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]ntermarriage” 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 Assimilative Crimes Act (ACA), when available, or using a novel specification.3 Unfortunately, doing so is a less than straightforward endeavor; state incest laws vary significantly.8 To illustrate, because Ms. Virgo is a stepdaughter, the original hypothetical is criminal incest in Georgia, but not in Hawaii.9 In addition to the intricacies of

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1 See MANUAL FOR COURTS-MARTIAL, UNITES STATES pt. IV, ¶ 62 (2012) [hereinafter MCM].
2 See UCMJ art. 120 (2012).
4 See MANUAL FOR COURTS-MARTIAL, UNITES 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).
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.
incest law, charging Article 134 is also a nuanced enterprise whether using the ACA\textsuperscript{11} or drafting novel specifications.\textsuperscript{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 countereuitive 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 \textit{incest} has meaning beyond the legal context.\textsuperscript{13} The general and generic concept of incest as a “universal taboo” overshadows any jurisdiction’s strict and specific legal definition.\textsuperscript{14} Almost all cultures prohibit some degree of interfamilial sexual activity or marriage.\textsuperscript{15} Even in terms of a nebulous taboo, incest can conjure two very different images.\textsuperscript{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.\textsuperscript{17}

Incest’s different implications—sometimes only a taboo, albeit consensual, relationship and sometimes an inherently nonconsensual sexual assault—is critical to recognize.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{23} It is fair to assume that the incest was neither reported nor discovered during that span of years. In truth, reporting


\textsuperscript{14} \textit{See Inbred Obscurity, supra note 6, at 2464.}

\textsuperscript{15} \textit{Id. Ancient Persia is a noted exception to the universal taboo. Id. at 2465 n.3.}

\textsuperscript{16} Id. at 2465.

\textsuperscript{17} \textit{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. \textit{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, COUSINCOPLES.COM, http://www.cousincouples.com/?page=states (last visited Dec. 1, 2015).}

\textsuperscript{18} \textit{Inbred Obscurity, supra note 6, at 2465.}

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

\textsuperscript{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 disabling 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)).

\textsuperscript{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.’” \textit{Id. at 18.}

\textsuperscript{22} \textit{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).}

\textsuperscript{23} Bienen, supra note 13, at 1502.
may be the exception to the general rule that most child sexual assaults go unreported into adulthood. 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.” 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.”

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, 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.” 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. Since then, the development of state incest jurisprudence is best characterized as “bizarre.” 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 relatives or by referring the category of people prohibited from marrying under state law. In contrast, other states provide a broader category of relationships, including first cousins, stepchildren, adopted children, and relatives by marriage. Some states do not focus on family relationship, but prohibit sexual activity based on positions of authority, including “guardian, custodian or person in loco parentis” as well as teachers, coaches, and scout leaders. 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. Defining the relationships determines who is prohibited from engaging in the specified acts.

The acts that state incest statutes proscrib fall into one of the following three categories: marriage, varying forms of sexual conduct, or both. 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.

34 See Written Deposition of Alex Bivens, Clinical Psychologist 4–5 (July 14, 2011) (on file with author).
35 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)).
36 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)).
37 Bienen, supra note 13, at 1502.
38 Id.
39 Id. at 1521–22.
40 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 overhaul of sexual assault laws).
41 See, e.g., FLA. STAT. § 826.04 (2014); IND. CODE § 35-46-1-3 (2014).
43 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”).
44 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).
45 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 not 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”).
46 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.
47 See, e.g., CONN. GEN. STAT. § 53a-191 (2014).
48 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).
49 See, e.g., MASS. ANN. LAWS ch. 272, § 17 (2014) (prohibiting marriage, sexual intercourse, and sexual activities).
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. Consequently, significant confinement is available. Similar to Article 120, some states provide different degrees of punitive exposure based on the type of sexual conduct. 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. Interestingly, the sole federal statute that proscribes incest does not define the crime. 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. 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.

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. Congress enacted two major revisions to sexual assault crimes in the UCMJ in the past seven years. Regrettably, like the civilian world, sexual assault cases involving non-spouse dependent family members are not uncommon to military justice practitioners. Despite the revisions, incest—an offense based on the status of the relationship between the offender and victim—is not a crime specified in the UCMJ. Instead, the current UCMJ contains the following categories of sexual assaults: (1) lack of consent type under Article 120, UCMJ (2) age of victim type under Article 120b, UCMJ and (3) “other sexual misconduct” under Article 120c, UCMJ.


