

Fifty Shades of State Law: A Primer to Prosecute Incest under Article 134, Uniform Code of Military Justice

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I. Introduction

After putting away groceries in her government quarters on Fort Stewart, Georgia, Mrs. Arrant walks upstairs and enters the master bedroom to discover her husband, Staff Sergeant (SSG) Arrant, engaging in sexual intercourse with her twenty-year-old daughter, Ms. Virgo, who is SSG Arrant's stepdaughter and a live-at-home dependent. In the confrontation that ensues, Mrs. Arrant asks, "How long has this been going on?" Ms. Virgo replies, "Mom, he's been doing this to me ever since you married him four years ago."

During Criminal Investigation Command's (CID's) investigation, Ms. Virgo discloses that she never wanted to participate in the sexual encounters with her stepfather. She initially tried to resist SSG Arrant, but eventually learned it was easier to relent than be subjected to his wrath. A digital forensic examination of Ms. Virgo's phone reveals she exchanged numerous sexually provocative text messages and pictures with SSG Arrant over the previous two years. The phone also shows that on the day Mrs. Arrant walked in on SSG Arrant, Ms. Virgo replied to SSG Arrant's text message of "come up to my room 4 some fun" with "lol- OK- brt."

What Uniform Code of Military Justice (UCMJ) charges might SSG Arrant face? The easy answer is adultery under Article 134, UCMJ.¹ But does this really sound like a typical adultery case? Is SSG Arrant's crime against his marriage or his stepdaughter? Is adultery the gravamen of the offense? Since Ms. Virgo indicated that the sexual advances and activities were unwanted, are charges for rape or sexual assault under Article 120, UCMJ appropriate?² If so, how will two years of "sexting"³ look to a panel regarding consent

or at least play into a mistake of fact as to the consent issue? Is there a charge that avoids the issue of consent?

Exploring the hypothetical further, how would small changes to the facts affect what charges are available? What if the incidents were committed off post or in Hawaii? What if Mrs. Arrant was only a fiancée rather than his wife? What if Ms. Virgo was SSG Arrant's biological child? What if, instead of four, the sexual activity had spanned the previous five years, thereby subjecting SSG Arrant to aggravated sexual assault of a child under the 2008 version of Article 120, UCMJ for the acts occurring before Ms. Virgo's sixteenth birthday; what about the four years after?⁴

The hypothetical explores some of the contours of criminal incest. Black's Law Dictionary defines incest in terms of either "[s]exual relations" or "[i]nter-marriage" between related family members.⁵ Almost every state criminalizes incest by statute.⁶ In contrast, the UCMJ does not.⁷ Fortunately, trial counsel can use Article 134 to cover this gap by either incorporating state law through the Assimilated Crimes Act (ACA), when available, or using a novel specification.⁸ Unfortunately, doing so is a less than straightforward endeavor; state incest laws vary significantly.⁹ To illustrate, because Ms. Virgo is a *stepdaughter*, the original hypothetical is criminal incest in Georgia, but not in Hawaii.¹⁰ In addition to the intricacies of

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¹ See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62 (2012) [hereinafter MCM].

² See UCMJ art. 120 (2012).

³ "Sexting" is the sending of sexually explicit messages or images by cell phone. *Sexting*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sexting> (last visited Dec. 1, 2015).

⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45.a.(d) (2008) [hereinafter 2008 MCM]. If Ms. Virgo turned age sixteen after 27 June 2012, a similar charge would be available under the current Article 120b, Uniform Code of Military Justice (UCMJ). See UCMJ art. 120b (2012).

⁵ *Incest*, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶ Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the "Sexual Family"*, 119 HARV. L. REV. 2464, 2469-70 (2006) (noting "Rhode Island repealed its criminal incest statute in 1989" and "New Jersey does not punish acts committed when both parties are over eighteen years old") [hereinafter *Inbred Obscurity*].

⁷ See *infra* pp. 9–10 and note 52.

⁸ See UCMJ art. 134 (2012); see also MCM, *supra* note 1, at pt. IV, ¶ 60.c (referencing operation of the Assimilative Crimes Act (ACA), 18 U.S.C. § 13 (2012)).

⁹ *Inbred Obscurity*, *supra* note 6, at 2469–70.

¹⁰ Compare GA. CODE ANN. § 16-6-22 (2014) (including stepchildren from class of incestuous relationships), with HAW. REV. STAT. § 707-741 (2014) (omitting stepchildren).

incest law, charging Article 134 is also a nuanced enterprise whether using the ACA¹¹ or drafting novel specifications.¹²

This article's goal is to assist the military justice practitioner in the following three ways: (1) to identify common incest case dynamics and understand the general contours of state criminal incest laws, (2) to recognize why and when charging incest may be appropriate, and (3) to correctly charge incest under Article 134.

To accomplish this goal, Part II provides a general overview of incest, including the history of the taboo and its treatment under criminal statutes. This part also considers the victims of incest and presents information regarding counterintuitive behavior relevant to such cases. Next, Part III explores the current gap in the UCMJ and reveals why trial counsel should consider state incest laws. Finally, Part IV explains how to charge incest under Article 134. Additionally, Appendix A contains a summarized table of state incest laws and Appendix B provides example specifications for the methods recommended in Part IV.

II. Background

A. Incest

The word *incest* has meaning beyond the legal context.¹³ The general and generic concept of incest as a “universal taboo” overshadows any jurisdiction's strict and specific legal definition.¹⁴ Almost all cultures prohibit some degree of interfamilial sexual activity or marriage.¹⁵ Even in terms of a nebulous taboo, incest can conjure two very different images.¹⁶ One type is consensual, invoking thoughts of kissing cousins; the other type is nonconsensual, rooted in the inherently coercive relationship created when one family

member has a high level of authority over a person with a high level of dependency, as with a parent and child.¹⁷

Incest's different implications—sometimes only a taboo, albeit consensual, relationship and sometimes an inherently nonconsensual sexual assault—is critical to recognize.¹⁸ This article focuses on prosecuting incest falling within the nonconsensual dynamic. Beyond this distinction, it is also important to appreciate how incest victims may behave and be perceived.

B. Understanding Incest Victim Behavior

As with any sexual assault, prosecuting incest requires an awareness of “society's perception of victims, victims' counterintuitive responses, and the methods used by . . . predators.”¹⁹ Below is a brief description of common issues in incest cases, but due to the complex nature of the subject, trial counsel are best served conducting additional research and, if needed, seeking an expert consultant or witness.²⁰

Perhaps due to the “deep-seated and universal taboo” associated with incest, the first hurdle may be society's natural aversion to accept that incest occurs.²¹ This aversion may cause skepticism. A starting point of disbelief is less than ideal for the prosecutor attempting to prove his case beyond a reasonable doubt. Rather than rare, one study revealed that over a third of reported juvenile sexual assault victims were family members of the offender.²²

Second, the length of time the incest is alleged to have taken place may raise doubt. A natural question would be, “How could this go on so long and no one else find out?” By its nature within the family setting, incestuous sexual assaults usually occur over time, even years, rather than being a single act.²³ It is fair to assume that the incest was neither reported nor discovered during that span of years. In truth, reporting

¹¹ See John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 12.

¹² Jayson L. Durden, *Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law*, ARMY LAW., Nov. 2013, at 4, 13.

¹³ Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998).

¹⁴ See *Inbred Obscurity*, *supra* note 6, at 2464.

¹⁵ *Id.* Ancient Persia is a noted exception to the universal taboo. *Id.* at 2465 n.3.

¹⁶ *Id.* at 2465.

¹⁷ See *id.* The only use of incest in the *Manual for Courts-Martial (MCM)* implies consensual incest because the Wharton Rule presumes there is “an agreement” between the parties. See *infra* note 58. Legally, kissing cousins are at the fringes of many legal definitions of incest, and in many states, first cousins can be legally married. See *US State Laws, COUSINCUPLES.COM*, <http://www.cousincouples.com/?page=states> (last visited Dec. 1, 2015).

¹⁸ *Inbred Obscurity*, *supra* note 6, at 2465.

¹⁹ See Maureen A. Kohn, *Special Victims Units—Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 68, 70.

²⁰ See *State v. Batangan*, 799 P.2d 48, 52 (Haw. 1990) (“Expert testimony [e]xposing jurors to the unique interpersonal dynamics involved in prosecutions for intrafamily child sexual abuse’ may play a particularly useful role by disabusing the jury of some widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths.”) (citations omitted) (first quoting *Wheat v. State*, 527 A.2d 269, 273 (Del. Super. Ct. 1987); then quoting *People v. Gray*, Cal. Rptr. 658, 660–61 (Cal. Ct. App. 1986)).

