"ANY SEXUAL MISCONDUCT": THE APPLICATION OF MRE 412 TO ART. 117A

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I. INTRODUCTION

Congress has amended the Uniform Code of Military Justice (UCMJ) several times over the past decade, responding to public outcry against Service member misconduct.[1] One recent change came in the wake of the 2017 "Marines United" scandal, which involved an online group of active duty and former Marines, as well as current and former Service members from other branches, sharing intimate photos of Service members without their consent.[2] This scandal caused a national uproar and a demand for legislative action.[3] Congress responded promptly by enacting Article 117a to the UCMJ in the 2018 National Defense Authorization Act.[4] In so doing, Congress followed the path taken by many other states in criminalizing "revenge porn" type-conduct.[5] This article's enactment

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[1] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013) (codified at 10 U.S.C. § 806b) (codifying certain rights for crime victims); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021) (codified at 10 U.S.C. § 824a) (creating military service offices of Special Trial Counsel).

[2] Thomas J. Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS (Mar. 4, 2017), https://bit.ly/3X8JGiV.

[3] *See* Alex Ward, *The Military May Soon Consider Revenge Porn a Criminal Act*, VOX (Sep. 20, 2017), https://bit.ly/3T6vAh6.

[4] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283, 1389 (2017) (codified at 10 U.S.C. § 917a).

[5] *See, e.g.*, *Nonconsensual Distribution of Intimate Images*, CYBER C.R. INITIATIVE, https://bit.ly/3Z5HVph. Forty-eight states, the District of Columbia, and two U.S. territories have passed laws criminalizing the nonconsensual distribution of intimate images.

was but the latest step forward in protecting victims of crimes involving sexual misconduct.

Nearly fifty years before the enactment of Article 117a in 2017, state legislatures and Congress adopted rape-shield laws to prohibit the in-court use of evidence of a victim's sexual behavior or a victim's sexual predisposition, except in very limited circumstances.[6] In 1980, then-President Jimmy Carter adopted Military Rule of Evidence (MRE) 412, which parallels the state and federal rules, into the *Manual for Courts-Martial (MCM)*, along with the rest of the newly drafted Military Rules of Evidence.[7] Though the military's rule was modeled on the federal rule, it was initially more expansive than the federal rule because it applied to "nonconsensual sexual offense[s]"[8] and not just "rape or assault with intent to commit rape."[9] The current version of the rule is even more broad than the first, applying to any case involving "an alleged sexual offense."[10] Nationwide, the rule's enactment and subsequent implementation marked a new restrictive approach to determining evidence admissibility.[11] This type of evidence went from being permitted unless an exception applied to being prohibited unless an exception applied.

MRE 412 prohibits two broad categories of evidence: (1) evidence that the alleged victim engaged in "other sexual behavior" and (2) evidence to prove an alleged victim's "sexual predisposition."[12] Even though the rule restricts these broad categories of evidence, it only applies when sexual offenses are charged. As a result, one might assume that MRE 412 does not apply to Article 117a, despite the sexual content of the material it prohibits from being shared.[13] Article 117a criminalizes the wrongful distribution of intimate visual images (WDII), not

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[6] *Rule 412: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Disposition*, 12 TOURO L. REV. 457, 458–59 (1996). *See, e.g.*, FED. R. EVID. 412 (1978); MICH. COMP. LAWS ANN. § 750.520j (West 1975); CAL. EVID. CODE § 782 (West 1975); MINN. STAT. ANN. § 609.347 (West 1975).

[7] Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 11 (1990) (citing Exec. Order No. 12, 198, 45 Fed. Reg. 16932 (Mar. 14, 1980)).

[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 412(a) (1984) [hereinafter 1984 MCM].

[9] *See* FED R. EVID. 412 advisory committee's note to 1994 amendment.

[10] MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 412(d) (2024) [hereinafter MCM] ("[T]he term 'sexual offense' includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. 'Sexual behavior' includes any sexual behavior not encompassed by the alleged offense. The term 'sexual predisposition' refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. For the purpose of this rule, the term 'victim' includes an alleged victim.").

[11] Rosanna Cavallaro, *Rape-Shield Evidence and the Hierarchy of Impeachment*, 25 AM. CRIM. L. REV. 295, 295 (2019*)* ("Rule 412 reverses the ordinary approach of such rules and prohibits the use of any and all rape-shield evidence unless it is explicitly permitted by the Rule.").

[12] MCM, *supra* note 10, M.R.E. 412.

[13] *See* UCMJ art. 117a (2017).

a sexual act.[14] However, neither Congress nor the President has directly addressed the question of whether MRE 412 applies. Likewise, no military appellate court has addressed this issue.

This paper will argue for applying MRE 412 to Article 117a, absent clear guidance from Congress or the President. In short, practitioners and military judges should apply MRE 412 when Article 117a is charged because MRE 412 applies to sexual offenses; a "sexual offense" includes "any sexual misconduct" punishable by law, and Article 117a punishes a specific type of sexual misconduct. Part II of this paper will review the text and context of MRE 412 and Article 117a. Part III will present arguments for and against the application of MRE 412. Part IV will explain why MRE 412's framework is the proper evidentiary sieve in Article 117a cases.

II. BACKGROUND: THE PROTECTION OF VICTIMS

A. History of Rape-Shield Protections and MRE 412

Originally passed as the Privacy Protections for Rape Victims Act of 1978[15] and subsequently implemented as Federal Rule of Evidence (FRE) 412, the rule represented a paradigmatic shift in how and whether courts considered evidence of a victim's sexual behavior.[16] This new approach made evidence of "past sexual behavior" inadmissible except in limited circumstances.[17] Past sexual behavior was broadly defined "to include all sexual conduct other than the rape or assault at issue. Hence, the rule embrace[d] all sexual conduct of the victim."[18] With the enactment of such laws, victims were no longer required to answer questions about their sexual history, manner of dress, way of talking, or anything about their lifestyle with a sexual connotation.[19] This entire line of questioning was now prohibited. Before rape-shield laws were enacted, defense attorneys in rape cases routinely put the victim's character on trial by offering character and opinion testimony of a victim's unchaste character.[20] Lawmakers enacted these

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[14] Major Joshua B. Fix, *The Revenge of Preemption: How to Correct Unintended Consequences of the Military's "Revenge Porn" Statute*, 3 ARMY LAW. 52, 53 (2021).
[15] Privacy Protections for Rape Victims Act of 1978, Pub. L. No. 95–540, 92 Stat. 2046–47 (1978) [hereinafter Privacy Protections Act].
[16] *See* Cavallaro, *supra* note 11.
[17] Privacy Protection Act, *supra* note 15.
[18] United States v. Torres, 937 F.2d 1469, 1472 (9th Cir. 1991) (quoting CHARLES A. WRIGHT ET AL., 23 FED. PRAC. & PROC. EVID. § 5384, at 541 (1980)).
[19] Cavallaro, *supra* note 11, at 298 (2019) (citing Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986); United States v. Dorsey, 16 M.J. 1, 7 (C.M.A. 1983)).
[20] *See* 5 JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 412 App.01 (2d ed. 1997) (quoting 124 Cong. Rec., H11944 11945 (daily ed. Oct. 10, 1978) (statement of Rep. James R. Mann) ("Mr. Speaker, for many years in this country, evidentiary rules have permitted the introduction of

provisions to protect victims in sexual offense cases from being shamed with any evidence of unchaste character, which would discourage the reporting of this type of crime.[21]

With the implementation of FRE 412, relevant evidence about the victim's sexual reputation and character were barred entirely from admission, even though previously, such evidence was admissible under FRE 405.[22] It also created a presumption that specific instances of previous sexual conduct by the victim were inadmissible.[23] This presumption could only be overcome in three particular instances. The first was that evidence could be admitted if it was constitutionally required.[24] The second exception permitted an accused to introduce "past sexual behavior" if it was used to demonstrate that someone other than the accused was the source of the semen or injury.[25] The third exception permitted evidence of "past sexual behavior" between the accused and the victim if it was offered to prove consent to the charged crime.[26] Notably, these three exceptions applied only to "sexual behavior," not "sexual predisposition."[27]

The military rule has closely reflected the federal rule with a few exceptions.[28] In *United States v. Banker*, the Court of Appeals of the Armed Forces (CAAF) departed from the traditional MRE 412 balancing test for constitutionally required evidence in favor of one that elevated the victim's

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evidence about a rape victim's prior sexual conduct. Defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life.")).

