Shocking and Embarrassing Displays On-line: Recent Developments in Military Crimes Involving Indecent Conduct via Webcam

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"The necessity for [Indecent Acts or Liberties with a Child under Article 134] was to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them."[1]

Introduction

The "webcam" is a relatively simple device. It is a camera attached to a computer with the ability to take still shots, record videos, and transmit live-video feed over the Internet.[2] Suspicious parents can employ a "Nanny Cam" to keep watch over their in-home child-care provider.[3] Concerned homeowners can use a webcam to perform remote home surveillance.[4] Opportunistic exhibitionists can set up a webcam to record their every move and charge customers to watch.[5] Unfortunately, child abusers can also use a webcam to interact with their on-line victims.[6]

In the typical scenario, a predator will identify a child (usually a teenager) in an Internet chatroom and initiate a conversation either in the chatroom or using an instant messenger service.[7] The individual will then steer the conversation to sexual topics and the conversation will become extremely sexually explicit. He will then turn on a webcam and display his penis to the child. In some cases, the predator will then begin to masturbate while still exposed on camera. The military courts have seen a surprising number of cases with facts that follow this general pattern, but in most cases, instead of finding an actual child, the accused has found a law enforcement officer posing as a child.

The military courts have recognized that the sexually explicit conversations in chatrooms or via instant messenger constitute communication of indecent language, an offense listed under Article 134.[8] Sexual conduct, like masturbation or exposure of the genitals, is more difficult to charge. No offense in the Uniform Code of Military Justice (UCMJ) specifically covers this type of long-distance sexual behavior using the Internet. Prior to the recent amendments to Article

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[1] United States v. Brown, 13 C.M.R. 10, 17 (C.M.A. 1953).

[2] *See also* United States v. Parker, No. 20080579, slip. op. at 2 n.1 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) ("A webcam is a camera used to transmit live images over the World Wide Web.").

[3] *See, e.g.*, *Nanny Shock: Caught on the Web Cam*, Feb. 22, 2008, http://www.ncwanted.com/ncwanted_home/story/2470371/.

[4] Josh Lowensohn, *DIY Home Surveillance With a Webcam*, CNET.COM, Aug. 3, 2009, http://news.cnet.com/8301-27076_3-10301349-248.html.

[5] "JenniCam" seems to be the most notorious of the websites in this genre. Viewers could watch Jennifer Ringley "slumped in front of the TV, doting on her countless pets, idly plaiting her hair, pottering around her house or sauntering naked between rooms." *R.I.P. Jennicam*, BBC NEWS, Jan. 1, 2004, http://news.bbc.co.uk/2/hi/uk_news/magazine/3360063.stm. The website, which went off-line in late 2003, boasted 100 million hits per week at one point during its lifespan. *Id.*; *Voyeur Web Site JenniCam to Go Dark*, CNN.COM, Dec. 10, 2003, http://www.cnn.com/2003/TECH/internet/12/10/jenni.cam.reut/.

[6] *See, e.g.*, Colorado v. Cook, 197 P.3d 269 (Colo. Ct. App. 2008) (case involving defendant who directed web camera at his own genitals and also used the webcam to broadcast sexually explicit acts by his girlfriend's daughter over the Internet); California v. Learn, No. A109084, 2007 WL 4157772 (Cal. Ct. App. Nov. 26, 2007) (unpublished) (case involving a law enforcement officer who posed as a fourteen-year-old boy and viewed the defendant showing his penis and masturbating via webcam); Minnesota v. Skapyak, 702 N.W.2d 331 (Minn. Ct. App. 2005) (case involving defendant who masturbated in front of two different teenage girls three to four times via webcam); Deecheandia v. Commonwealth, 2004 WL 1243042 (Va. Ct. App. 2004) (unpublished) (defendant exposed his penis via webcam during an instant messenger chat with a law enforcement officer posing as a thirteen-year-old girl); Brooker v. Commonwealth, 587 S.E.2d 732 (Va. Ct. App. 2003) (defendant exposed his penis via webcam during an instant messenger chat with a law enforcement officer posing as a twelve-year-old girl).

[7] Instant messenger services allow individuals to "chat" on-line back and forth in real time without having to send e-mail back and forth. Conversations occur in a "chat window" that remains open on the user's computer. *See* How to Use Instant Messenger Programs, http://www.ehow.com/how_2095611_instant-messenger-programs.html (last visited Nov. 5, 2009). Current examples include Yahoo! Messenger and MSN Messenger. *See* Instant Messaging Programs, http://www.pctechbytes.com/messenger.htm (last visited Dec. 6, 2009).

[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 89 (2005) [hereinafter 2005 MCM] (indecent language); *see, e.g.*, United States v. Larson, 66 M.J. 212, 213–14 (C.A.A.F. 2008) (affirming, without directly addressing the issue, one specification of communicating indecent language for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager); United States v. Miller (*Miller I*), 65 M.J. 845, 846 (A.F. Ct. Crim. App. 2007) (affirming conviction for attempting to communicate indecent language to a child for sexually explicit discussions via instant messenger with a law enforcement officer posing as a teenager); United States v. Parker, No. 20080579 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) (affirming, without directly addressing the issue, conviction on two specifications of attempting to communicate indecent language to a child for sexually explicit discussions via instant messenger with a law enforcement officer posing as a teenager); United States v. Ferguson (*Ferguson I*), No. 37272, 2009 WL 2212070, slip op. (A.F. Ct. Crim. App. July 15, 2009) (unpublished) (affirming, without directly addressing the issue, conviction on one specification of attempting to communicate indecent language to a child for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager); United States v. Garner, 67 M.J. 734, 735–36 (N-M. Ct. Crim. App. 2009) (affirming, without directly addressing the issue, conviction on one specification of attempting to communicate indecent language to a child for sexually explicit discussions in a chatroom with a law enforcement officer posing as a teenager).

120,[9] three listed offenses under Article 134 provided the best means for charging this conduct: indecent acts or liberties with a child,[10] indecent acts with another,[11] and indecent exposure.[12] Between 2008 and 2009, the military courts decided several cases involving the application of these three offenses to sexual conduct with children (or law enforcement officers posing as children) over the Internet using a webcam. As of 1 October 2007, all three of these offenses are now codified in Article 120, and the elements of all three offenses changed.[13] With these developments, applying the UCMJ to indecent conduct using an Internet webcam continues to present a challenge for military justice practitioners.

This article will begin with an analysis of *United States v. Miller*,[14] where the Court of Appeals for the Armed Forces (CAAF) held that conduct over the Internet, using a webcam, cannot create the physical presence required for indecent liberties with a child under Article 134—a conclusion with even more force now that the offense is codified in Article 120.[15] The next section will address indecent acts. After *Miller*, indecent acts with another under Article 134 became the fallback position for indecent conduct via the Internet, and it appears that this trend will continue now that the offense of indecent acts is an enumerated offense under Article 120. The third section will address indecent exposure via webcam. This is the offense where military law is in the most flux. Two service courts have reached opposite conclusions in cases involving webcams, and the CAAF granted review on one of the two—presumably to resolve the split. The decision, however, did not resolve the myriad issues surrounding indecent exposure via webcam. Furthermore, after 1 October 2007, this offense also falls under Article 120 and has elements that appear to differ from the Article 134 version. In analyzing these three offenses when applied to indecent conduct via webcam, practitioners will find that, as with child pornography, the law has failed to keep pace with technological advancements. As such, the "cloak of protection," described in the introductory quote, seems threadbare in spots. Nonetheless, two crimes—indecent acts and indecent language—still offer viable protection for children from offenders seeking to use the webcam as a tool for sexual exploitation.

Indecent Liberties via Webcam: "Constructive Presence" Is Not "Physical Presence"

Prior to the major revision to Article 120 that became effective in 2007,[16] child sexual abuse that did not involve sexual intercourse was punished using the offenses listed in the *Manual for Court-Martial* (*MCM*) under Article 134. From the list of applicable offenses under this article, indecent acts or liberties with a child had the highest maximum punishment[17] and did not require physical contact.[18] The purpose for listing this offense in the *MCM* was "to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them."[19] Two cases provided the basic parameters for this offense.

The first case, *United States v. Brown*, involved a servicemember who exposed his penis to two sisters, aged seven and ten, while the girls were riding their bicycles.[20] The Government crafted a specification alleging indecent liberties with a child under Article 134 that borrowed some of the language from indecent exposure under Article 134.[21] The Court of Military Appeals (CMA) concluded that this conduct could be punished as indecent liberties with a child even though the accused did not physically contact his victims.[22] An offense that might otherwise constitute

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[9] *See* National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 [hereinafter 2006 NDAA] (codified at 10 U.S.C. § 920 (2006)) (amending Article 120, UCMJ with an effective date of 1 October 2007) (making substantial revisions to the sexual offense scheme, which became effective 1 October 2007).

[10] 2005 MCM, *supra* note 8, pt. IV, ¶ 87 (indecent acts or liberties with a child).

[11] *Id.* ¶ 90 (indecent acts with another).

[12] *Id.* ¶ 88 (indecent exposure).

[13] *See* 2006 NDAA, *supra* note 9 (the substantial revisions to the sexual assault scheme included moving indecent acts with another, indecent acts or liberties with a child, and indecent exposure from Article 134 to Article 120; amendments became effective 1 October 2007) (codified at 10 U.S.C. § 920); UCMJ art. 120 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45j (indecent liberty with child), ¶ 45k (indecent act), ¶ 45n (indecent exposure) (2008) [hereinafter 2008 MCM].

[14] 67 M.J. 87 (C.A.A.F. 2008).

[15] 2008 MCM, *supra* note 13, pt. IV, ¶ 45j (indecent liberty with a child).

[16] *See* 2006 NDAA, *supra* note 9.

