



# THE ARMY LAWYER

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*Major Douglas J. Sackett*

**“The Good Soldier Defense is Dead. Long Live the Good Soldier Defense”:  
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**Team of Teams: New Rules of Engagement for a Complex World**

*Reviewed by Captain Mark E. Bojan*

*Judge Advocate General's Corps Bulletin 27-50-511*

*December 2015*

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**Editor, Captain Cory T. Scarpella**  
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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

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## Lore of the Corps

### Three Unique Medals to an Army Lawyer: The Chinese Decorations Awarded to Colonel Edward H. “Ham” Young

By Fred L. Borch  
Regimental Historian & Archivist

While it is not unusual for a judge advocate in today’s Army to be awarded a foreign *badge* for proficiency in parachuting, marksmanship or physical prowess, the award of foreign decorations and medals is another matter, if for no other reason than these are rarely presented to judge advocates. Additionally, because of the constitutional prohibition on any “Person holding any Office” from accepting “any present . . . or Title, of any kind whatever, from any King, Prince, or foreign state,” the Army has traditionally been reticent about permitting servicemembers to accept and wear foreign medals—especially during peacetime.<sup>1</sup>

With this as background, the award of not one or two, but three foreign military decorations to Colonel Edward H. “Ham” Young is a story worth telling. Young was awarded all three decorations by the Chinese government, in recognition of his outstanding service as the senior Army lawyer in China, from 1944 to 1947.

Born in Milwaukee, Wisconsin, in June 1897, Edward Hamilton “Ham” Young entered the U.S. Military Academy in June 1917.<sup>2</sup> Since the Army needed officers badly as it expanded during World War I, Young and his classmates graduated in November 1918, just 18 months after arriving as cadets. Commissioned in the Infantry, Second Lieutenant Young was immediately sent to Europe, where he visited the Belgian, French, and Italian battle fronts and also observed the American Army in occupation duties in Germany.<sup>3</sup> After

returning from Europe, Young served in a variety of company, battalion, and regimental assignments in the Philippines and the United States in the 1920s and early 1930s.<sup>4</sup>



Colonel Edward H. “Ham” Young, circa 1947

In 1933, Young was sent to New York University School of Law, where he took a course in law, then went to West

<sup>1</sup> U.S. CONST., art. 1, § 9, cl. 8. After the Persian Gulf War, for example, a small number of high ranking Soldiers, including Generals Colin L. Powell and H. Norman Schwarzkopf, were awarded the Knight Commander, Order of the British Empire (KBE) by the U.K. government. *List of Honorary British Knights and Dames*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_honorary\\_British\\_knights\\_and\\_dames#Military](https://en.wikipedia.org/wiki/List_of_honorary_British_knights_and_dames#Military) (last visited Dec. 14, 2015). Ordinarily, recipients of the KBE are entitled to be addressed as “Sir” (as in “Sir Colin” or “Sir Norman”), but because of the constitutional prohibition in Article 1, Section 9, Generals Powell and Schwarzkopf were not permitted to accept this honorific. U.S. CONST., art. 1, § 9.

Despite the constitutional obstacles to accepting a title accompanying a foreign decoration like the KBE, the Congress began enacting legislation in World War I that gave blanket authority to “any and all members of the military forces of the United States . . . to accept . . . decorations” awarded to them by Allied governments. U.S. DEP’T OF ARMY REG. 600-45, AWARD AND SUPPLY OF DECORATIONS FOR INDIVIDUALS (9 Mar. 1922). Similar legislation was enacted during World War II, Korea, and Vietnam so that judge advocates serving in those conflicts were permitted to accept (and wear) Belgian, British, Dutch, French, Italian, Korean, and Vietnamese decorations and medals. See Act of Aug. 1, 1947, Pub. L. No. 80-314 (authorizing the acceptance of decorations, orders, medals, and emblems by officers and enlisted men of the armed forces of the United States tendered them by governments of cobelligerent nations, neutral nations, or other American Republics); Act of May 8, 1954, Pub. L. No. 83-354 (authorizing certain members of the Armed Forces to accept and wear decorations of certain foreign nations); Act of Oct. 19, 1965, Public L. No. 89-257

(authorizing certain members of the Armed Forces to accept and wear decorations of certain foreign nations (codified as 5 U.S.C. § 7342 (2015))).

Today, Army Regulation 600-8-2, *Military Awards*, paragraph 9-3, provides that a foreign decoration which has been awarded in recognition of “active field service in connection with combat operations,” or which has been awarded “for outstanding or unusually meritorious performance,” may be accepted and worn upon receiving the approval of Commander, U.S. Army Human Resources Command (HRC), Awards and Decorations Branch, Fort Knox, Kentucky. U.S. DEP’T OF ARMY REG. 600-8-2, MILITARY AWARDS para. 9-3 (25 June 2015). To ease the approval process, however, paragraph 9-27 provides that any foreign decoration listed in Appendix E of the regulation is pre-approved by Human Resources Command (HRC) for acceptance, provided it is approved by a commander who is a brigadier general or a commander who is a colonel with general court-martial convening authority. *Id.* para. 9-27, Appendix E. A decoration not listed in Appendix E cannot be accepted or worn without HRC approval. *Id.* para. 9-27.

<sup>2</sup> Fred L. Borch, *From West Point to Michigan to China: The Remarkable Career of Edward Hamilton Young (1897-1987)*, ARMY LAW., Dec. 2012, at 1.

<sup>3</sup> *Id.*

<sup>4</sup> M.S. Young, *Edward H. Young 1919*, ASSEMBLY, Sept. 1990, at 154. For more on Young, see Borch, *supra* note 2.

Point to be an instructor in the academy's law department.<sup>5</sup> Three years later, he joined the Judge Advocate General's Department, and in 1938, finally completed his law studies and passed the New York Bar Exam.<sup>6</sup>

When the United States entered World War II, Young was in Washington, D.C., where he was the deputy chief of the Military Affairs Division. Then, in February 1942, Major General Myron C. Cramer, The Judge Advocate General, selected Colonel Young to be the first commandant of The Judge Advocate General's School, United States Army (TJAGSA), then located at the National University Law School.<sup>7</sup>

Shortly thereafter, when TJAGSA moved to the campus of the University of Michigan in Ann Arbor, Young went with it.<sup>8</sup> Working with a small group of Army lawyers, Young successfully planned, organized, and administered a comprehensive course of instruction. During his tenure as commandant, TJAGSA trained more than 1700 officers and officer candidates to be judge advocates.<sup>9</sup> As this constituted two-thirds of the active duty strength of the entire Judge Advocate General's Department,<sup>10</sup> it was a remarkable achievement by any measure.

In December 1944, Colonel Young was transferred to the China, Burma, India Theater where he assumed duties in China as the Theater Judge Advocate, U.S. Forces in China.<sup>11</sup> He was also the legal advisor to the U.S. Embassy and the Far East United Nations War Crimes Commission.<sup>12</sup> After the Japanese surrender in August 1945, Colonel Young remained in China as the Staff Judge Advocate, Nanking Headquarters Command and Advisory Group.<sup>13</sup>

When he left China in June 1947, Colonel Young's tenure had been unique in the history of the Corps, as no other judge advocate had served as Theater Judge Advocate before him—and no one followed Young in the assignment.<sup>14</sup> He was decorated by his boss with the Legion of Merit for his extraordinary service.<sup>15</sup> But the Nationalist Chinese government of General Chiang Kai-shek also saw Young's service as worthy of recognition, and decorated him with three medals: the Special Collar of the Order of the Brilliant Star, the Special Breast Order of the Cloud and Banner, and the Special Breast Order of Pao Ting. He is the only judge

advocate in history to be awarded all three Chinese military decorations.<sup>16</sup>



Order of the Brilliant Star Award to Colonel Young

Founded in February 1941 as an award for outstanding merit, the Order of the Brilliant Star was created in nine classes or grades. Colonel Young received the Third Class or "Special Collar" class of the decoration with its purple neck ribbon. Very few awards of the Order of the Brilliant Star have been awarded; by 1968, the Nationalist Chinese government (relocated to the island of Taiwan in 1949) had only made 875 awards of the decoration.<sup>17</sup>



Order of the Cloud and Banner Awarded to Colonel Young

<sup>5</sup> Borch, *supra* note 2, at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 188 (1975). Founded in 1869, the National University Law School merged with the George Washington University School of Law in 1954. *History, THE GEORGE WASHINGTON UNIVERSITY*, <http://www.law.gwu.edu/School/Pages/History.aspx> (last visited Dec. 1, 2015).