²¹ See LOISE BARNETT, *UNGENTLEMANLY ACTS: THE ARMY'S NOTORIOUS INCEST TRIAL* 219 (2000) (explaining that in the nineteenth century, the majority of the country preferred to believe incest did not occur “regardless of the evidence” or that it only occurred among other “uncivilized” communities). Some may believe, as one “writer for the *Independent* insisted, ‘The very fact that [incest] is a crime against nature ought to be *prima facie* evidence against its commission.’” *Id.* at 18.

²² See *Who are the Victims*, RAPE ABUSE & INCEST NATIONAL NETWORK, <https://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Dec. 1, 2015).

²³ Bienen, *supra* note 13, at 1502.

may be the exception to the general rule that most child sexual assaults go unreported into adulthood.²⁴ In terms of incest, one study revealed adolescents “[sexually] assaulted by family members were 5.6 times more likely to delay disclosure than disclose within a month.”²⁵ Additionally, it is not uncommon for assaults to occur when other family members are at home—even “in the same room or even the same bed.”²⁶ Either by arguing it never happened or that there was consent, delayed reporting of continuous assaults is ripe for attacking the victim’s credibility.

On the whole, incest victims may not always evoke much sympathy,²⁷ and it is reasonable to suggest that as the victim gets older, any sympathy is further eroded by a notion of holding the victim responsible for not reporting. In addition to delayed reporting, the effect of incest accusations on the family may also mean that accusers often “retract charges,” or “engage in behavior that subjects their testimony to impeachment.”²⁸ Trial counsel must understand, investigate, and, if necessary, explain at trial these incest case dynamics—all while also being an expert in the law.

C. Criminal Statutes

Incest was not a crime under English common law, but it has been codified by every state since colonial times.²⁹ Since then, the development of state incest jurisprudence is best characterized as “bizarre.”³⁰ Consequently, even though all fifty states address incest in statute, it is impossible to universally define incest in black and white terms. From a

national perspective, incest is grey, and whether a person’s actions are illegal incest is entirely dependent on which state they are committed in. The significant differences between state definitions are rooted in what persons are included in the prohibited relationship and what acts are prohibited between the related persons.

Relationship determines whether a person’s status invokes the incest statute. Some states narrowly define the types of relationships such that incest provisions apply to only close blood relatives³¹ or by referring the category of people prohibited from marrying under state law.³² In contrast, other states provide a broader category of relationships, including first cousins, stepchildren, adopted children, and relatives by marriage.³³ Some states do not focus on family relationship, but prohibit sexual activity based on positions of authority,³⁴ including “guardian, custodian or person in loco parentis” as well as teachers, coaches, and scout leaders.³⁵ In addition to defining the requisite relationship, a minority of states require the parties be within a specified age range to trigger the incest statute.³⁶ Defining the relationships determines who is prohibited from engaging in the specified acts.

The acts that state incest statutes proscribe fall into one of the following three categories: marriage,³⁷ varying forms of sexual conduct,³⁸ or both.³⁹ The states that only prohibit marriage will not be helpful in charging the type of incest this primer seeks to address; though current events suggest this category is shrinking.⁴⁰

²⁴ See Written Deposition of Alex Bivens, Clinical Psychologist 4–5 (July 14, 2011) (on file with author).

²⁵ *Id.* at 9 (quoting Steven M. Kogan, *Disclosing Unwanted Sexual Experiences: Results from a National Sample of Adolescent Women*, 28 CHILD ABUSE & NEGLECT 147, 157 (2004)).

²⁶ *Id.* at 20 (citing Rocky C. Underwood et al., *Do Sexual Offenders Molest When Other Persons are Present? A Preliminary Investigation*, 11 SEXUAL ABUSE 243 (1999)).

²⁷ Bienen, *supra* note 13, at 1502.

²⁸ *Id.*

²⁹ *Id.* at 1521–22.

³⁰ *Id.* at 1524 (noting many statutes originated from codifications of Biblical prohibitions, were sometimes treated as hybrid criminal civil-criminal statutes regulating marriage and sexual conduct, and have recently undergone sweeping reforms alongside overhauls of sexual assault laws).

³¹ See, e.g., FLA. STAT. § 826.04 (2014); IND. CODE § 35-46-1-3 (2014).

³² See, e.g., HAW. REV. STAT. § 707-741 (2014); IDAHO CODE ANN. § 18-18-6602 (2014).

³³ See, e.g., N.C. GEN. STAT. § 14-178 (2014) (including adopted and stepchildren); GA. CODE ANN. § 16-6-22 (2014) (“whether related by blood or marriage”); N.Y. PENAL LAW § 225.25 (Consol. 2014) (“whether through marriage or not”).

³⁴ See Bienen, *supra* note 13, at 1575 and n.249 (explaining the trend of reforming statutes to focus on authority and stating that as of 1981, eighteen states included such provisions).

³⁵ See OHIO REV. CODE ANN. § 2907.03(A)(5)–(13) (LexisNexis 2014) (including family and non-familial relationships under sexual battery). It is sometimes necessary to look in more than one section of the state law to determine all of the relationships that can constitute an offense. Compare N.C. GEN. STAT. § 14-27.7 (listing non-familial relationships under Article 7A, titled “rape and other sex offenses,” and labeling the crime “[i]ntercourse and sexual offenses with certain victims; consent no defense”), with *id.* § 14-178 (listing familial relationships that constitute incest under Article 26, titled “offenses against public morality and decency,” and labeling the crime “Incest”).

³⁶ See *infra* Appendix A. Continuing with the divergent treatment of incest across the nation, some states limit incest to when the prohibited act is done with a prohibited person above or below a certain age; some states do both. See *id.* This different treatment reflects the different goals of criminalizing incest: preventing either the consensual or nonconsensual form.

³⁷ See, e.g., CONN GEN. STAT. § 53a-191 (2014).

³⁸ Compare MD. CODE ANN., CRIM. LAW §3-323 (LexisNexis 2014) (including only vaginal intercourse), with KY. REV. STAT. ANN. §530.020 (LexisNexis 2014) (prohibiting sexual intercourse and deviate sexual intercourse).

³⁹ See, e.g., MASS. ANN. LAWS ch. 272, § 17 (2014) (prohibiting marriage, sexual intercourse, and sexual activities).

⁴⁰ Michael Symons, *Teen, Dad’s Marriage Plan Spurs N.J. to Incest Ban Effort*, USA TODAY (Jan. 22, 2015), <http://www.usatoday.com/story/news/nation/2015/01/22/adult-incest-ban-new-jersey/22152025/>. In truth, New Jersey already bans incest, but its definition does not prohibit adult blood relatives from engaging in sexual conduct. See N.J. STAT. ANN. §37:1-1 (West 2014) (prohibiting and voiding marriages between blood relatives);

Beyond defining incest in terms of who and what is covered, each state sets its own punishment for incest. As expected, punishments vary greatly from state to state, but the vast majority of states classify incest as a felony.⁴¹ Consequently, significant confinement is available.⁴² Similar to Article 120, some states provide different degrees of punitive exposure based on the type of sexual conduct.⁴³ Albeit differently, all states address incest.

The federal government appears content with leaving the criminalization of incest to the states. With one exception, which only applies to Indians on Indian country, incest is not addressed by federal criminal law.⁴⁴ Interestingly, the sole federal statute that proscribes incest does not define the crime.⁴⁵ Instead, Congress chose to defer to the “laws of the State in which such offense was committed . . . [and are] in force at the time of such offense” to determine the elements and establish the punishment for the federal crime.⁴⁶ Except for Rhode Island, incest is punishable by local law in every

American state, territory, the District of Columbia, and even Game of Thrones’ fictional kingdom of Westeros.⁴⁷

III. The Need to Look to State Law

Sexual assault in the military is a topic receiving considerable attention and an area of the UCMJ that has been experiencing dramatic changes.⁴⁸ Congress enacted two major revisions to sexual assault crimes in the UCMJ in the past seven years.⁴⁹ Regrettably, like the civilian world, sexual assault cases involving non-spouse dependent family members are not uncommon to military justice practitioners.⁵⁰ Despite the revisions, incest—an offense based on the status of the relationship between the offender and victim,⁵¹—is not a crime specified in the UCMJ.⁵² Instead, the current UCMJ contains the following categories of sexual assaults: (1) lack of consent type under Article 120, UCMJ;⁵³ (2) age of victim type under Article 120b, UCMJ;⁵⁴ and (3) “other sexual misconduct” under Article 120c, UCMJ.⁵⁵

see also id. § 2C:14-2 (limiting sexual assault offenses for related persons to instances when the victim is under age eighteen).