[17] *Compare* 2005 MCM, *supra* note 8, pt. IV, ¶ 87e (indecent acts or liberties with a child having a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years), *with id*. pt. IV, ¶ 88e (indecent exposure; maximum punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months) and *id*. pt. IV, ¶ 90e (indecent acts with another; maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years).

[18] 2005 MCM, *supra* note 8, pt. IV, ¶ 87b, c.

[19] United States v. Brown, 13 C.M.R. 10, 17 (C.M.A. 1953).

[20] *Id*. at 10–11.

[21] *Id*. at 11. The specification read as follows:

> In that Private Lester E. Brown, United States Army, Company A, 508th Airborne Infantry, did, at Fort Benning, Georgia, on or about 24 October 1952, take indecent liberties with . . . and . . . , both females under 16 years of age, by willfully and wrongfully exposing in an indecent manner to them in public, his penis with intent to gratify the sexual desires of the said Private Lester E. Brown.

Id.; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 6 (1951) (Form 146 provides the form specification for indecent acts with a child and Form 147 provides the form specification for indecent exposure.).

[22] *Brown*, 13 C.M.R. at 17.

indecent exposure can be charged as indecent acts with a child, and thereby subject the accused to a greater maximum punishment, because "[t]he remedy for the evil [of exposing oneself to a child] is to provide substantial punishment for those who perform indecent and immoral acts which cause shame, embarrassment, and humiliation to children, or lead them further down the road to delinquency."[23] In *Brown*, though, while there was no contact, the accused was actually in the presence of his two victims.[24]

The second key case, *United States v. Knowles*,[25] pushed the CMA to examine the nature of the presence required for an indecent liberties conviction. In two separate incidents, the accused used obscene language when speaking to children over the telephone.[26] The court confirmed that indecent liberties with a child requires physical presence with the child, and cited several cases where the courts affirmed convictions because the indecent conduct occurred in the actual physical presence of the child.[27] However, the court held that communication over a telephone is not sufficient to sustain a conviction for indecent liberties with a child, reasoning that "the offense . . . requires greater conjunction of the several senses of the victim with those of the accused than that of hearing a voice over a telephone wire."[28] After this decision, the drafters of the *MCM* revised the explanation for indecent acts with a child to require that the "liberties be taken in the physical presence of the child."[29]

In these two cases, the CMA established three fundamental principles. First, indecent liberties with a child does not require physical contact. Second, this offense requires physical presence with the child. Third, a telephone cannot create the necessary physical presence. After *Knowles*, the law of physical presence for purposes of indecent liberties remained settled until the advent of the webcam. This technological innovation re-opened the question that the CMA left unanswered in *Knowles*: whether indecent liberties with a child may be "committed by performance of indecent acts and the use of obscene language over an audio-visual system."[30] Air Force Staff Sergeant (SSgt) Christopher Miller would provide the courts an opportunity to answer that question.

United States v. Miller: *Establishing the Limits of Indecent Liberties with a Child*

The facts of *United States v. Miller*[31] fall into the general pattern outlined in the introductory paragraph. In 2005, a civilian police officer was monitoring an Internet chatroom posing as a fourteen-year-old girl.[32] Thinking that he had found an actual teenage girl, the accused used an instant messaging program to initiate a conversation with the officer.[33] While chatting on-line, the accused asked if she wanted to see a picture of him.[34] When the officer responded that she did, the accused turned on a webcam and initiated a live-video feed over the Internet link.[35] After several minutes, he asked the officer if she wanted to see his penis.[36] When she responded affirmatively, he directed the webcam toward his penis and began masturbating while engaging in an "extremely graphic" conversation with the officer.[37] He continued for about ten minutes while asking the officer about her breast size and describing the sexual acts he would like to perform with her.[38] He also stated that he "liked young girls" and "never had one but always wanted to try."[39] While still on camera, he ejaculated, cleaned himself up, and asked her if "she liked what she had seen."[40] She confirmed that she did and then asked him how it felt.[41] The accused then responded, "[F]elt good would have felt better if i [sic] had someone else's hand on it."[42] The conversation ended at that point, but the accused

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[23] *Id.*

[24] *Id.* at 11.

[25] United States v. Knowles, 35 C.M.R. 376 (C.M.A. 1965).

[26] *Id.* at 377–78; United States v. Miller (*Miller II*), 67 M.J. 87, 89 (C.A.A.F. 2008); U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. 25, at 25-13 (rev. 1969) (July 1970) [hereinafter DA PAM. 27-2]. One incident involved a male child and another involved a female child. *Id.*

[27] *See Knowles*, 35 C.M.R. at 377 (citing United States v. Riffe, 25 C.M.R. 650 (A.B.R. 1957)) (involving a "face to face indecent proposal to a child"); United States v. Childers, 31 C.M.R. 747 (A.F.B.R. 1962) (accused held his hand close to "a part of his own anatomy" while commenting on personal parts of a seven-year-old girl's body)); United States v. Daniel, 26 C.M.R. 894 (A.F.B.R. 1958) (accused "made obscene remark" to a child "while pointing to a personal part of his body").

[28] *Knowles*, 35 C.M.R. at 377–78.

[29] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVIII, ¶ 213f(3) (1969) [hereinafter 1969 MCM] (indecent acts with a child under the age of 16 Years); DA PAM. 27-2, *supra* note 26, ch. 28, para. 213f(3), at 28-19.

[30] *Knowles*, 35 C.M.R. at 378.

[31] *Miller II*, 67 M.J. 87 (C.A.A.F. 2008).

[32] *Id.* at 88.

[33] *Id.* Although the case does not definitively establish the gender of the officer, the pronoun "she" is used in this section to refer to the officer posing as the teenage girl.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] United States v. Miller (*Miller I*), 65 M.J. 845, 846 (A.F. Ct. Crim. App. 2007) (the "conversation" occurred via a typewritten exchange in the chatroom).

[38] *Id.*

[39] *Id.*

[40] *Miller II*, 67 M.J. at 88.

[41] United States v. Miller (*Miller III*), No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. 2009) (unpublished).

[42] *Id.*

engaged in a similar conversation about a month later without the video feed of the masturbation.[43]

For these acts, the accused faced three specifications under Article 80, UCMJ: two specifications of attempting to communicate indecent language to a child under sixteen and one specification of attempting to take indecent liberties with a child.[44] Contrary to his pleas, the military judge sitting as a general court-martial convicted the accused of all three specifications. On appeal to the Air Force Court of Criminal Appeals (AFCCA), the accused claimed that the military judge erred in finding him guilty of attempting to take indecent liberties with a child because he was "never physically in the presence of the 'child.'"[45] Because the conduct in this case occurred only through the Internet video feed, the Air Force court inferred that the military judge relied on a theory of "constructive presence" in convicting the accused of this specification.[46] The AFCCA affirmed, framing the issue as one of legal sufficiency and holding that the accused's "real-time conversations and his live-feed broadcast of himself masturbating were sufficient to satisfy the presence element on indecent liberties, at least for the purposes of an Article 80, UCMJ, prosecution."[47] On appeal to the CAAF, the accused renewed his argument that his conviction for attempting to take indecent liberties with a child was not legally sufficient because "he was not physically present with the detective while he masturbated."[48] This led the court to confront the question left open in *Knowles:* whether "presence created through the use of an audio-visual system" could satisfy "physical presence" for purposes of indecent liberties with a child.[49]

As described above, indecent liberties with a child requires that the accused commit the indecent act "in the presence" of the child, even when there is no actual physical contact. Although the act was charged as an attempt, the CAAF first found that the "nature of the presence required by the completed offense is germane" to the charge of attempted indecent liberties and, in fact, "the nature of the presence required for the completed offense . . . is the threshold question."[50] The court then turned to the requirement for physical presence with the child. The provision that appeared in the 1969 *MCM* after *Knowles* remains unchanged in the 2005 *MCM*: "[T]he liberties must be taken in the physical presence of the child."[51] While the *MCM* explanations are not binding on the court, the CAAF described them as "persuasive authority . . . to be evaluated in light of [the court's] precedent."[52] Citing *Brown*, *Knowles*, and a third case, *United States v. Rodriguez-Rivera*,[53] the court confirmed that its precedent requires that the act at issue occur in the physical presence of the child.[54] Furthermore, although *Knowles* left open the question of whether acts performed through an audio-visual system could be "in the presence" of the child, the court noted that the *MCM* explanation was amended after that case to include the physical presence requirement.[55] Therefore, the court held that "presence means physical presence, rather than presence created through the use of an audio-visual system."[56] To conclude its analysis, the court turned to the plain meaning of the words "physical presence." Applying dictionary definitions for the words "physical" and "presence," the court concluded, "'[P]hysical presence' requires the accused to be in the same physical space as the victim" and "constructive presence will not suffice in context of a penal statute that has been construed to require physical presence."[57] Turning to the case at hand, the court found that the accused was not in the same physical space as the officer while he was masturbating, and, as such, he did not commit the act "in the presence" of the victim.[58] The court did provide a caveat though, noting that the case does not decide "whether future advances in technology or the

[43] *Id.*

[44] *Miller II*, 67 M.J. at 88; UCMJ art. 80 (2008). The offenses were charged in this way based on the concept of factual impossibility. As the victim in this case was an adult posing as a fourteen-year-old girl, it was factually impossible for him to actually communicate indecent language to a child or actually take indecent liberties with a child. Therefore, these acts were properly charged as attempts under Article 80. *See* 2005 MCM, *supra* note 8, pt. IV, ¶ 4c.(3) (describing the concept of factual impossibility); United States v. Thomas, 32 C.M.R. 278, 288 (C.M.A. 1962) (recognizing that factual impossibility is not a bar to a conviction for attempt).

[45] *Miller I*, 65 M.J. 845, 845–46 (A.F. Ct. Crim. App. 2007); 2005 MCM, *supra* note 8, pt. IV, ¶ 87b, c.