<sup>8</sup> JUDGE ADVOCATE GENERAL'S CORPS., *supra* note 7, at 188.

<sup>9</sup> *Id.* at 187.

<sup>10</sup> *Id.* at 169.

<sup>11</sup> Borch, *supra* note 2, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> For more on Young's service in China, see Fred L. Borch, *Contracting in China: The Judge Advocate Experience, 1944-1947*, ARMY LAW., Aug. 2012, at 1.

<sup>14</sup> Borch, *supra* note 2, at 2.

<sup>15</sup> Young, *supra* note 4, at 154.

<sup>16</sup> *Id.*

<sup>17</sup> ROBERT WERLICH, ORDERS AND DECORATIONS OF ALL NATIONS 86 (1990).

The Order of the Cloud and Banner was created in 1935 as an award for exceptional acts of bravery by members of the Chinese armed forces. By World War II, however, its award to foreigners also was permitted. Like the Order of the Brilliant Star, the Order of the Cloud and Banner also came in nine classes or grades. Colonel Young received the Fourth Class award with its wide blue stripe edged in narrow red/orange and bordered in white.<sup>18</sup>



Ribbon Bar Worn by COL Young



Order of Precious Tripod Awarded to COL Young

Finally, Colonel Young was awarded the Special Breast Order of Tao Ping or “Precious Tripod.” Created by Chiang Kai-shek in 1929, for either valor or outstanding service by a member of the Chinese armed forces or foreigners, the medal features a green and white tripod in its center. Colonel Young received the Fourth Class of the award, as evidenced by the white enamel band surrounding the tripod, and the blue and white ribbon.<sup>19</sup>

The obverse of each Chinese medal is depicted in this “Lore of the Corps,” along with Colonel Young’s original ribbon bar from his dress uniform. Note that the three Chinese decorations follow all Young’s American medal ribbons (Distinguished Service Medal, Legion of Merit, American Defense Service Medal, Army of Occupation of Germany Medal, World War I Victory Medal, American Campaign Medal, Asiatic-Pacific Campaign Medal, and World War II Victory Medal).<sup>20</sup>

“Ham” Young retired from active duty in 1954 and died in Florida in 1987.<sup>21</sup> He is interred in Arlington National Cemetery.<sup>22</sup> As for his Chinese decorations, they were donated to the Judge Advocate General’s Corps by Colonel Young’s descendants, and are part of the historical collection at the the Judge Advocate General’s Legal Center and School, United States Army.

*World War II Judge Advocate General’s School Scrapbooks on the Library of Congress Website*

In 1942, the Judge Advocate General’s School opened on the campus of the University of Michigan in Ann Arbor, Michigan. Initially, the School was under the leadership of Colonel Edward H. “Ham” Young, who determined the curriculum and put together the initial staff and faculty. When Young departed for a new assignment in late 1944, he was succeeded by Colonel Reginald C. Miller, who served as Commandant until the school closed in 1946. During its operation at the University of Michigan, the school transformed hundreds of civilian lawyers into Army judge advocates. These military lawyers ultimately served as uniformed attorneys in a variety of world-wide locations, including Australia, China, England, France, Germany, India, Japan, and Morocco. These scrapbooks contain photographs, newspaper articles, graduation programs, and other documents related to the operation of the school from 1943 to 1946.

*See the scrapbooks here:*

[http://www.loc.gov/rr/frd/Military\\_Law/Scrapbooks.html](http://www.loc.gov/rr/frd/Military_Law/Scrapbooks.html)

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website

<https://www.jagcnet.army.mil/8525736A005BE1BE>

*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

<sup>18</sup> *Id.* at 88.

<sup>19</sup> *Id.* at 87.

<sup>20</sup> JOHN E. STRANDBERG & ROGER JAMES BENDER, THE CALL OF DUTY: MILITARY AWARDS AND DECORATIONS OF THE UNITED STATES OF AMERICA (2004).

<sup>21</sup> Borch, *supra* note 2, at 3.

<sup>22</sup> *Id.*

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

Major Douglas J. Sackett\*

## 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.<sup>1</sup> 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?<sup>2</sup> If so, how will two years of "sexting"<sup>3</sup> 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?<sup>4</sup>

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.<sup>5</sup> Almost every state criminalizes incest by statute.<sup>6</sup> In contrast, the UCMJ does not.<sup>7</sup> 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.<sup>8</sup> Unfortunately, doing so is a less than straightforward endeavor; state incest laws vary significantly.<sup>9</sup> To illustrate, because Ms. Virgo is a *stepdaughter*, the original hypothetical is criminal incest in Georgia, but not in Hawaii.<sup>10</sup> In addition to the intricacies of

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

<sup>2</sup> See UCMJ art. 120 (2012).

<sup>3</sup> "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).

<sup>4</sup> 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).

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

<sup>6</sup> 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*].

<sup>7</sup> See *infra* pp. 9–10 and note 52.

<sup>8</sup> 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)).

<sup>9</sup> *Inbred Obscurity*, *supra* note 6, at 2469–70.

<sup>10</sup> 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 ACA<sup>11</sup> or drafting novel specifications.<sup>12</sup>

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.<sup>13</sup> The general and generic concept of incest as a “universal taboo” overshadows any jurisdiction's strict and specific legal definition.<sup>14</sup> Almost all cultures prohibit some degree of interfamilial sexual activity or marriage.<sup>15</sup> Even in terms of a nebulous taboo, incest can conjure two very different images.<sup>16</sup> 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.<sup>17</sup>

Incest's different implications—sometimes only a taboo, albeit consensual, relationship and sometimes an inherently nonconsensual sexual assault—is critical to recognize.<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> It is fair to assume that the incest was neither reported nor discovered during that span of years. In truth, reporting

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

<sup>12</sup> 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.

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

<sup>14</sup> See *Inbred Obscurity*, *supra* note 6, at 2464.

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

<sup>16</sup> *Id.* at 2465.

<sup>17</sup> 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).

<sup>18</sup> *Inbred Obscurity*, *supra* note 6, at 2465.

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

<sup>20</sup> 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)).

<sup>21</sup> 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.

<sup>22</sup> 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).

<sup>23</sup> Bienen, *supra* note 13, at 1502.

may be the exception to the general rule that most child sexual assaults go unreported into adulthood.<sup>24</sup> 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.”<sup>25</sup> 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.”<sup>26</sup> 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,<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup> Since then, the development of state incest jurisprudence is best characterized as “bizarre.”<sup>30</sup> 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<sup>31</sup> or by referring the category of people prohibited from marrying under state law.<sup>32</sup> In contrast, other states provide a broader category of relationships, including first cousins, stepchildren, adopted children, and relatives by marriage.<sup>33</sup> Some states do not focus on family relationship, but prohibit sexual activity based on positions of authority,<sup>34</sup> including “guardian, custodian or person in loco parentis” as well as teachers, coaches, and scout leaders.<sup>35</sup> 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.<sup>36</sup> 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,<sup>37</sup> varying forms of sexual conduct,<sup>38</sup> or both.<sup>39</sup> 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.<sup>40</sup>

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

<sup>25</sup> *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)).

<sup>26</sup> *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)).

<sup>27</sup> Bienen, *supra* note 13, at 1502.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1521–22.

<sup>30</sup> *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).

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

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

<sup>33</sup> 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”).

<sup>34</sup> 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).

<sup>35</sup> 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”).

<sup>36</sup> 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.

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

<sup>38</sup> 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).