⁴¹ *See generally* Am. Prosecutors Research Inst., *Criminal Incest Chart*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION (Jan. 2010), http://www.ndaa.org/pdf/criminal_incest%20chart%20_2010.pdf [hereinafter *Criminal Incest Chart*].

⁴² *See generally id.* (showing many states with maximum sentences in the terms of double digit years and some, including Michigan, Montana, and Nevada, with a maximum of life imprisonment).

⁴³ *Compare* Exec. Order No. 13643, 78 Fed. Reg. 29559, 29607 (May 15, 2013) (authorizing a sentence of a maximum of thirty years confinement for sexual assault compared to a maximum of seven years confinement for abusive sexual contact under Article 120, UCMJ), *with* MICH. COMP. LAWS § 750.520d–e (2014) (providing maximum confinement of fifteen years for incest involving penetration compared to maximum confinement of two years for sexual contact).

⁴⁴ *See* 18 U.S.C. § 1153(a) (2012) (criminalizing incest by Indians on federal Indian reservations).

⁴⁵ *See id.*

⁴⁶ *Id.* In 1966, Congress amended 18 U.S.C. § 1153 to incorporate the surrounding state law in response to the dismissal of a father-daughter incest case because the previous federal statute prohibited, but did not define incest or set a punishment. Bienen, *supra* note 13, at 1501 n.61 (citing *Acunia v United States*, 404 F.2d 140 (9th Cir. 1968)).

⁴⁷ *See* Nat’l Dist. Att’y Ass’n’s Nat’l Ctr. for Prosecution of Child Abuse, *Statutory Compilation Regarding Incest Statutes* (Mar. 2013), <http://www.ndaa.org/pdf/Incest%20Statutes%202013.pdf> [hereinafter *Incest Statutes*] (showing Rhode Island prohibits incestuous marriage, but does not punish for it); *see also* GEORGE R.R. MARTIN, *A CLASH OF KINGS* 497 (1999).

⁴⁸ *See* Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA JOURNAL (Sept. 1, 2013, 10:10 AM), http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/.

⁴⁹ *Compare* UCMJ art. 120 (2005), *with* UCM art. 120 (2008), *and* UCMJ art. 120 (2012).

⁵⁰ *United States v. Torres*, 27 M.J. 867, 869 (A.F.C.M.R. 1989) (citing to the Supreme Court of North Carolina’s discussion of interfamilial sexual abuse, found in *State v. Etheridge*, 352 S.E.2d 673 (N.C. 1987)).

⁵¹ Bienen, *supra* note 13, at 1535.

⁵² *See* SUBCOMM. OF THE JOINT SERV. COMM. OF MILITARY JUSTICE, *SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE*, 150 (2004), http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf [hereinafter *JCS SUBCOMM. REPORT*]. After noting that the majority of the subcommittee concluded a specific prohibition of “sexual activity between a military person and their family member” was unnecessary because sexual activity with children under sixteen is already prohibited, the subcommittee “reasoned that sexual activity between military personnel and a family member over the age of 15 was so rare as to not require a specific prohibition.” *Id.* Two sentences later, the reports states, “The sexual abuse of children by a parent or an individual standing in loco parentis is not, unfortunately, a rare occurrence.” *Id.* (citing *Torres*, 27 M.J. at 869).

⁵³ *See* UCMJ art. 120 (2012). This category includes Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact. *Id.* While lack of consent is no longer an element that must be proven by the prosecution, practically speaking, all of these crimes are done in the absence of legitimate consent: with force or threats, under conditions consent cannot be given (asleep, unconscious, impaired, mental defect), or where consent is obtained by fraud. *See id.*

⁵⁴ *See* UCMJ art. 120b (2012). This category includes Rape of a Child, Sexual Assault of a Child, and Sexual Abuse of a Child. *Id.* Offenses in this category are only applicable when the victim is under sixteen years old at the time of the offense. *See id.*

⁵⁵ UCMJ art. 120c (2012). Other sexual conduct includes three subcategories: (a) “Indecent Viewing, Visual Recording or Broadcasting,” (b) “Forcible Pandering,” and (c) “Indecent Exposure.” UCMJ art. 120c (2012). Subcategories (a) and (c) appear to be Congressional recognition of a collection of sex-related offenses that had previously been proscribed by the 2005 Manual for Courts-Martial (2005 MCM) as specified offenses under Article 134 prior to 2008. *Compare* UCMJ art. 120(k), (n) (2008), *and* UCMJ art. 120c(a), (c) (2012), *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 88, 90 (2005) [hereinafter 2005 MCM]. In the 2008 UCMJ, “Indecent act” under Article 120 was defined as engaging in “indecent conduct,” which was itself broadly defined as of “immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety . . . [and] includes observing, or [recording], without

A. Why: Article 120 Is Not Adequate in Incest Cases

As a result of the recent changes, save the clearly inadequate charge for indecent exposure under Article 120c,⁵⁶ the case of the aged sixteen or older military dependent who “consents” to sexual activity with her military parent is not punishable by the current Article 120. Moreover, even for cases when the victim is under age sixteen, the lack of an incest charge fails to include an important component of the criminal conduct: sexual assault of a child is undeniably horrible, but the child being family should make it worse.

Although the UCMJ contains no explicit prohibition on incest nor mention of incest,⁵⁷ a search of the Manual for Courts-Martial (MCM) reveals the term “incest,” but only once.⁵⁸ Despite such *de minimis* reference in the MCM, military justice has dealt with the topic of criminal incest for generations: in 1879 the “Army’s notorious incest trial” was prosecuted by a man who would become the Judge Advocate General;⁵⁹ in 1960, an Army Judge Advocate wrote an entire subsection of his LL.M. thesis on charging incest under Article 134.⁶⁰

Prior to the 2012 UCMJ changes, the specified charge of “indecent act” covered incestuous conduct.⁶¹ In the previous UCMJ, applicable to conduct before 28 June 2012, “indecent act” was specified under Article 120, with rape, sexual assault, and other sexual misconduct.⁶² The UCMJ prior to that, applicable to conduct before 27 June 2007, specified “indecent act with another” under Article 134 as an

enumerated general article.⁶³ “Indecent act” was defined under both Article 120 and Article 134 to include acts of “immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety.”⁶⁴ In 1994, the Court of Military Appeals ruled incestuous sexual intercourse fell within that definition.⁶⁵ Yet in 2012, the current revision of the UCMJ eliminated the broad “indecent act” from Article 120 without transferring it into Article 120c.⁶⁶ Perhaps unintentionally, the recent modifications to modernize sexual assault in the UCMJ have closed the door to charging incestuous conduct under the UCMJ’s sexual assault articles.

Given the historical characteristic of parental authority over children within the family,⁶⁷ Article 120 is ill-equipped to address incest cases. The age of the victim is a bright-line rule that excludes charges under Article 120b.⁶⁸ While Article 120 is still available, the issue of consent, both legal and factual, can be extremely problematic in the family setting.

Returning to the hypothetical, it would be possible to charge SSG Arrant with rape or sexual assault under the current Article 120.⁶⁹ Rape can be accomplished via various means, including unlawful force, serious threats, or rendering another unconscious, but the only theory applicable from the facts of the hypothetical is unlawful force.⁷⁰ Article 120 defines “unlawful force” as “an act of force done without legal justification or excuse” and “force” as “the use of a weapon; the use of such physical strength or violence as sufficient to overcome, restrain, or injure a person; or inflicting physical

another person’s consent and contrary to that other person’s reasonable expectation of privacy that person’s [private areas] or [engaging in a sexual act].” See UCMJ art. 120(k), (t)(12) (2008). “Indecent” was similarly broadly defined under Article 134’s indecent act in the 2005 MCM. See 2005 MCM, *supra* pt. IV, ¶ 90.c. Thus, it appears Article 120c, with the relevant subcategory (a) limited to only indecent viewing, recording, or broadcasting the private area of another person, was narrowed from what had been covered by the broad 2008 indecent act. Compare UCMJ art. 120c(a) (2012), with UCMJ art. 120(t)(12) (2008).

⁵⁶ UCMJ art. 120c.(c) (2012) (prohibiting the intentional exposure of private parts in an indecent manner, defined in the broad terms of the 2008 MCM, indecent act). The max punishment for this offensive is one year confinement. Exec. Order No. 13643, 78 Fed. Reg. 29559, 29607 (May 15, 2013) (authorizing maximum punishments for Article 120c, UCMJ).