[46] *Miller I*, 65 M.J. at 847. The military judge did not specifically state that he relied on a theory of "constructive presence"; however, during his closing argument, the trial counsel mentioned constructive presence and *United States v. Cook*, 61 M.J. 757 (A.F. Ct. Crim. App. 2005), where the AFCCA held that constructive presence was sufficient to support a guilty plea to attempted indecent liberties with a child. *Id.*

[47] *Id.* The AFCCA left open the issue of whether constructive presence would be sufficient to support a conviction under Article 134. *Id.*

[48] *Miller II*, 67 M.J. 87, 88 (C.A.A.F. 2008).

[49] *Id.* at 90; United States v. Knowles, 35 C.M. R. 376, 378 (C.M.A. 1965).

[50] *Miller II*, 67 M.J. at 89.

[51] 2005 MCM, *supra* note 8, pt. IV, ¶ 87c; 1969 MCM, *supra* note 29, ch. XXVIII, ¶ 213f(3); DA PAM. 27-2, *supra* note 26, para. 213f(3), at 28-19.

[52] *Miller II*, 67 M.J. at 89 (citing United States v. Miller, 47 M.J. 352, 356 (C.A.A.F. 1997) and United States v. Hemingway, 36 M.J. 349, 351–52 (C.A.A.F. 1993)).

[53] 63 M.J. 372, 285 (C.A.A.F. 2006) (setting aside a conviction for indecent liberties with a child where the victim watched pornographic videos at the accused's house, even though the accused was not with the victim while she watched the videos).

[54] *Miller II*, 67 M.J. at 90.

[55] *Id.*

[56] *Id.* (internal quotations omitted).

[57] *Id.* (quoting BLACK'S LAW DICTIONARY 1221 (8th ed. 2004) (defining "presence" as "[t]he state or fact of being in a particular place and time" and [c]lose proximity coupled with awareness) and MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 935 (11th ed. 2003) (defining "physical" as having material existence" and "of or relating to the body")).

[58] *Id.*

understanding of physical presence might change the analysis."[59]

However, this case was charged as an attempt, not the completed offense. For an attempt under Article 80, the accused's act must "tend[] to effect the commission of the intended offense."[60] None of the accused's actions met this element. Although the detective could watch him while he masturbated, none of his actions "tended to effect the element of being in the detective's physical presence."[61] Therefore, the court set aside the conviction for attempted indecent liberties with a child and foreclosed the possibility of charging indecent conduct over a webcam as an indecent liberty with a child under Article 134.[62]

Beyond Article 134: Miller's *Implications for Future Webcam Cases*

The CAAF's decision in *Miller* is a straightforward application of the plain language in the *MCM*, the court's precedent on the subject, and the plain meaning of the terms at issue. The CAAF's resolution of this issue, though, has significant import for both the policymaker and the practitioner. First, this case exposes a gap in the coverage of child-specific sexual abuse offenses. It seems that sexual offenders like SSgt Miller have retreated from the schoolyards and street corners into the expansive and ethereal Internet network where these offenders can reach a broader audience. These offenders can encounter children and teens that they might never meet or see in real life, and exploit their naiveté and curiosity for sexual gratification. The accused in *Miller* thought that he had identified a teenage girl and masturbated to ejaculation in front of her using a webcam. This is a startlingly different scenario than that in *Knowles*, where the children were listening to obscene language spoken over a telephone. If the need for this offense was "to throw a cloak of protection around minors and to discourage sexual deviates from performing with, or before them," it is incongruous that conduct should penetrate this cloak simply because it occurred over the Internet.[63] Perhaps the CMA was prescient when the *Knowles* opinion left open the possibility that another "audio-visual system" could create the "presence" required for indecent liberties.[64] Nonetheless, the choice of language in the *MCM* caused the CAAF to reject this reasoning. While the next section will address another offense that can be used to address this conduct, the burden will fall to policymakers to mend the cloak in such a way that the child-specific sexual offenses adequately protect children from indecent conduct over the Internet.

For conduct occurring after 1 October 2007, indecent liberty with a child is now codified under Article 120. As such, some may view *Miller* as a narrow holding applying to an old offense. But *Miller* has importance even for the newer version of this offense. Under Article 120(j), "[a]ny person . . . who engages in indecent liberty in the physical presence of a child [with the requisite specific intent] is guilty of indecent liberty with a child and shall be punished as a court-martial may direct."[65] For offenses occurring after 1 October 2007, the physical presence requirement is now an element rather than a persuasive explanation of the offense in the *MCM*.[66] There is nothing in the statutory language, the *MCM* provisions, or the Joint Service Committee report on sexual offenses[67] to suggest a departure from prior interpretations of this term under Article 134. No language

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[59] *Id.*

[60] 2005 MCM, *supra* note 8, pt. IV, ¶ 4b. The four elements of an attempt under Article 80, UCMJ, are as follows:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

Id.

[61] *Miller II*, 67 M.J. at 91.

[62] *Id.*

[63] United States v. Brown, 13 C.M.R. 10, 17 (C.M.A. 1953).

[64] United States v. Knowles, 35 C.M.R. 376, 378 (C.M.A. 1965).

[65] UCMJ art. 120(j) (2008).

[66] 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(10). The elements of indecent liberty with a child under Article 120, UCMJ, are as follows:

(1) That the accused committed a certain act or communication;

(2) That the act or communication was indecent;

(3) That the accused committed the act or communication in the physical presence of a certain child;

(4) That the child was under 16 years of age; and

(5) That the accused committed the act or communication with the intent to:

(i) Arouse, appeal to, or gratify the sexual desires of any person; or

(ii) Abuse, humiliate, or degrade any person.

Id.

[67] *See* SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE 240 (Feb. 2005), *available at* http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc [hereinafter SEX CRIMES AND THE UCMJ]. The report provides a number of ways in which this offense differs from the Article 134 version, but no mention is made of the physical presence issue. *Id.* Furthermore, the report describes how the proposed definition of "indecent liberty" in Article 120(t)(12) "statutorily overrule[s]" *United States v. Baker*, 57 M.J. 330 (C.A.A.F. 2002), which held that the "factual consent of the child is relevant to whether the conduct was indecent." There is no mention of *Knowles* or *Rodriguez-Rivera*, suggesting that the drafters acquiesced to those interpretations of the requirement for physical presence. *Id.* at 255.

suggests the adoption of a doctrine of constructive presence or suggests that physical presence could occur through an audio-visual mechanism like a closed-circuit television system or an Internet link with a webcam. Rather, by requiring that the offense occur "in the physical presence of a child," Article 120(j) simply adopts the language that the *MCM* drafters added after *Knowles* and that has been included in every *MCM* since 1969. Should a constructive presence case make its way to an appellate court under the Article 120 version of indecent liberties with a child, there appears to be no basis for a court to depart from the CAAF's reasoning in *Miller*. As this offense is no longer a viable option for conduct like that in *Miller*, practitioners must consider whether it constitutes an "indecent act" under either Article 134 or Article 120.

Indecent Acts: Indecency and "Affirmative Interaction" via Webcam

In *Miller*, the court set aside the accused's convictions for attempted indecent liberties with a child. However, the court did not say that this conduct was not subject to criminal sanction under the UCMJ. This section will explain how the courts have analyzed indecent acts with another under Article 134 when the conduct involves the use of a webcam and will also consider whether the analysis changes now that this offense is codified under Article 120. While indecent liberties with a child is not a viable charge when the conduct occurs via webcam, both indecent acts with another under Article 134 and indecent act under Article 120 provide avenues to address indecent conduct via webcam when it involves children.

Affirming Indecent Acts with Another via Webcam: A Service Court Survey

Prior to the 2006 National Defense Authorization Act (NDAA), the *MCM* listed indecent acts with another as a lesser included offense for indecent acts or liberties with a child.[68] In *Miller*, the Government asked the CAAF to affirm attempted indecent acts with another as a lesser included offense to attempted indecent liberties with a child.[69] Indecent acts with another only requires that the act be committed "with a certain person," and contains "neither a 'physical presence' nor a 'presence' requirement."[70] Although the CAAF did not affirm this lesser included offense because the AFCCA did not assess its legal and factual sufficiency, the CAAF provided the lower courts with the necessary groundwork. Under indecent acts with another, the act must "be done in conjunction or participating with another person,"[71] but the other person "must be more than an inadvertent or passive observer."[72] The offense requires "some affirmative interaction between the accused and the victim" and they need not be in the "same physical space."[73] The CAAF remanded the case to the AFCCA to consider whether the lesser included offense of attempted indecent acts with another would be factually and legally sufficient under these facts. The efforts to outline the elements of the offense, and the holdings of relevant case law, offer a strong indicator that the CAAF considers indecent acts with another as an available lesser included offense where an indecent liberties conviction fails due to a lack of physical presence.

Before the AFCCA could accept the CAAF's invitation, the Army Court of Criminal Appeals (ACCA) became the first to apply *Miller* to a case involving indecent conduct via webcam. The facts in *United States v. Lorenz*[74] are remarkably similar to those in *Miller*. While in his barracks room at Fort Hood, Texas, the accused initiated a conversation in an Internet chatroom with someone he believed to be a thirteen-year-old girl.[75] Not surprisingly, the thirteen year-old girl was actually an undercover civilian police detective.[76] After some sexually explicit chat conversation, the accused used his webcam to establish a live-video feed.[77] He then displayed his penis, masturbated, and ejaculated.[78] While performing these acts in front of the webcam, he continued the sexually explicit conversation in the chatroom with the detective posing as the teenage girl.[79]

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[68] *See* 2005 MCM, *supra* note 8, pt. IV, ¶ 87(d)(1).

[69] "If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt." *Id.* pt. IV, ¶ 4d; *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008).

