The defense counsel repeatedly asked for clarification regarding the sexual harassment charge from the government, then eventually the court, but both declined. *Id.* The court-martial convicted AT2 Peszynski of communicating a threat and violating the Navy sexual harassment policy, but not guilty of the alleged assaults. *Id.*

[124] *Id.* at 881 (noting that even the term "offensive" would have been a helpful addition as "an arguably objective (if not entirely clear) standard.") (parenthetical in original).

[125] *Id.*

[126] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021).

[127] Chema, *supra* note 22, at 10.

[128] Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

[129] ELIZABETH P. VAN WINKLE ET AL., SEXUAL ASSAULT ACCOUNTABILITY AND INVESTIGATION TASK FORCE 18 (2019).

[130] United States v. Braimer, 81 M.J. 572, 589 (N-M Ct. Crim. App. 2021) (considering a factual insufficiency claim for a sexual harassment order violation, rather than a constitutional argument).

at his own expense.[131] The accused and victim did not work "in the same work center or same chain of command . . . such that [ISC Braimer's] off-duty conduct could reasonably be said to be connected in some way with either his or [the victim's] job or work environment."[132] The court held that "however broad the terms 'workplace' and 'work environment' are defined . . . they are not so broad as to encompass [ISC Braimer's] conduct in this context."[133] Thus, off-duty conduct that occurs between Service members and is otherwise unrelated to the military must occur in or impact the work environment.[134]

However, Executive Order 14062 significantly enlarges this limit on expression. It prohibits offending "any person . . . who by some duty or military-related reason may work or associate with the accused."[135] This would include Service members who engage in inappropriate, but not criminal, conduct like AT2 Peszynski at his second job.[136] The new punitive article also covers "any location, regardless of whether the victim or accused is on or off duty at the time of the alleged act or acts."[137] This would include Service members like ISC Braimer, while on liberty at a hotel, wholly disconnected from his work. The Executive Order also prohibits conduct that a recipient finds welcome or neutral at the time, then later decides that it was unwelcome. By punishing a substantial amount of expression and broadening the definition of workplace, Section 539D of the FY22 NDAA and Executive Order 14062 significantly push the boundary of overbreadth and will certainly invite litigation.[138]

B. The New Punitive Article is Counterproductive

1. Criminalization Will Not Reduce Harassment

Despite its worthy intent, Congress will not succeed in removing sexual harassment from the military by criminalizing conduct any more than civil sexual harassment law has succeeded in the civilian workplace.[139] The rate of sexual harassment in the civilian sector has not changed since the 1980s—approximately forty percent of females and sixteen percent of males claim to have been sexually harassed in the workplace.[140] In the military,

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131 MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 49c(1)(b) (2023) ("In the case of other officers or enlisted persons, 'on duty' relates to duties or routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as 'off duty' or 'on liberty.'"); *Braimer*, 81 M.J. at 589.

132 *Braimer*, 81 M.J. at 589.

133 *Id.*

134 *Id.*

135 Exec. Order No. 14062, 87 Fed. Reg. 4763, 4784–85 (Jan. 31, 2022) (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107).

136 *See* United States v. Peszynski, 40 M.J. 874 (N-M.C.M.R. 1994).

137 *Id.*

138 Exec. Order No. 14062, 87 Fed. Reg. at 4784–85 (amending MCM 2019, *supra* note 10, at pt. IV, ¶ 107) ("Nature of victim[:] 'A certain person' extends to any person, regardless of gender or seniority, and regardless of whether subject to the UCMJ, who by some duty or military-related reason may work or associate with the accused.").

139 Schultz, *supra* note 8, at 2068.

140 Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, 98 HARV. BUS. REV. 44, 46 (2020); *see also* Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using*

the outlook is even more discouraging. Despite the increase in laws proscribing sexual misconduct, sexual harassment has "not gone away in the civilian sector, and the forced intimacy of military life virtually guarantees [sexual misconduct] will persist in the military at even more intense levels."[141] In fact, sexual harassment reached an all-time high at the Service Academies during the 2020-2021 academic year.[142] In the early 1970s, feminist scholar and sexual harassment law pioneer Catharine MacKinnon wanted the government to "stamp out all words, thoughts, or ideas that may lead to an unequal outcome," but, as Professor Paul Weizer noted, "even if the state were to enact all of her demands, it is doubtful that discrimination would cease to exist."[143]

Unfortunately, "despite the massive body of law and regulatory infrastructures now in place to address sexual assault, violence, and harassment in homes, workplaces, schools, and on college campuses, the system does not prevent violence or protect survivors when it occurs."[144] Criminalization of sexual harassment will instead hinder reconciliation and impede legitimate progress.