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

<sup>40</sup> 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.<sup>41</sup> Consequently, significant confinement is available.<sup>42</sup> Similar to Article 120, some states provide different degrees of punitive exposure based on the type of sexual conduct.<sup>43</sup> 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.<sup>44</sup> Interestingly, the sole federal statute that proscribes incest does not define the crime.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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

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

<sup>41</sup> *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](http://www.ndaa.org/pdf/criminal_incest%20chart%20_2010.pdf) [hereinafter *Criminal Incest Chart*].

<sup>42</sup> *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).

<sup>43</sup> *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).

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

<sup>45</sup> *See id.*

<sup>46</sup> *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)).

<sup>47</sup> *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).

<sup>48</sup> *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/](http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/).

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

<sup>50</sup> *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)).

<sup>51</sup> Bienen, *supra* note 13, at 1535.

<sup>52</sup> *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](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).

<sup>53</sup> *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.*

<sup>54</sup> *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.*

<sup>55</sup> 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,<sup>56</sup> 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,<sup>57</sup> a search of the Manual for Courts-Martial (MCM) reveals the term “incest,” but only once.<sup>58</sup> 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;<sup>59</sup> in 1960, an Army Judge Advocate wrote an entire subsection of his LL.M. thesis on charging incest under Article 134.<sup>60</sup>

Prior to the 2012 UCMJ changes, the specified charge of “indecent act” covered incestuous conduct.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> “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.”<sup>64</sup> In 1994, the Court of Military Appeals ruled incestuous sexual intercourse fell within that definition.<sup>65</sup> Yet in 2012, the current revision of the UCMJ eliminated the broad “indecent act” from Article 120 without transferring it into Article 120c.<sup>66</sup> 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,<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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

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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).

<sup>56</sup> 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).

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

<sup>58</sup> 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)).

<sup>59</sup> See BARNETT, *supra* note 21, at 213.

<sup>60</sup> 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.

<sup>61</sup> 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.”).

<sup>62</sup> See UCMJ art. 120(k) (2008).

<sup>63</sup> 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”).

<sup>64</sup> See *supra* note 55.

<sup>65</sup> 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”).

<sup>66</sup> See *supra* note 55.

<sup>67</sup> 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.”).

<sup>68</sup> 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.

<sup>69</sup> See *id.* art. 120(a)–(b).

<sup>70</sup> See *id.* art. 120(a).

harm sufficient to coerce or compel submission by the victim.”<sup>71</sup>

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.<sup>72</sup> The *Military Judge’s Benchbook* (*Benchbook*) contains a specific panel instruction on constructive force for “parental or analogous compulsion.”<sup>73</sup> Moreover, the *Benchbook* includes a specific constructive force instruction for “parental . . . compulsion and when consent issues involving of children of tender years.”<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> However, for the typical incest scenario, where a father is using his daughter or stepdaughter for sexual gratification,<sup>78</sup> 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.<sup>79</sup> Even if a rare occurrence,<sup>80</sup> 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.<sup>81</sup> 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

<sup>71</sup> See *id.* art. 120(g)(5)–(6).

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

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* para. 3-45-1 n.9.

<sup>75</sup> *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)).

<sup>76</sup> 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.

<sup>77</sup> 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.

<sup>78</sup> *Bienen*, *supra* note 13, at 1503.

<sup>79</sup> 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).

<sup>80</sup> See JSC SUBCOMM. REPORT, *supra* note 52, at 150.

<sup>81</sup> See UCMJ art. 134 (2012).

Federal law . . . .”<sup>82</sup> “State and foreign laws are not included in [clause 3].”<sup>83</sup> However, through operation of the ACA, it is sometimes possible to utilize state criminal law.<sup>84</sup> 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.<sup>85</sup>

In 2009, the Army Court of Criminal Appeals (ACCA) considered whether charging state incest law under Article 134 violated the preemption doctrine.<sup>86</sup> In *United States v. McNaughton*, the ACCA held Article 120 did not preempt state incest law.<sup>87</sup> 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.<sup>88</sup> Although *McNaughton* concerned a Colorado statute, the court’s analysis provides a pattern for evaluating any state’s incest law.<sup>89</sup> 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.<sup>90</sup> 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.”<sup>91</sup> 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.’”<sup>92</sup>

<sup>82</sup> MCM, *supra* note 1, pt. IV, ¶ 60.c.(1).

<sup>83</sup> *Id.* pt. IV, ¶ 60.c.(4).

<sup>84</sup> See 18 U.S.C. § 13 (2012).

<sup>85</sup> 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).

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

<sup>87</sup> *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.*

<sup>88</sup> 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.

<sup>89</sup> See *McNaughton*, 2009 CCA LEXIS 187, at \*1.

<sup>90</sup> 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.*

<sup>91</sup> *United States v. Williams*, 327 U.S. 711 (1946).

<sup>92</sup> *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.”<sup>93</sup> 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 . . . .”<sup>94</sup> 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”<sup>95</sup> 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.<sup>96</sup> The second type, if using the ACA method, requires that no enactment of Congress punishes the conduct as to preclude assimilation of state law.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> With the ACA, both the federal and state statute should be identified.<sup>100</sup>

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.”<sup>101</sup> 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.<sup>102</sup> Since ACA prosecutions are “creatures of federal law, both substantively and procedurally[.]”<sup>103</sup> state procedural rules, including “rules of evidence, . . . sufficiency of an indictment, and state statutes of limitations” do not apply.<sup>104</sup>

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

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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.

<sup>93</sup> *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.

<sup>94</sup> *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.

<sup>95</sup> *McNaughton*, 2009 CCA LEXIS 187, at \*1.

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

<sup>97</sup> 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.

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

<sup>99</sup> 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.

<sup>100</sup> 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.”).

<sup>101</sup> *Id.* para. 3-60-2c n.5.

<sup>102</sup> *Id.* para. 3-60-2c n.4.

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

<sup>104</sup> 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)).

<sup>105</sup> 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).

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

<sup>107</sup> 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.<sup>108</sup>

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.<sup>109</sup> 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,<sup>110</sup> but “[o]bviously, though, conduct which is service-discrediting or prejudicial to good order can also violate state or foreign laws.”<sup>111</sup> Such conduct is criminal because of the uniquely military terminal element.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> Still, the specification should include words of criminality.<sup>116</sup> Thus, the allegations should include that the accused *wrongfully* engaged in sexual acts.<sup>117</sup> 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.”<sup>118</sup> That being said, one military court of appeals found incest simultaneously violated both clauses.<sup>119</sup>

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.<sup>120</sup> Under both methods, a conviction for incestuous conduct under Article 134 should require sexual offender registration.<sup>121</sup> 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

<sup>108</sup> See BENCHBOOK, *supra* note 72, para. 3-60-2c.

<sup>109</sup> 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.

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

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

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

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

<sup>114</sup> 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.

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

<sup>116</sup> *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).

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

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

<sup>119</sup> *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.”).

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

<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup>

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.”<sup>124</sup>

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.<sup>125</sup> 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.<sup>126</sup> Admittedly at the edge, a novel specification based on a non-familial relationship is also feasible.<sup>127</sup>

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).<sup>128</sup> 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.<sup>129</sup> “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.<sup>130</sup>

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.<sup>131</sup> 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.

<sup>122</sup> Garver, *supra* note 11, at 14.

<sup>123</sup> *Id.* at 14 n.34.

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

<sup>125</sup> See *infra* Appendix A.

<sup>126</sup> 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).

<sup>127</sup> See *supra* note 35 and accompanying text.

<sup>128</sup> See UCMJ art. 43 (2012).

<sup>129</sup> 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.

<sup>130</sup> 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).

<sup>131</sup> 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

<sup>132</sup> 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](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
			Under 18	YES	Sexual intercourse or Lewd Fondling
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)



# “The Good Soldier Defense is Dead. Long Live the Good Soldier Defense”<sup>1</sup>: The Challenge of Eliminating Military Character Evidence in Courts-Martial

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## I. Introduction

Abandoning the weak legal and policy justifications for the broad application of the good Soldier defense is long overdue, especially in sexual offense cases. Congress recently set reform in motion by mandating the amendment of Military Rule of Evidence (MRE) 404(a) to include a direct prohibition of military character evidence for certain offenses and a modification of the standard of admissibility for the remaining offenses.<sup>2</sup> However, the legislative effort and rule drafted by the Joint Service Committee on Military Justice (JSC) present an imperfect solution that is unlikely to withstand judicial scrutiny. The JSC has a limited ability to address some shortcomings of the Congressional mandates, but primary responsibility for shaping the interpretation and survival of the new rule rests with practitioners at the trial and appellate level.