⁵⁷ See generally UCMJ (2012); see also JSC SUBCOMM. REPORT, *supra* note 52, at 150.

⁵⁸ MCM, *supra* note 1, pt. IV, ¶ 5.c.(3). Incest is used as an example, along with “dueling, bigamy, . . . adultery, and bribery” to describe the type of offensive for which a conspiracy cannot be charged because “the agreement exists only between persons necessary to commit such an offense.” *Id.* This concept is illustrative of the legal doctrine commonly referred to as “Wharton’s Rule.” MCM, *supra* note 1, app. 23, ¶ 5; see also Iannelli v. United States, 420 U.S. 770, 773 (1975) (citing 2 F. WHARTON, CRIMINAL LAW § 1604, 1862 (12th ed. 1932)).

⁵⁹ See BARNETT, *supra* note 21, at 213.

⁶⁰ See William G. Myers, Immorality and Article 134, Uniform Code of Military Justice, 1960 (unpublished LL.M. thesis, The Judge Advocate General’s School) (on file with the United States Army Judge Advocate General’s Center and School Library). It appears military justice topics, like fashion, become vogue in cycles.

⁶¹ See United States v. Carey, 2006 CCA LEXIS 294, 12 (N-M. Ct. Crim. App. 2006) (unpublished decision) (upholding criminal adult incest as an appropriate Article 134, UCMJ charge in post-*Lawrence v. Texas* jurisprudence) (considering applicability of *Lawrence v. Texas*, 539 U.S. 558 (2003)); see also United States v. Wheeler, 40 M.J. 242, 247 (C.M.A. 1994); United States v. Mazza, 67 M.J. 470, 471, (C.A.A.F. 2009); but see, United States v. Drake, 26 M.J. 553 (A.C.M.R. 1988) (holding for the purpose of calculating maximum punishment, “the offense of incest and indecent acts are not closely related.”).

⁶² See UCMJ art. 120(k) (2008).

⁶³ Compare 2008 MCM, *supra* note 4, at pt. IV, ¶ 45.a.(t)(12) (defining “Indecent conduct”), with 2005 MCM, *supra* note 55, at pt. IV, ¶ 90c (defining “Indecent”).

⁶⁴ See *supra* note 55.

⁶⁵ United States v. Wheeler, 40 M.J. 242, 247 (C.M.A. 1994) (stating that “the indecency was two parties engaging in sexual intercourse when there was a familial relationship between them”).

⁶⁶ See *supra* note 55.

⁶⁷ Bienen, *supra* note 13, at 1548 n.157 (“Taught at an early age to obey the orders of fathers and other male adults, these girls hesitated to challenge male authority even in cases of sexual abuse.”).

⁶⁸ See UCMJ art. 120b (2012). Consequently, under the UCMJ, a biological father can legally have consensual intercourse with his biological daughter after her sixteenth birthday.

⁶⁹ See *id.* art. 120(a)–(b).

⁷⁰ See *id.* art. 120(a).

harm sufficient to coerce or compel submission by the victim.”⁷¹

Despite what appears to be a rather specific and limited definition of force as using a weapon, physical strength, or the infliction of physical harm, “constructive force” provides another way to find force.⁷² The *Military Judge’s Benchbook* (*Benchbook*) contains a specific panel instruction on constructive force for “parental or analogous compulsion.”⁷³ Moreover, the *Benchbook* includes a specific constructive force instruction for “parental . . . compulsion and when consent issues involving of children of tender years.”⁷⁴

Constructive force and these special instructions are aimed at the heart of the consent issue present in many incest cases. With constructive force, the law is willing to create a legal fiction to find sufficient force to satisfy the element of the crime despite the actual lack of force defined by the UCMJ. At the same time, the law recognizes a child could potentially legally consent to sexual activity with a parent, potentially even when the age of the child is below the age of legal consent.⁷⁵ Whereas charging Article 120 may require complex mental and legal gymnastics to get around consent issues, charging incest avoids consent issues.

B. When: (Almost) Every Time

As demonstrated in the hypothetical, in some situations the specific facts or the available evidence may create gaps in applicability of Article 120. An incest charge can serve as the gravamen when the potential alternatives under the UCMJ are

either unavailable or the evidence is problematic.⁷⁶ In truth, charging incest is a worthy endeavor even if the facts fit neatly within Article 120 and the evidence is strong. Undoubtedly, it is not appropriate to prosecute every potential incest case.⁷⁷ However, for the typical incest scenario, where a father is using his daughter or stepdaughter for sexual gratification,⁷⁸ charging incest permits military justice to address the full criminality of the offender’s conduct.

Today’s Army has many commitments, and paramount among them are the commitments to prevent sexual assault and to take care of Families.⁷⁹ Even if a rare occurrence,⁸⁰ these commitments should include preventing sexual assaults of family members aged sixteen and older, by aggressively prosecuting reported cases. In summary, why would a trial counsel want to charge incest? Because incest is not dependent on age or consent, it should not suffer from the limitations of Articles 120 and 120b. When should trial counsel charge incest? Every time justice requires it and the facts permit it.

IV. Charging Incest Under the UCMJ

Appropriately titled the “general article,” Article 134 permits trial counsel to charge misconduct that is not otherwise enumerated in the UCMJ.⁸¹ Article 134 has three categories of offenses: clause 1, covering “all disorders and neglects to the prejudice of good order and discipline in the armed forces”; clause 2, concerning “all conduct of a nature to bring discredit upon the armed forces”; and clause 3, consisting of “noncapital crimes or offenses which violate

⁷¹ See *id.* art. 120(g)(5)–(6).

⁷² U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGE’S BENCHBOOK para. 3-45-1 n.7 (1 Sept. 2014) [hereinafter BENCHBOOK].

⁷³ *Id.*

⁷⁴ *Id.* para. 3-45-1 n.9.

⁷⁵ *Id.*

A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case, including but not limited to: (state any lay or expert testimony relevant to the child’s development) (state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any).

Id. Interestingly, when determining whether sexual acts were indecent, military courts differentiated between legal and factual consent, even for children younger than age sixteen. See *United State v. Banker*, 60 M.J. 216, 220 (C.A.A.F. 2004) (recognizing that prior to determining the decency of the acts or whether legal consent existed, the court must consider the child’s age, relationship with the accused, and the nature of the sexual acts) (citing *United States v. Baker II*, 57 M.J. 330, 335 (C.A.A.F. 2002)).

⁷⁶ Problematic evidence may create issues with consent; recall Ms. Virgo’s sexting. The credibility or bias of the accuser can be called into question based on the circumstances of the discovery; an obvious theory for the

defense in the hypothetical is to argue that Ms. Virgo is only claiming the acts were nonconsensual to preserve her relationship with her mother. See *Bienen*, *supra* note 13, at 1503 (noting incest may be first discovered “during a divorce or other family crisis”). Similarly, evidence issues may arise when evidence is strong for later-in-time events but not for sexual activity occurring when the victim was under age sixteen. This could occur when the activity is discovered by a third party after the victim reached age sixteen or other corroborating evidence, such as text messages, that do not extend back to before the victim was under age sixteen. In this case, the defense may admit to the later-in-time conduct, claim it was consensual, and argue that the accusations of sexual conduct prior to age sixteen are fabricated, to place blame on the accused.

⁷⁷ As with any charging decision, judgment is important in determining what justice requires. The service member who marries his first cousin in violation of a state’s incest law will likely not need to be prosecuted. Similarly, the twenty-year-old service member who marries a forty-five-year-old woman only to find out his spouse’s twenty-two-year-old daughter is more to his liking, may not warrant incest charges.

⁷⁸ *Bienen*, *supra* note 13, at 1503.

⁷⁹ Memorandum from John McHugh, Sec’y of the Army, Dep’t of the Army, Secretary of the Army Top Priorities (Oct. 30, 2014), <https://core.us.army.mil/c/downloads/369926.pdf> (listing preventing sexual assault first and taking care of “Soldiers, Civilians and Families” third of his top ten priorities for fiscal year 2015).

⁸⁰ See JSC SUBCOMM. REPORT, *supra* note 52, at 150.

⁸¹ See UCMJ art. 134 (2012).