[70] *Id.* at 91; *see also* 2005 MCM, *supra* note 8, pt. IV, ¶ 90b. The elements of indecent acts with another under Article 134, UCMJ, are as follows:

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

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

Id.

[71] *Miller II*, 67 M.J. at 91 (quoting United States v. Thomas, 25 M.J. 75, 76 (C.M.A. 1987)).

[72] *Id.* (quoting United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996)).

[73] *Id.* (quoting United States v. McDaniel, 39 M.J. 173, 175 (C.M.A. 1994)).

[74] No. 20061071 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished).

[75] United States v. Lorenz, No. 20061071, slip op. at 2 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

The accused pled guilty to attempted indecent liberties with a child under Article 80.[80] On appeal, the ACCA affirmed in an unpublished opinion, applying the doctrine of constructive presence that had developed under the service court caselaw prior to *Miller*.[81] After the CAAF rejected the doctrine of constructive presence in *Miller*, the ACCA reconsidered its decision.[82] Finding the facts in *Lorenz* to be "substantially similar" to those in *Miller*, the court set aside the conviction for attempted indecent liberties with a child and affirmed the lesser included offense of attempted indecent acts with another.[83] The court reasoned that the facts established the "necessary affirmative interaction" between the two individuals at issue and supported a conviction for attempted indecent acts.[84] Specifically, the court noted the following: the "two-way online conversation" lasted for more than three hours; the accused asked his intended victim several sexually explicit questions that she answered; her answers then prompted him to ask more questions; and the two made plans to meet for a sexual encounter.[85] The court found that the detective in the case was "by no means a passive or inadvertent observer" and held that the facts supported attempted indecent acts with another: his acts were indecent, wrongful, and service discrediting."[86]

Shortly after *Lorenz*, the AFCCA issued its opinion on remand in *Miller*, accepting the CAAF's suggestion and affirming a conviction for the lesser included offense of attempted indecent acts with another.[87] Applying the evidence in the record, the court found that all of the elements of attempted indecent acts with another were proven beyond a reasonable doubt.[88] The accused established a live-video feed and "affirmatively obtained the victim's assurance" that he could show her his penis.[89] He then began masturbating while continuing a sexually explicit conversation with her using an instant messaging program.[90] After ejaculating, he asked her "if she liked what she had seen" and she responded affirmatively.[91] Based on these facts, the AFCCA concluded, "These affirmative interactions, though done at long distance over the Internet, are sufficient to meet the elements of the lesser included offense of attempted indecent acts with another."[92]

In the summer of 2009, the ACCA had yet another chance to consider a case involving masturbation via webcam. This time the case involved the unfortunate and unusual fact that the recipient of the accused's amorous advances and lascivious exhibitions was an actual teenage girl. The accused in *United States v. Parker*[93] was stationed in Yongsan, Korea. Using a webcam and an instant messaging program, the accused conversed with a fourteen-year-old girl who was located in Montana.[94] On four separate occasions, they used an instant message program to engage in sexually explicit chats about "what they would do together sexually" and, using the webcam, he exposed his penis and masturbated while she watched via the live-video feed.[95] The court observed that she "actively participated in the chats" and, upon his request, even sent him a picture of her pubic area.[96] For these acts, the accused pled guilty to four specifications of indecent liberties with a child under Article 134.[97] Applying *Miller*, the ACCA set aside the convictions for indecent liberties and affirmed the lesser included offense of indecent acts with another.[98] The court concluded that these facts supported the necessary affirmative interaction between the accused and the teenager and demonstrated that the girl in this case was an "active participant," rather than "an inadvertent or passive observer."[99] Based on the accused's admissions during the guilty plea inquiry and in the stipulation of fact, the ACCA was "convinced beyond a reasonable doubt [his] acts were wrongful, indecent, prejudicial to good order and discipline, and service discrediting."[100]

Indecent Act(s): The Catchall for Webcam Indecency?

Although all three cases discussed in this section are unpublished, they are instructive. First, the facts in all three cases are remarkably similar. In all three cases, there is a two-way conversation using some sort of real-time Internet conversation tool, like a chat room or an instant message

[80] United States v. Lorenz, No. 20061071, slip op. at 1 (A. Ct. Crim. App. Nov. 18, 2008) (unpublished) (withdrawn upon reconsideration).

[81] *Id.* at 4.

[82] *Id.* at 1–2.

[83] *Id.* at 3.

[84] *Id.* at 4 (quoting *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008)) (internal quotations omitted).

[85] *Id.*

[86] *Id.*

[87] *Miller III*, No. 36829, 2009 WL 1508494 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

[88] *Id.* at *2.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] No. 20080579, slip op. (A. Ct. Crim. App. Aug. 31, 2009) (unpublished).

[94] *Id.* at *2.

[95] *Id.*

[96] *Id.* The opinion does not state whether the video was one-way or two-way.

[97] Unlike all of the cases discussed thus far, this case involved an actual victim and there was therefore no need to resort to the inchoate offense of attempt.

[98] *Parker*, No. 20080579, at *2.

[99] *Id.* at *4 (quoting United States v. Eberle, 644 M.J. 374, 375 (C.A.A.F. 1996) and *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008)).

[100] *Id.*

program. Also, in all three cases, the accused used the "chat" capability to engage in sexually explicit conversations with the victim (or the law enforcement officer posing as the victim). Each accused asked questions of the child that were of a graphic sexual nature and described the sexual acts that each wished to perform with their particular victim. Also, in all of the cases, the child (or the law enforcement officer posing as the child) participated in the conversation by answering the accused's questions. In *Miller*, the victim even asked some questions of her own.[101] Next, in all of the cases, the accused established a live-video feed, exposed his penis, and masturbated. This video was then transmitted in real-time to the victim who ostensibly watched it. According to these three service court panels, these victims were more than inadvertent or passive observers and these common facts establish the requisite "affirmative interaction" for indecent acts (or an attempt where the accused was a law enforcement agent).[102]

As another observation, all of these cases involve an accused who thought he was engaging an actual teenager. This is a fundamental part of the indecency analysis. In *Parker*, the accused was actually performing in front of a real teenager and the court affirmed a conviction for indecent acts with another.[103] In both *Miller* and *Lorenz*, these two servicemembers were engaging law enforcement agents posing as children, and the courts affirmed attempted indecent acts with another rather than the actual completed offense.[104] This is a key distinction. The conduct in these cases—masturbation in front of one other person via webcam—is indecent because it involves a child. It appears then, that without more, such conduct between consenting adults in private would not be punishable as an indecent act.[105]

As a final note on indecent acts, the three cases addressed conduct that occurred before the new Article 120 took effect. For offenses occurring after 1 October 2007, indecent act is now codified in Article 120(k).[106] No court has yet explained how Article 134 caselaw will apply to the offense as it is codified under Article 120. The most significant difference is that the Article 120 version no longer requires that the acts be prejudicial to good order and discipline or service discrediting.[107] None of the courts, however, seemed to struggle much in finding that masturbation in front of a webcam that is broadcast over the Internet to a person purporting to be a minor was either service discrediting or prejudicial to good order and discipline in the Armed Forces.[108] As such, it does not appear that this change will adjust the difficulty in proving this offense. Additionally, the definition of indecent conduct under Article 120 is substantially similar to the definition under the Article 134 version of the offense.[109] Accordingly, the Army Trial Judiciary has imported the Article 134 indecent acts jurisprudence governing "open and notorious" sexual conduct into Article 120.[110] But there is a final key difference between the Article 120 version and the Article 134 version: an indecent act under Article 120 does not require that the acts be done "with another."[111] In *Miller*, when suggesting that indecent acts with another may be a viable lesser included offense, the court focused on the element requiring that the act be committed "*with* a certain person."[112] The court identified three cases which provided key principles for determining whether an act was "done in

[101] *See Miller III*, No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished). After the accused ejaculated, he asked "if she liked what she saw," and the officer asked "how it felt." *Id.*

[102] *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008).

[103] *Parker*, No. 20080579, at *3.

[104] United States v. Lorenz, No. 20061071, slip op. at 3 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished); *Miller III*, No. 36829, 2009 WL 1508494, at *1 (A.F. Ct. Crim. App. Apr. 30, 2009) (unpublished).

[105] *See also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK instr. 3-45-9 n.2 (1 Jan 2010) [hereinafter BENCHBOOK] ("If the evidence raises the issue of private consensual conduct between adults . . . the following instruction should be given. . . . Article 120, UCMJ, is not intended to regulate the wholly private consensual sexual activities of individuals . . . ."); *see also* United States v. McCracken, 67 M.J. 467, 468 n.2. (C.A.A.F. 2009) (Baker, J., concurring) (noting that absent other aggravating circumstances, private consensual sexual contact between unmarried adult persons "has never been punishable in the military as an indecent act.") (citations omitted).

[106] UCMJ art. 120(k) (2008).

[107] *Compare* 2005 MCM, *supra* note 8, pt. IV, ¶ 90b, *with* 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11). Under the new Article 120, the elements of indecent act are as follows:

(1) That the accused engaged in certain conduct; and

(2) That the conduct was indecent.

2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11). *See also* SEX CRIMES AND THE UCMJ, *supra* note 67, at 240–41.

[108] *Miller II*, 67 M.J. 87, 91 (C.A.A.F. 2008) (affirming attempted indecent acts with another without addressing the prejudice to good order and discipline or the act's tendency to discredit the service); United States v. Parker, No. 20080579, slip. op. at 4 (A. Ct. Crim. App. Aug. 31, 2009) (unpublished) (finding the conduct to be service discrediting without explicitly analyzing the element); United States v. Lorenz, No. 20061071, slip op. at 4 (A. Ct. Crim. App. Apr. 20, 2009) (unpublished) (finding the conduct to be service discrediting without explicitly analyzing the element).