[21] Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986) ("Rape-shield laws, as they are popularly known, reversed the long-standing common-law doctrine that permitted a defendant accused of rape to inquire into the complainant's 'character for unchastity,' that is, her propensity to engage in consensual sexual relations outside of marriage.").

[22] *See* FED R. EVID. 405 (1978) ("Rule 405. Methods of Proving Character (a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. (b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."); *see, e.g.*, Gish v. Wisner, 288 F. 562, 562 (5th Cir. 1923) ("Hence, in a prosecution or suit for an assault with intent to commit rape, the rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent.").

[23] FED. R. EVID. 405 (1978).

[24] FED. R. EVID. 412(b)(1) (1978).

[25] FED. R. EVID. 412(b)(2)(A) (1978).

[26] FED. R. EVID. 412(b)(2)(B) (1978).

[27] FED. R. EVID. 412(b) (1978). Both "sexual behavior" and "sexual predisposition" are defined in the rule. Still, one way to summarize their differences is that "behavior" refers to things explicitly sexual, whereas "predisposition" refers to things implicitly sexual.

[28] United States v. Banker, 60 M.J. 216, 217 (C.A.A.F. 2004).

privacy interest.[29] To be admissible, the probative value of the evidence had to outweigh the prejudice to the victim's privacy interest.[30] The court reversed course in *United States v. Gaddis*, returning to the traditional MRE 412 balancing test for determining the admissibility of constitutionally required evidence.[31] However, military judges have given the rule the widest applicability in keeping with the rule's shift from offense-focused to victim-focused. For example, the CAAF extended MRE 412 protections to victims of all allegations of sexual misconduct, consensual and nonconsensual, in the case of *United States v. Banker*.[32] It did this despite the text of the rule, specifically, the heading of the rule itself and the definition of "nonconsensual sexual offense" provided in the rule.[33]

B. History of Article 117a

Reporter Thomas J. Brennan broke the news story detailing the Facebook group, Marines United, on March 4, 2017.[34] His reporting detailed the existence of a private Facebook group with over 30,000 members composed of former and actively serving members of the armed forces, some of whom were sharing videos and images of nude women, including active and former Service members and civilians.[35] This news ignited a firestorm of coverage from national news outlets and attention from Congress and the Pentagon.[36]

Within days of these reports, members of Congress called for new legislation to criminalize sharing sexually explicit photos without permission.[37] A new law was needed because, in most cases, the UCMJ did not plainly prohibit sharing intimate photos and videos voluntarily taken or recorded with the other

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[29] *Id*. at 223 ("[W]hen balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interests.").
[30] *Id*.
[31] United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).
[32] 60 M.J. at 220.
[33] MCM, *supra* note 10, M.R.E. 412 ("A 'nonconsensual sexual offense' is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.").
[34] Brennan, s*upra* note 2.
[35] *Id.*
[36] *See* Anna Hiatt, *Strong Responses Follow News of Nude Photo Sharing by Marines*, THE WAR HORSE, (Apr. 13, 2017), https://bit.ly/3MpMnbd; Bill Chappell, *Sharing of Nude Photos of Female Marines Online Prompts Pentagon Investigation*, NATIONAL PUBLIC RADIO, TWO-WAY (Mar. 6, 2017, 8:10 AM), https://n.pr/3z3hqX3; *Marine Corps Social Media Nude Photos Investigation*, C-SPAN (Mar. 14, 2017), https://bit.ly/3X6GbcX (displaying the testimony of the Commandant of the Marine Corps before the Senate Armed Services Committee about the Marines United scandal).
[37] *Illicit Photo Scandal Touches Other Military Branches Besides Marines: Report*, ABC NEWS (Mar. 10, 2017, 10:25 AM), https://bit.ly/4g6YpDO.

person's consent.[38] Senator Elizabeth Warren raised this issue to the Commandant of the Marine Corps, General Robert Neller, when the Senate Armed Services Committee questioned him. She asked whether the military services needed a "revenge porn" statute to criminalize this behavior.[39] General Neller responded that such a statute "would be helpful in the accountability process."[40]

Congress rushed to fill this gap, and by the end of that year, it created a new punitive provision, Article 117a. Introduced initially as the "Protecting the Rights of Individuals Against Technological Exploitation Act or the PRIVATE Act," the provision was ultimately enacted as part of the 2018 National Defense Authorization Act.[41] The law criminalized the "wrongful broadcast or distribution of intimate visual images."[42] Its numbering as Article 117a located it in the section of the code dealing with military-specific offenses, those that have an impact on military readiness and efficiency, such as absence without leave [43] and disrespect,[44] and not with traditionally recognized common law offenses, such as murder [45] and rape. [46] It was placed just after Article 117, which prohibits provoking speeches or gestures between service members.[47] Its focus on military readiness and efficiency can be seen in the elements of the offense, which does not criminalize all sharing of intimate images, but only those that have a "reasonably direct and palpable connection to a military mission or military environment."[48] Senator Clare McCaskill, one of the provision's supporters in the Senate, spoke publicly about military readiness as a justification for the law: "Whether it's in the barracks or on the internet, degradation and intimidation of

[38] Military officers involved could have been charged with an Article 133 violation, criminalizing any conduct unbecoming an officer. *See* UCMJ art. 133 (2016). For enlisted personnel, it was possible to charge under Article 134, which criminalizes, *inter alia*, "all disorders and neglects to the prejudice of the good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces[.]" *Id*. art. 134.
[39] Jeff Schogal, *Marine Corps Social Media Policy: Cyberbullying is Illegal*, MARINE CORPS TIMES (Mar. 15, 2017), https://bit.ly/4e18IHE.
[40] *Id*.
[41] Protecting the Rights of Individuals Against Technological Exploitation Act or the PRIVATE Act, H.R. 2052, 115th Cong. (2017) [hereinafter PRIVATE Act].
[42] *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283, 1389 (2017) (codified at 10 U.S.C. § 917a).
[43] UCMJ art. 86.
[44] *Id*. art. 89.
[45] *Id*. art. 118.
[46] UCMJ art. 120. *See generally* DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES (4th ed. 2024), which divides the code into Inchoate Offenses (Articles 77 to 82), Military Specific Offenses (Articles 83 to117a), Common Law Offenses (Articles 118 to 132), and the General Articles (Articles 133 to 134).
[47] *See* UCMJ art. 117; *see also* SCHLUETER ET AL., *supra* note 46, § 5.50 ("This Article dates to the time of crusades and the Ordinance of Richard I, A. D. 1190, which was issued to prevent disputes between soldiers and sailors on their way to the Holy Land.").
[48] UCMJ art. 117a.

our service members is a serious crime that threatens good order and discipline, and we've got to give our military the tools it needs to treat it that way."[49]

In the years since this article was enacted, there have been relatively few appellate court decisions interpreting its text.[50] No court has heard a challenge to the application of MRE 412 to the offense.

III. DOES MRE 412 APPLY TO ARTICLE 117A?

A. Arguments for the Application of MRE 412 to Article 117a

1. Article 117a is a "Sexual Offense"

The first argument in favor of the applicability of MRE 412 to Article 117a is based on the text of the rule. That is, the language of MRE 412 is broad enough to include the offense. The argument can be stated as follows: (1) MRE 412 applies to "sexual offenses," and (2) sexual offenses include those that contain "sexual misconduct," and (3) Article 117a prohibits sexual misconduct, (4) it follows that MRE 412 applies to cases where Article 117a is alleged.