This article addresses both parts of the new rule. First, the constitutionality (or unconstitutionality) of the per se prohibition of military character evidence in certain offenses is examined. Second, the effectiveness of the “residual clause” that limits the good Soldier defense in the remaining offenses where “evidence of the general military character of the accused is not relevant to an element of an offense for which the accused has been charged” is assessed. This assessment is preceded by a brief review of the good Soldier defense’s modern history.<sup>3</sup> This review emphasizes the good Soldier defense’s application in sexual offense cases in order to contextualize the challenges the new rule presents. Finally, recommendations are provided for the JSC and practitioners

to improve the rule and to shape interpretation of the residual clause to achieve meaningful reform.

Celebration of the demise of the good Soldier defense is premature; the per se prohibition upon military character evidence is unlikely to withstand constitutional challenge. Further, the residual clause will achieve little without complimentary litigation to effectively redefine the standard of admissibility. This article provides practitioners with the background required to understand how to shape the new rule, now that it has been promulgated.

## II. Congressional Intent and the Proposed Rule

### A. The Congressional Response to Military Sexual Assault

Criticism of the good Soldier defense is not new, but reform was not seriously contemplated until Congress renewed its focus upon military sexual assault in 2013.<sup>4</sup> The Congressional response was accompanied by a sense of urgency and bi-partisan support in the otherwise contentious 113th Congress.<sup>5</sup> *The Invisible War*<sup>6</sup> and recent high profile cases involving senior leaders<sup>7</sup> have also contributed to calls for military justice reform. A perception that military leaders (including panel members) will “protect their own” and disregard credible allegations when a good performer or senior leader stands accused has colored the debate.<sup>8</sup> In response to growing concerns of the efficacy of the military justice system the National Defense Authorization Act of 2014 (FY14 NDAA) included provisions that expanded

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<sup>1</sup> “The king is dead, long live the king!” is an aphorism, based upon the traditional proclamation made following the accession of a new monarch in medieval Europe. “The king is dead” is the announcement of a monarch who has just died, while “long live the king” refers to the heir who ascends to a throne upon the death of the preceding monarch. Thus, while the king may be dead, the monarchy continues on.

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. Law No. 113-291, § 536, 128 Stat. 3292, 759 (2014).

<sup>3</sup> The “good Soldier defense” is a term used to describe the use of “good military character evidence” by an accused, and thus, is a defense theory premised upon such evidence. See, e.g., Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 117-18 (2001). It is not in itself an affirmative defense; rather, it describes the

defense’s use of good military character evidence at trial and the rationale for introducing such evidence. *Id.*; see also U.S. DEP’T OF ARMY PAM. 27-9, MILITARY JUDGE’S BENCHBOOK para. 7-8-1. (10 Sep. 2014). This article uses the terms in context as appropriate to the discussion.

<sup>4</sup> See, e.g., Jennifer Steinhauer and Thom Shanker, *Congress Stepping Up Its Efforts Against Sexual Assault in Military*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/24/us/congress-steps-up-anti-sexual-assault-efforts.html>.

<sup>5</sup> See, e.g., Alan Fram, *113th Congress Ends with more Fights than Feats*, ASSOCIATED PRESS (Dec. 17, 2014), <http://www.washingtontimes.com/news/2014/dec/17/113th-congress-ends-with-more-fights-than-feats/>.

<sup>6</sup> THE INVISIBLE WAR (Chain Camera Productions 2012).

<sup>7</sup> See, e.g., Nancy Montgomery, *Air Force Pilot’s Sex Assault Dismissal Sparks Cries For Reform*, STARS & STRIPES (Mar. 3, 2013), <http://www.stripes.com/news/air-force-pilot-s-sex-assault-dismissal-sparks-cries-for-reform-1.210371>.

<sup>8</sup> “Too often, the good [S]oldier defense has been seen as overcoming specific evidence directly related to a crime. This appearance undermines the essential perception that a verdict is determined by direct evidence supporting the elements of the crime, not the previous reputation of the defendant.” 159 CONG. REC. S8311-8312 (daily ed. Nov. 20, 2013) (statement of Sen. Reed).

victims' rights and limited command discretion and post-trial clemency powers, but maintained the traditional role of the commander as the centerpiece of the military justice system.<sup>9</sup>

The rationale for limiting the good Soldier defense was foreshadowed in a relatively minor provision of the FY14 NDAA that directed modification of the non-binding discussion to Rule for Court Martial (R.C.M.) 306 by striking “the character and military service of the accused” from the matters a commander should consider in deciding how to dispose of an offense.<sup>10</sup> More symbolic than consequential, the provision demonstrated congressional concern that reliance upon military character will lead to bias and inhibit disposing of cases based upon their factual merit.

The good Soldier defense is at the heart of this concern—presenting a risk of panel nullification at trial. Specifically, an accused, whose guilt has been otherwise proven beyond a reasonable doubt, could be “excused” of criminal liability based upon deference to past achievement or reputation. This risk is amplified in cases where the putative victim is not similarly situated in life or professional esteem as the accused.<sup>11</sup> *United States v. McNeill*, highlights this risk: evidence of good military character excluded on the merits was later admitted during pre-sentencing, triggering the panel to request reconsideration of their guilty finding.<sup>12</sup>

In the second session of the 113th Congress, three separate bills proposed modifying MRE 404(a) to limit admissibility of military character evidence. The Victims' Protection Act of 2014 (VPA)<sup>13</sup> proposed relatively modest reform by modifying the standard of admissibility in the same manner as the residual clause (without any direct prohibitions by offense). An early version of the National Defense Authorization Act of 2015 (FY15 NDAA), passed by the House of Representatives, pursued a bolder approach:

prohibiting general military character evidence outside of defined “military specific offenses.”<sup>14</sup> However, it was the Senate version of the FY15 NDAA that formed the basis of the enacted version: combining a prohibition upon military character evidence in certain offenses with a modification of the standard of admissibility for the remaining offenses.<sup>15</sup>

The influential National Institute of Military Justice Blog (CAAFLOG) named reforming the good Soldier defense the top military justice story of 2014 “because the new restriction so dramatically upends well-settled military law.”<sup>16</sup> Indeed, the effort to limit the applicability of the good Soldier defense conflicts with a long tradition of broad, nearly universal, admissibility. However, the aggressive stance adopted by Congress will face a gauntlet of challenges that a more cautious solution, such as that proposed by the VPA, would not have.

#### B. The Revised MRE 404(a)

In compliance with the FY15 NDAA, the MRE 404(a)(2) was amended to read as follows:

(A) The accused may offer evidence of the accused's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the [Uniform Code of Military Justice]:

- (i) Articles 120-123a;
- (ii) Articles 125-127;
- (iii) Articles 129-132;

<sup>9</sup> Military Justice Improvement Act, S. 1752, 113th Cong. § 2 (2013). See also Military Justice Improvement Act, S. 2292, 113th Cong. §§ 2-3, 5 (2014).

<sup>10</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672, 705 (2013).

<sup>11</sup> See *supra* text accompanying note 8; see also Jennifer Hlad, *Restriction of 'Good Soldier' Defense at Center of Senate Bill* (Mar. 11, 2014), <http://www.stripes.com/news/us/restriction-of-good-soldier-defense-at-center-of-senate-bill-1.272243>.

<sup>12</sup> *United States v. McNeill*, 17 M.J. 451 (C.M.A. 1984).

<sup>13</sup> Victims Protection Act of 2014, S. 1917, 113th Cong. § 3(g) (2014). The Victims Protection Act of 2014 was passed by the Senate with a vote of 97-0 on March 10, 2014 and was referred to the Committee on Armed Services, among others, in the House of Representatives. *Victims Protection Act of 2014*, CONGRESS.GOV (March 11, 2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1917>. If enacted, Military Rule of Evidence (MRE) 404(a) would have been “modified to clarify that the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused, except that evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.” S. 1917, 113th Cong. § 3(g) (2014).

