

The Fundamental Limits of Rape Law Reform

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Normative Words and the Fundamental Limits of Rape Law Reform, 74 S.C. L. REV. 351 (2022)

The Effect of Changing the Military's Sexual Assault Laws on Law Enforcement Investigative Findings in the US Army, 46 LAW & HUM. BEHAV. 313 (2022) (peer-reviewed, with Gonzalez, I., Garcia, S., & Odom, G.)

Agenda

- Reform efforts and reform models
- Did the changes have any effect?
 - 2007 change to Art. 120
- If no effect, why not?
- What else can be done?

The problem, according to reformers

Inaccurate beliefs about offenders and victims
are incorporated into the common law definition of rape.

This leads to high rates of case attrition.



Ingroup

- Ingroup men don't rape
 - She must have consented
 - Or he misunderstood
 - “mythcommunication”
 - He was drunk



Outgroup

- Only deviant men rape
- Women lie about sexual assault
- Women's behavior confuses ingroup men

Leads to the flipping of the
investigative presumption

ARMY 2020
Generating Health &
Discipline in the Force
Ahead of the Strategic Reset
REPORT 2012



Common law

Rape = sex act + force + no consent

Focus is on the victim's mental state, not the offender's

Starting point is, "Yes, unless she fights"

Reform model 1: Force-centric (Michigan)

Sex assault = sex act + force + ~~no consent~~

Reform model 2: Assault-plus (Canada)

Sexual assault = assault + sex act

Reform model 3: Consent-centric (Florida)

Sex assault = sex act + ~~force~~ + no consent

“No, unless . . .”

[Model Penal Code]

Sexual assault = mental state [+ act] [+ force]
[+ no consent]

All retain the mistake of fact defense

Did the legal changes have any effect?

Research designs

- Natural experiment (quasi-experimental)
- Control for abrupt changes (what is happening with other crimes?)
- Control for long-term changes

Other jurisdictions

- An increase in victim reporting
- Otherwise, mixed findings
 - A slight upward trend in the percentage of arrests for rape that resulted in a case filing
 - An increase in the probability that an offender would be incarcerated

The Oct. 1, 2007, change to Art. 120

Before

- Common law rape (P)
- Forcible sodomy (P)
 - Consent centric or force centric
- Indecent assault (NP)
 - Assault-plus (force centric)

After

- Rape (P)
- Aggravated sexual assault (P)
- Forcible sodomy (P)
- Aggravated sexual contact (NP)
- Abusive sexual contact (NP)
- Wrongful sexual contact
 - Consent centric

Table 1

Investigative Findings by Case Category, Before and After the Legal Intervention

Investigative finding by case category	January 2004 through Sep- tember 2007		October 2007 through June 2012	
	<i>N</i>	(%)	<i>N</i>	(%)
Sexual assaults (combined)				
Founded	2,963	75	8,509	83
Insufficient evidence	537	13	421	4
Unfounded	461	12	1,334	13
Penetrative sexual assaults				
Founded	1,403	67	4,960	79
Insufficient evidence	362	17	314	5
Unfounded	319	15	982	16
Nonpenetrative sexual assaults				
Founded	1,560	83	3,549	88
Insufficient evidence	175	9	107	3
Unfounded	142	8	352	9
Assaults (combined)				
Founded	13,061	99	19,078	97
Insufficient evidence	59	<1	216	1
Unfounded	128	1	291	1
Aggravated assaults				
Founded	1,821	97	3,260	97
Insufficient evidence	22	1	13	<1
Unfounded	33	2	74	2
Simple assaults				
Founded	11,240	99	15,818	97
Insufficient evidence	37	<1	203	1
Unfounded	95	1	217	1

Figure 1

Ratio of Proportions of Founded Sexual Assault Cases (Combined) to Assault Cases (Combined)