2. Criminalization Will Hinder Reconciliation

Sexual harassment in the military is a detriment to effective warfighting and an embarrassment to modern society. However, criminalizing hostile work environment sexual harassment will obstruct efforts to eliminate it by creating disproportionately severe punishment for the offender, increasing antagonism between the offender and the offended party, and raising the evidentiary burden of proof for claims.

a. Disproportionately Severe Punishment

To be labeled a criminal—whether a felon or misdemeanant—is a lifelong brand seared onto a convicted person's identity, to say nothing of the deprivation of liberty and property formally associated with the criminal system.[145] As such, it must be "reserved for

Meta-Analysis to explain Reported Rate Disparities, 56 J. PERS. PSYCH. 607, 626 (2003) (noting that highly structured organizations, regardless of gender demographics, tend to have higher levels of sexual harassment).

141 *Military Sex Scandals from Tailhook to the Present*, *supra* note 25, at 788; U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-103973, DOD AND THE COAST GUARD SHOULD ENSURE LAWS ARE IMPLEMENTED TO IMPROVE OVERSIGHT OF KEY PREVENTION AND RESPONSE EFFORTS 2, 10 (2022) (after 249 statutory requirements addressing sexual assault prevention and response from 2004 to 2019, sexual assault prevalence has actually increased in the military).

142 U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES: ACADEMIC PROGRAM YEAR 2020-2021, 3 (2022), https://www.sapr.mil/sites/default/files/public/docs/reports/MSA/DOD_Annual_Report_on_Sexual_Harassment_and_Violence_MSA_APY20-21_Consolidated.pdf.

143 PAUL I. WEIZER, THE SUPREME COURT AND SEXUAL HARASSMENT: PREVENTING HARASSMENT WHILE PRESERVING FREE SPEECH 102 (2000); *see also* Schultz, *supra* note 8, at 2068 (referring to corporate efforts to "banish" sexuality from the workplace in an attempt to avoid Title VII litigation).

144 Laura T. Kessler & Sagen Gearhart, *Sexual Harassment is Not a Crime: Aligning the Uniform Code of Military Justice with Title VII*, 6 U. PA. J.L. & PUB. AFF. 413, 469 (2021).

145 Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1076 (2015) [hereinafter *Misdemeanor Decriminalization*].

specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict."[146] Treating hostile work environment sexual harassment as a crime, rather than socially inappropriate conduct, raises the stakes beyond that which is conducive to actual learning, healing, and, ultimately, effective warfighting.[147]

Severe sexual conduct in the workplace that may also fall under the definition of sexual harassment is already a crime in the military. Notably, Article 93, UCMJ, explicitly criminalizes exploitative sexual harassment, and Article 93a similarly prohibits abuse of authority by recruiters and those in "training leadership positions."[148] Article 128, UCMJ, criminalizes unwanted physical contact of any kind.[149] Thus, the only new conduct that Section 539D of the FY22 NDAA punishes is limited to peer-to-peer, non-contact actions that are perceived to be unwelcome by the recipient or by an offended third party.[150] It may also prohibit consenting expression of romance between people of similar grades, but outside any reporting chain.[151]

This new crime encompasses a significant amount of non-criminal behavior and impacts a vast number of Service members.[152] A recent study indicated that the most common paygrade relationship in sexual harassment situations was junior enlisted Service members making complaints against their peers (twenty-eight percent).[153] Similarly, in the private sector, "the vast majority of all harassment complaints are filed against coworkers, not supervisors."[154] Additionally, in Fiscal Year 2022, a significant majority of allegations in the DoD were previously non-criminal. Of almost 700 formal harassment allegations, eighty-three percent substantiated "crude or offensive behavior" and sixty-six percent of allegations substantiated "unwanted sexual attention."[155] Only eight percent of the total allegations fell under sexual coercion.[156] When this new criminal prohibition is combined with the fact that Service members are always on duty in some manner in "settings that traditionally are far more expansive than the civilian work place," the number of potential offenders becomes effectively unlimited.[157] Thus, Congress has targeted a large number of

146 *Id.*; Erik Luna, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 703, 714 (2005).