[109] Under Article 120, "indecent conduct" is defined as "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." 2008 MCM, *supra* note 13, pt. IV, ¶ 45a(11). Under Article 134, "indecent signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to lust and deprave the morals with respect to sexual relations." 2005 MCM, *supra* note 8, pt. IV, ¶ 90b. Interestingly, in the explanation, the 2008 MCM includes a definition of "indecent" that is slightly different from the statutory definition of indecent conduct, but almost identical to the definition of "indecent" under Indecent Acts with Another under Article 134. *See* 2008 MCM, *supra* note 13, pt. IV, ¶ 45c(3).

[110] BENCHBOOK, *supra* note 105, Instr. 3-45-9, n.2.

[111] 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(11).

[112] *Miller II*, 67 M.J. 87, 91 n.5 (C.A.A.F. 2008).

conjunction or participating with another person."[113] This analysis does not seem necessary under the Article 120 version. While this conduct will almost always *involve* another person, the statutory language appears to eliminate the requirement that the person *participate* in the conduct. Notwithstanding this change, practitioners and courts should thoroughly explore the nature of the surrounding circumstances to ensure that the conduct at issue is truly "indecent."

In sum, should there be a need to charge beyond the communication of indecent language, indecent act appears to be the failsafe for indecent conduct with a child via webcam. In cases where the "child" is actually an adult posing as a child, the courts have consistently affirmed attempted indecent acts under Article 80. By eliminating the requirement that the acts occur "with another," it appears that these cases may be even easier to prove under the Article 120 version. There is, however, one other offense that the Government has charged in some webcam cases: indecent exposure.

Indecent Exposure via Webcam: The Final Frontier

Despite the availability of indecent acts as a crime to cover webcam cases, there are some cases where the Government has charged indecent exposure under Article 134 where the accused used a webcam to expose himself over the Internet to a person he thought was a child. There is currently an open question regarding the extent to which exposure of the genitals via webcam is factually and legally sufficient for indecent exposure under Article 134.[114] Two service courts have split in their application of indecent exposure to cases involving the display of genitalia via webcam, and the CAAF recently reviewed one of these two cases. This section will explore how courts have addressed indecent exposure via webcam and consider how the analysis may change now that indecent exposure is codified under Article 120.[115]

Indecent Exposure in the Military: Willful, Indecent, and in the Public View

Indecent exposure is the least serious indecency offense under the UCMJ.[116] Under the common law, this offense "prohibited the public exhibition of a person's private parts which instinctive modesty, human decency, or self-respect requires [to] be customarily kept covered in the presence of others."[117] The CAAF has further explained that the "purpose of criminalizing public indecency is to protect the public from shocking and embarrassing displays of sexual activities."[118] In *United States v. Graham*, the CAAF summarized the key requirements for indecent exposure under Article 134: the exposure must be "willful, indecent, and in public view."[119] First, the exposure must be willful. Negligence or heedlessness is insufficient.[120] The explanation in the *MCM* explains that "willful" means "an intentional exposure to public view."[121] In general, the Government can demonstrate willfulness in one of two ways: (1) the exposure occurs in a place "so public that it must be presumed it was intended to be seen by others," or (2) the exposure is "accompanied by some action by which [the accused] draws attention to his exposed condition."[122]

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[113] *Id.* at 91 (citing United States v. Thomas, 25 M.J. 75, 76 (C.M.A. 1987) ("The offense of committing indecent acts with another requires that the acts be done in *conjunction or participating with another person*."); United States v. McDaniel, 39 M.J. 173, 175 (C.M.A. 1994) (describing the appellant's actions as "affirmative interaction" with his victims); United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996) ("Appellant admitted substantially more than merely acting in the presence of the two women.")).

[114] 2005 MCM, *supra* note 8, pt. IV, ¶ 88 (Indecent exposure). The elements of indecent exposure under Article 134 are as follows:

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

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

Id. pt. IV, ¶ 88b.

[115] *See* UCMJ art. 120(n) (2008) (indecent exposure); 2008 MCM, *supra* note 13, pt. IV, ¶ 45a(n) (indecent exposure).

[116] 2005 MCM, *supra* note 8, pt. IV, ¶ 88e (stating that the maximum punishment for indecent exposure is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for six months); 2008 MCM, *supra* note 13, pt. IV, ¶ 45f(7) (setting the maximum punishment for indecent exposure under the new Article 120 as a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year).

[117] DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES § 7.31[2] (1st ed. 2007) (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 1004 (2d ed. reprint 1920)).

[118] United States v. Graham, 56 M.J. 266, 269 (C.A.A.F. 2002) (internal quotations and emphasis omitted).

[119] *Id.* at 267 (internal quotations omitted).

[120] *See* United States v. Stackhouse, 37 C.M.R. 99, 101 (C.M.A. 1967) (accused had habit of walking around his first floor apartment in the nude and was visible to neighbors, but made no effort to attract their attention); United States v. Manos, 25 C.M.R. 238, 239 (C.M.A. 1958) (court held exposure "negligent" where military policeman observed accused drying himself after a shower in front of the upstairs rear bedroom of his home); *see also* 2005 MCM, *supra* note 8, pt. IV, ¶ 88c ("Negligent indecent exposure is not punishable as a violation of the code."); SCHLUETER ET AL., *supra* note 117, at § 7.31[3] ("In the military, there is no such thing as negligent indecent exposure.") (citing *Stackhouse*, 37 C.M.R. at 99 and *Manos*, 25 C.M.R. at 238).

[121] 2005 MCM, *supra* note 8, pt. IV, ¶ 88c ("Negligent indecent exposure is not punishable as a violation of the code."); *see also* SCHLUETER ET AL., *supra* note 117, § 7.31[3] ("In the military, there is no such thing as negligent indecent exposure.") (citing *Stackhouse*, 37 C.M.R. at 101; *Manos*, 25 C.M.R. at 239).

[122] *See Graham*, 56 M.J. at 268 (internal citations omitted). "Drawing attention" can include "motions, signals sounds or other actions . . . designed to attract attention to his exposed condition." *Id.*

The next requirement is that the conduct be indecent, that is, it must demonstrate "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust, and deprave the morals with respect to sexual relations."[123] The courts concede that indecency is an elusive concept, but in general, this offense requires more than just nudity.[124] Most of the indecent exposure cases involve exposure of genitals to women and children, or exposure to the public at large.[125]

The third requirement is that the conduct occur in "public view."[126] In *Graham*, the CAAF synthesized its prior decisions[127] and clarified that conduct can be "in public view" in one of two ways. First, it can occur in a public place. This obviously includes public lands or public buildings, but also includes those "places so public and open . . . that they are certain to be observed by the general population."[128] The courts also recognize that indecent exposure can also occur in private locations, such as inside a privately-owned home; however, the conduct must be "in the view of the public."[129] Following the state court decisions on the matter, which comprise the majority view, the CMA stated that "the focus of the offense is on the victim, not the location of the crime."[130]

After establishing this framework, the court then turned to the actual facts in *Graham*. While wearing only a towel, the accused invited his fifteen-year-old babysitter into his bedroom.[131] Once there, he allowed the towel to drop, exposing his penis to the babysitter.[132] Contrary to his pleas, the accused was convicted of indecent exposure under Article 134.[133] On appeal to the CAAF, the court found that the conduct was willful—there was no evidence to suggest that the dropping of the towel was inadvertent or otherwise negligent.[134] The court also found that the conduct was indecent, reasoning that the babysitter was "not a spouse or girlfriend, or . . . a family member or other person involved with him in such a way that a given exposure might not be indecent."[135] Rather, she was "completely unrelated to and uninvolved with" him, and she "neither invited nor consented to his conduct."[136]

After resolving these two issues easily, the court turned to the real issue in the case: whether this exposure was "in public view." The incident did not occur in a traditionally public place, like a park or a building. It also did not occur in a place readily observable by members of the general public, like an open garage.[137] As the exposure occurred in a private bedroom, the court had to determine whether it was "in public view." The CAAF began its analysis by articulating the purpose of criminalizing indecent exposure: "to protect the public from shocking and embarrassing displays of sexual activities."[138] Furthermore, "[a] person need not be in a public place to be a member of the public."[139] The court then provided its formulation of what it means to be "in public view": "'[P]ublic view' means 'in the view of the public,' and in that context, 'public' is a noun referring to any member of the public who views the indecent exposure."[140] This circular definition begs the question: Who is "a member of the public?" The court did not define the term any further, but concluded that the babysitter was a "member of the public," finding that the accused "made certain that an unsuspecting and uninterested member of the general population had no choice but to see him naked."[141] The court affirmed the conviction for indecent exposure.[142]

In writing for the majority, it appears that Judge Crawford tried to provide a roadmap for analyzing indecent exposure cases. But determining whether a particular

[123] 2005 MCM, *supra* note 8, pt. IV, ¶ 90c; SCHLUETER ET AL., *supra* note 117, § 7.31[3].

[124] United States v. Caune, 46 C.M.R. 200, 201 (C.M.A. 1973) (holding that a disrobing in front of male law enforcement officers was contemptuous and disrespectful, rather than indecent). The court in *Caune* opined, "Although we have difficulty in defining what indecency is, we believe we know what it is not." *Id.* (citing Jacobellis v. Ohio, 378 U.S. 194, 197 (1964) (Stewart, J., concurring)).

[125] *See id. But see* United States v. Choate, 32 M.J 423 (C.M.A. 1991) (holding that, although not charged as indecent exposure, conduct involving exposure of the buttocks to a female neighbor ("mooning") was indecent and prejudicial to good order and discipline).

[126] *See* 2005 MCM, *supra* note 8, pt. IV, ¶ 88b; *Graham,* 56 M.J. at 267.