Federal law”⁸² “State and foreign laws are not included in [clause 3].”⁸³ However, through operation of the ACA, it is sometimes possible to utilize state criminal law.⁸⁴ Thus, when the ACA applies, a clause 3 charge based on state law may be available, but charges under Article 134 cannot violate the preemption doctrine.⁸⁵

In 2009, the Army Court of Criminal Appeals (ACCA) considered whether charging state incest law under Article 134 violated the preemption doctrine.⁸⁶ In *United States v. McNaughton*, the ACCA held Article 120 did not preempt state incest law.⁸⁷ To be clear, *McNaughton* is an unpublished decision and involved a previous version of the UCMJ. Nonetheless, the changes found in the current version of the UCMJ would seemingly not alter the analysis.⁸⁸ Although *McNaughton* concerned a Colorado statute, the court’s analysis provides a pattern for evaluating any state’s incest law.⁸⁹ Hence, *McNaughton* validated the paradigms of charging incest under Article 134 and using the ACA to do so.

Ultimately, incestuous conduct can be charged one of two ways under Article 134: (1) as in *McNaughton*, by

employing clause 3 and incorporating applicable state law through the ACA (the ACA method); or (2) by drafting a novel specification utilizing either or both clause 1 and clause 2 (the novel specification method). Although the ACA method is more complicated and narrowly applicable, it is arguably preferred for reasons explained below. The novel specification method is a simpler fallback that is always available.

A. ACA Method: Using Clause 3 to Assimilate State Law

The verbose text of the ACA makes conduct occurring on federal land under federal jurisdiction that violates the current law of the state where the federal land was acquired punishable as a violation of federal law.⁹⁰ The Supreme Court found that the ACA’s purpose is to “use local statutes to fill in the gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offense.”⁹¹ The Court noted that by the ACA’s own text, it only “applies state law to . . . acts or omissions that are ‘not made punishable by any enactment of Congress.’”⁹²

⁸² MCM, *supra* note 1, pt. IV, ¶ 60.c.(1).

⁸³ *Id.* pt. IV, ¶ 60.c.(4).

⁸⁴ See 18 U.S.C. § 13 (2012).

⁸⁵ The preemption doctrine is one enumerated limitation on Article 134. See MCM, *supra* note 1, pt. IV, ¶ 60.c.(5). Of course, beyond the limitations enumerated in the MCM, constitutional requirements, such as sufficient notice under the Fifth Amendment’s due process clause, can also limit what can be charged under Article 134, UCMJ. See *infra* note 113 and accompanying text. The preemption doctrine bars using Article 134 to charge conduct already covered by Articles 80 through 132, UCMJ. *Id.* pt. IV, ¶ 60.c.(5)(a). The preemption doctrine prevents the creation of a new type of offense that is analogous to a crime already defined by Congress, particularly where Congress has already set a specific minimum standard. *Id.* The MCM provides the example of attempting to get around the specific intent requirement of Article 121, UCMJ. *Id.* “Simply stated, preemption is the legal concept where Congress has occupied the field of a given type of misconduct by addressing in one of the specific punitive articles of the code, another offenses may not be created and punished under Article 134, by simple deleting a vital element.” *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). The preemption test consists of two prongs: (1) Did Congress intend to limit prosecutions in a particular “field to offense defined in specific articles of the [UMCJ];” and (2) Is the charged offense “composed of a residuum of elements of a specific offense?” *United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992).

⁸⁶ *United States v. McNaughton*, 2009 CCA LEXIS 187, at *1 (A. Ct. Crim. App. Apr. 16, 2009) (unpublished decision).

⁸⁷ *Id.* Specifically, the court found that “the military judge improperly concluded Congress intended that Article 120 cover all sexual offenses, in a complete way.” *Id.* The court found both prongs of the preemption test negatively answered: “Congress did not intend to limit prosecution for aggravated incest to Article 120, UCMJ; nor is aggravated incest a residuum of elements of a specific offense listed in the code.” *Id.* The court highlighted that incest “is a crime that centers on the family relationship.” *Id.*

⁸⁸ Indeed, the repeal of the broad indecent act from Article 120 in the current UCMJ would strengthen the position that Congress currently does not intend it to cover all sexual offenses. See *supra* note 55.

⁸⁹ See *McNaughton*, 2009 CCA LEXIS 187, at *1.

⁹⁰ See 18 U.S.C. § 13(a) (2012)

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id. Congress enacted the ACA in 1825 due to problems enforcing criminal laws on federal lands, namely that that many serious crimes could not be prosecuted because the states did not have jurisdiction and the federal criminal code did not contain numerous offenses, including “rapes, arsons, and batteries” *Garver, supra* note 11, at 12. In essence, the ACA relieved Congress from legislating ordinary criminal offenses for all federal lands. *Id.* Since 1948, the ACA has remained substantially unchanged and continuously assimilates state law. *Id.*

⁹¹ *United States v. Williams*, 327 U.S. 711 (1946).

⁹² *United States v. Lewis*, 523 U.S. 155, 164 (1998) (quoting 18 U.S.C. § 13(a)). To determine whether a gap in federal law exists, courts should first ask, “Is the defendant’s ‘act or omission . . . made punishable by any enactment of Congress.’” *Lewis*, 523 U.S. at 164 (quoting 18 U.S.C. § 13(a)). However, even if there is an enactment, the ACA may still apply depending on “whether the federal statutes that apply to the [conduct] preclude application of the state law in question.” *Id.* Answering this second question is complicated. See *id.* (“There are too many different state and federal criminal laws, applicable in too many different kinds of circumstances, bearing too many different relations to other laws, to common law tradition, and to each other, for a touchstone to provide an automatic general answer to this second question.”). Ultimately, it boils down to a question of legislative intent: Does the federal enactment intend “to punish conduct such as the defendant’s to the exclusion of the particular state statute at issue.” *Id.* at 166. Interestingly, because it is not a provision of general application, the UCMJ is not considered an enactment of Congress for the purpose of the ACA. See *United States v. Hall*, 979 F. 2

In *McNaughton*, the ACCA actually began its analysis by finding that “aggravated incest as defined by [Colorado state law] is not proscribed by either the UCMJ or an applicable Federal Criminal Code.”⁹³ While this could have ended the analysis, the ACCA continued to find that Colorado’s incest statute “does not interfere with a federal policy, does not effectively rewrite a carefully considered federal law, and there is no federal intent to occupy the field”⁹⁴ Such a robust finding, as well as the holding that “[t]he incest statute at issue fills a gap in the criminal law and may properly be assimilated”⁹⁵ indicates that the ACCA felt incest was clearly within the purview of the ACA.

It is worth emphasizing that trial counsel must be prepared to articulate two distinct types of “preemption” analysis. The first type requires that charging incest is not subject to Article 134’s preemption doctrine by any enumerated charge within the UCMJ.⁹⁶ The second type, if using the ACA method, requires that no enactment of Congress punishes the conduct as to preclude assimilation of state law.⁹⁷ According to *McNaughton*, neither type of preemption prevents charging incest.

Drafting a specification using the ACA method is not simple but need not be overly difficult. As is always a best practice when drafting charges, consulting the updated *Benchbook* provides a model specification and other pertinent

information.⁹⁸ Using clause 3, “each element of the federal or assimilated statute must be alleged expressly or by necessary implication . . . [and] the federal or assimilated statute should be identified” in the specification.⁹⁹ With the ACA, both the federal and state statute should be identified.¹⁰⁰

In military courts, jurisdiction is an element, and either “[e]xclusive or concurrent . . . federal jurisdiction . . . must be determined by the fact finder, although in an appropriate case judicial notice may substitute for other evidence.”¹⁰¹ Additionally, it is necessary to look to the assimilated state law to determine the substantive elements that must be alleged in the specification and proven at trial.¹⁰² Since ACA prosecutions are “creatures of federal law, both substantively and procedurally[.]”¹⁰³ state procedural rules, including “rules of evidence, . . . sufficiency of an indictment, and state statutes of limitations” do not apply.¹⁰⁴

An obvious benefit of the ACA method is incorporation of the state’s punitive exposure to confinement.¹⁰⁵ In addition to the state’s punishment, the MCM authorizes sentences to include discharge and forfeiture based on the potential maximum confinement authorized.¹⁰⁶ Since the vast majority of states treat incest as a felony,¹⁰⁷ a sentence based on incest

320, 322 (3d Cir. 1992). This means service members can be tried in federal district court for violating the ACA even though Article 134’s preemption doctrine would preclude the same ACA charge at a court-martial. See Garver, *supra* note 11, at 18.

⁹³ *McNaughton*, 2009 CCA LEXIS 187, at *1. It is interesting to note that the court’s finding that incest was not proscribed by the UCMJ was actually relevant to only the preemption doctrine analysis.