147 Non-minor offenses like extortion, assault, maltreatment are already proscribed in long-standing punitive articles. *See supra* Part IIB.

148 Uniform Code of Military Justice, 10 U.S.C. §§ 892–93 (2019).

149 Uniform Code of Military Justice, 10 U.S.C. §§ 892–128 (2017).

150 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021).

151 *Id.*

152 Chema, *supra* note 22, at 8 ("[M]ilitary personnel are always on duty in settings that traditionally are far more expansive than the civilian work place. Accordingly, the sexual harassment concept in the military is potentially of far greater scope than that of the civilian work force.").

153 DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT IN THE MILITARY, APPENDIX F: SEXUAL HARASSMENT ASSESSMENT 13 (2023), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY22/Appendix-_F_Sexual_ Harassment_Assessment_FY2022.pdf.

154 Schultz, *supra* note 8, at 2105.

155 DEP'T OF DEF., ANNUAL REPORT ON SEXUAL HARASSMENT IN THE MILITARY, APPENDIX F: SEXUAL HARASSMENT ASSESSMENT 12 (2023), https://www.sapr.mil/sites/default/files/public/docs/reports/AR/FY22/Appendix_F_Sexual_ Harassment_Assessment_FY2022.pdf.

156 *Id.*

157 Chema, *supra* note 22, at 8.

Service members who, while their conduct may be inappropriate, should not be branded as criminals.[158]

As noted above, the permanent mark of a federal conviction is of the utmost concern. While the authorized punishments for the above offenses are significant, a federal conviction at any level is almost always a life sentence.[159] Moreover, federal convictions can be inherently inequitable because of the disparity between states.[160] This is especially true for Service members who will ultimately reside in various states throughout the country. With a criminal conviction, former Service members will return home to face innumerable obstacles to societal reintegration.[161] Criminal records impact employment, professional licensing, student loans, eligibility for public housing, and much more.[162] Thus, convictions of any kind "can turn out to be more burdensome for the offender than the formal punishment itself," preclude reintegration into society, and thereby continue to "spin the revolving doors of justice."[163]

Moreover, sexual harassment as a standalone punitive article comes dangerously close to a sex offense, requiring the catastrophic burden of sex offender registration.[164] The Secretary of Defense specifies which criminal offenses are reportable under the Federal Sex Offender Registration and Notification Act ("SORNA") and has determined that every offense under Article 120, UCMJ, and all but two sex-related offenses under Article 134, UCMJ, are registerable.[165] That sexual harassment may be added to that list is well within the realm of possibility.[166] Although the new punitive article is currently listed under Article 134, there are many in Congress who believe that it should be a sex offense.[167] By criminalizing hostile work environment sexual harassment, Congress has drastically increased risk for anyone accused of inappropriate workplace behavior.

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158 *See Misdemeanor Decriminalization*, *supra* note 145, at 1095 (lowering the evidentiary bar for non-jailable offenses will "widen the net" of the criminalized population).

159 For an example of significant punitive exposure, the maximum punishment for a violation of Article 92 is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years. MCM 2019, *supra* note 10, at pt. IV, ¶ 18d. For a discussion of the disproportionate impact of minor misdemeanor convictions, see PUNISHMENT WITHOUT CRIME, *supra* note 89, at 37 ("The formal mark of an arrest or conviction record lasts a lifetime; the psychological and economic burdens of being convicted can last just as long. The total impact of these burdens and exclusions can be so great as to amount to what some call a 'new civil death,' a permanent barrier to full civic and economic participation.").

160 Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 358 (2005).

161 Michael Pinard, *Collateral Consequences of Criminal Convictions*, 85 N.Y.U. L. REV. 457, 492 (2010).

162 *Misdemeanor Decriminalization*, *supra* note 145, at 1090–91; *see* McClean, *supra* note 83, at 2238.

163 *Misdemeanor Decriminalization*, *supra* note 145, at 1113; HUSAK, *supra* note 1, at 6.

164 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20911–32).

165 34 U.S.C. § 20911(6); U.S. DEP'T OF DEF., INSTRUCTION 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY, enclosure 1 & app. 4 (Mar. 11, 2013) (Change Four effective August 19, 2020).