[127] *See* United States v. Shaffer, 46 M.J. 94, 96–97 (C.A.A.F. 1997) (affirming an indecent exposure conviction where neighbors observed the accused standing naked in his open garage); United States v. Ardell, 40 C.M.R. 160, 161 (C.M.A. 1969) (setting aside a conviction for indecent exposure where neighborhood children observed the accused naked in his residence, but no evidence showed that the he was aware of their presence); United States v. Stackhouse, 37 C.M.R. 99, 100–01 (C.M.A. 1967) (setting aside three convictions for indecent exposure where neighbors viewed the accused naked inside his apartment, but no evidence showing that the exposure was intentional).

[128] *See* United States v. Graham, 56 M.J. 266, 268 (C.A.A.F. 2002) (emphasis omitted).

[129] *Id.* at 267.

[130] *Id.* at 268.

[131] *Id.* at 267.

[132] *Id.*

[133] *Id.* at 266.

[134] *Id.* at 267.

[135] *Id.*

[136] *Id.*

[137] *See* United States v. Shaffer, 46 M.J. 94, 97 (C.A.A.F. 1997) (where neighbors passing his house observed the accused standing naked in his open garage).

[138] *Graham*, 56 M.J. at 269.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 268.

[142] *Id.* at 270.

exposure is willful, indecent, or in public view can be difficult and will depend heavily on the facts of the case. Thus, in an indecent exposure case, the answers to two questions provide the key facts for the analysis of whether a particular case is factually and legally sufficient: (1) Where did the exposure occur? and (2) Who actually viewed the exposure? The easiest case is where the conduct occurred in a truly public place, like public land or a public building, and where the conduct was viewed by someone that did not know the accused at all. The *Graham* case provides an example of a more difficult case where the conduct occurred in a private location, only the accused and the victim were present, and the victim knew the accused. The most difficult set of facts involves an exposure via webcam in a private location to a law enforcement posing as a teenager who acquiesces to the exposure. This is where the service courts have struggled in using *Graham's* roadmap.

Exposure to Police via Webcam: Indecent Exposure?

The fickle nature of the indecency definition and the circular nature of the definition of "in public view" have proved difficult for the military courts when considering an exposure via webcam to a law enforcement officer posing as a child. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had the first opportunity to consider the issue in *United States v. Hockemeyer*.[143] In that case, the accused engaged in several online conversations with an individual whom he believed to be a girl between the ages of thirteen and fifteen.[144] In fact, "Raven" was an undercover Naval Criminal Investigative Service (NCIS) officer.[145] Each of their instant messenger conversations became more sexual in nature and, in their last conversation, the accused used a webcam to transmit a live video of his erect penis.[146] He pled guilty, in relevant part, to one specification of indecent exposure and was convicted.[147] On appeal to the NMCCA, he conceded that his conduct was willful, but argued that his plea was improvident because the conduct was neither indecent nor in the public view because it occurred between "consenting adults."[148] In an unpublished opinion, the NMCCA found the plea improvident and set the conviction aside.[149]

First, the court assumed from the record that no one besides Raven viewed the transmission.[150] This assumption makes the case factually analogous to *Graham*: although it occurred via the Internet, the exposure occurred in private, between only the accused and the victim. Next, following the military precedent, which in turn follows the state majority view, the NMCCA stated that "the focus of indecent exposure is on the victim and not the location of the crime."[151] Therefore, the crime can occur in a private setting.[152] The court then narrowed its focus to the victim, finding that she was "a member of the public who viewed the appellant's exposure."[153] At this point, the court compared the victim to the babysitter in *Graham*, finding that the law enforcement officer posing as Raven was "neither unsuspecting nor uninterested."[154] Instead, the target of the exposure "was an NCIS agent attempting to snare online predators."[155] Also, the exposure was preceded by a number of online chats that became "progressively sexual in nature."[156] Finally, the conversation that immediately preceded the exposure gave a strong indication that the accused was about to display his penis.[157] Although given the opportunity, the agent did not object and even complimented the accused's display.[158] Based on these facts, the NMCCA found the record factually insufficient to sustain the conviction for indecent exposure, concluding that

[143] No. 200800077, 2008 WL 4531999 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished).

[144] *Id.* at *1.

[145] The screen name the NCIS agent used was "lilraven0103" and the court used "Raven" as shorthand when referring to the agent. *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at *2.

[149] *Id.* at *1.

[150] *Id.* at *2.

[151] *Id.* (quoting United States v. Graham, 56 M.J. 266, 268 (C.A.A.F. 2002).

[152] *Id.*

[153] *Id.* at *3.

[154] *Id.* (internal quotations omitted).

[155] *Id.*

[156] *Id.*

[157] *Id.* The court recounted the conversation as it appears in the record of trial as follows:

> ACC: and maybe I could show u a few things of me
> Raven: pleeeeez
>
> . . . .
>
> ACC: u alone?
> Raven: yeah why
> ACC: want to make sure cuz I may show u more then just my face
> Raven: oh yeah . . . just me
> ACC: so u won't mind if I show u more of me?
> Raven: its up to you
> ACC: u ready to see this?
> Raven: yeah

Id. at *1.

[158] *Id.* The court recounted the conversation as it appears in the record of trial as follows:

> ACC: u like?
> ACC: u like my * * * *?
> Raven: wow that is big
> Raven: never seen one before

Id.

the victim was "neither unsuspecting nor uninterested."[159] As the court specifically found that the exposure was to a member of the public and the accused conceded that his conduct was willful, the court's resolution had to have been grounded in the conclusion that, under the circumstances of this case, the exposure to the law enforcement officer was not indecent.

After *Hockemeyer*, the AFCCA had the next opportunity to review a conviction for indecent exposure to a law enforcement official using a webcam. The facts of *United States v. Ferguson*[160] are very similar to those in *Hockemeyer*. The accused entered an Internet chat room and made contact with an individual whom he believed to be a fourteen-year-old boy.[161] "Bradnh14" was actually an undercover civilian law enforcement officer.[162] On a number of different occasions over about a month, the accused engaged in several sexually graphic conversations with the officer, and in the course of one of the online chats, used his webcam to send a live video of himself masturbating and ejaculating.[163] The accused pled guilty to indecent exposure as well as several other charges.[164]

On appeal to the AFCCA, the accused advanced the same arguments that were successful in *Hockemeyer*: that his conduct was not "in the public view" because he "exposed himself in a nonpublic way . . . to an undercover police officer who was neither unsuspecting nor uninterested."[165] In yet another unpublished opinion, the AFCCA, with one dissenting judge, rejected the *Hockemeyer* reasoning and affirmed the accused's conviction for indecent exposure.[166] The court concluded that the officer remained a member of the public and found that neither the elements of the offense nor the *Graham* holding required a "complete lack of interest and suspicion as a precondition to a finding of 'public view.'"[167] Providing a hypothetical where an accused exposed himself to a "consenting" child, the court reasoned that "even 'invited' exposure might, under certain circumstances, still be considered indecent, and to a member of the public."[168] Instead, the court articulated a "totality of the circumstances" approach where the nature of the relationship between the parties, as well as the role of consent, are important considerations in determining whether a particular exposure is "indecent" or in "public view."[169] The court then applied the *Graham* framework to the facts of the case, considering the totality of the circumstances. The accused did not dispute that his conduct was willful.[170] Next, the court found that the officer remained a "member of the public."[171] Using the *Graham* court's description of the babysitter, the court reasoned that the officer and the accused did not have a "pre-existing relationship . . . such as that of a family member or paramour," and, therefore, the exposure occurred "in public view."[172] Additionally, the court found that conduct was indecent because of the very nature of the conduct itself; the fact the exposure occurred as part of an ongoing sexual dialogue; and, most significantly, the fact that the accused believed he was exposing himself to a fourteen-year-old boy.[173] Therefore, although the record shows that the officer "invited or at least acquiesced in the online exposure," the court found the conduct legally and factually sufficient for indecent exposure under Article 134.[174]

The CAAF granted review of *Ferguson*, presumably due to the service court split on the issue of webcam exposure to law enforcement personnel. Rather than tackling the myriad issues involved in assessing the criminal nature of this conduct, the three-judge majority resolved the case on very narrow grounds. Airman First Class (A1C) Ferguson pled guilty to indecent exposure and did not even raise the issue of the providence of his plea to the AFCCA.[175] In an opinion that will surely be cited for its pronouncements on the appellate review of guilty pleas, the court simply held that there was not a substantial basis in law or fact to question A1C Ferguson's guilty plea.[176]

Writing for the majority, Judge Stucky noted several key admissions by the accused. Essentially, the accused admitted that he "transmitted live images of himself over the Internet, intentionally exposing his naked body and erect penis while ejaculating to a person he thought was a

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[159] *Id.* at *3.

[160] *Ferguson I*, No. 37272, 2009 WL 2212070 slip op. (A.F. Ct. Crim. App. July 15, 2009) (unpublished).

[161] *Id.* at *1.

[162] *Id.*

[163] *Id.*

[164] *Id.* The other charges include attempting to send obscene materials to a minor via the Internet, communicating indecent language to a person believed to be a minor, and possession of child pornography. *Id.*

[165] *Id.* at *2.

[166] *Id.* at *2–5; *see also id.* at *5–7 (Heimann, J., dissenting). Judge Heimann would have reversed the case applying the same reasoning as the NMCCA in *Hockemeyer*. *Id.* It appears that the entire panel viewed the *Hockemeyer* reasoning as grounded in a finding that the exposure was not "in public view." *See id.* at *3, *6.

[167] *Id.* at *3.

[168] *Id.*

[169] *Id.*

[170] *Id.* at *2.

[171] *Id.* at *2, *4.

[172] *Id.* at *4.

[173] *Id.*

[174] *Id.* at *4–5.

[175] United States v. Ferguson (*Ferguson II*), No. 10-0020, slip op. at 3 (C.A.A.F. Mar. 22, 2010). The accused raised no issues on appeal, but the AFCCA specified the issue concerning the providence of his plea to indecent exposure. *Id.*; *Ferguson I*, 2009 WL 2212070, at *1.