51 Bienen, supra note 13, at 1535.

52 See SUBCOMMITTEE 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://ppp.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 report 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. 120(b) (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. 120(c), (e) (2012), with MANUAL FOR COURTS-MARTIAL, UNITES 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,66 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.52 The UCMJ prior to that, applicable to conduct before 27 June 2007, specified “indecent act with another” under Article 134 as an

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. 120(c)(a) (2012), with UCMJ art. 120(t)(12) (2008).


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 offense 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.


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


62 See UCMJ art. 120(k) (2008).


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.”

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. The Military Judge’s Benchbook (Benchbook) contains a specific panel instruction on constructive force for “parental or analogous compulsion.” Moreover, the Benchbook includes a specific constructive force instruction for “parental . . . compulsion and when consent issues involving of children of tender years.”

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. 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. 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. However, for the typical incest scenario, where a father is using his daughter or stepdaughter for sexual gratification, 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. Even if a rare occurrence, 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. 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 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.

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.

As with any charging decision, judgment is important in determining what justice requires. The service member who marries his first cousin in order to take care of Families. 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.

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).

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 States 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)).

Proper 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
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  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.

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


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 touchscreen 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.”

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 . . . .” 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”

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.

The second type, if using the ACA method, requires that no enactment of Congress punishes the conduct as to preclude assimilation of state law.

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.

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.

With the ACA, both the federal and state statute should be identified.

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.”

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.

Since ACA prosecutions are “creatures of federal law, both substantively and procedurally[,]” state procedural rules, including “rules of evidence, . . . sufficiency of an indictment, and state statutes of limitations” do not apply.

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

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93. *Benchbook*, supra note 72, para. 3-60-2c (highlighting potential legal issues).

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*, 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.”

96. *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.

98. 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.C. Code Section 13.”).

99. 18 U.S.C. § 1153(a) (2012). Particularly with respect to ACA was addressed even though ACCA could have 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.

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

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).
112 See MCM, supra note 1, pt. IV, ¶ 60.c.(2)–(3).
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
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. 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. 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. Admittedly at the edge, a relationship of the parties at the time of the offense. Incest protects Army families by attacking an especially vile form of sexual assault perpetrated against a particularly vulnerable class of victims.

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.

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122 Garver, supra note 11, at 14.

123 Id. at 14 n.34.


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 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.
### Appendix A. Table of State Incest Laws