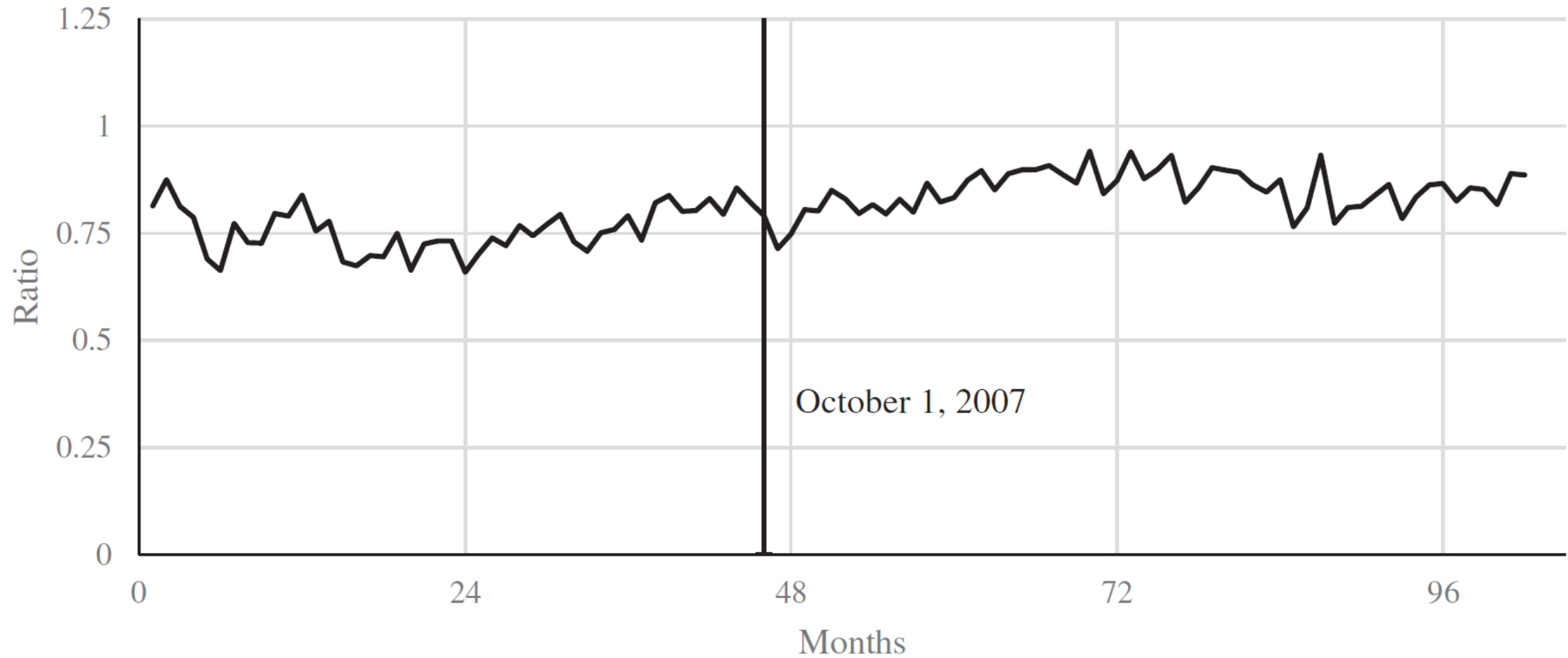


Figure 2

Ratio of Proportions of Founded Penetrative Sexual Assault Cases to Aggravated Assault Cases