Definitionally, MRE 412 applies in any case involving an "alleged sexual offense."[51] Step one then is determining what constitutes a sexual offense. The rule defines "sexual offense" as "any sexual misconduct punishable under the [UCMJ], federal law or state law."[52] This definition of "sexual offense" differs from the definition of "sexual offense" contained in MRE 413.[53] The definition in MRE 413 is more restrictive and specific than that of MRE 412. Missing in MRE 413 are the words "any sexual misconduct." Instead, MRE 413 applies to "a sexual offense." The words "sexual offense" are defined as "an offense punishable under the [UCMJ], or a crime under federal law or state law," which is the same

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[49] Leo Shane III, *Congress Poised to Outlaw Revenge Porn in the Military*, ARMY TIMES (Sep. 20, 2017), https://bit.ly/3XrBNqr.

[50] Some of the reported cases include: United States v. Grijalva, No. 23-0215, 2024 CAAF LEXIS 385, at *11–15 (C.A.A.F. June 26, 2024) (finding that Article 134 was preempted by Article 117a); United States v. Jennings, No. ACM 40282, 2023 CCA LEXIS 525, at *15-25 (A.F. Ct. Crim. App. Dec. 13, 2023) (considering what it means to electronically transmit an image); United States v. Robles, No. ACM 40280, 2023 CCA LEXIS 353, at *16–21 (A.F. Ct. Crim. App. Aug. 18, 2023) *review denied*, United States v. Robles, 2023 CAAF LEXIS 863 (C.A.A.F. Dec. 12, 2023) (considering what images are sexually explicit); United States v. Hiser, 82 M.J. 60, 66–67 (C.A.A.F. 2022) (considering what it means to have a "connection to a military mission or military environment"); United States v. Page, 80 M.J. 760, 766–68 (N-M Ct. Crim. App. 2021) (considering an issue of information transmitted with an image).

[51] MCM, *supra* note 10, M.R.E. 412(a).

[52] *Id*. M.R.E. 412(d).

[53] *See id*. M.R.E. 413.

as in MRE 412, but MRE 413 then provides a specific list of offenses to which it applies.[54] MRE 412 contains no such specific listing of applicable offenses.

MRE 412 is not limited in its applicability to only those offenses often referred to as "sexual offenses," such as rape, sexual assault, and any such attempt to commit those acts. Nor is it specifically limited to those enumerated punitive articles such as Article 120 through Article 120c, UCMJ, which were the type of offenses included in the 1988 amendments to FRE 412.[55] Modeling the changes that first appeared in the 1994 amended FRE 412,[56] MRE 412 does not denote any enumerated criminal offenses to which it applies. Instead, the rule applies to "any sexual misconduct," which is punishable under the UCMJ, state, or federal law. This parallels the language in the Advisory Committee Notes, which states that the federal rule applies in all cases involving sexual misconduct.[57]

Step two is to determine the definition of "sexual misconduct." MRE 412 does not provide a definition. There is no specific definition in the MCM or within the federal rule. However, there are a few other uses of the words in the MCM. The term is used in the title of Article 120c, "Other sexual misconduct," to categorize three specific offenses outside of those prohibited in Articles 120 through 120b.[58] However, "sexual misconduct" is not defined by that punitive article. The other times "sexual misconduct" is referred to in the MCM, it is used

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[54] *Id*. MRE 413 provides:

> (d) Definition. As used in this rule, 'sexual offense' means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as 'state' is defined in 18 U.S.C. § 513), involving:
> (1) any conduct prohibited by Article 120;
> (2) any conduct prohibited by 18 U.S.C. chapter 109A;
> (3) contact, without consent, between any part of the accused's body, or an object held or controlled by the accused, and another person's genitals or anus;
> (4) contact, without consent, between the accused's genitals or anus and any part of another person's body;
> (5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
> (6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

[55] *See* FED R. EVID. 412 advisory committee's note to 1994 amendment.

[56] *See* FED R. EVID. 412(a).

[57] FED R. EVID. 412 advisory committee's note to 1994 amendment.

[58] *See* UCMJ art. 120c. The offenses proscribed by the article include (1) indecent viewing, visual recording, or broadcasting, (2) forcible pandering, and (3) indecent exposure.

generically and not to delineate a list of sexual offenses.[59] The same is true of the federal rule.[60]

Since the rule itself does not provide the definition, nor can one be found within the MCM, the words must be understood by their ordinary meaning.[61] FRE 412 is construed similarly for terms that are not explicitly defined.[62] Looking outside of the military context reveals that the words "sexual misconduct" are not legal terms but are used to refer to any misconduct involving sexual behavior.[63] Neither *Black's Law Dictionary*[64] nor *Ballentine's Law Dictionary*[65] contains a definition for "sexual misconduct." A Google search of a definition for sexual misconduct garners numerous results from universities describing their policies prohibiting several specific types of sexual misconduct.[66] These definitions describe a broad class of behavior that is sexual in character.[67]

The next step is to determine whether wrongful distribution of an intimate visual image is "sexual misconduct." It is helpful to consider two other

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[59] *See, e.g.*, MCM, *supra* note 10, app. 17 ("Forcible *sexual misconduct* previously addressed under Article 125 (MCM 2016) is now addressed in Articles 120 and 134 (Animal abuse)." (emphasis added)).
[60] FED R. EVID. 412 advisory committee's note to 1994 amendment ("Rule 412 extends to . . . witnesses . . . whose testimony about other instances of *sexual misconduct* . . . . Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a 'victim of alleged *sexual misconduct*.'" (emphasis added)).
[61] *See* United States v. Bergdahl, 80 M.J. 230, 249 (C.A.A.F. 2020) ("In the absence of any specific statutory definition, we look to the ordinary meaning of the word." (quoting United States v. Schloff, 74 M.J. 312, 313 (C.A.A.F. 2015))).
[62] United States v. Shaw, 824 F.2d 601, 608 (8th Cir. 1987) ("In construing the meaning of Rule 412(b)(2)(A), a court 'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (quoting Park 'n Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))).
[63] *Sexual Harassment*, RAINN, https://bit.ly/4egRUwj ("Sexual misconduct is a non-legal term used informally to describe a broad range of behaviors, which may or may not involve harassment.").
[64] *See generally* BLACK'S LAW DICTIONARY (3d Pocket ed. 2006) (lacking a definition for "sexual misconduct").
[65] *See generally* BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (lacking a definition for "sexual misconduct").
[66] *See, e.g.*, *What is Sexual Misconduct?*, COVENANT COLLEGE, https://bit.ly/3XxlzvT ("Sexual Misconduct is conduct of a sexual nature or conduct based on sex or gender that is nonconsensual or has the effect of threatening, intimidating, or coercing a person. The College prohibits the following specific conduct . . . : 1. Sexual Harassment; 2. Sexual Assault; 3. Dating Violence; 4. Domestic Violence; 5. Stalking; 6. Retaliation."); *What is Sexual Misconduct?*, CLARK COLLEGE, https://bit.ly/3TjV5vq ("Sexual misconduct is a type of violence that uses power, control, and/or intimidation to harm another. It includes sexual harassment, sexual assault, domestic violence, dating violence, and stalking. It occurs when there is an absence of consent."); *P&P, Section 9.4.1.2: Sexual Misconduct – Further Definitions of Sexual Misconduct & Intimate Partner Violence*, MIT INSTITUTE DISCRIMINATION & HARASSMENT RESPONSE OFF., https://bit.ly/3MzaaWf ("Sexual misconduct is a broad term that includes sexual assault (rape, sexual fondling, incest or statutory rape) as well sexual exploitation and sexual harassment.").
[67] *Id*.

terms defined in MRE 412 that inform what amounts to "sexual misconduct." While MRE 412 applies in cases involving "any sexual misconduct," the rule prohibits evidence of other "sexual behavior" and evidence of "sexual predisposition." MRE 412 defines "sexual behavior" as "*any* sexual behavior not encompassed by the alleged offense."[68] "Sexual predisposition" is defined as a victim's manner of dress, speech, or lifestyle that *may* have a sexual connotation.[69] These are incredibly expansive definitions and can inform the meaning of "sexual misconduct."