⁹⁴ *Id.* (citing *Lewis*, 523 U.S. at 164-65). Although not noted by the Army Court of Criminal Appeals (ACCA) in its decision, the fact that in choosing to punish incest on Indian reservations, Congress defers to the surrounding state’s criminal definition of incest further supports the position that there is a gap in federal law. See 18 U.S.C. § 1153(a) (2012). Particularly with incest, it is clear that Congress is both aware of a gap in federal law and is intentionally deferring to state law definitions. See *supra* note 46.

⁹⁵ *McNaughton*, 2009 CCA LEXIS 187, at *1.

⁹⁶ See MCM, *supra* note 1, pt. IV, ¶ 60.c.(5); see also *supra* note 85.

⁹⁷ The order of this analysis is reversed from what the ACCA did in *McNaughton*. See *McNaughton*, 2009 CCA LEXIS 187, at *1. In his article, John B. Garver identified that the principles of the preemption doctrine and “any acts of Congress” analysis for ACA are very similar, noting that “military courts often mix them together and talk of both within the same case” and that such “practice causes no harm.” Garver, *supra* note 11, at 15 n.48 (citing *United States v. Picotte*, 30 C.M.R. 196 (C.M.A. 1961)). Garver suggests that the preemption doctrine analysis should occur first, and then, assuming the use of Article 134 is not preempted, trial counsel should conduct the “any enactments by Congress” analysis for the ACA. *Id.* To be fair, the ACCA in *McNaughton* may have reversed the order of the analysis as a matter of judicial economy to ensure the issue with respect to ACA was addressed even though ACCA could have answered the issue on appeal by only addressing the preemption doctrine.

⁹⁸ See generally BENCHBOOK, *supra* note 72, para. 3-60-2 (highlighting potential legal issues).

⁹⁹ MCM, *supra* note 1, pt. IV, ¶ 60.c.(6).(b). The *Military Judge’s Benchbook (Benchbook)* notes that the “specification should cite the official statute of the state, not a commercial compilation. For example, allege a violation of the Texas Penal Code, not Vernon’s Annotated Texas Penal Code.” BENCHBOOK, *supra* note 72, para. 3-60-2 n.3. In some ways, notes in the *Benchbook* are like product warning labels: Somebody did something wrong enough in the past to warrant taking the effort to issue a warning to others.

¹⁰⁰ See BENCHBOOK, *supra* note 72, para. 3-60-2c (b) (“Model Specification: In that _____ (personal jurisdiction data) did at _____, a place under exclusive or concurrent federal jurisdiction, on or about _____, (allege all elements of state offense), in violation of (Article 27, Section 35A, of the Code of Maryland) (_____) assimilated into federal law by 18 U.S. Code Section 13.”).

¹⁰¹ *Id.* para. 3-60-2c n.5.

¹⁰² *Id.* para. 3-60-2c n.4.

¹⁰³ See *Blackmon v. United States*, 2007 U.S. Dist. LEXIS 77356, at *11-12 (W.D. Tex. Sept. 28, 2007).

¹⁰⁴ Garver, *supra* note 11, at 19. The military judge is only bound by the state law to determine “the elements of an offense and the range of punishment.” *Id.* at 19 (quoting *United States v. Sain*, 795 F.2d 888, 889 (10th Cir. 1986)).

¹⁰⁵ See *id.* (quoting the ACA text requiring violators to be “subject to a like punishment” as state offenders); see also *United States v. Picotte*, 30 C.M.R. 196, 200 (C.M.A. 1961). While no authority was found concerning military courts, federal courts incorporate state minimum as well as maximum punishments when assimilating like punishment. See *United States v. Smith*, 574 F.2d 988, 992 (9th Cir. 1978).

¹⁰⁶ MCM, *supra* note 1, R.C.M. 1003(c)(1)(B)(ii).

¹⁰⁷ See *Criminal Incest Chart*, *supra* note 41; see also *infra* Appendix A.

law using the ACA method could include a dishonorable discharge and total forfeitures.¹⁰⁸

The ACA method is preferred because it uses established statutes that specifically address the misconduct. Consequently, the elements and punishment are known. However, in many situations the ACA method will not be available.¹⁰⁹ Fortunately, even when the ACA method is not an option, Article 134 is still available for charging of incestuous conduct.

B. The Novel Specification Method: Clause 1 or Clause 2

The novel specification method provides an alternate route to charge incestuous conduct. This method can be used regardless of whether the ACA method is applicable: it works both on and off post and is not dependent on state law. Article 134 does not criminalize violations of state law,¹¹⁰ but “[o]bviously, though, conduct which is service-discrediting or prejudicial to good order can also violate state or foreign laws.”¹¹¹ Such conduct is criminal because of the uniquely military terminal element.¹¹² Yet, novel specifications carry some risk.

A constitutional due process claim, on the grounds that a person must have “fair notice” that an act is criminal, can present a challenge to a novel specification under Article 134.¹¹³ It is fair to expect such a challenge when the reason for using the novel specification method is that there is no applicable federal or state criminal law. However, in terms of incest, military case law suggests such a challenge is not likely to prevail.¹¹⁴

A novel specification under Article 134 only requires two elements: (1) that at the alleged time and place the accused did some act, and (2) that the act triggers either clause 1 or clause 2.¹¹⁵ Still, the specification should include words of criminality.¹¹⁶ Thus, the allegations should include that the accused *wrongfully* engaged in sexual acts.¹¹⁷ Even though clause 1, clause 2, or both can serve as the terminal element of a novel specification, clause 2 seems to be the best candidate, as incest would have “a tendency to bring the service into disrepute or . . . tends to lower it in the public esteem.”¹¹⁸ That being said, one military court of appeals found incest simultaneously violated both clauses.¹¹⁹

The novel specification method is simpler because it is not necessary to nest elements of state law and federal code within an Article 134 specification. However, determining the maximum punishment is not certain—punishment under a novel specification could be limited to one year of confinement.¹²⁰ Under both methods, a conviction for incestuous conduct under Article 134 should require sexual offender registration.¹²¹ Ultimately, the method of charging will be at the option of the trial counsel and based on the facts of each case.

C. Facts Drive Charging Decisions

This subsection includes a list of factors trial counsel should evaluate when assessing if and how to charge incest. Considering the questions of “where, who, what, and when” will assist in identifying potential issues and determining which method is best.

First, trial counsel must ask where it occurred and what type of jurisdictions is applicable. Knowing the type of

¹⁰⁸ See BENCHBOOK, *supra* note 72, para. 3-60-2c.

¹⁰⁹ This includes anytime the offense occurs outside a place of concurrent or exclusive federal jurisdiction, such as when the acts occur in off-post housing. Even if the ACA is applicable, the corresponding state incest statute may not be; the on-post stepdaughter in the Hawaii scenario is one example. See *supra* note 10 and accompanying text.

¹¹⁰ MCM, *supra* note 1, pt. IV, ¶ 60.c.(4)(a).

¹¹¹ Robinson O. Everret, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N.C. L. REV. 142, 148 (1959).

¹¹² See MCM, *supra* note 1, pt. IV, ¶ 60.c.(2)–(3).

¹¹³ See *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003).

¹¹⁴ The Court of Appeals for the Armed Forces has identified many “potential sources of ‘fair notice’ including: federal law, state law, military case law, military custom and usage, and military regulations.” *United States v. Vaughn*, 58 M.J. 29, 31–32 (C.A.A.F. 2003). Differences in state statutes may not affect notice for the purposes of notice that an act is service discrediting, rather the question is “whether the state statutes would have placed a reasonable [S]oldier on fair notice that [the act] . . . was service discrediting under Article 134.” *United States v. Saunders*, 59 M.J. 1, 9 (C.A.A.F. 2003) (holding that, even when the act occurred in Germany, when “all fifty states and Title 18 [United States Code section 2261A] punish harassment as either a specific or general intent offense” there is sufficient “fair notice” to permit prosecution under Article 134). Moreover, albeit under the specified recently repealed Articles 120 and 134, military

case law places Soldiers on notice that incest, including cases involving a stepchild, is service discrediting. See *supra* note 61 and accompanying text.

¹¹⁵ See MCM, *supra* note 1, pt. IV, ¶ 60.b; see also BENCHBOOK, *supra* note 72, para 3-60-2a.

¹¹⁶ *United States v. Hughey*, 72 M.J. 809, 814 (C.G. Ct. Crim. App. 2013); see also MCM, *supra* note 1, R.C.M. 307(c)(3)(G)(ii).

¹¹⁷ MCM, *supra* note 1, R.C.M. 307(c)(3)(G)(ii).