[176] *Ferguson II*, No. 10-0020, at 2.

fourteen-year-old boy."[177] Although the accused asked whether "bradnh14" was alone, he admitted to the military judge the "he couln't have known who was in the room."[178] Additionally, the accused stipulated that "the Internet transmission could have been intercepted by a third party, was 'public,' and 'indecent.'" The accused admitted that "he performed the acts intentionally, purposefully, and in public view."[179] As such, the court found that there was no matter inconsistent with his plea.[180]

The accused did, however, raise an issue that the majority found necessary to discuss. The accused argued that *Graham* requires the victim to be unsuspecting and uninterested when the conduct occurs in a private setting.[181] This principle was central to the NMCCA's analysis in *Hockemeyer* and was found to be persuasive by the lone dissenting judge in the AFCCA opinion.[182] According to the majority's reading of *Graham*, the fact that the victim was "unsuspecting and uninterested" is necessary to establish willfulness when the conduct occurs in a private location.[183] Should the conduct occur in a public location, that fact alone will be sufficient to establish the willful nature of the conduct.[184] However, because the conduct in *Graham* occurred in private, "the willfulness was established by the fact that Graham exposed himself to a member of the public . . . who was unsuspecting and uninterested, and had no choice but to see him naked."[185] According to the majority, the accused's admissions during the plea colloquy established willfulness in the case at hand.[186]

In a dissenting opinion, which Judge Ryan joined, Judge Erdmann opined that the plea in this case was not provident.[187] The key point of departure from the majority was the reading of *Graham*. Judge Erdmann noted that the *Graham* opinion discussed the babysitter's status in the discussion of both the willfulness element and the indecency element.[188] As such, Judge Erdmann reasoned that the status of the victim and consent to the conduct at issue are relevant to both willfulness and indecency.[189] He also noted that status and consent would also be important in determining whether the conduct was wrongful.[190] Based on this reasoning, Judge Erdmann concluded that "consideration of the victim's status must be included in any analysis of an indecent exposure offense in a nonpublic location."[191] In this case, the accused asked whether "bradnh14" was alone, and the individual stated that he was. Additionally, there is no evidence in the record that anyone other than "bradnh14" viewed the exposure, and the law enforcement officer specifically requested that the accused transmit the image. Judge Erdmann found that the law enforcement officer "specifically invited and consented to the exposure" and concluded that the facts in this case "do not meet the legal requirements of indecent exposure as defined in the *MCM* and [the CAAF]."[192] With a narrow majority opinion and the points Judge Erdmann raised in his dissent, *Ferguson* leaves a number of unresolved issues concerning indecent exposure in webcam cases.

Indecent Exposure Under Article 134: Forging the Road Ahead

As Judge Erdmann noted, two service courts applied *Graham* to almost identical facts and reached opposite conclusions.[193] There are, however, a couple of points that appear undisputed. First, the Government could have charged the conduct in both *Hockemeyer* and *Ferguson* as an attempted indecent act under Article 134 and subjected the accused to a significantly higher maximum punishment. In both cases, the accused engaged in sexually explicit dialogue with a person he believed to be a minor. Then, the accused used a webcam to transmit live video of masturbation and ejaculation to the "teen," who then commented approvingly on the video. Second, it appears that the courts accept the principle that an indecent exposure can occur via Internet webcam. No court thus far has read a requirement that the exposure must occur in the physical presence of the victim to constitute indecent exposure. Setting aside issues involving invitation, law enforcement officers posing as children, and pre-recorded pictures and video, it seems beyond cavil that an accused could use his webcam to

[177] *Id.* at 4.

[178] *Id.* at 5.

[179] *Id.* at 11.

[180] *Id.*

[181] *Id.* at 8.

[182] United States v. Hockemeyer, No. 200800077, 2008 WL 4531999, slip op. at *3 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished); *Ferguson I*, No. 37272, 2009 WL 2212070, slip op. at *5–7 (A.F. Ct. Crim. App. July 15, 2009) (unpublished) (Heimann, J., dissenting).

[183] *Ferguson II*, No. 10-0020, slip op. at 10.

[184] *Id.*

[185] *Id.*

[186] *Id.* ("[W]hether appellant's acts were willful . . . was resolved during the plea inquiry. Appellant confirmed to the military judge that the decision to expose himself 'was the result of a freely made decision on his part.'").

[187] *Ferguson II*, No. 10-0020, slip op. at 1 (Erdmann, J., dissenting).

[188] *Id.* at 5.

[189] *Id.*

[190] *Id.* Indecent exposure must be both "willful" and "wrongful." *See id.* at 3; 2005 MCM, *supra* note 8, pt. IV, ¶ 88; BENCHBOOK, *supra* note 105, instr. 3-88-1.

[191] *Ferguson II*, No. 10-0020, slip op. at 5 (Erdmann, J., dissenting).

[192] *Id.* at 7.

[193] *Id.* at 1.

willfully expose a certain part of his body to public view in an indecent manner via live-video feed.[194]

It appears likely that the CAAF certified *Ferguson* based on the incongruous results from the service courts. However, questions remain in the factual scenario where a law enforcement officer poses as a child and acquiesces in the exposure. There appear to be two salient questions. First, when does an individual cease to be a "member of the public?" Second, what is the role of invitation and consent in the crime of indecent exposure? Two principles in the *Graham* opinion provide important waypoints for a final resolution of this issue. The first is the policy behind criminalizing indecent exposure: "to protect the public from shocking and embarrassing displays of sexual activities."[195] The second is the CAAF's description of the accused's actions in *Graham*: "[H]e made certain that *an unsuspecting and uninterested member of the general population* had *no choice* but to see him naked."[196] These two salient questions and these two waypoints offer some assistance to courts and practitioners handling future Article 134 indecent exposure cases.

In both *Ferguson* and *Hockemeyer*, the courts agreed that the law enforcement officer at issue was a member of the public. However, a deeper analysis of the *Graham* opinion might yield a different result. There appears to be a recognition that some individuals are not "members of the public" for purposes of indecent exposure, like spouses, family members, or other members of the household.[197] It is logical that at some point, an individual ceases to be a "member of the public" for indecent exposure purposes and is no longer in need of protection from "shocking and embarrassing" displays of sexuality. In both *Ferguson* and *Hockemeyer*, the accused engaged in extensive online chatting with these two victims and the chatting involved sexually explicit topics. Furthermore, prior to the exposure, the servicemembers sought some form of permission from their targets. Both victims are easily distinguishable from the babysitter who had no idea what awaited her when she entered Graham's bedroom.[198] Instead, these two victims were interested in seeing the genitals of the accused and expected that the accused would, at some point, show his genitals. One who engages in explicit sexual conversations with an individual who then seeks permission to display his genitals no longer needs the protection from the "shocking and embarrassing displays" that an indecent exposure offense endeavors to provide members of the public.

Additionally, the courts acknowledge that the victims in both *Ferguson* and *Hockemeyer* invited or consented to the exposure. This factor must play a role in whether the conduct is indecent. Under *Graham*, the court describes the victim as one "who had no choice but to see [the accused] naked."[199] The law enforcement officers in both *Ferguson* and *Hockemeyer* had sufficient warning that the two accused were going to expose themselves and had ample opportunity to avoid seeing the genitals of these two servicemembers. Nonetheless, they acquiesced in the display in order to perfect a criminal case against the accused. Should a particular exposure be willful and in the public view, the only logical place for consent or invitation is in assessing the indecent nature of the offense. One who invites an individual to display certain parts of his body, or consents to such a display, has a choice in the matter and no longer needs the protection that the indecent exposure offense provides. The obvious exception to this principle is the case involving an actual child. However, without resorting to a conclusion that children cannot consent to indecent conduct, indecent acts or indecent liberties with a child account for this circumstance—with a higher maximum punishment.[200]

Narrowing the definition of "member of the public" and broadening the role of invitation or consent has applications in a more conventional context as well. Consider a hypothetical scenario where a female neighbor comes to a male servicemember's house to return a borrowed copy of the latest *Harry Potter* book.[201] The servicemember invites the neighbor into the house and steers the conversation away from Voldemort and Hogwarts toward topics of a more sexual nature. Instead of leaving the servicemember's house immediately, the neighbor participates in sexually-oriented

[194] For example, a servicemember could send a link to an "unsuspecting or uninterested" person on the Internet who, on clicking on the link, is transported to a live-video feed where the accused exposes himself. Consider another example where two individuals are chatting via webcam and one displays his genitals to the other in an unexpected manner.

[195] United States v. Graham, 56 M.J. 266, 269 (C.A.A.F. 2002) (emphasis added).

[196] *Id.* at 268 (emphasis added).

[197] While understandable considering the common law development of the offense, it is interesting that indecent exposure is limited to members of the public. Children remain protected under other offenses and it would be nonsensical to protect spouses. It seems, however, that the law should protect other members of the household from exposures that are indecent. The definition of "indecent" would naturally operate to exempt from prosecution those rare, incidental exposures that occur as a result of everyday life in a common household.

[198] *Id.*

[199] *Id.*

[200] *See* 2005 MCM, *supra* note 8, pt. IV, ¶ 87e (indecent acts or liberties with a child with a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for seven years); *id.* pt. IV, ¶ 88e (indecent exposure with a maximum punishment of bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months); *id.* pt. IV, ¶ 90e (indecent acts with another with a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years); *Ferguson I*, No. 37272, 2009 WL 2212070, slip op. at *6 (A.F. Ct. Crim. App. July 15, 2009) (Heimann, J., dissenting) (noting that indecent act with a child would apply to the facts at hand, with a far greater maximum punishment). Of course, after *Miller*, indecent liberties with a child does not apply to conduct over the Internet.