The Advisory Committee's Notes to the 1994 federal amendment also provide insight into what the definition of "sexual behavior" encompasses. "[S]exual behavior connotes *all* activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that *imply* sexual intercourse or sexual contact." [70] The Committee's Notes cite several cases where courts concluded that conduct that did not explicitly involve sexual behavior nonetheless implied "sexual behavior," which was enough for courts to consider it covered by the rule.[71]

The definition of "sexual predisposition" is even more broad than "sexual behavior." Again, the focus is on dress, speech, or lifestyle "that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder."[72] The word connotation is defined as "something suggested by a word or thing."[73] Some have concluded, "This must mean that evidence of 'sexual predisposition' includes behavior that does not amount to sexual contact or lead to sexual arousal, but still reveals something more general about a victim's sexuality."[74] "Sexual predisposition" appeals to something more significant and insidious, such as stereotyping or insinuating.[75]

With the ideas of "sexual behavior" and "sexual connotation" in mind, Article 117a must be examined to determine whether it prohibits "sexual behavior" or whether the conduct it prohibits has a "sexual connotation." Since the ordinary meaning of "sexual misconduct" applies, we must necessarily look at the content of the offense to ascertain whether it is sexual misconduct. Here,

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[68] MCM, *supra* note 10, M.R.E. 412 (emphasis added).
[69] *Id*. (emphasis added).
[70] FED R. EVID. 412 advisory committee's note to 1994 amendment (emphasis added).
[71] *See id*. (citing United States v. Galloway, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 418 (1992) (finding use of contraceptives inadmissible since use implies sexual activity); United States v. One Feather, 702 F.2d 736 (8th Cir. 1983) (finding birth of an illegitimate child inadmissible); State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986) (finding evidence of venereal disease inadmissible).
[72] FED R. EVID. 412 advisory committee's note to 1994 amendment.
[73] *Connotation*, MERRIAM-WEBSTER.COM DICTIONARY, https://bit.ly/3z5Z4ot.
[74] CHARLES A. WRIGHT ET AL., 23 FED. PRAC. & PROC. EVID. § 5374.1 (2d ed. 2019).
[75] *Id*.

while the offense prohibits sharing intimate images without permission, it is only because the images contain sexually explicit content that the prohibition exists. While it is possible for a non-explicit photo shared without permission to be a violation of the UCMJ through Article 134, Article 117a does not prohibit such sharing. It only prohibits sharing those images that contain "sexually explicit conduct."[76] This is "sexual behavior," as defined by MRE 412, and can undoubtedly be used to show a victim's "sexual predisposition."

Another way to demonstrate the textual argument for including Article 117a is to compare it with Article 120c, Indecent Viewing.[77] Article 120c does not prohibit sexual acts, but it does prohibit "sexual behavior," and yet it is considered sexual misconduct, such that a conviction requires sex offender registration.[78] Article 120c can be distilled to prohibit three types of conduct: (1) seeing someone naked without consent, (2) photographing or recording someone naked without consent, and (3) broadcasting or distributing the photo or video without consent.[79] This broadcasting or distributing is the same *actus reus* prohibited by Article 117a. The only difference is that in Article 117a, the victim knew the accused possessed the intimate images, and in Article 120c, the victim did not. How can the determination of whether one offense is treated as a "sexual offense" so that MRE 412 applies depends on whether or not the victim knew the accused possessed the intimate image? The determination of whether it is a "sexual offense" must rely instead on the content of the offense, on the actual behavior involved, and whether it contains anything sexual.

It can be concluded on this basis that Article 117a prohibits a type of sexual misconduct because the behavior it criminalizes has sexual content and is sexual behavior—"sexually explicit conduct."[80] This concept fits within the ordinary meaning of the words "sexual misconduct." The sharing of the photo and the content of the photo cannot be separated. It is the content of the photo that makes the sharing illegal. The ultimate conclusion that cogently follows is that because Article 117a prohibits a specific type of sexual misconduct, it is a "sexual offense." Since MRE 412 applies in cases where a "sexual offense" is alleged, it can be concluded that MRE 412 applies to allegations of Article 117a.

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[76] UCMJ art. 117a(b)(6) ("SEXUALLY EXPLICIT CONDUCT.—The term 'sexually explicit conduct' means actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse.").
[77] UCMJ art. 120c.
[78] *See* U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 4 (11 Mar. 2013).
[79] UCMJ art. 120c(a)(1)–(3).
[80] *Id*.

2. MRE 412 Applies to Some Article 134 Offenses

MRE 412 has broad applicability. As stated before, it applies in "any proceeding involving an alleged sexual offense[.]" [81] Some offenses are commonly recognized as sexual offenses, particularly those UCMJ articles in the 120-series. This series of punitive articles criminalize the type of conduct that gave rise to the first rape-shield laws, such as rape and sexual assault. Notably, a conviction for one of these sex offenses results in sex offender registration, which is partly why they are commonly referred to as "sex offenses."[82] There is no question about whether MRE 412 applies when an offense in the 120-series is alleged, despite the lack of specificity about the definition of sexual offense. But MRE 412 also applies to other punitive provisions outside of those recognized sexual offenses. It applies to offenses involving sexual misconduct covered by Article 134, including indecent conduct,[83] sexual harassment,[84] and pandering and prostitution.[85]

The commonality among these other offenses is their concern with sexual behavior. Consider the offense of indecent conduct, which prohibits actions that contain a "form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations."[86] The offense of sexual harassment prohibits "sexual advances, demands or requests for sexual favors, [and] engag[ing] in other conduct of a sexual nature[.]"[87] Pandering and prostitution prohibit sexual acts in exchange for money or other compensation.[88] Sexual behavior is at the heart of what these offenses prohibit just as Article 117a.

There are two other categories of offenses to which MRE 412 applies that are not specifically enumerated sexual offenses in the UCMJ: federal sexual offenses and state sexual offenses. Known as "Clause 3 offenses" because of the

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[81] MCM, *supra* note 10, M.R.E. 412(a).
[82] *See* U.S. DEP'T OF DEF., INSTR., 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY PAROLE AUTHORITY (11 Mar. 2013) (C4, 19 Aug. 2020) (providing the list of UCMJ offenses that require sex offender registration).
[83] *See, e.g.*, United States v. Seeto, 2018 CCA LEXIS 518, at *21–22 (A.F. Ct. Crim. App. Oct. 26, 2018) (authorizing a rehearing in a conviction for Article 134, Indecent Conduct, where the accused was convicted of ejaculating on the victim's stomach).
[84] United States v. Porter, 2000 CCA LEXIS 307, at *3 (N-M Ct. Crim. App. Aug. 10, 2000) (acknowledging the trial court's MRE 412 hearing in a case where sexual harassment was alleged); *see also* FED R. EVID. 412 advisory committee's note to 1994 amendment (explaining that FRE 412 applies in any civil case including those for claims of sexual harassment).
[85] *See* SCHLUETER ET AL., *supra* note 46, § 7.18. Though there are no reported cases where a court has specifically applied MRE 412 to the offense, the crime prohibits certain sexual acts. The provision adopts the "sexual act" definition of sexual defined in Article 120 of the MCM.
[86] MCM, *supra* note 10, pt. IV, ¶ 104(c)(1).
[87] *Id*. ¶ 107a(b)(1).
[88] *Id*. ¶ 106(b)(1).

language of the article enabling them to be charged, Article 134 permits federal and state crimes to also be charged as violations of the UCMJ.[89] By implication, MRE 412 applies to those Article 134 offenses that incorporate federal sexual offenses[90] and state sexual offense crimes under the Assimilated Crimes Act.[91]

Since MRE 412 applies to more than just those commonly recognized sex offenses, and Article 117a is one of those offenses, MRE 412 should also apply to Article 117a. Like these other offenses where MRE 412 applies, Article 117a is concerned with sexual activity or sexual behavior. More specifically, it is concerned with ensuring the privacy of sexual activity or sexual behavior between those consenting adults who choose to record their actions for their private use. While each of these other offenses has a distinct element, act, or subject in view, they all share an essential commonality that warrants the protections provided by MRE 412. Because Article 117a shares that commonality, MRE 412 should apply.