<sup>14</sup> Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. § 537 (passed 335-98 by the House of Representatives). 160 CONG. REC. H4804-05 (daily ed. May 22, 2014). The military-specific offenses specified include Articles 84 through 117, Uniform Code of Military Justice (UCMJ), with the exception of Article 106 and Article 112a, UCMJ. *Id.* Although, the latter offense is described as “Article 112” suggesting the offense of “drunk on duty” was omitted in error. Articles 133 and 134, UCMJ, are also designated as military-specific offenses. H.R. 4435, 113th Cong. § 537(b). For the applicable offenses, the rule would be amended “to clarify that the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused, except when evidence of a trait of the military character of an accused is relevant to an element of an offense for which the accused has been charged.” *Id.* at § 537(a).

<sup>15</sup> Carl Levin National Defense Authorization Act for Fiscal Year 2015, S. 2410, 113th Cong. § 545(g) (2014).

<sup>16</sup> Zachary D. Spillman, *Top Ten Military Justice Stories of 2014—#1: Restriction of the Defense of Good Military Character*, NIMJ BLOG-CAAFLOG (Jan. 3, 2015), <http://www.caaflg.com/2015/01/03/top-ten-military-justice-stories-of-2014-1-restriction-of-the-defense-of-good-military-character/>.

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(v) An attempt or conspiracy to commit one of the above offenses.<sup>17</sup>

The draft rule proposed by the JSC did not deviate from the language prescribed by the FY15 NDAA.

### III. Constitutionality of the Per Se Prohibition

The Constitution guarantees an accused “a meaningful opportunity to present a complete defense.”<sup>18</sup> The right to present a defense is derived from the Sixth Amendment rights to obtain witnesses and confront adverse witnesses as well as the Fifth Amendment guarantee of due process of the law.<sup>19</sup> However, as *United States v. Scheffer* provides, the right to present a defense is not absolute:

A defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant’s interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not “arbitrary” or “disproportionate to the purposes they are designed to serve.”<sup>20</sup>

Further, “the exclusion of evidence [is] unconstitutionally arbitrary or disproportionate only where it has infringed upon a *weighty interest of the accused*.”<sup>21</sup>

Federal circuit courts have interpreted this to mean that “the exclusion of evidence seriously undermine[s] ‘fundamental elements of the [accused]’s defense’ against the crime charged,”<sup>22</sup> or in the context of the entire record of trial, that the excluded evidence creates a reasonable doubt that did not otherwise exist.<sup>23</sup> It is also worth noting that under military law, a trait of character is pertinent when it “is one which is directed to the issue or matters in dispute, and legitimately tends to prove the allegations of the party offering it.”<sup>24</sup> Clearly, under some circumstances military character evidence is sufficiently “weighty” to warrant constitutional protection.<sup>25</sup>

#### A. Is the Per Se Prohibition Arbitrary?

An “arbitrary rule” is one that excludes “important defense evidence but [does] not serve any legitimate interests” of Government—specifically, interests relating to the trial process itself.<sup>26</sup> Consequently, identifying the legitimate interests served by the per se prohibition is a starting point of analysis. The good Soldier defense’s history of broad admissibility suggests that the per se prohibition is arbitrary, at least rhetorically; however, the standard of admissibility is flawed and overly broad. Critically, for this analysis, the current standard fails to adequately distinguish military character evidence that is merely relevant versus evidence that is constitutionally required.<sup>27</sup>

Identifying the policy and trial interests served by the per se prohibition is not readily ascertained from the legislative history of the new rule. Most significantly, there is scant material available to provide a coherent explanation for the delineation of offenses subject to the per se prohibition. In contrast, the VPA’s scope of applicability to all offenses was clear.<sup>28</sup> Likewise, the House version of the FY15 NDAA

<sup>17</sup> Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057-6058 (Dep’t of Def. Feb. 4, 2015) (notice of response to public comments).

<sup>18</sup> *California v. Trombetta*, 467 U.S. 479, 485 (1984) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (internal citations and ellipses omitted).”)

<sup>19</sup> “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense,” and “[t]his right is a fundamental element of due process of law.” *Washington v. Texas*, 388 U.S. 14, 19 (1967).

<sup>20</sup> *United States v. Scheffer*, 523 U.S. 303, 308 (1997) (internal quotations and citations omitted).

<sup>21</sup> *Id.* (emphasis added) (citing *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. at 22-23).

<sup>22</sup> *Miskel v. Karnes*, 397 F.3d 446, 455 (6th Cir. 2005) (quoting *Scheffer*, 523 U.S. at 315). See also *Rock*, 483 U.S. at 55 (quoting *Chambers*, 410 U.S. at 295).

<sup>23</sup> See, e.g., *United States v. Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006) (quoting *Washington v. Schriver*, 255 F.3d 45, 47 (2d Cir. 2001)).

<sup>24</sup> *United States v. Court*, 24 M.J. 11, 14 (C.M.A. 1987).

<sup>25</sup> “The Supreme Court long has recognized that, in some circumstances, character evidence alone ‘may be enough to raise a reasonable doubt of guilt,’ as ‘the jury may infer that’ an accused with such a good character ‘would not be likely to commit the offense charged.’” *United States v. Gagan*, 43 M.J. 200, 202 (C.A.A.F. 2005) (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361 (1896)). The good Soldier defense has undoubtedly influenced, if not determined, the outcome of courts-martial; however, it may have also defeated the ends of justice in cases where it should not have been admitted.

<sup>26</sup> *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). *Holmes*’ discussion of *Scheffer* noted that the prohibition upon polygraph evidence at issue “serve[d] several legitimate interests in the criminal trial process,” indicating such interests are trial focused and do not necessarily extend to include broad policy interests of the Government. *Id.* Ensuring “fairness” in the trial process is the baseline objective of any constitutionally-sustainable rule that excludes evidence meeting the definition of “relevant” under MRE 401.

<sup>27</sup> The author takes the position that admissibility has far exceeded the latter standard—with military character evidence admitted anytime it may be vaguely connected to a controversy at trial.

<sup>28</sup> See *supra* text accompanying note 13. From the context of the overall bill, the change appears to have been motivated by a desire to impact the

established and defined a distinction between military specific offenses and common law crimes.<sup>29</sup> Section 536 of the enacted FY15 NDAA provides no such reasoning for the per se prohibition's applicability to some, but not all, of the common law offenses under the Uniform Code of Military Justice (UCMJ).<sup>30</sup>

Specifically, offenses charged as violations of Articles 118 (murder), 119 (manslaughter), 119a (death or injury of an unborn child), 124 (maiming), and 128 (assaults), UCMJ, are not subject to the per se prohibition. Only speculation and inference provide any explanation for Congress' determination that these offenses be treated differently. Moreover, the Congressional Report accompanying the FY15 NDAA adds confusion by stating that the objective of section 536 is to prohibit the good Soldier defense in sexual offenses cases.<sup>31</sup> The absence of useful legislative history or explanatory text does not render the new rule arbitrary itself—however, it does exacerbate concerns of “arbitrariness” and leaves the interests served by the per se prohibition open to interpretation.

The language of the new rule also does not explain the interests served or rationale for differentiating between offenses. First, there is no unifying element or theory of criminal liability tying offenses as disparate as rape, arson, and fraud against the United States Government together.<sup>32</sup>

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good Soldier defense in sexual offense cases despite its broader reach. Had the Victims' Protections Act (VPA) been enacted, the modification of the standard would not have raised the constitutional concerns of the per se prohibition. Further, the Response Systems to Adult Sexual Assault Crimes Panel recommended that, “Congress should enact Section 3(g) of the [VPA] because it may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time”. RESPONSE SYSTEMS PANEL, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, 50 (June 2014), [http://responsesystemspanel.whs.mil/Public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf) [hereinafter RESPONSE SYSTEMS PANEL]. But, it cautioned “that this change is unlikely to result in significant modification of current trial practice.” *Id.*

<sup>29</sup> See *supra* text accompanying note 14.