[201] *E.g.*, J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

banter. This encourages the servicemember to take the conversation in an even more sordid direction. As the conversation continues, the servicemember asks whether the neighbor wants to see his penis and the neighbor's reply, rather than "No!" or leaving immediately, is "Sure!" This neighbor is easily distinguishable from a perfect stranger or a neighbor walking down the street, and it seems absurd that this conduct could be considered to be indecent and in the public view. The law should not provide the same protection to this neighbor that it offers to the rest of the general population.

Beyond the role of consent and the status of the victim, three more issues warrant consideration when discussing indecent exposure in the webcam context. The first is the significance of others who might view the webcam feed. In *Ferguson*, the accused asked "bradnh14" if he was alone and "bradnh14" confirmed that he was. However, in the stipulation of fact, the accused agreed that the "Internet transmission could have been intercepted by a third party."[202] Additionally, during the providence inquiry, the accused admitted that "he couldn't have known who was in the room" with "bradnh14."[203] This raises interesting issues regarding the ability of others to view private Internet transmissions, the likelihood of another viewing a private Internet transmission, and the accused's knowledge of that likelihood. The military jurisprudence proves very helpful here. In *Stackhouse*, the accused admitted to walking nude in his apartment and even admitted that it was possible that his neighbors might see him.[204] However, the court found such evidence "clearly insufficient to establish a willful indecent exposure."[205] Contrast this with *Shaffer*, where the accused was seen standing naked in the back of his garage, with the garage door open, "facing the street."[206] The court noted that "school buses and automobiles, drove by on a regular basis, . . . children routinely passed by on foot and on their bicycles[, and o]ther families' homes were located directly alongside of and across the street . . . ."[207] Based on these facts, the court held that the exposure was "willful and wrongful."[208] As the *Benchbook* instructs, "'Willful' means an intentional exposure to public view. The exposure must be done with the intent to be observed by one or more members of the public."[209] Assuming that the exposure is in a private location and the primary target of the exposure is not a member of the public, the accused must know that someone else is witnessing the exposure and intend that they observe it. Heedlessness or negligence is not enough.[210] In rejecting the providence of A1C Ferguson's plea, Judge Erdmann noted that in previous cases, the CAAF has recognized that "members of the public are not generally able to view e-mails and instant messenger conversations."[211] This is an important footnote because CAAF has thus far rejected the idea that all electronic transmissions are open to the view of the general public.[212] The situation where there is a private transmission, with the mere possibility that the transmission is viewed by an employee of the service provider or a hacker that intercepted the transmission, seems more analogous to *Stackhouse* than *Shaffer*. Thus, the facts are critical to determining whether an Internet exposure is willful.

The second issue involves attempts under Article 80.[213] In a situation where the accused believes he is exposing himself to a child, rather than an adult law enforcement agent, attempted indecent exposure should be both a valid charge, as well as a valid appellate remedy under Article 59.[214] Indeed, Judge Erdmann noted this in his dissenting opinion in *Ferguson*.[215]

As a third and final issue, as of 1 October 2007, indecent exposure is now codified under Article 120(n), UCMJ, and the elements have changed. The elements are now as follows:

> (1) That the accused exposed his or her genitalia, anus, buttocks, or female areola, or nipple;
> (2) That the accused's exposure was in an indecent manner;
> (3) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by

[202] *Ferguson II*, No. 10-0020, slip op. at 5 (C.A.A.F. Mar. 22, 2010).

[203] *Id.*

[204] United States v. Stackhouse, 37 C.M.R. 99, 100–01 (C.M.A. 1967).

[205] *Id.* at 101; *see also* United States v. Manos, 25 C.M.R. 238, 239 (C.M.A. 1958).

[206] United States v. Shaffer, 46 M.J. 94, 97 (C.A.A.F. 1997).

[207] *Id.*

[208] *Id.*

[209] BENCHBOOK, *supra* note 105, instr. 3-88-1.

[210] 2005 MCM, *supra* note 8, pt. IV, ¶ 88c ("Negligent indecent exposure is not punishable as a violation of the code."); SCHLUETER ET AL., *supra* note 117, § 7.31[3] ("In the military, there is no such thing as negligent indecent exposure.") (citations omitted).

[211] *Ferguson II*, No. 10-0020, slip op. at 6 n.3 (C.A.A.F. Mar. 22, 2010) (Erdmann, J., dissenting).

[212] In *Hockemeyer*, the NMCCA found the record "devoid of any facts demonstrating that th[e] transmission was either observed by a third party, or capable of being observed by a third party. United States v. Hockemeyer, No. 200800077, 2008 WL 4531999, slip op. at *2 (N-M. Ct. Crim. App. Sept. 30, 2008) (unpublished). Furthermore, the court did not find "any indication . . . that a purported private online video transmission could be viewed by other computers through which the images travel." *Id.* at 2 n.5.

[213] UCMJ art. 80 (2008).

[214] *Id.* art. 59b ("Any reviewing authority . . . may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

[215] *Ferguson II*, No. 10-0020, slip op. at 7 (Erdmann, J., dissenting) ("The facts as presented here may have constituted the offense of attempted indecent exposure . . . .").

people other than the accused's family or household; and
(4) That the exposure was intentional.[216]

Although the elements differ from the Article 134 version, the exposure must still be intentional and indecent.[217] There are, however, several key changes. First, the statute applies to both male and female servicemembers and the statute clearly identifies the body parts at issue. Under the Article 134 version, it was an open question whether the offense covered exposure of the buttocks or the female breast.[218] Second, the statute replaces the term "public view" with a more specific phrase. The conduct must occur "*in a place* where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household."[219] In proposing this language, the drafters of the Joint Service Committee report on sexual assault intended that Congress codify the holding in *Graham*.[220] The drafters viewed the Article 134 definition as "narrow" and borrowed the current language from the Georgia indecent exposure statute in an effort to broaden the places where this offense can occur.[221] The question raised above concerning private Internet transmissions is now phrased a new way: can it be *reasonably expected* that a third party will view the transmission? Third, Article 120 now governs the applicability of certain defenses. Marriage is an affirmative defense to indecent exposure, unless the accused's intent is "to abuse, humiliate, or degrade any person."[222] Additionally, consent and mistake of fact as to consent are not affirmative defenses to indecent exposure.[223] Thus, for cases arising under Article 120, the key question appears to be whether the exposure at issue is indecent, and *Graham* will remain instructive. In performing the indecency analysis, the court described the babysitter as "completely unrelated to and uninvolved with him, and . . . neither invited nor consented to his conduct."[224] While consent or invitation may not be affirmative defenses, facts indicating either should still have bearing on whether the conduct at issue is indecent.

Considering *Graham*, *Hockemeyer*, *Ferguson*, and the new Article 120, indecent exposure remains an enigma when applied to conduct occurring over the Internet. The learning point for practitioners is that the conduct in both *Hockemeyer* and *Ferguson* would have been punishable as an indecent act, whether under the Article 134 version or under the Article 120 version. While the court in *Ferguson* affirmed the accused's guilty plea based on the his admissions and stipulations, the narrow disposition and Judge Erdmann's dissent sound ominous tones of caution for trial counsel considering an indecent exposure charge for a case involving webcam exposure to a law enforcement officer posing as a child.

Conclusion

In just two years, there have been six appellate opinions that dealt with an accused who used an Internet webcam to display his genitals to someone he thought was a child. In four of the five instances at issue, the accused found a law enforcement officer rather than a child, but the prevalence of this crime is worthy of note to practitioners at all levels. Also worthy of note is the difficulty that the courts have in applying law designed for conduct that occurs in the actual physical presence of the victim to conduct that occurs over the Internet and using webcams. The policy behind these laws—either protecting children from sexual predators or protecting the public from shocking and embarrassing displays of a sexual nature—has continuing validity and mandates that military law accommodate this new avenue for predatory and deviant sexual activity. Indecent liberties with a child fails because it requires actual physical presence and indecent exposure is littered with open issues when applied to exposure via webcam to a law enforcement officer posing as a child. Indecent language has always been available for the words spoken or typed, and the charge of indecent acts has become the catch-all for the sexual acts performed.

Over the past several years, child pornography cases have occupied a significant portion of the military justice docket. The cases discussed in this article are a significant development because they show another way that the UCMJ has failed to keep pace with the age of the computer and the Internet. With more cases involving the use of the Internet to commit crimes of a sexual nature, perhaps the time has come for the military justice system to account for the Internet age in the statutory language of the UCMJ and in the explanations and analysis of the *MCM*. Until that is done, practitioners will continue to rely on the courts' "tech-savvy" in analogizing misconduct over the Internet to misconduct occurring in a more conventional, face-to-face manner. As these cases show, the cloak of protection is a growing a bit threadbare.

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[216] 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(14) (internal quotations omitted).

[217] The drafters proposed the phrase "willfully exposes" to reflect the language in the Article 134 version, and then defined "willful" as "intentional exposure in a public place." SEX CRIMES AND THE UCMJ, *supra* note 67, at 273, 275. Congress ultimately adopted the more simple phrase "intentionally exposes." *See* UCMJ art. 120(n) (2008).

[218] SCHLUETER ET AL., *supra* note 117, § 7.31[3]; *see* United States v. Choate, 32 M.J. 423, 426 (C.M.A. 1991) (finding exposure of the buttocks indecent and prejudicial to good order and discipline under the circumstances).

[219] 2008 MCM, *supra* note 13, pt. IV, ¶ 45b(14)(c) (emphasis added).

[220] SEX CRIMES AND THE UCMJ, *supra* note 67, at 241.

[221] *Id.* (quoting GA. STAT. ANN. § 16-6-3(15) (2004)).

[222] UCMJ art. 120(q) (2008).

[223] *Id.* art. 120(r).

[224] United States v. Graham, 56 M.J. 266, 267 (C.A.A.F. 2002) (emphasis added).