166 S. 4600, 116th Cong. § 3 (2020); S. 1611, 117th Cong. § 3 (2021); H.R. 3224, 117th Cong. § 3 (2021).

167 This includes at least seven Senators and the entire United States House of Representatives. S. 1611, 117th Cong. § 3; H.R. 3224, 117th Cong. § 3 (2021).

b. Increased Antagonism

When a victim of sexual harassment reports an incident, rather than prompting thoughtful engagement to correct the behavior, the complaint will initially trigger the full military justice machine.[168] With the possibility of criminal conviction, incarceration, and the potential for sex offender registration at the forefront, the accused will naturally assume a defensive and adversarial posture. If one starts "*any* training by telling a group of people that they're the problem," they will get defensive and be "much less likely to want to be a part of the solution; instead they'll resist."[169] A litigation-based approach to any equal opportunity violation creates a "victim-villain paradigm" where "one party not only loses the case," but must be condemned as either "deceitful or evil."[170] Thus, an individual accused of sexual harassment has every incentive to disbelieve and discredit the complainant, and no incentive to pursue amicable resolution.[171]

Additionally, the growing fear of harassment accusations, particularly in male-dominated industries, alienates female victims.[172] There is a perception among male and female "soldiers of all ranks, including some judge advocates," that sexual harassment and sexual assault claims "can be weaponized."[173] Young Service members surveyed by the Fort Hood Independent Review Committee Report ("FHIRC"), stated that "training makes men afraid that they will be falsely accused rather than providing skills and knowledge to be part of positive change."[174] A recent study at the United States Military Academy ("USMA"), found that the fear of punishment for sexual misconduct—what some called "getting SHARPed"—is so significant that "victims (usually women) are unwilling to say anything to stop harassment."[175]

To combat misunderstandings and limit risk, many organizations have taken steps to avoid opposite sex interaction altogether. Professor Vicki Schultz noted examples of this phenomenon in her prolific research of sexual harassment law and policy outside of the military.[176] For instance, one construction company instructs its employees to "adhere

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168 Even if the commander ultimately disposes of the case administratively, the initial allegation will begin in with a criminal perspective. *See* 10 U.S.C. § 1561 (requiring commanders to, upon receipt of a sexual harassment report, direct an independent investigation and forward the report to the next superior general court-martial convening authority).

169 Dobbin & Kalev, *supra* note 140, at 47.

170 Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination*, 50 U. RICH. L. REV. 487, 506–07 (2016).

171 *See* Avery, *supra* note 8, at 25.

172 SWECKER ET AL., *supra* note 6, at 81; Schultz, *supra* note 8, at 2134.

173 SWECKER ET AL., *supra* note 6, at 81.

174 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 30 (2021) [hereinafter HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT] (noting the training to which these Service members were referring was outdated).

175 LIEUTENANT GENERAL ROBERT L. CASLEN, JR. ET AL., GETTING TO THE LEFT OF SHARP: LESSONS LEARNED FROM WEST POINT'S EFFORTS TO COMBAT SEXUAL HARASSMENT AND ASSAULT 14 (2015) (parenthetical in original); *see also* Haley Britzky, *'Stop the Social Experiment' – New Survey Spotlights Bias Against Women in Army Special Ops*, TASK AND PURPOSE (May 18, 2021), https://taskandpurpose.com/news/army-special-operations-women-survey/ (quoting a male special operations officer who says, "I am afraid that if I fail a female who fails to meet the standards, she can end my career by claiming SHARP.").

176 Schultz, *supra* note 8, at 2134–35.

to a 'five-second rule' which prohibits the men from even looking at a woman for more than the allotted time."[177] Other companies encourage supervisors to avoid meeting with opposite-sex subordinates behind closed doors.[178] Professor Schultz further demonstrated that training males to "curtail sexual talk and conduct in order to avoid insulting women's sexual sensibilities [does] nothing to solve the underlying structural problems, and risk[s] reinforcing stereotypes of women as 'different' and more easily offended."[179]

This was also true at the USMA where some cadets deliberately avoid interaction with females "so there can be no possible misunderstanding."[180] The Independent Review Commission on Sexual Assault in the Military ("IRC") recently reported that some Service members interpret sexual harassment and sexual assault prevention training to be: "don't touch a female; don't look at a female; and don't talk to a female."[181]

The harm that this causes is self-evident: "if male supervisors cannot meet with their female subordinates in private settings, how will women ever gain access to the training and mentoring needed to succeed?"[182] The same of course is true for peers.[183] This alienation not only fails to adequately address sex discrimination and harassment, but it also exacerbates the problem.