<sup>30</sup> This exceeded the Response Systems to Adult Sexual Assault Crimes Panel's recommendation. RESPONSE SYSTEMS PANEL, *supra* note 28. Further, responses to a request for information (RFI) from the Panel to the Department of Defense and the services reveal concern over prohibiting military character evidence beyond sexual offenses. For example,

[e]liminating the defense's ability to present good military character evidence would have an unfavorable effect on a broad range of courts-martial” [and] [i]t is important to remember that the military justice system deals with a wide variety of offenses, including both common law crimes and purely military offenses. Good military character evidence promotes fair and just outcomes in many of those cases. It is important to avoid changes to the military justice system designed to have a particular impact on sexual assault prosecutions without a full understanding and appreciation of how those changes would affect the system's fairness when trying cases presenting a vast array of criminal charges.

RESPONSE SYSTEMS PANEL, RESPONSE TO REQUEST FOR INFORMATION 108, <http://responsesystemspanel.whs>.

Second, common law offenses not subject to the per se prohibition relate to murder, lesser included offenses thereof, or offenses premised upon bodily harm. This could be indicative of a desire to preserve the good Soldier defense in alleged war crimes cases—where the lawfulness of actions or omissions may be closely related to duty. However, crediting duty status or circumstances presents an inconsistency: forgery and fraud offenses may likewise be committed ostensibly in the scope of duty, while many assaults may have no connection to the military at all. Congress's absence of a coherent rationale for differentiating between offenses contributes to arguments that the new rule is flawed and arbitrary in application.<sup>33</sup>

The per se prohibition also faces a difficult reconciliation with existing rules and principles of evidence. “[T]he Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant.”<sup>34</sup> Military Rule of Evidence 403 requires that relevant evidence must bear sufficient probative value to overcome countervailing interests or considerations.<sup>35</sup> This concept of balancing also applies to evidence offered under MRE 404(b) and MRE 413.<sup>36</sup> Rules of this nature are “familiar and unquestionably constitutional.”<sup>37</sup> Likewise, MRE 412 includes a balancing requirement under its “constitutionally required” exception, while also providing specific exceptions.<sup>38</sup> In contrast to the

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mil/Public/docs/Background\_Materials/Requests\_For\_Information/RFI\_Response\_Q108.pdf (last visited Dec. 10, 2015).

<sup>31</sup> Instead, the congressional record states that the purpose was to eliminate the “good [S]oldier defense” for the purpose of showing the probability of innocence for sex-related offenses.” H.R. REP. NO. 113-714, at 75 (2014).

<sup>32</sup> See 10 U.S.C. §§ 120-132 (2015).

<sup>33</sup> Further, assuming the exclusion of common law offenses from the per se prohibition is based upon an element of bodily harm, the same issues of inconsistency and lack of a clear policy purpose are presented: Most sexual offenses include an element of bodily harm. See 10 U.S.C. § 920 (2015).

<sup>34</sup> *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

<sup>35</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 403 (2012) [hereinafter MCM]; *Dimberio*, 56 M.J. at 26 (“Rules such as Mil. R. Evid. 403 and 404(a) that exclude evidence from criminal trials do not abridge an accused's constitutional right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. Evidence may be excluded even though of probative value if ‘its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.’” (quoting *Michelson v. United States*, 335 U.S. 469 (1948))); see also *United States v. Clemons*, 16 M.J. 44, 50 (C.M.A. 1983) (Everett, J., concurring) (“In some situations there are strong public policies that favor excluding certain types of relevant evidence.”).

<sup>36</sup> See, e.g., *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989); *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000).

<sup>37</sup> *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion)).

<sup>38</sup> See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). Further, in assessing whether MRE 412 infringes upon an accused's right to present a defense, *Gaddis* notes that the legislative history of MRE 412 “‘makes clear the drafters' intention that this rule should not be applied in derogation of a

per se prohibition, none of these constitutionally-sustainable rules are absolute in nature; the absence of any exceptions or mechanism to balance competing interests presents a significant, if not existential, challenge to the rule.

Returning to *Scheffer*, the Supreme Court held that the absolute prohibition upon polygraph evidence required by MRE 707 did not infringe upon the right to present a defense. Policy considerations for exclusion were persuasive, but it was the Court's determination that polygraph evidence could never satisfy a balancing test that proved dispositive in sustaining the rule.<sup>39</sup> *Scheffer* relied upon a lineage of cases where the right to present a defense was threatened by statute or rules: one such rule precluded an accused from testifying at trial based upon her "hypnotically refreshed" memories,<sup>40</sup> another limited the ability of a co-accused to be called as a witness by a fellow co-accused in the latter's trial,<sup>41</sup> and a common law rule contributed to an accused being denied the opportunity to impeach his own witness.<sup>42</sup> Each case included a bright line rule of prohibition, depriving the trial court of the ability to consider the limitation in light of the particular circumstances of a case; all ended in reversal.<sup>43</sup> These cases involved the denial of any opportunity for the fact finder to consider evidence relating to a *factual matter* in dispute or to consider the confrontation of a witness in support of a defense theory.<sup>44</sup>

It is unclear whether evidence of a *subjective matter*, such as military character evidence, may be treated differently. However, courts have observed that "[t]he power of character evidence cannot be underestimated,"<sup>45</sup> and, "in some circumstances, character evidence alone may be enough to raise a reasonable doubt of guilt, as the jury may infer that an accused with such a good character would not be likely to commit the offense charged."<sup>46</sup> This rationale has sustained

the good Soldier defense in modern practice and is indicia of the "weighty" nature that character evidence may attain. Irrespective of whether evidence is factually based or subjective, an accused's "due process rights are [not] violated any time a . . . court excludes evidence that [an accused] believes is the centerpiece of his defense," rather, "a defendant's due process rights are violated when a . . . court excludes important evidence on the basis of an arbitrary, *mechanistic*, or *per se rule*, or one that is disproportionate to the purposes it is designed to serve."<sup>47</sup> This suggests that courts are unlikely to treat opinion or reputation evidence differently than more substantive evidence.

The propagation of the dubious legal reasoning underlying the current standard of admissibility has left no distinction between evidence that is merely relevant versus that which is constitutionally required. The so-called "nexus test" (discussed in depth in Section IV, *infra*) allows for admission of military character evidence so broadly that the relationship between an offense and character evidence is often "strained."<sup>48</sup> Defining, or redefining, the proper standard for admissibility plays a role in determining whether the rule is arbitrary. Specifically, whether the existing standard—emphasizing a subjective assessment of an offense's attendant circumstances—or an objective assessment strictly limited to an offense's elements emerges as the standard will greatly impact this issue.

Ultimately, without a determination that military character evidence could never be admitted in the offenses subject to the per se prohibition, it will be difficult for the judiciary to find that the per se prohibition is not mechanistic or arbitrary.<sup>49</sup> This consideration is also shared in the disproportionality analysis: a rule that prohibits constitutionally-required evidence is inherently

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criminal accused's constitutional rights." *Id.* at 253 (quoting *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)). See also *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004); *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (discussing the clear policy purposes, legislative intent, and drafter's analysis of MRE 412 and Federal Rule of Evidence (Fed. R. Evid.) 412, respectively).

<sup>39</sup> *United States v. Scheffer*, 523 U.S. 303, 307-08 (1997). The lack of scientific reliability in polygraph results contributed to the conclusion that such evidence could never overcome an MRE 403 balancing test—the prejudice of such evidence could never outweigh the nominal probative value of such evidence provided, based upon its lack of reliability and basis in opinion. *Id.* Further, *United States v. Collier* held that "the term 'unfair prejudice' in the context of [MRE] 403 . . . addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness." *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009).

<sup>40</sup> *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

<sup>41</sup> *Washington v. Texas*, 388 U.S. 14, 16-17 (1967).

<sup>42</sup> *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973).

<sup>43</sup> See *Rock*, 483 U.S. at 44; *Washington*, 388 U.S. at 14; *Chambers*, 410 U.S. at 284.

<sup>44</sup> See *Rock*, 483 U.S. at 56; *Washington*, 388 U.S. at 16-17; *Chambers*, 410 U.S. at 302-03.