Finally, there is at least one state, Hawaii, that regards WDII as a registerable sex offense.[92] And there is another that requires sex offender registration after a second conviction.[93] These examples lend support to MRE 412's applicability to cases where Article 117a is charged because if MRE 412 applies to "any sexual misconduct . . . punishable under state law," then it would apply if the Hawaii criminal statute was charged since it is an offense requiring sex offender registration. Notwithstanding the charging of the state crime, the fact that some states regard it as a registerable offense supports the position that Article 117a deals with sexual misconduct.

3. Policy Interests Align

The policy rationale behind MRE 412 closely aligns with Article 117a. As mentioned above, the history and the intent behind MRE 412 (and FRE 412) align with the purpose of Article 117a. The purpose of both provisions is to protect the privacy and dignity of victims by increasing the protections afforded them and to encourage the reporting of misconduct. The reasoning that gave rise to the first rape-shield law and FRE 412 was the desire to protect victims from attacks on their sexual character, which would cause shame and embarrassment.[94] FRE 412

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[89] *Id*. ¶ 91 (criminalizing "crimes and offenses not capital").
[90] *See generally* UCMJ art. 134; *see, e.g.*, United States v. Kearns, 73 M.J. 177, 179 (C.A.A.F. 2014) (upholding appellant's conviction for violating 18 U.S.C. § 2423(a), which was charged as a violation of clause 3 of Article 134).
[91] 18 U.S.C. § 13 (1996).
[92] HAW. REV. STAT. § 711-1110.9 (2018); HAW. REV. STAT. § 701–846e (2024).
[93] IDAHO CODE § 18-6605 (2022); *id*. § 18-8304 (2022).
[94] *See* WEINSTEIN, s*upra* note 20.

was enacted to encourage the prosecution of such crimes.[95] With Article 117a, the impetus for the law was the desire to protect victims from those who would share their intimate images to shame and embarrass them.[96]

If MRE 412 did not apply in Article 117a cases, the purposes of both would be thwarted. Consider the potential chilling effect on victims' reporting WDII if other intimate images of them could be introduced during a trial. Victims could experience even more shame and embarrassment by reporting the crime than not reporting it. This scenario would circumvent the protections and purpose provided by MRE 412. Therefore, not applying MRE 412 would frustrate the purpose of Article 117a and could prevent victims from coming forward to report this crime. At the very least, it could subject them to the same embarrassment and ridicule that MRE 412 was designed to prohibit.

The wide application of MRE 412 is supported by the broad definition of "sexual behavior" as defined in the original rule.[97] But the drafters could not foresee the rise of a new form of character attack on women using the internet and social media. Nor could they foresee the type of sexual behavior that arose with the creation of the internet, social media, and smartphones. Nevertheless, the rule was intended to prevent the introduction of any sexual behavior other than what was alleged.[98] Applying MRE 412 to Article 117a furthers the purposes of the rule and the offense by protecting victims from shame and embarrassment. It encourages the reporting of the crime prohibited by Article 117a.

The broad applicability of the rule is demonstrated in the 1994 Notes of the Advisory Committee, which stated:

> The reason for extending the rule to *all criminal cases* is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report

[95] WRIGHT ET AL., *supra* note 75, § 5372 ("'Rape' is one of the most heinous and fastest growing crimes in this country. According to the [Federal Bureau of Investigation], since 1962 forcible rapes have increased 62 percent. Yet rape is one of the most underreported violent crimes. Even where the crime is reported victims are often unwilling to proceed with the prosecution. In New York City only one-tenth of all rapes are actually reported and another study in Denver found that over 40 percent of rape victims were unwilling to cooperate with the prosecution." (citing 124 CONG. REC. S18580 (daily ed. Oct. 12, 1978) (remarks of Mr. Biden)).).

[96] *See* 163 CONG. REC. H1598-599 (daily ed. Mar. 8, 2017) (statement of Rep. Speier) ("This is not about sex or fun or boys will be boys. This is about [M]arines deliberately trying to degrade, humiliate, and threaten fellow marines [sic]."); 163 CONG. REC. H3052 (daily ed. May 2, 2017) (statement of Rep. Lee, "Not only do such actions threaten our mission, they strip our brave servicemembers who are women of their dignity.").

[97] 1984 MCM, *supra* note 8, M.R.E. 412(d) ("[T]he term 'past sexual behavior' means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.").

[98] *Id*.

> criminal acts *is not confined to cases that involve a charge of sexual assault*. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.[99]

Extending the protections of MRE 412 to victims of Article 117a is equally obvious. Article 117a is a crime, recognized nearly nationwide, that involves significant privacy interests of victims. The strong social policy of protecting victim privacy and encouraging reporting has not been confined to sexual assault or a crime that involves a physical sexual act. This same policy compelled Congress to quickly prohibit the behavior exhibited in the "Marines United" scandal. MRE 412 should be applied because it gives this social policy full effect.

4. Some Victims Counsel Programs Treat Article 117a as an Eligible Offense

Another consideration in determining whether Article 117a is a "sex offense" is how the military's victim legal counsel organizations treat the offense. Is it one that triggers the special protections intended by Congress in mandating the military to create these programs?[100] Some military services treat Article 117a as an offense that entitles a Service member to be represented by a victims' legal counsel, special victims' counsel, or victims' counsel.[101]

Only certain offenses entitle Service members to representation by a victim's counsel. These are set out in statute and military service regulations. One of the authorizing statutes, 10 U.S.C. § 1044e, authorizes legal counsel to victims of "sex-related offenses."[102] A "sex-related offense" is defined as a violation of Articles 120, 120b, and 120c, as well as an attempt to commit any one of the offenses in violation of Article 80.[103] Legal assistance for victims of "sexual assault" is also codified at 10 U.S.C. §1565b.[104] "Sexual assault," as defined by the provision, covers "the offenses of rape, sexual assault, forcible sodomy,

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[99] FED. R. EVID. 412 advisory committee's note to 1994 amendment (emphasis added).
[100] The requirement for the military departments to provide victims of sex assault with protections was enacted with the FY2011 NDAA. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 581(a), Dec. 31, 2011, 125 Stat. 1430, codified at 10 U.S.C. § 1565b (2011) (requiring the military departments to establish regulations to the provision of legal services to victims of sexual assault).
[101] The Marine Corps and Navy refer to these attorneys as Victims' Legal Counsel. The Army and Coast Guard call them Special Victims' Counsel. The Air Force refers to them as Victims' Counsel.
[102] 10 U.S.C. § 1044e (2015).
[103] *Id*. § 1044e(h).
[104] This statute requires more than just legal assistance for victims of sexual assault.

aggravated sexual contact, abusive sexual contact, and attempts to commit such offenses, as punishable under applicable Federal or State law."[105]

Despite these limited definitions, some military services have expanded this benefit to victims of Article 117a. In the Air Force Victim Counsel Program regulations, Article 117a is explicitly included as an eligible offense, although for Article 117a, additional criteria must be met. The Coast Guard has also included victims of Article 117a as those eligible to receive the services of a special victims' counsel. The Navy's Victim Legal Counsel Program may also take a broader view of who an eligible victim is. Although their manual states that they provide representation to those victims of "sex offenses,"[106] which aligns with the federal definition of "sex-related offense,"[107] their public-facing website claims that they provide representation to victims of domestic violence and Article 117a.[108]

Most of the military's victim counsel organizations explicitly provide legal representation to victims of Article 117a and none are prohibited from doing so. Congress requires these organizations to provide legal services to victims of sex-related offenses. Their provision of legal services to victims of this offense supports treating Article 117a as a sexual offense.