c. Raised Evidentiary Standard

Bringing sexual harassment under the purview of criminal law also raises the evidentiary bar for prosecutors to prove the allegation beyond a reasonable doubt.[184] This combination creates a no-win situation. When a victim of harassment brings forward a claim, the allegation will now undergo review in the criminal context, regardless of severity, even if it is finalized in an administrative setting.[185] Because most sexual harassment cases are difficult to prove, often with only one witness and a heavy reliance on subjective terms and ambiguous elements, the government will face a difficult choice.[186] When the government pursues cases without a reasonable chance of obtaining and sustaining a conviction, it undermines "confidence and trust in the military justice system."[187]

177 *Id.* at 2134.
178 *Id.* at 2135.
179 Deborah Thompson Eisenberg, *supra* note 170, at 504.
180 CASLEN, JR. ET AL., *supra* note 175, at 14.
181 HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 174, at 30.
182 Schultz, *supra* note 8, at 2135.
183 Diane Y. Byun, *Reexamining Reasonableness: Modernizing the Ellerth/Faragher Defense*, 28 UCLA WOMEN'S L.J. 371, 396–97 (2021) ("Implementing largely legalistic solutions, rather than practical ones, creates an invisible yet powerful division as men become hesitant to interact with women in the workplace, inhibiting mentor relationships and paths to advancement.").
184 MCM 2019, *supra* note 10, at R.C.M. 918(c).
185 10 U.S.C. § 1561 (requiring commanders to, upon receipt of a sexual harassment report, direct an independent investigation and forward the report to the next superior general court-martial convening authority).
186 Kessler & Gearhart, *supra* note 144, at 477.
187 HARD TRUTHS, APP. B, *supra* note 79, at 53 (proposing an "obtain and sustain" standard as "a matter of fundamental fairness and in the interest of the efficient administration of justice.").

Contrarily, if the government does not refer a victim's case to court-martial, the victim may perceive this as a rejection of her claim and a "failure" to believe her.[188] Given the low probability of success as well as the adversarial process required to achieve that success, victims of the new behavior will likely lose confidence in the military justice system and refrain from bringing their claims forward at all, thereby perpetuating the problem.[189]

III. PROPOSALS

A. Repeal Section 539D of the FY22 NDAA

Decriminalization can and should be done. There is a growing movement in the United States recognizing the problem of overcriminalization and advocating removal of bad laws.[190] Congress should repeal Section 539D of the FY22 NDAA. Moreover, in order to fully decriminalize hostile work environment sexual harassment, the Services should remove the applicable punitive language from each of their Service regulations, replacing it with a standalone basis for administrative separation. This will still maintain a higher standard for Service members than their civilian counterparts, but will bring sexual harassment adjudication closer into parity with civilian practice as well as avoid constitutional problems.[191] At the very least, Congress should allow the DoD a period of time to consider the constitutional implications and to evaluate alternatives to criminalization.[192] This would comport with the two-year implementation period for the other changes to military justice contained in the FY22 NDAA and allow for thoughtful reconsideration.[193]

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188 *See, e.g.*, Marina Villeneuve & Michael Hill, *Judge Dismisses Sole Criminal Charge Against Andrew Cuomo*, AP NEWS (Jan. 7, 2022), https://apnews.com/article/business-new-york-andrew-cuomo-albany-david-soares-7fb-427f8bba47de711fbd556d4e5c782 ("My disappointing experience of re-victimization with the failure to prosecute a serial sexual abuser, no matter what degree the crime committed, yet again sadly highlights the reason victims are afraid to come forward, especially against people in power.").

189 *See* Dobbin & Kalev, *supra* note 140, at 47; Deborah Thompson Eisenberg, *supra* note 170, at 506–07; Avery, *supra* note 8, at 25.

190 Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 248 (1994) (discussing "the decriminalization of sexual and sex-related behavior in the latter half of the twentieth century"); Darryl K. Brown, *Can Criminal Law Be Controlled?* 108 MICH. L. REV. 971, 988 (2010) (reviewing HUSAK, *supra* note 1, at 3). Note that "decriminalization" is somewhat a term of art, in that it does not equate to full legalization or societal approval. *Misdemeanor Decriminalization*, *supra* note 145, at 1116.