<sup>45</sup> *United States v. Gagan*, 43 M.J. 200, 202-03 (C.A.A.F. 2005) (citing *Michelson v. United States*, 335 U.S. 469, 476 (1948); *Edgington v. United States*, 164 U.S. 361 (1896)).

<sup>46</sup> *Gagan*, 43 M.J. at 202-03. Further, "[A]dmissibility of good character evidence is rooted in common observation and experience that a person who has uniformly pursued an honest and upright course of conduct will not depart from it and do an act inconsistent with it." *Id.* at 203 (citing 1A J. WIGMORE, EVIDENCE § 55 (Tillers rev. 1983)). Whether the strength of this dicta is justified in practice is open to debate.

<sup>47</sup> *Alley v. Bell*, 307 F.3d 380, 394 (6th Cir. 2002) (emphasis added).

<sup>48</sup> See Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 131 MIL. L. REV. 171, 185 (1990).

<sup>49</sup> The recommendation of the Response Systems to Adult Sexual Assault Crimes Panel do not create a per se prohibition, and the Army and Coast-Guard responses to the panel should have warned Congress of this issue: "Amending the rules of evidence to preclude 'good military character' evidence in all cases could have constitutional implications on an accused's right to present a defense . . . Eliminating the ability to introduce character on the terms provided in the [MRE] would raise a substantial constitutional issue insofar as it would impede the accused's right to present a defense." RESPONSE SYSTEMS PANEL, *supra* note 28; see also RESPONSE SYSTEMS PANEL, RESPONSE TO REQUEST FOR INFORMATION 108, *supra* note 30.

disproportionate, no matter how strong other legitimate interests may be. Considering the variability in probative value of evidence based upon the circumstances of a case and the strong preference for balancing competing interests under the rules of evidence, the per se prohibition is likely to be read as one of the “mechanistic” rules that the Supreme Court has declared unconstitutional.<sup>50</sup>

## B. Is the Per Se Prohibition a Disproportionate Solution?

Whether the good Soldier defense has assumed “constitutional proportions” is not directly addressed under military or federal case law.<sup>51</sup> However, the ubiquity of the defense makes it difficult to argue that it never assumes such magnitude at trial, even if presented as a complimentary theory to more substantive defenses. The current standard of admissibility makes a disproportionality analysis somewhat difficult, since military character evidence may be relevant in some manner, but not case dispositive or requiring constitutional protection.<sup>52</sup> Only a retrospective analysis, after all evidence has been considered and findings made, can resolve whether military character evidence was sufficiently “weighty” or likely to have changed the outcome of a case.<sup>53</sup>

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<sup>50</sup> Alternatively, though to the detriment of meaningful reform, the strongest argument that the per se prohibition is not arbitrary may be to emphasize the term “general military character” which is ill defined. *See United States v. Wattenbarger*, 21 M.J. 41, 45 (C.M.A. 1985). “General military character” is tolerated as an amalgamation of more specific traits, and not sufficiently “general” to be disqualified under MRE 404(a). Whether good military character has become synonymous with good general character is open to debate. *Cf. United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984) (holding that “a person’s military character is properly considered a particular trait of his general character . . .”). Acceptance of this blurred line between general character and military character is indicia of the powerful nature of tradition, or more charitably, *stare decisis*. “[A]dherence to precedent ‘is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). However, precedent “need not be followed when the precedent at issue is ‘unworkable or . . . badly reasoned.’” *Id.* Abandoning this logic could preclude the need for a constitutional analysis of the rule, leaving it to be interpreted as a restatement of existing law: That evidence of general character is inadmissible. Effectively, aspects of military character would remain admissible in all offenses, so long as what is offered is something more than generalized military character evidence. In other words, the per se prohibition could be preserved by arguing that it is irrelevant and redundant. However, the net effect may be a nullity as subsets of military character such as “character for personal responsibility” or civilian equivalents such as “law abidingness” emerge to assume this role in defense strategy. Only a change in the overall standard of admissibility would bring about any reform. Prosecutors could find themselves in an even more difficult position: With positive aspects of an accused’s character admitted, but the increased specificity stifling effective rebuttal or cross examination upon an accused’s “skeletons in the closet.”

<sup>51</sup> “To my knowledge, the Supreme Court has not made any specific pronouncement as to whether this evidentiary rule or its counterpart in federal or state evidentiary codes has a constitutional dimension.” *United States v. Vandelinder*, 20 M.J. 41, 49 (C.M.A. 1985) (Cox, J., concurring). However, the opinion further notes that “[r]econsideration of . . . the relationship of Article 59(a), [UCMJ], to the standard for constitutional

*United States v. Holmes* illustrates this problem. *Holmes* ended in reversal because of the standard used to exclude evidence of third-party guilt offered by the defense, not because exclusion of such evidence would always infringe upon the right to present a defense.<sup>54</sup> The trial court erred by crediting the prosecution theory and evidence, while conversely finding that defense “evidence of third-party guilt ha[d] only a weak logical connection to the central issues of the case.” The Court was troubled by the fact that “the strength of the prosecution’s case [could not] be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact.”<sup>55</sup> The difficulty in weighing the value of military character evidence without assuming the role of the fact finder has almost certainly contributed to the deference the good Soldier defense enjoys in practice: a “better safe than sorry” approach appears to be widespread even when evidence may be “only marginally relevant.”<sup>56</sup>

The potentially disproportionate consequences of the per se prohibition may be assessed through vignettes:

First, assume that a company supply sergeant has been charged with larceny of Government property in violation of Article 121, and loss or willful disposition of Government property in violation of

error may be appropriate.” *Id.* at n.2. *See also United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006) (describing the burden to demonstrate constitutional error).

<sup>52</sup> The absence of clear reasoning for the application of the per se prohibition (with perhaps the exception of sexual offenses) also contributes to this difficulty. *See supra* text accompanying note 26.

<sup>53</sup> *See United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). *See also infra* text accompanying note 94.

<sup>54</sup> In a victim-based crime, the good Soldier defense may provide an inference of doubt as to whether the offense occurred at all or the complaining witness has mistakenly identified the offender. The latter is similar to the defense theory of third-party guilt in *Holmes*, conceding that an offense occurred, but raising doubt that the accused committed it. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006).

<sup>55</sup> *Id.*

The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution’s proof, and the true strength of the prosecution’s proof cannot be assessed without considering challenges to the reliability of the prosecution’s evidence. Just because the prosecution’s evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.

*Id.*

<sup>56</sup> *Id.* at 325 (quoting *Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also infra* text accompanying note 90 (discussing the often low probative value or impact military character evidence).

Article 108 loss or willful disposition of Government property, UCMJ, as an alternate theory of liability. Prior to unit equipment going missing and ending up at an off-post pawn shop, the Accused was an exemplary Soldier with top-tier non-commissioned officer evaluation reports, his supply standard operating procedure was adopted across his entire battalion, and he had brought a disorganized supply room and subpar supply squad up to standard. In this case, he did not make any statements, and the defense theory is that a subordinate, who denies wrongdoing, actually stole the property. Further, the elderly pawn shop owner cannot identify the Soldier who pawned the equipment and lost the record of the transaction.

This vignette exposes several problems. First, the charged offenses expose a situation where the good Soldier defense could apply to the “military specific offense” charged under Article 108 but not the offense under Article 121, UCMJ. Notably, the former is a general intent crime, while the latter is a specific intent crime. At times the prosecution may allege alternate theories of a case out of necessity, but in this scenario doing so may be detrimental to the overall case; irrespective of a limiting instruction it may be difficult to avoid the spillover of the fact finder’s opinion of the accused from one offense to the other. Second, under the current standard of admissibility, the good Soldier defense could be admitted and considered as a defense for both offenses. A clearly articulable basis for a military nexus exists—both in terms of the accused’s duties and the nature of the property. Even a strict elements based test of admissibility may not preclude this evidence, absent a per se prohibition, assuming the specification alleges that the items are “military property.”<sup>57</sup>

Consider another vignette involving a sexual offense, also exposing the potential for a disproportionate impact of the per se prohibition:

Assume that a male drill sergeant is accused by a female trainee of performing non-consensual oral sodomy during a counseling session in the accused’s office during duty hours. There are no witnesses and no physical evidence is recovered

due to delayed reporting. Further, the putative victim states that under other circumstances she would have engaged in sexual acts with the accused, but in this situation felt coerced. Specifically, she felt that she had to engage in the sexual act based upon the accused’s rank, position, and the inference that the counseling session would end in a recommendation for her separation from the Army if she did not acquiesce.<sup>58</sup> In a statement to law enforcement, the drill sergeant denies any sexual contact or acts, but admits that he found the putative victim attractive. He further claims that she made sexual advances toward him during the counseling session, which he declined. The drill sergeant has an exemplary military record, is happily married, and is a youth pastor at his local church. He also scores a 300 on the Army physical fitness test.