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

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.
<table>
<thead>
<tr>
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<th>Step child</th>
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<th>Classification Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>IND. CODE § 35-46-1-3 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sexual Conduct</td>
<td>Level 5 Felony; Level 4, if victim under 16</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE § 726.2 (2013). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sex Act</td>
<td>Class D Felony</td>
</tr>
<tr>
<td>Kansas</td>
<td>KAN. STAT. ANN. § 21-5604 (2013). Incest. Aggravated Incest.</td>
<td>18 &amp; up</td>
<td>NO</td>
<td>Sexual intercourse or Sodomy or Marriage</td>
<td>Level 10 Felony</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Under 18</td>
<td>YES</td>
<td>Marriage</td>
<td>Level 7 Felony</td>
</tr>
<tr>
<td></td>
<td></td>
<td>16-18</td>
<td>YES</td>
<td>Sexual Intercourse or Sodomy</td>
<td>Level 3 Felony</td>
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<tr>
<td></td>
<td></td>
<td>16-18</td>
<td>YES</td>
<td>Lewd Fondling</td>
<td>Level 7 Felony</td>
</tr>
<tr>
<td>Kentucky</td>
<td>KY. REV. STAT. ANN. § 530.020 (LEXISNEXIS 2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Intercourse or Deviate Sexual Intercourse</td>
<td>Class C Felony; Class B, if victim under 18</td>
</tr>
<tr>
<td>Louisiana</td>
<td>LA. REV. STAT. ANN. § 14:78 (2013), repealed by 2014 La. Acts 177. Incest.</td>
<td>-</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Min 25 yrs., max 99 yrs. if victim under 13.</td>
</tr>
<tr>
<td>Maryland</td>
<td>MD. CODE ANN., CRIM. LAW § 3-323 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Vaginal Intercourse</td>
<td>Felony Not less than 1 or more than 10 yrs.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>MASS. GEN LAWS ch. 272, § 17 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Intercourse or Sexual Activities or Marriage</td>
<td>20 yrs</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Required Victim Age</td>
<td>Step child</td>
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</tr>
<tr>
<td>Mississippi</td>
<td>MISS. CODE ANN. § 97-29-5 (2014). Adultery and fornication; between certain persons forbidden to inter-marry.</td>
<td>-</td>
<td>YES</td>
<td>Adultery or Fornication or Marriage or Cohabitation</td>
<td>10 yrs.</td>
</tr>
<tr>
<td>Missouri</td>
<td>MO. REV. STAT. § 568.020 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Intercourse or Deviate Sexual Intercourse or Marriage</td>
<td>Class D Felony</td>
</tr>
<tr>
<td>Montana</td>
<td>MONT. CODE ANN. § 45-5-57 (2014). Incest.</td>
<td>-</td>
<td>YES, (consent is defense if over 18)</td>
<td>Sexual Intercourse or Sexual Contact or Marriage or Cohabitation</td>
<td>Life, not to exceed 100 yrs.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. § 28-703 (2014). Incest.</td>
<td>-</td>
<td>YES (if under 18)</td>
<td>Sexual Penetration</td>
<td>Class III Felony</td>
</tr>
<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. § 201.180 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Fornication or adultery or Marriage</td>
<td>Category A Felony Min 2 yrs., max Life</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>N.H. REV. STAT. ANN. § 639:2 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Penetration or Marriage or Cohabitation</td>
<td>Class B Felony</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. STAT. ANN. § 30-10-3 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sexual Intercourse or Marriage</td>
<td>Third Degree Felony</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. CODE § 12.1-20-11 (2013). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sex Acts or Marriage or Cohabitation</td>
<td>Class C Felony</td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO REV. CODE ANN. § 2907.03 (2014). Sexual battery.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Conduct</td>
<td>Felony 3d Degree</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. tit. 21, § 885 (2013). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Adultery or Fornication or Marriage</td>
<td>Felony (10 yrs.)</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 163.525 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sexual Intercourse or Deviate Sexual Intercourse or Marriage</td>
<td>Class C Felony</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>18 PA. CONS. STAT. § 4302 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sexual Intercourse or Marriage or Cohabitation</td>
<td>Felony of the Second Degree</td>
</tr>
<tr>
<td>State</td>
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</tr>
<tr>
<td>Texas</td>
<td>TEX. PENAL CODE § 25.02 (2013). Prohibited Sexual Conduct.</td>
<td>YES</td>
<td></td>
<td>Sexual Intercourse or Deviate Sexual Intercourse</td>
<td>Felony in the Third Degree; Second Degree if descendant by blood or adoption.</td>
</tr>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 76-5-406 (2014). Sexual offense against the victim without consent of victim.</td>
<td>Under 18</td>
<td>YES</td>
<td>Sexual Intercourse and other Sexual Conduct</td>
<td>Third Degree Felony</td>
</tr>
<tr>
<td>Vermont</td>
<td>VT. STAT. ANN. tit. 13, § 205 (2014). Intermarriage of or fornication by persons prohibited to marry.</td>
<td>-</td>
<td>NO</td>
<td>Fornication or Marriage</td>
<td>5 yrs.</td>
</tr>
<tr>
<td>Virginia</td>
<td>VA. CODE ANN. § 18.2-366 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Fornication or Adultery</td>
<td>Class 1 Misdemeanor, If descendent, Class 3 Felony</td>
</tr>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE § 9A.64.020 (2014). Incest.</td>
<td>-</td>
<td>YES (if under 18)</td>
<td>Sexual Intercourse or Sexual Contact</td>
<td>Class B-C Felony</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. VA. CODE § 61-8-12 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Intercourse or Sexual Intrusion</td>
<td>Felony (Min 5 yrs., Max 15 yrs)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. § 944.06 (2014). Incest.</td>
<td>-</td>
<td>NO</td>
<td>Sexual Intercourse</td>
<td>Class F Felony</td>
</tr>
<tr>
<td></td>
<td>WIS. STAT. § 948.06 (2014). Incest with a child.</td>
<td>Under 18</td>
<td>YES</td>
<td>Sexual Intercourse or Sexual Contact</td>
<td>Class C Felony</td>
</tr>
<tr>
<td>Wyoming</td>
<td>WYO, STAT. ANN. § 6-4-402 (2014). Incest.</td>
<td>-</td>
<td>YES</td>
<td>Sexual Intrusion or Sexual Contact</td>
<td>Felony (15 yrs. max)</td>
</tr>
</tbody>
</table>
## Appendix B. Example Specifications\(^\text{133}\)