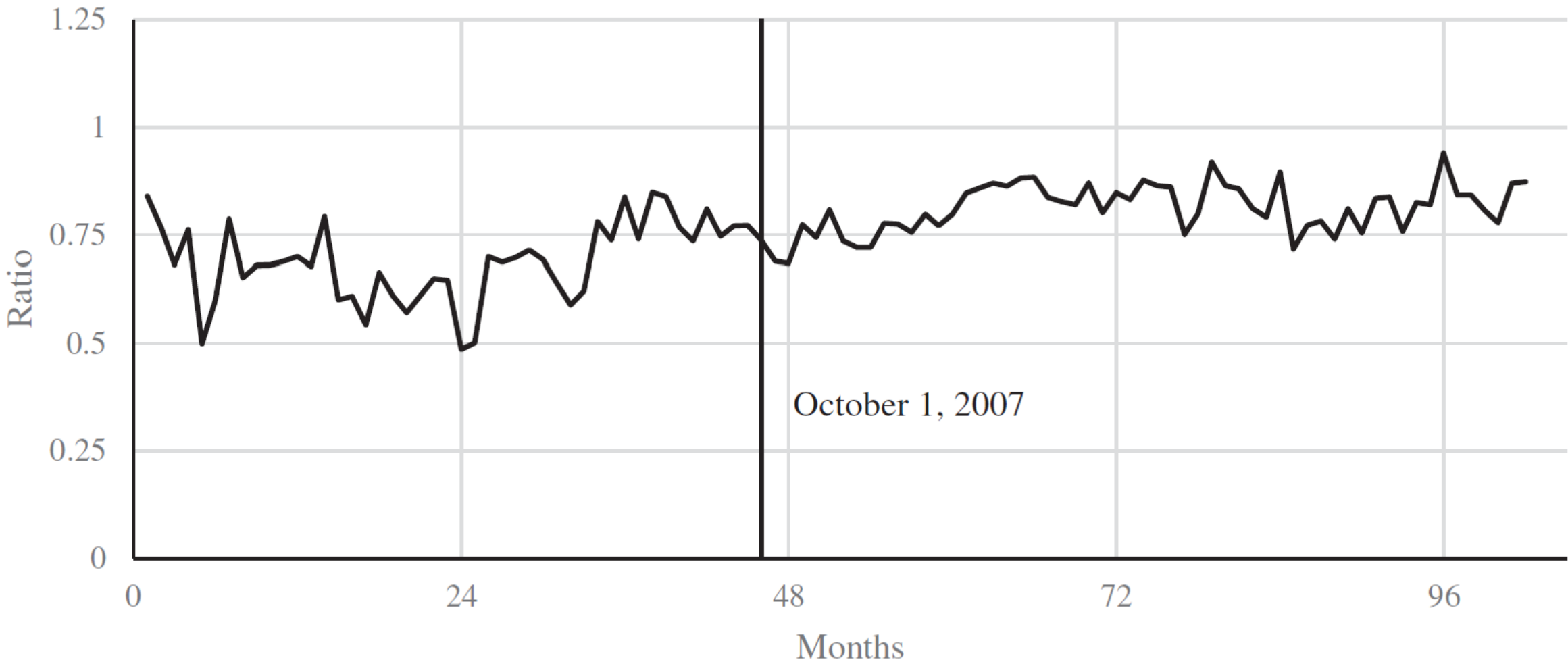


Figure 3

Ratio of Proportions of Founded Nonpenetrative Sexual Assault Cases to Simple Assault Cases

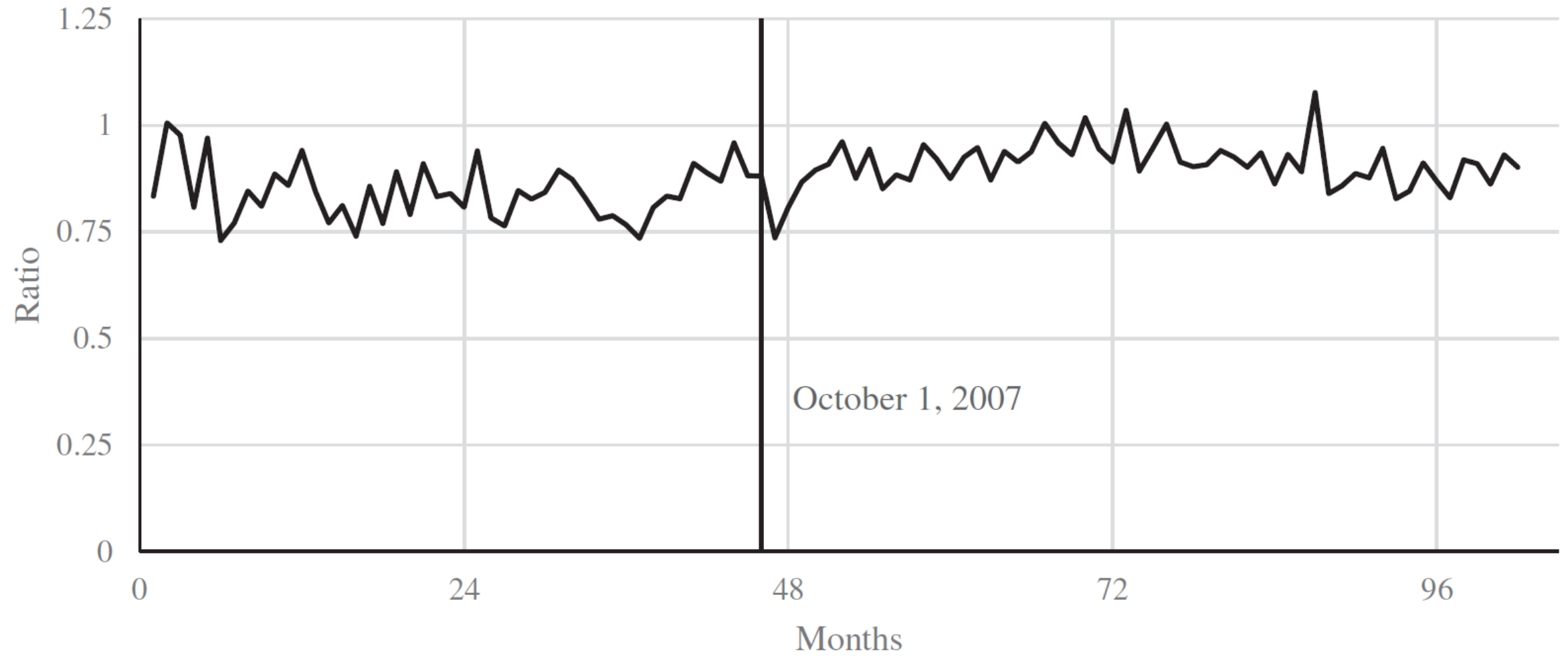


Table 2
Analysis of Ratio of Proportions of Founded Cases Before and After the Legal Intervention