5. Article 117a is a "Covered Offense"

Another indicator of whether Article 117a should be considered a sexual offense is whether it is one of the small number of offenses to be handled solely by the new offices of special trial counsel. Created by the Fiscal Year 2022 National Defense Authorization Act, these new prosecutorial offices will decide whether allegations of certain "covered offenses" will be prosecuted.[109] Article 117a is one of these thirteen "covered offenses."[110]

The creation of these new offices was the culmination of Defense Secretary Lloyd Austin's 90-Day Independent Review Commission (IRC) on

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[105] 10 U.S.C § 1565b(c)(1) (2022).
[106] U.S. DEP'T OF NAVY, JAGINST 5810.3A, NAVY VICTIMS' LEGAL COUNSEL PROGRAM MANUAL, ch. 1-1 (23 Apr. 2018).
[107] 10 U.S.C. § 1044e(h).
[108] *Victims' Legal Counsel Program FAQ*, U.S. DEP'T NAVY, https://bit.ly/3YeEaMz ("In order to be eligible to receive legal services from the VLC Program, you must be a victim of a sexual offense or domestic violence and otherwise eligible for legal services from a military attorney . . . . Common domestic violence offenses, such as Article 128 - Assault and Article 130 - Stalking which are covered when they relate to domestic violence. Victims of Article 117a - Wrongful Broadcast or Distribution of Intimate Visual Images are also eligible for our services.").
[109] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021) (codified at 10 U.S.C. § 824a).
[110] *Id*.

Sexual Assault in the Military that occurred in 2021.[111] For years, there were discussions and attempts to change how sexual assaults were prosecuted in the military,[112] but the IRC's report was the push advocates for reform needed to make changes. One of the report's recommendations was for increased accountability for offenders of Article 117a.[113] As one of the "covered offenses," Article 117a will receive the same prosecutorial review as the crimes of murder, rape, and child pornography.[114]

Its grouping with Articles 120, 120b, 120c, and 134 (Sexual Harassment) requires an examination of the commonalities among these offenses. The IRC Report recognized that sexual harassment and sexual assault exist on a "continuum of harm."[115] The IRC Report also identified a link between cyberharassment and sexual assault.[116] "Not infrequently, special victims can experience multiple crimes that overlap with sexual assault."[117] These crimes will now be handled similarly because of their content. They all capture various aspects and modes of sexual misconduct

B. Arguments Against Applying MRE 412 to Article 117a

1. Article 117a is not a "Sexual Offense"

The most straightforward argument against applying MRE 412 to Article 117a is that Article 117a is not a "sexual offense" as defined by the rule.[118] Article 117a is not a sexual offense because it is not sexual misconduct. Article 117a is not sexual misconduct because the prohibited act, the *actus reus*, is sharing images without permission. The prohibited act is not a sexual act. Even though the images it prohibits from being shared contain sexually explicit conduct, the illegal act is sharing, broadcasting, or distributing the image. The sexually explicit conduct

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[111] Memorandum from Sec'y of Def to Senior Pentagon Leadership, Dep't of Def et al., subject: Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military (26 Feb. 2021).
[112] *See* Press Release, Kirsten Gillibrand, Senator, U.S. Senate, Gillibrand Hails Historic Military Justice Reforms in Defense Bill (Dec. 7, 2022), https://bit.ly/4gFbFj8.
[113] INDEPENDENT REVIEW COMMISSION, SEXUAL ASSAULT IN THE MILITARY REPORT, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 27 (Jul. 2, 2021) [hereinafter IRC REPORT] ("The Military Services must commit to holding Service members accountable who engage in cyberharassment, the *nonconsensual distribution of intimate visual images*, or other crimes or violence perpetrated through technology, and providing remedies to victims." (emphasis added)).
[114] UCMJ art. 1(17) (defining "covered offense").
[115] IRC REPORT, s*upra* note 114, at 22.
[116] *Id*. at 29 n.68 ("Cyberharassment is also linked to sexual assault. DoD's own surveys indicate that one-third of victims who report experiencing sexual assault felt they had been the target of retaliation through online ostracism or maltreatment.").
[117] *Id.* at 19.
[118] MCM, s*upra* note 10, M.R.E. 412(d).

itself is not unlawful. Possessing the intimate image of an adult is not a crime as long as the image was obtained with permission. It is not illegal to possess images someone has shared voluntarily. It is not even a crime to possess intimate images of an adult if they were wrongly shared. Instead, it is the broadcasting or distributing of the image that is prohibited.

a. The Text Does Not Support Applying MRE 412

The phrase "sexual misconduct," used in its ordinary sense, refers to crimes that are sexual. Indeed, as defined by the rule, a "sexual offense" is any sexual misconduct punishable under law, whether under the UCMJ, a state's criminal code, or a federal law. One definition of misconduct in Black's Law Dictionary is "unlawful or improper behavior."[119] When considered alongside the adjective "sexual," its range does not extend to any offense or crime that has a sexual element, a sexual aspect, or facts that involve sexual activity. Instead, this phrase is primarily limited to misconduct, where the *actus reus* is sexual conduct or, more broadly, sexual relations.[120]

A few examples of other sexual offenses will illustrate the point. Consider the offense of rape. The *actus reus* is a sexual act committed by unlawful force. In an allegation of sexual assault, the crime is a sexual act (for example, touching a sexual organ) when the other party is unconscious. Stalking can involve the fear of sexual assault. Two of the specific offenses criminalized in Article 120c of the UCMJ all have an illegal sexual act. In forcible pandering, it is forcing someone to engage in prostitution—in sexual acts for money—that is the *actus reus*.[121] With indecent exposure, the act of exposing oneself is the *actus reus*.[122]

Similarly, with the Article 134 offense of child pornography, the crime—whether possessing, distributing, or producing—is centered on sexually explicit conduct with children.[123] While the images themselves are illegal, the target of the offense is sexually abusing children who cannot consent to sexual acts. With Article 117a, sharing the images without consent is unlawful. Sexually explicit conduct is not the focus.

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[119] BLACK'S, *supra* note 65.
[120] *Id*. (defining "sexual relations" as, "1. Sexual intercourse. 2. Physical sexual activity that does not necessarily culminate in intercourse. Sexual relations usu. Involve the touching of another's breast, vagina, penis, or anus. Both person (the toucher and the person touched) are said to engage in sexual relations").
[121] UCMJ art. 120c(b).
[122] *Id*. art. 120c(c).
[123] UCMJ art. 134.

Even for offenses outside of what is commonly referred to as a sexual offense, those prohibited in the 120 series of offenses, the *actus rei*, are sex acts. The criminal act is the sex act itself. This conduct is why MRE 412 applies. With the new offense of sexual harassment, punishable under Article 134, the *actus reus* is conduct of a sexual nature.[124] The actual conduct is prohibited. Likewise, pandering and prostitution criminalize actual sexual acts.