### CHARGE SHEET

<table>
<thead>
<tr>
<th>1. NAME OF ACCUSED (Last, First, Middle Initial)</th>
<th>2. SSN</th>
<th>3. GRADE OR RANK</th>
<th>4. PAY GRADE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrant, Jamie</td>
<td>123-45-6789</td>
<td>SSG</td>
<td>E-6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5. UNIT OR ORGANIZATION</th>
<th>6. CURRENT SERVICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company A, 1st SQD, 1st CAB, 54th ID, Fort Gordon, GA</td>
<td>a. INITIAL DATE: 10 Sep 08</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7. PAY PER MONTH</th>
<th>8. NATURE OF RESTRAINT OF ACCUSED</th>
<th>5. DATE ISSUED</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. BASIC 1,658.00</td>
<td>None</td>
<td>N/A</td>
</tr>
<tr>
<td>b. SEA/FOREIGN DUTY</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. TOTAL 1,658.00</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### II. CHARGES AND SPECIFICATIONS

#### 10. CHARGE

**VIOLATION OF THE UCMJ, ARTICLE 134**

**SPECIFICATION:**

1. In that Staff Sergeant Jamie Arrant, US Army, did at Fort Gordon, Georgia, a place under exclusive or concurrent federal jurisdiction, on or about 16 July 2014, engage in sexual intercourse, to wit: penetration of the vulva with his penis, with Ms. Veronica Vergo, a person, did not know was related to Staff Sergeant Jamie Arrant by marriage, to wit: his stepchild, in violation of Title 16, Chapter 6, Section 22, of the Official Code of Georgia Annotated, assimilated into federal law by 18 U.S. Code Section 13.

**SPECIFICATION 2:** In that Staff Sergeant Jamie Arrant, US Army, did at or near Augusta, Georgia, on or about 15 January 2014, wrongfully engage in a sexual act, to wit: penetration of the vulva with his penis, with Ms. Veronica Vergo, a person, did not know was related to Staff Sergeant Jamie Arrant by marriage, to wit: his stepchild, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

**SPECIFICATION 3:** In that Staff Sergeant Jamie Arrant, US Army, did at or near Honolulu, Hawaii, on divers occasions between on or about 1 January 2013 and on or about 31 December 2014, wrongfully engage in a sexual act, to wit: penetration of the vulva with his penis, with Ms. Veronica Vergo, a person, did not know was related to Staff Sergeant Jamie Arrant by marriage, to wit: his stepchild, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

**CHARGE II:** Violation of 10 USC, Article 120, 2008 UCMJ, Art. 120, indecent act.

**THE SPECIFICATION:** In that Staff Sergeant Jamie Arrant, US Army, did at or near Fort Hood, Texas, on divers occasions between 10 September 2011 and 27 June 2012, wrongfully commit indecent conduct, to wit: penetration of the vulva with his penis, with Ms. Veronica Vergo, a person, did not know was related to Staff Sergeant Jamie Arrant by marriage, to wit: his stepchild.

### III. PREFERRAL

<table>
<thead>
<tr>
<th>11a. NAME OF ACCUSER (Last, First, Middle Initial)</th>
<th>11b. GRADE</th>
<th>11c. ORGANIZATION OF ACCUSER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1SG I AM</td>
<td>1SG</td>
<td>202d Mess Kit Repair Company</td>
</tr>
</tbody>
</table>

**AFFIDAVIT:** Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 31 day of August, 2013, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

**IM A COMMANDER**

Typical Name of Officer

O-3

Grade

Company Commander

OFFICIAL CAPACITY TO ADMINISTER OATH

(See R.C.M. 101(b)) must be commissioned officer)

**DD FORM 458, MAY 2000**

\(^{133}\) Portions of the specifications are based on language contained in an actual charge sheet, concerning a case the author participated in prior to trial and the preferral of additional charges, including charges for incest under the ACA and Georgia law. See U.S. Dep’t of Def., DD Form 458, Charge Sheet, (May 2000) (drafted by Brett Cramer, Senior Trial Counsel, 25th Infantry Division, on Aug. 1, 2014) (on file with the author).