¹¹⁸ *United States v. Caldwell*, 72 M.J. 137, 141 (C.A.A.F. 2013) (quoting MCM, *supra* note 1, pt IV, ¶ 60.c.(3)).

¹¹⁹ *United States v. Carey*, 2006 CCA LEXIS 294, at *18 (N-M. Ct. Crim. App. Nov. 15, 2006) (“There is little doubt in our mind that these offenses of sexual misconduct by a commander in the U.S. Navy with his teenage daughter brought discredit upon the armed forces. The offenses are also prejudicial to good order and discipline as they directly and adversely affect the family unit in a military.”).

¹²⁰ See BENCHBOOK, *supra* note 72, para 3-60-2a; see also Durden, *supra* note 12, at 13.

¹²¹ See DEP’T OF DEF, INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY 78 (11 Mar. 2013) (“An offense involving consensual sexual conduct between adults is not a reportable offense, unless the adult victim was under the custodial care of the offender at the time of the offense.”).

jurisdiction where the offense occurred is outcome-determinative for the ACA method; without federal jurisdiction, the ACA is unavailable. Precision is necessary because some military installations encompass more than one type of jurisdiction.¹²² Therefore, it is necessary to determine and to be able to prove the type of jurisdiction of the exact location of the offense. Keep in mind, the ACA is not limited to military bases; it applies to all federal lands with federal jurisdiction, including national parks, public lands, airports, and even U.S. embassies in foreign countries.¹²³

If the offense occurred outside federal jurisdiction, trial counsel must use the novel specification method. The analysis should turn to whether the act violates either clause 1 or clause 2. If both, trial counsel should charge conjunctively: use an “and” rather than “or.”¹²⁴

Next, trial counsel should consider the relationship of the parties. Who the victim is in terms of the accused is half of the equation that determines whether state incest law is available. State incest laws always cover biological children, but application to stepchildren and adopted children vary by state.¹²⁵ Other relatives, such as nephews and nieces, are generally included, but it is necessary to look closely at the facts and state law since it may be a matter of whether they are related by blood or marriage.¹²⁶ Admittedly at the edge, a novel specification based on a non-familial relationship is also feasible.¹²⁷

Then, trial counsel should examine what act was committed as the second half of the equation for determining whether state incest law is applicable. Trial counsel should use the state definitions for the terms within the specifications when using the ACA method. This will help ensure specifications give adequate notice of the required state elements. For novel specifications, it is best to use the terms in the MCM.

Finally, trial counsel should scrutinize the “when.” Most importantly, timing determines what version of state law and

the UCMJ are applicable; this includes the punitive articles and the statute of limitations (SoL).¹²⁸ While rape and rape of a child currently have an unlimited SoL, Article 134’s SoL is five years; incest is not a listed child abuse offense.¹²⁹ “When” is also relevant to “who.” It is necessary to prove the relationship of the parties at the time of the offense. Incest will likely not cover the daughter of a fiancée or girlfriend, but they may work for an ex-wife’s daughter since some states continue to apply incest prohibitions to stepchildren even after a divorce.¹³⁰

Armed with the answers to the above questions, trial counsel can make informed charging decisions. Like an ounce of prevention, intelligent charging at the beginning of a case can pay dividends leading up to and at trial.

V. Conclusion

Although many sexual assaults of family members can be prosecuted under Article 120, consent and age issues can cause significant difficulties that can be avoided by charging incest. Whether Congress should amend Article 120 to include incest is beyond the scope of this primer.¹³¹ Nonetheless, trial counsel must be prepared to use the UCMJ they have rather than the one they wish they had. Armed with an understanding of what facts to look for and how to navigate the law, trial counsel can use either the ACA or novel specification method to successfully prosecute incest under the current Article 134. Such knowledge is another arrow in trial counsel’s quiver and wise charging decisions can ensure it is employed as justice requires. Aggressively prosecuting incest protects Army families by attacking an especially vile form of sexual assault perpetrated against a particularly vulnerable class of victims.

¹²² Garver, *supra* note 11, at 14.

¹²³ *Id.* at 14 n.34.

¹²⁴ R. Peter Masterton, *A View from the Bench: Prohibition on Disjunctive Charging Using “Or,”* ARMY LAW., May 2012, at 27, 28.

¹²⁵ See *infra* Appendix A.

¹²⁶ Compare ALA. CODE § 13A-13-3 (2014) (including “aunt, uncle, nephew or niece of the whole or half-blood”), with GA. CODE ANN. § 16-6-22 (2014) (including “[persons known to be] (by blood or marriage) . . . Aunt or nephew; or Uncle and niece”) (emphasis added). Since many statutes use names such as “uncle, aunt, nephew, or niece” without reference to whether the relationship is by blood or marriage, it will be necessary to determine how the relevant state defines such terms legally. For example, in West Virginia “Niece” means the daughter of a person’s brother or sister” and would therefore not include the daughter of the person’s spouse’s brother or sister. See W. VA. CODE § 61-8-12(a)(10) (2014).

¹²⁷ See *supra* note 35 and accompanying text.

¹²⁸ See UCMJ art. 43 (2012).

¹²⁹ See *id.* (including indecent acts under Article 134 as a type of child abuse offense despite the fact that indecent acts was moved to Article 120 in 2008 and then repealed in 2012). Determining the applicability of the statute of limitations for child abuse offenses, particularly when Article 134 is being used, can be complicated. See Patrick D. Pflaum, *Building a Better Mousetrap or Just a More Convoluted One?: A Look at Three Major Developments in Substantive Criminal Law*, ARMY LAW., Feb. 2009, at 29, 35-40. Consequently, charging Article 120 utilizing a theory of constructive force may be the necessary method of charging incest occurring more than five years ago.

¹³⁰ See *Inbred Obscurity*, *supra* note 6, at 2474-75; see also TEX. PENAL CODE § 25.02 (2013) (including “the actor’s current or former stepchild”) (emphasis added).

¹³¹ Undoubtedly, such a charge in the UCMJ would better protect family members by establishing a consistent definition of incest that is independent of the varying gamut of fifty different state laws and applicable around the world. Moreover, such a charge would simplify the prosecutions of such crimes.

State	Statute	Required Victim Age	Step child	Acts	Classification Punishment
Alabama	ALA. CODE. § 13A-13-3 (2014). Incest.	-	YES	Sexual Intercourse or Marriage	Class C Felony
Alaska	ALASKA STAT. § 11.41.450 (2014). Incest	-	NO	Sexual Penetration	Class C Felony
Arizona	ARIZ. REV. STAT. ANN. § 13-3608 (2014). Incest.	18 & up	NO	Fornication or Adultery or Marriage	Class 4 Felony
Arkansas	ARK. CODE ANN. § 5-26-202 (2014). Incest.	16 & up	YES	Sexual Intercourse or Deviate Sexual Activity or Marriage	Class C Felony
California	CAL. PENAL CODE § 785 (2014). Incest.	14 & up	NO	Fornication or Adultery or Marriage	With State Prison
Colorado	COLO. REV. STAT § 18-6-301 (2014). Incest.	21 & up	YES	Sexual Penetration or Sexual Intrusion, or Sexual Contact	Class 4 Felony
	COLO. REV. STAT § 18-6-302 (2014). Aggravated Incest.	Under 21	YES	Sexual Penetration or Sexual Intrusion, or Sexual Contact	Class 3 Felony
Connecticut	CONN. GEN. STAT. § 53a-191 (2014). Incest.	-	YES	Marriage	Class D Felony
	CONN. GEN. STAT. § 53a-71 (2014). Sexual Assault.	Under 18.	YES	Sexual Intercourse	Class B or C Felony
Delaware	DEL. CODE ANN. tit. 11, § 766 (2014). Incest.	-	YES	Sexual Intercourse	Class A Misdemeanor
Florida	FLA. STAT. § 826.04 (2014). Incest.	-	NO	Sexual Intercourse	Felony of the Third Degree
Georgia	GA. CODE. ANN. § 16-6-22 (2014). Incest.	-	YES	Sexual Intercourse and Sodomy	Min 10 yrs., max 30 yrs., unless victim under 14, then min 25 yrs., max 50 yrs.
Hawaii	HAW. REV. STAT. §707-741 (2014). Incest.	-	NO	Sexual Penetration	Class C Felony
Idaho	IDAHO CODE ANN. § 18-6602 (2014). Incest.	-	NO	Fornication or Adultery or Marriage	Not to exceed life.
Illinois	720 ILL. COMP. STAT. 5/11-11 (2014). Sexual Relations Within Families.	18 & up	YES	Sexual Penetration	Class 3 Felony

¹³² This table provides a quick reference of applicable state statutes, whether stepchildren relationships are included, the necessary acts, and the level of punishment. The author created this table with the assistance of two products available from the National District Attorneys Association website. *See State Statutes*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, http://www.ndaa.org/ncpca_state_statutes.html (last visited Dec. 1, 2015). One product is a chart of state incest laws. *See Criminal Incest Chart*, *supra* note 41. The other product is a comprehensive list consisting of the text of incest laws for all states and American territories. *See Incest Statutes*, *supra* note 47. With the exception of Louisiana, the author checked all the statutes and found no substantial changes. The listed statutes are current through the legislative session year indicated.