191 *See* Schultz, *supra* note 8, at 2093 (noting that termination is a serious matter that is often easily executed instead of the more difficult, but more effective, efforts toward "preventive or remedial measures other than punishing individual harassers"); *see also* United States v. Brown, 55 M.J. 375, 387 (C.A.A.F. 2001) (the accused "may well have warranted 'instruction, counseling or other types of administrative corrective action[.]'" (quoting United States v. Wolfson, 36 C.M.R. 722, 731 (ABR 1966)).

192 *See* HARD TRUTHS, APP. B, *supra* note 79, at 30.

193 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021).

B. Implement Mediation and Diversion

Decriminalization begs the question of how then the military should address hostile work environment sexual harassment. The answer is in the same way the private sector handles non-criminal harassment—through restorative justice, administrative discipline, and termination. It is almost axiomatic that social change occurs not when individuals are afraid of criminal conviction—"the argument of force in its worst form"—but when they instead "internalize social norms."[194] The 2015 USMA study advocated for "candid dialogue," and education over litigation.[195] As Professor Ellen Pogdor wrote, "[t]he glamour of the indictment and courtroom plea or trial may provide a superior news item for deterrence," but it fails to achieve any benefit for society when all parties "suffer harsher consequences than they would have if the agency action had successfully rooted out the misconduct sooner."[196] A restorative justice model that involves mediation, diversion, and, where that fails, administrative discipline and separation, is the most appropriate and effective means to root out hostile work environment sexual harassment.

Restorative justice in other contexts has been demonstrably effective.[197] For example, in domestic violence cases, "disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness, prevents crime."[198] In the civil sexual harassment context, mediation has proven most effective when both parties are free to agree that "something happened," even if no blame is attached.[199] Professor Meredith J. Duncan has even advocated for mediation in nonconsensual sex cases, where one of the goals is the "reintegration of the accused and the victim into society as productive contributors."[200]

A successful military mediation program for hostile work environment sexual harassment could take myriad forms and should be left to the discretion of the Services to implement.[201] At a minimum, the recipient of the unwanted gesture should have the option to enter mediation or to refer the case to a senior officer for administrative disposition. In order to ensure adequate participation, a senior officer, perhaps the cognizant special or general court-martial convening authority should appoint a mediator senior to and removed from both parties. The communications ought to be kept strictly confidential, to encourage

194 HUSAK, *supra* note 1, at 7; Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 550 (1991) (citing Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

195 CASLEN, JR. ET AL., *supra* note 175, at 16.

196 Ellen S. Pogdor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1112–23 (2021).

197 Deborah Thompson Eisenberg, *supra* note 170, at 534.

198 *Id.*

199 *Id.* at 538.

200 Duncan, *supra* note 69, at 1125; *see also* Stephanos Bibas & Richard A. Biershbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 131131 (2004) ("82% of victims whose cases were handled in mediation believed that the criminal justice system was fair, versus 56% of those in court. Likewise, 91% of offenders whose cases were handled in mediation thought the criminal justice system was fair, versus 78% of those in court.").

201 The IRC on Sexual Assault in the Military acknowledged that in "certain limited situations, an opportunity for rehabilitation should be available," the successful completion of which should result in the Service terminating separation proceedings. HARD TRUTHS, APP. B, *supra* note 79, at 30–31.

forthright discussion and education. The mediation should end with a mutual agreement that, "something happened," and an appropriate "means of amends," perhaps including "educational programs, community service, and monetary restitution."[202] Finally, if the victim is unsatisfied or declines mediation, there should be a mechanism to elevate the complaint to higher authority for review and administrative disposition, up to and including administrative separation.[203]

C. Support Initiatives Already in Place

Ongoing initiatives in the DoD should be allowed to succeed in lieu of criminalization. For instance, gender integration and more equal representation has been demonstrated to be the single most effective means of reducing sexual harassment in the workplace even when the proportion of the work group is mostly men.[204] Empirical evidence has shown that more women in supervisory positions "leads to less sex stereotyping and leaves junior women feeling less pressured to cater to senior men's sexual needs and more free to express their sexuality as they see fit."[205] In well-integrated industries, "sex harassment virtually ceases to be a problem" even though sexual expression occurs at the same rate.[206] There is more gender representation and integration in the Armed Forces than any time in history and this trajectory will continue as female Service members are promoted into higher ranks.[207]

Additionally, to the extent that some Sexual Assault Prevention and Response services are not yet available to recipients of sexual harassment, the DoD should implement the IRC's recommendations to extend these options.[208] The DoD should also seriously consider implementing the IRC's recommendation to extend the Catch a Serial Offender ("CATCH") Program to recipients of sexual harassment.[209] The program currently allows sexual assault victims to anonymously disclose information about the incident and discover whether the suspect may have also assaulted another person.[210] While there are reasonable arguments on both sides of this proposition, an expansion of CATCH, combined with decriminalization, would be worth exploring.[211]

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202 Deborah Thompson Eisenberg, *supra* note 170, at 538; Duncan, *supra* note 69, at 1126. Restitution would most logically be under the circumstance in which a victim is authorized to receive "restitution as provided in law" under Article 6b(6), UCMJ, rather than carving out an exception to the *Feres* doctrine. *See* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 470 (2010).