Admittedly, there are other possible applications of MRE 412 where the *actus reus* of the charged offense is not sexual. Still, these are rare and likely only to arise when the trial counsel has not charged an offense where the *actus reus* is prohibited sexual activity. In the federal case where the court upheld the application of FRE 412 to a federal charge of kidnapping, sexual activity was intrinsic to the facts of the case.[125] In those cases where prohibited sexual conduct is intrinsic evidence, even if not a charged offense, MRE 412 still applies because the rule applies not only to "sexual offenses" but also in any cases involving "sexual misconduct" whether or not it is charged. The sexual misconduct just has to be punishable under the law, but it does not have to be charged. MRE 412 could be amended to include the sexual conduct prohibited by Article 117a within the definition of "sexual offense."[126]

b. The Context Does Not Support Applying MRE 412

The legislative history does not support applying MRE 412 to Art. 117a. This is because there is no mention of it in any of the testimonies or remarks by members of Congress. There was no consideration at all about whether Article 117a would be considered a sexual offense. There was no mention of whether a Service member convicted of the offense would be required to register as a sex offender.[127] Additionally, not one member of Congress referred to Article 117a as a "sexual offense."[128]

Another contextual aspect to consider is the placement of Article 117a after Article 117, not as a new Article 120d. Ostensibly, the drafters placed the

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[124] MCM, *supra* note 10, pt. IV, ¶ 107a.c.(1) ("Whether 'other conduct' is 'of a sexual nature' is dependent upon the circumstances of the act or acts alleged and may include conduct that, without context, would not appear to be sexual in nature.").
[125] *See* United States v. Nelson, 82 M.J. 336, 345 (C.A.A.F. 2022) (defining intrinsic evidence as "inextricably related in time and place to the offenses charged or whether it is extrinsic to those offenses." (citing United States v. Thomas, 11 M.J. 388, 392 (C.M.A. 1981))).
[126] California amended its rape-shield law to include online and digital sharing of intimate images within its definition of "sexual conduct." However, the rule still only applies in the prosecution of traditional sexual offenses. That is, despite the new definition of "evidence of sexual conduct" in the California rape-shield law, the rule does not apply to its revenge porn law. *See* CAL. EVID. CODE § 782(b)(2), (c) (West 2022).
[127] *See generally supra* Part II.B.
[128] PRIVATE Act, *supra* note 41.

new criminal provision in the location within the UCMJ where it logically fit. In other words, it was placed with similar provisions. Article 117a comes after Article 117, which prohibits provoking speeches or gestures between Service members. The purpose of this provision is to prevent conflict between Service members and promote good order and discipline and military efficiency.[129] Article 117 targets words that cause conflict. Article 117a targets actions that cause conflict. Article 117 and Article 117a have similar ends: to prevent conduct, words, and deeds that harm good order and discipline in the military services.

An additional argument is that Congress could have amended MRE 412 to specify that it applies in cases where Article 117a is charged. Congress clearly communicated which offenses were covered by MRE 413. MRE 413 has a different definition for "sexual offense" than MRE 412. Its definition includes the precise list of offenses to which it applies. Article 117a is not one of the offenses delineated by MRE 413. The fact that Congress did not amend MRE 412 to clarify to which specific offenses it applies supports the position that Congress did not consider Article 117a a sexual offense.

2. Conflating "Sexual Offense" and "Sexual Behavior"

Applying MRE 412 to Article 117a confuses the category of offenses to which it applies and the type of conduct it prohibits. MRE 412 describes the types of offenses to which it applies. The rule's prohibitions apply to "any proceeding involving an alleged sexual offense."[130] As previously discussed, "sexual offense" means "any sexual misconduct punishable under military, federal, or state law."[131] The rule prescribes two types of evidence about a victim: (1) other sexual behavior and (2) sexual predisposition.[132] Sexual behavior evidence is broadly defined as "any sexual behavior not encompassed by the alleged offense."[133] Sexual predisposition evidence is that which "refers to a victim's mode of dress, speech, or lifestyle . . . that may have a sexual connotation for the fact finder."[134]

Article 117a occupies a grey zone. It is a crime that is not a "sexual offense," but it potentially contains evidence of "sexual behavior" and "sexual predisposition." This causes one to conflate the offense's content with the offense's classification.

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[129] *See* SCHLUETER ET AL., *supra* note 46, § 5.50 ("The Article is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and forestall the commission of an offense by an otherwise innocent party.").
[130] MCM, *supra* note 10, M.R.E. 412(a).
[131] *Id*. M.R.E. 412(d).
[132] *Id*. M.R.E. 412(a).
[133] *Id*. M.R.E. 412(d).
[134] *Id*.

To illustrate the point, take the example of an accused who is charged with a violation of Article 120, Sexual Assault. The accused cannot use evidence of the victim's images containing sexually explicit conduct unless one of the exceptions applies. Similarly, an accused cannot use sexually explicit images shared by the victim to imply the victim has a sexual predisposition when an Article 120 offense is charged. A correct application of MRE 412 would prohibit such evidence. However, the prohibited evidence, which is also an offense under Article 117a, cannot be read back into MRE 412 as a sexual offense. Just because a crime consists of sexual behavior does not make it a sexual offense.

3. Some Victims' Counsel Programs Do Not Treat it as an Eligible Offense

The definition of "victim" contained in the UCMJ is broad and includes anyone "who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of [a UCMJ offense.]"[135] But not every victim is entitled to legal counsel. The military services do not uniformly provide special victims' counsel or victims' legal counsel to victims of all crimes. By statute, only victims of "sex-related" offenses are entitled to receive legal services.[136]

Article 117a is not an offense that uniformly entitles a victim to legal counsel. This lack of entitlement is because it is not a sexual offense or a sex-related offense. If it were a sexual offense, then the military services would be required to provide legal counsel to a victim. The Marine Corps does not automatically grant a victim of Article 117a with legal counsel. Eligible Marines are those victims of "sex-related offenses" as defined above, domestic violence offenses, and a catch-all other offenses category.[137] A victim of Article 117a can be detailed to a victim's legal counsel in the Marine Corps, but it is neither required nor prohibited.

The Army takes a slightly different approach.[138] Its special victims' counsel are eligible to represent victims of "sex-related offenses" and crimes involving domestic violence.[139] For "sex-related offenses," their definition generally tracks what is contained in the federal statute.[140] Victims of domestic

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[135] 10 U.S.C. § 806b.
[136] 10 U.S.C. § 1044e(h).
[137] U.S. MARINE CORPS, ORDER 5800.16 -V4, MARINE CORPS VICTIMS' LEGAL COUNSEL ORGANIZATION 13 (26 Aug. 2021) ("Other crime victims with an opportunity to be heard under MRE 412, 513, or 514, or regarding other rights provided by statute, regulation, or case law, subject to counsel availability and if approved by the CVLC.").
[138] The Army refers to attorneys who represent victims of crimes as Special Victim Counsel.
[139] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-7.c (20 Apr. 2024) [hereinafter AR 27-10].
[140] *Id*. para. 3-6.b. This paragraph states:

violence crimes are represented by both legal assistance attorneys and special victims' counsel.[141] There is no mention of providing services to victims of Article 117a. Even though the military services differ on this issue, the reason they differ is that Article 117a is not, by definition, a sex-related offense. Those military services that do provide coverage for Article 117a victims do so as a policy matter, not a legal requirement.

MRE 412 makes clear that when there is a motion before a court on the issue of sexual behavior or sexual predisposition, the victim must be given a "reasonable opportunity to . . . be heard" through a special victims' counsel.[142] The fact that all victims of Article 117a are not entitled to a special victims' counsel supports the position that MRE 412 does not apply to Article 117a. If victims of Article 117a were entitled to be represented by a special victims' counsel, MRE 412 would seemingly permit them to be heard on pertinent issues.

IV. MRE 412 PROVIDES A BETTER FRAMEWORK TO DETERMINE EVIDENCE ADMISSIBILITY

As previously discussed,[143] before the creation of FRE 412, courts sifted evidence using rules 401[144] and 403.[145] Because relevance is a low standard and the balancing test was weighted towards admission, courts were usually required to admit evidence of a victim's sexual history.[146] Legislators across the country determined that these longstanding evidence rules were not stringent enough to adjudicate sex offense cases fairly.[147] In the fifty years since the creation of the

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> For the purpose of this subparagraph, sex-related offenses include a violation of the following sections of the UCMJ: (1) Article 120: Rape and sexual assault. This includes rape, sexual assault, aggravated sexual contact, and abusive sexual contact. (2) Article 130: Stalking. (If committed prior to 1 January 2019, Article 120a—see appendix 22, MCM, 2019). (3) Article 120b: Rape and sexual assault of a child. This includes rape, sexual assault, and sexual abuse of a child. (4) Article 120c: Other sexual misconduct. This includes indecent viewing, visual recording, or broadcasting. (5) Article 125: Forcible sodomy; bestiality, if committed prior to 1 January 2019 (see appendixes 21 and 22, MCM, 2019). (6) Article 80: Attempt (any attempt to commit these offenses).