State	Statute	Required Victim Age	Step child	Acts	Classification Punishment
Indiana	IND. CODE § 35-46-1-3 (2014). Incest.	-	NO	Sexual Conduct	Level 5 Felony; Level 4, if victim under 16
Iowa	IOWA CODE § 726.2 (2013). Incest.	-	NO	Sex Act	Class D Felony
Kansas	KAN. STAT. ANN. § 21-5604 (2013). Incest. Aggravated Incest.	18 & up	NO	Sexual intercourse or Sodomy or Marriage	Level 10 Felony
		Under 18	YES	Marriage	Level 7 Felony
		16-18	YES	Sexual Intercourse or Sodomy	Level 3 Felony
		16-18	YES	Lewd Fondling	Level 7 Felony
Kentucky	KY. REV. STAT. ANN. § 530.020 (LEXISNEXIS 2014). Incest.	-	YES	Sexual Intercourse or Deviate Sexual Intercourse	Class C Felony; Class B, if victim under 18
Louisiana	LA. REV. STAT. ANN. § 14:78 (2013), <i>repealed by</i> 2014 La. Acts 177. Incest. La. Rev. Stat. Ann. § 14:89-89.1 (2014), <i>amended by</i> 2014 La. Acts 177. Crimes against nature. La. Rev. Stat. Ann. § 14:89.1 (2014), <i>amended by</i> 2014 La. Acts 177. Aggravated crimes against nature.	-	N/A	N/A	N/A
			NO	Sexual intercourse or Marriage	Max 15 yrs., Ascendants; max 5 yrs., Aunts/Uncles
			YES	Sexual intercourse or Lewd Fondling	Min 5 yrs., max 25 yrs. Min 25 yrs., max 99 yrs. if victim under 13.
Maine	ME. REV. STAT. ANN. tit. 17-A, §556 (2014). Incest.	-	NO	Sexual Intercourse	Class D Crime [not to exceed 1 yr.]
Maryland	MD. CODE ANN., CRIM. LAW § 3-323 (2014). Incest.	-	YES	Vaginal Intercourse	Felony Not less than 1 or more than 10 yrs.
Massachusetts	MASS. GEN LAWS ch. 272, § 17 (2014). Incest.	-	YES	Sexual Intercourse or Sexual Activities or Marriage	20 yrs
Michigan	MICH. COMP. LAWS §§ 750.520b-750.520e (2014). Criminal sexual conduct in the first thru fourth degrees.	13 – under 16	YES	Penetration, Sexual Contact	Min 2 yrs., max Life.
Minnesota	MINN. STAT. § 609.365 (2014). Incest.	-	NO	Sexual Intercourse	10 yrs.

State	Statute	Required Victim Age	Step child	Acts	Classification Punishment
Mississippi	MISS. CODE ANN. § 97-29-5 (2014). Adultery and fornication; between certain persons forbidden to inter-marry.	-	YES	Adultery or Fornication or Marriage or Cohabitation	10 yrs.
Missouri	MO. REV. STAT. § 568.020 (2014). Incest.	-	YES	Sexual Intercourse or Deviate Sexual Intercourse or Marriage	Class D Felony
Montana	MONT. CODE ANN. § 45-5-57 (2014). Incest.	-	YES, (consent is defense if over 18)	Sexual Intercourse or Sexual Contact or Marriage or Cohabitation	Life, not to exceed 100 yrs.
Nebraska	NEB. REV. STAT. § 28-703 (2014). Incest.	-	YES (if under 18)	Sexual Penetration	Class III Felony
Nevada	NEV. REV. STAT. § 201.180 (2014). Incest.	-	NO	Fornication or adultery or Marriage	Category A Felony Min 2 yrs., max Life
New Hampshire	N.H. REV. STAT. ANN. § 639:2 (2014). Incest.	-	YES	Sexual Penetration or Marriage or Cohabitation	Class B Felony
New Jersey	N.J. STAT. ANN. § 2C:14-2.1 (2014). Sexual assault.	Under 18	YES	Sexual Penetration	Crime of Second Degree
New Mexico	N.M. STAT. ANN. § 30-10-3 (2014). Incest.	-	NO	Sexual Intercourse or Marriage	Third Degree Felony
New York	N.Y. PENAL LAW §§ 255.25-225.227 (2014). Incest in the third – second degree.	-	YES	Sexual Intercourse or Sexual Conduct	Class E-B felony
North Carolina	N.C. GEN. STAT. § 14-178 (2014). Incest.	-	YES	Carnal Intercourse	Class B1-F Felony
North Dakota	N.D. CENT. CODE § 12.1-20-11 (2013). Incest.	-	NO	Sex Acts or Marriage or Cohabitation	Class C Felony
Ohio	OHIO REV. CODE ANN. § 2907.03 (2014). Sexual battery.	-	YES	Sexual Conduct	Felony 3d Degree
Oklahoma	OKLA. STAT. tit. 21, § 885 (2013). Incest.	-	YES	Adultery or Fornication or Marriage	Felony (10 yrs.)
Oregon	OR. REV. STAT. § 163.525 (2014). Incest.	-	NO	Sexual Intercourse or Deviate Sexual Intercourse or Marriage	Class C Felony
Pennsylvania	18 PA. CONS. STAT. § 4302 (2014). Incest.	-	NO	Sexual Intercourse or Marriage or Cohabitation	Felony of the Second Degree

State	Statute	Required Victim Age	Step child	Acts	Classification Punishment
Rhode Island	R.I. GEN. LAWS § 15-1-2 (2014). Marrying kindred forbidden.	-	YES	Marriage (ONLY)	None (marriage void)
South Carolina	S.C. CODE ANN. § 16-15-20 (2014). Incest.	-	YES	Carnal Intercourse	Min note less than 1 yr
South Dakota	S.D. CODIFIED LAWS § 22-2A-2 (2014). Incest.	-	NO	“mutually consensual act of sexual penetration with each other”	Class 5 Felony
Tennessee	TENN. CODE ANN. § 39-15-302 (2014). Incest.	-	YES	Sexual Penetration	Class C Felony
Texas	TEX. PENAL CODE § 25.02 (2013). Prohibited Sexual Conduct.		YES	Sexual Intercourse or Deviate Sexual Intercourse	Felony in the Third Degree; Second Degree if descendant by blood or adoption.
Utah	UTAH CODE ANN. § 76-5-406 (2014). Sexual offense against the victim without consent of victim.	Under 18	YES	Sexual Intercourse and other Sexual Conduct	Third Degree Felony
Vermont	VT. STAT. ANN. tit. 13, § 205 (2014). Inter-marriage of or fornication by persons prohibited to marry.	-	NO	Fornication or Marriage	5 yrs.
Virginia	VA. CODE ANN. § 18.2-366 (2014). Incest.	-	YES	Fornication or Adultery	Class 1 Misdemeanor, If descendent, Class 3 Felony
Washington	WASH. REV. CODE § 9A.64.020 (2014). Incest.	-	YES (if under 18)	Sexual Intercourse or Sexual Contact	Class B-C Felony
Washington D.C	D.C. CODE. § 22-1901 (2014). Incest.	-	NO	Sexual Intercourse Marriage or Cohabitation	12 yrs.
West Virginia	W. VA. CODE § 61-8-12 (2014). Incest.	-	YES	Sexual Intercourse or Sexual Intrusion	Felony (Min 5 yrs., Max 15 yrs)
Wisconsin	Wis. STAT. § 944.06 (2014). Incest.	-	NO	Sexual Intercourse	Class F Felony
	Wis. STAT. § 948.06 (2014). Incest with a child.	Under 18	YES	Sexual Intercourse or Sexual Contact	Class C Felony
Wyoming	WYO, STAT. ANN. § 6-4-402 (2014). Incest.	-	YES	Sexual Intrusion or Sexual Contact	Felony (15 yrs. max)