203 HARD TRUTHS, APP. B, *supra* note 79, at 30–31.

204 Schultz, *supra* note 8, at 2144.

205 *Id.* at 2144–45.

206 *Id.* at 2144.

207 Lori Robinson & Michael E. O'Hanlon, *Women Warriors: The Ongoing Story of Integrating and Diversifying the American Armed Forces*, BROOKINGS (May 2020), https://www.brookings.edu/essay/women-warriors-the-ongoing-story-of-integrating-and-diversifying-the-armed-forces.

208 HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 174, at 32.

209 *Id.* at 27.

210 *See generally* OFFICE OF THE UNDER SECRETARY OF DEFENSE, PROCEDURES TO IMPLEMENT THE "CATCH A SERIAL OFFENDER" PROGRAM (2019).

211 *Id.*; *see also* Kessler & Gearhart, *supra* note 144, at 461 (2021).

The Secretaries of each Service should reiterate that sexual harassment can still be a violation of other articles if the action rises to the appropriate level. For minor misconduct, non-judicial punishment ("NJP") under Article 15, UCMJ, remains the appropriate venue.[212] The evidentiary standard at NJP in the Sea Services is a preponderance of the evidence, and the remaining Services should amend their regulations in accordance with the IRC's recommendation.[213] The full panoply of administrative tools available to commanders should be made available to combat the complex problem of hostile work environment sexual harassment without the blunt instrument of criminal law.[214]

CONCLUSION

Congress should not have made hostile work environment sexual harassment a crime in Section 539D of the FY22 NDAA. Although some have called it "more of a messaging move than anything else," national leaders and legal practitioners must not overlook the new law's constitutional deficiencies and counterproductive nature.[215] In its place, the DoD should implement non-criminal measures including restorative justice and administrative discipline and separation. In so doing, the military will promote an atmosphere of "apology and education" rather than "an atmosphere of denial and blame," and make lasting progress toward an end to the problem of sexual harassment in the military.[216]

[212] UCMJ, art. 15, (2016); MCM 2019, *supra* note 10, at pt. V, ¶1d(1).

[213] U.S. DEP'T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAG INSTRUCTION 5800.7G) 1-30 (§ 0110(b)) (Jan. 15. 2021); U.S. COAST GUARD, MILITARY JUSTICE MANUAL (COMMANDANT INSTRUCTION M5810.1H) 2-15 (art. K.7) (July 9, 2021); U.S. DEP'T OF ARMY, REGUL. 27-10, MILITARY JUSTICE para. 3-16 (Dec. 3, 2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN31271-AR_27-10-001-WEB-2.pdf; U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-202, NONJUDICIAL PUNISHMENT para. 3.4 (Mar. 31, 2015), https://static.e-publishing.af.mil/production/1/af_ja/publication/dafi51-202/afi51-202.pdf; HARD TRUTHS: DOD 2021 SEXUAL ASSAULT REPORT, *supra* note 174, at 54 (looking at recommendation 1.7c).

[214] Avlana K. Eisenberg, *supra* note 14, at 609.

[215] Diana Stancy Correll, *Rare Firing of Flag Officer for Sexual Harassment Came After Unwanted Kissing*, NAVY TIMES (Mar. 17, 2022) https://www.navytimes.com/news/your-navy/2022/03/17/rare-firing-of-flag-officer-for-sexual-harassment-came-after-unwanted-kissing (quoting the President of Protect our Defenders, a non-profit victim advocacy organization); *see also* Sara Sun Beale, *The Many Faces of Overcriminalization*, 54 AM. U. L. REV. 747, 773 (2005) ("Legislators are concerned (and rightly so) that the public may conflate their support of decriminalization with support for the conduct in question.").

[216] Duncan, *supra* note 69, at 1137.