Case category	January 2004 through September 2007	October 2007 through June 2012	<i>t</i> (<i>df</i>)	<i>p</i>	Cohen's <i>d</i>	95% CI
SA:A	.76	.85	−8.87 (100)	<.001	1.77	[1.30, 2.21]
PSA:AA	.69	.81	−7.62 (69.5)	<.001	1.60	[1.14, 2.04]
NPSA:SPLA	.84	.91	−5.39 (100)	<.001	1.07	[0.65, 1.48]

Table 3
Analysis of the Means of the Residuals Before and After the Legal Intervention

Model	January 2004 through September 2007	October 2007 through June 2012	<i>t</i> (<i>df</i>)	<i>p</i>	Cohen’s <i>d</i>	95% CI
SA versus A	0.00008	0.00214	−0.234 (100)	.82	0.05	[−0.34, 0.44]
PSA versus AA	−0.00225	0.00378	−0.436 (68.3)	.66	0.09	[−0.30, 0.48]
NPSA versus SPLA	−0.00230	0.00268	−0.409 (100)	.68	0.08	[−0.31, 0.47]

Why no change?



Ingroup

- Ingroup men don't rape
 - She must have consented
 - Or he misunderstood
 - “mythcommunication”
 - He was drunk



Outgroup

- Only deviant men rape
- Outgroup women lie
- Outgroup women are deviants and their behavior confuses ingroup men

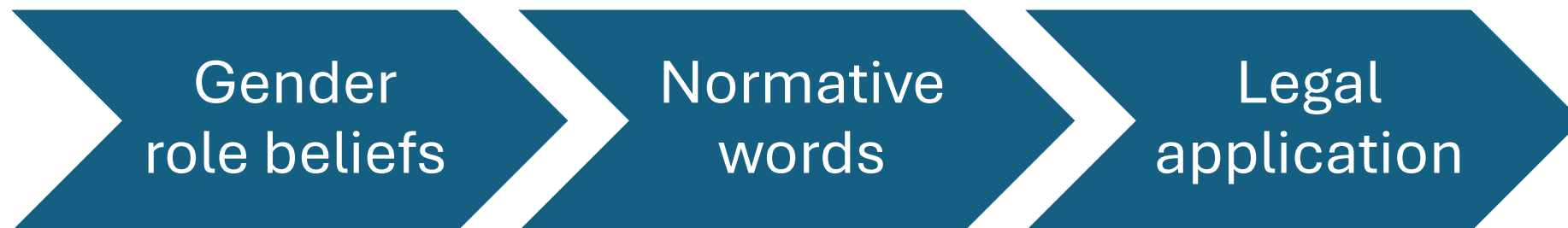
Any real difference? Just timing.

Sex assault = sex act + ~~force~~ + no consent

Sex assault = sex act + force + ~~no consent~~

All retain the mistake of fact defense

With more precision, normative words are the entry point.



Normative words

- Words that can only be satisfied by the fact-finder relying on his/her value system
- reasonable, appropriate, should, fair, due, unjustifiable, sufficient, necessary, foreseeable, offensive, obscene, meaningful, essential, gross deviation in the standard of care, called for by the circumstances, etc.

Consent—is her testimony reasonable?

Mistake of fact—honest and reasonable?

Normative words are fundamentally fixed

- Confrontation Clause (consent)
- Due Process Clause (mistake of fact defense)

Consent and victim credibility

- Confrontation Clause:
 - Trial judges can only impose “*reasonable*” limits on such cross-examination.”
 - If a trial judge does impose limits, those limits must still allow defendants
 - to engage in “otherwise *appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness
 - and thereby ‘to expose the jury the facts from which jurors could *appropriately* draw inferences relating to the reliability of the witness

Mistake of fact defense

- *Due* Process Clause

- “The right of an accused in a criminal trial to due process is, in essence the right to a *fair* opportunity to defend against the State’s accusations.”
- “a *meaningful* opportunity to present a complete defense”
- “*essential* to his defence”
- “*necessary* . . . to present [the] defense”

What space is left for reforms?

Define “reasonable” where you can.

Define “consent”

- Yes =
 - Consent is a freely given agreement (verbal or nonverbal) to sexual conduct
 - At the moment of the sex act
 - Canada: “Consent must be present at the time the sexual activity in question takes place”
- No =
 - An expression of lack of consent through words or conduct means there is no consent.
 - A current or previous dating or social or sexual relationship by itself, or the manner of dress of the person involved with the accused in the conduct at issue, does not constitute consent
- Silence (no words, no actions) = no

Mistake of fact defense

- 2007 Art. 120 language, RIP:
 - To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented
 - Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts.
 - The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.
 - A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

Canadian version

- The defense is unavailable if:
 - The accused's belief is due to his intoxication, reckless conduct, or willful blindness;
 - He did not take reasonable steps to determine if the victim was consenting; or
 - There is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct

Don't expect that legal changes will solve the problem.

Get back to the standard investigative presumption.

Make explicit normative arguments at trial.

Questions?