[141] AR 27-10, *supra* note 139.
[142] MCM, s*upra* note 10, M.R.E. 412(c)(2).
[143] WEINSTEIN, *supra* note 200.
[144] MCM, *supra* note 10, M.R.E. 401.
[145] MCM, *supra* note 10, M.R.E. 403.
[146] Frank Tuerkheimer, *A Reassessment and Redefinition of Rape-shield Laws*, 50 OHIO ST. L. J. 1245, 1245–46 (1989); Galvin, s*upra* note 21. *See, e.g.*, WEINSTEIN, *supra* note 20, § 412.02 n. 21 (citing Hicks v. Hiatt, 64 F. Supp. 238, 249 (M.D. Pa. 1946) (granting service member's habeas corpus petition due to his inability to present evidence of the victim's chastity at trial); Gish v. Wisner, 288 F. 562, 562 (5th Cir. 1923) ("[T]the rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent.")).
[147] Galvin, *supra* note 21, at 767.

first rape-shield law, judges across the country, including in the military, have demonstrated the ability to balance the constitutional rights of the accused and the interests of the victim. With the rise of social media and smartphones, enabling scandals like Marines United, legislators again responded to victims' cries by criminalizing WDII. The question is: What rules are best situated to evaluate evidence in Article 117a cases? The framework provided by MRE 412 is the fairest way to resolve evidentiary disputes in Article 117a cases.

A. MRE 401 and MRE 403 Cannot Protect Victim Interests

The traditional framework provided by MRE 401 and MRE 403 is insufficient to protect the rights of victims in Article 117a cases, just as they were inadequate before the enactment of rape-shield laws. Because evidence is relevant if it has "any tendency" to make a consequential fact more or less probable, a defense counsel would have a very low threshold to meet to convince a military judge that evidence of prior or subsequent intimate image recording by a victim is relevant evidence.[148] Relevant evidence can only be excluded if its prejudicial effects outweigh its probative value.[149] Looking closely at the language of MRE 403, the rule starts by saying a "military judge may exclude," meaning even if prejudicial effects substantially outweigh the probative value, it is within the military judge's discretion whether to rule it inadmissible.[150] Under this standard, evidence is relevant if it helps the accused's case even in the slightest way.[151] A defense counsel would likely argue that evidence of a victim's prior or subsequent history of sharing intimate images is relevant to the issue of whether the victim consented to the broadcast or distribution and whether the victim retained a reasonable expectation of privacy. Since the government is required to prove the accused shared images without consent, evidence that the accused believed he had consent is relevant under MRE 401.[152] Suppose the accused knew the victim posted other sexually explicit images on a subscriber-based pornographic website. Certainly, this fact would have more than the slightest tendency to challenge the element of consent. The same scenario applies to the reasonable expectation of privacy issue. Whether a victim previously posted intimate images online logically relates to a present expectation of privacy. It is unlikely the prejudicial effect on the victim will outweigh the probative value to the trier of fact in

[148] 1 MILITARY RULES OF EVIDENCE MANUAL § 401.02 (LexisNexis 2024) [hereinafter MRE MANUAL] ("Applying Rule 401 means the military judge should find any evidence that can help, even a little bit in rationally deciding disputed issues, to be relevant and potentially helpful to the finder of fact.").
[149] MCM, *supra* note 10, M.R.E. 403.
[150] *Id*.
[151] *Id*. M.R.E. 401.
[152] *Id*.

deciding these key questions.[153] As explained below, this evidence would likely be excluded under the MRE 412 rubric.

B. MRE 412 Can Protect Victim Interests

The framework provided by MRE 412(b) is a better way to determine the admissibility of evidence in Article 117a cases. The three exceptions to the prohibition on evidence of other sexual behavior are well suited to evaluate the type of evidence that an accused is likely to offer in defense. The first exception would permit an accused to provide evidence that someone else was the source of the physical evidence. For example, defendants could offer evidence that the alleged victim also shared the intimate image allegedly shared by them with another person. This other sexual behavior would be relevant if the accused argued that this other recipient was the person who distributed the intimate image. The second exception would permit the accused to offer evidence of "specific instances of a victim's sexual behavior" with the accused if offered to prove consent.[154] An example of this exception could include previous distribution by the accused with the victim's consent. The constitutional exception could permit an accused to offer evidence in line with the established parameters of existing MRE 412 case law, which would uphold the accused's constitutional rights and prevent relevant but not constitutionally required evidence. Examples of this could include a victim's spoken desire to make money by sharing intimate images,[155] a victim's bias or motive to lie,[156] prior false allegations of WDII, or when an accused testifies about conversations with the victim about intimate images shared with others.[157] However, the MRE 412 safeguards would prohibit the introduction of a victim's history of posting intimate images, which could be relevant under MRE 401. MRE 412 would likely exclude evidence that the victim maintained an OnlyFans[158] page if the accused was unaware of the page until after the alleged crime unless the accused could tie the page to a material fact of their relationship.

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[153] MRE MANUAL, *supra* note 148, § 403.02 ("The rule is constructed to favor the admission of evidence. As a result, exclusion of otherwise relevant testimony is the exception not the rule.").
[154] MCM, *supra* note 10, M.R.E. 412(b).
[155] FED. R. EVID. 412 advisory committee's note to 1994 amendment. This hypothetical was provided by the Advisory Committee as a possible exception to the rule.
[156] Olden v. Kentucky, 488 U.S. 227, 232 (1988) (finding the lower court violated the Confrontation Clause by preventing the defendant from questioning the witness about a prior sexual relationship when offered as evidence of motive to lie).
[157] Rock v. Arkansas, 483 U.S. 44, 51 (1987) (explaining that the right to testify in one's own defense is based on the 14th Amendment's right to due process of law and the 6th Amendment's compulsory process clause).
[158] OnlyFans is a fee based pornographic website. *See* ONLYFANS, https://bit.ly/3NUcxmT.

V. CONCLUSION

The protections and rights afforded to victims of crimes involving sexual misconduct have slowly increased over the past fifty years. Beginning with the creation of the first rape-shield law in the 1970s to the creation of the independent offices of special trial counsel in the military in 2022, victims' rights have gone from nascent to ascendant. During this time, our legislative and judicial systems have adapted the justice system, seeking to make it more responsive and just. Today, as a result of the proliferation of smartphones, sexual misconduct is not limited to what happens in the bedroom. Article 117a is Congress' response to this new problem.

MRE 412 should apply in Article 117a cases because the text of the rule permits it, and the context surrounding the creation of the rule and amendments to the rule supports it. "Sexual misconduct" is an intentionally broad category of offenses governed by the ordinary and plain meanings of the words. The definition of sexual offenses in MRE 412 is noticeably broader than the definition of "sexual offense" in MRE 413.[159] "Sexual offense" in MRE 413 is limited to specifically enumerated offenses.[160] "Sexual offense" in MRE 412 is not.[161] Since the enactment of rape-shield laws, judges have looked at the content of the offense to determine whether it applies.[162] Article 117a is concerned with sexually explicit content, which should fall under the expansive definition of sexual misconduct found in MRE 412.

Article 117a aims to protect victims' privacy interest in sexually explicit images and videos of themselves. Victims of this offense should receive the protections afforded to victims of other sexual crimes. By policy, the military services are providing victims of this offense with increased attention and resources. They should receive the same support and protection in the courts. The text and context surrounding MRE 412 and Article 117a strongly favor applying the rule to the crime. Providing victims of Article 117a with the protections afforded by MRE 412 would advance both provisions' legislative purposes.

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[159] MCM, *supra* note 10, M.R.E. 412(d).
[160] *Id*. M.R.E. 413 (d).
[161] *Id*. M.R.E. 412 (d).
[162] FED R. EVID. 412 advisory committee notes to 1994 amendment.