Generally, elements of a sexual assault offense do not directly implicate military responsibility or duties. Likewise, the relationship between the parties is seldom, if ever, required to be directly alleged in a specification, even it is essential to the theory of the case.<sup>59</sup> However, in this scenario the theory of criminal liability is predicated upon a senior-subordinate relationship and military duty—manifested in an ability to coerce the putative victim by threatening wrongful action or quid pro quo.<sup>60</sup> Only by assessing this situation strictly by the statutory elements could the significance of the accused’s military duties, relationship to the putative victim, and context of the threat be overlooked. This vignette highlights the risk of a disproportionate outcome by applying the per se prohibition: a conviction that would not have occurred, but for the exclusion of such evidence that adds context to the military duty at the center of the case.

Under many offenses subject to per se prohibition the facts and circumstances contributing to the theory of criminal liability may be substantially based upon the accused’s military duties or status, despite their nature as common law offenses. Likewise, military duty or status may have no connection to offenses not subject to prohibition, even if described as “military specific.”<sup>61</sup> Ultimately, the per se prohibition as enacted is incompatible with the nuance or balancing required to avoid infringement upon the right to present a defense. The rule’s absolute terms make it likely

<sup>57</sup> Other interesting issues are presented. For example, further assume that the prosecution provides notice under MRE 404(b) that the accused was facing financial problems at the time of the alleged offense. The military judge denies a defense motion in limine and determines that the prosecution may offer such evidence as a motive of the accused. Whether good military character evidence could be used to rebut this type of evidence, if otherwise prohibited, is an issue worthy of consideration in the future.

<sup>58</sup> For a prosecution under Article 120(b)(1)(A), UCMJ, “The term ‘threatening or placing that other person in fear’ means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.” MCM, *supra* note 35, pt. IV, ¶ 45.a.(g).(7); 10 U.S.C. § 920(g)(7) (2015).

<sup>59</sup> As an exception, an offense charged under Article 120(b)(1)(D) alleging an actual or purported relationship between the parties may necessitate charging the element of “inducing a belief by any artifice, pretense, or concealment that the person is another person.” UCMJ art. 120 (2012). For example, a medic pretending to be a gynecologist for purposes of digitally penetrating a fellow Soldier.

<sup>60</sup> Further, consider if the accused had also been charged under Article 92 for violating Army Command Policy prohibiting inappropriate relationships between individuals of different grades. See U.S. DEP’T OF ARMY REG. 600-20, ARMY COMMAND POLICY para. 4-14.b. (6 Nov. 2014).

<sup>61</sup> For example, riot or breach of peace in violation of Article 116, UCMJ. See *supra* text accompanying note 14.

that once a court determines that exclusion in one circumstance has infringed upon the right to present a defense the whole prohibition will fall—underscoring the importance of the residual clause’s interpretation.

#### IV. The Residual Clause in Context

The residual clause’s language alone will do little to change the status quo of admissibility, but other contemporary military justice developments provide a basis for developing a more restrictive standard. The tenuous constitutional footing of the per se prohibition means practitioners should not overlook shaping of the “new” standard prescribed by the residual clause—as this may be *the* standard of the future. However, whether the residual clause presents anything “new” is debatable; it does little more than integrate part of the former drafter’s analysis into the rule. The former drafter’s analysis has been broadly interpreted or ignored by military courts,<sup>62</sup> providing that:<sup>63</sup>

[MRE 404(a) is a] significant change from Para. 138 f of the 1969 Manual [for Courts-Martial] which also allows evidence of “general good character” of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. It is the intention of the Committee, however, to *allow the defense to introduce evidence of good military character when that specific trait is pertinent*. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.<sup>64</sup> (emphasis added).

The new rule has effectively merged the emphasized portion of the drafter’s analysis with a definition of

“pertinent” similar to that found in the case law on the subject.<sup>65</sup> Accordingly, the residual clause does not by itself present a drastic departure from the status quo. Allowing military character evidence when “relevant to any element of an offense” nominally clarifies *what* must be considered, but fails to redefine *how* judges do so. A vast array of circumstances may be imputed or inferred to be related to an element of an offense, leaving the trial judiciary significant leeway to interpret this revision as reconcilable with the current standard.

The ambiguity of the former rule and drafter’s analysis contributed to the broad interpretation of the admissibility of military character. Promulgation of MRE 404(a) in 1980 ushered in the modern era of the good Soldier defense,<sup>66</sup> and prohibited evidence of “general good character.”<sup>67</sup> However, the rule and analysis were generally imprecise.<sup>68</sup> Early interpretations of MRE 404(a) limited the good Soldier defense to military specific offenses, though this reasoning was quickly abandoned.<sup>69</sup> Many were critical of the rule and analysis, and “[t]he leading treatise on the Military Rules of Evidence stated: ‘[i]t might have been preferable for the drafters to amend the rule itself to reflect [limiting the good Soldier defense], rather than attempting to accomplish it through the non-binding Drafters’ [analysis].’”<sup>70</sup>

The legal arguments providing for broad use of the good Soldier defense have traditionally been complimented by several policy considerations: (1) military life entails a “separate society,” (2) the unique nature of military offenses, (3) Soldiers are “under surveillance” and subject to constant scrutiny, and (4) the long standing “tradition” of allowing military character evidence at trial. Proponents argue that each of these factors make “military character” an important

<sup>62</sup> See, e.g., *infra* text accompanying note 73.

<sup>63</sup> MCM, *supra* note 35, MIL. R. EVID. 404 analysis at A22-34.

<sup>64</sup> Paragraph 138f, referenced in the analysis, stated in part, “To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen.” MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f. (1969).

<sup>65</sup> See, e.g., *United States v. Court*, 24 M.J. 11, 14 (C.M.A. 1987).

<sup>66</sup> See Capofari, *supra* note 48, at 172-74 (providing a thorough history of the good Soldier defense and the treatment of character evidence before 1980).

<sup>67</sup> Capofari noted:

The drafters acknowledged that limiting favorable character evidence to pertinent traits was a “significant change” from prior military practice. The only justification for the change given by the drafters was that “general good character” is not a specific

trait. Then the drafters attempted to backpedal. Recognizing the longstanding use of good military character at courts-martial, the drafters stated that the committee intended to continue to permit this evidence “when that specific trait is pertinent.”

*Id.* at 176. Military Rule of Evidence 405(a) allows for opinion or reputation evidence, not specific instances of conduct. MCM, *supra* note 35, MIL. R. EVID. 405(a).

<sup>68</sup> The rule did not attempt to fundamentally alter the overall use of character evidence at trial which is described as “archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-privilege to the other.” *Michelson v. United States*, 335 U.S. 469, 486 (1948) (Jackson, J., concurring) (further remarking “[b]ut somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”). *Id.*

<sup>69</sup> See *infra* text accompanying note 75.

<sup>70</sup> Capofari, *supra* note 48, at 177.

trait of character in practice.<sup>71</sup> One judge summarized this sentiment:

[I]n my judgment, the fact that a person has given good, honorable, and decent service to his country is always important and relevant evidence for the triers of fact to consider. Commanders consider it not only when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense.<sup>72</sup>

This widely prevailing view is embedded in case law and will be difficult to eradicate in practice.<sup>73</sup> Interpretation of the residual clause as a significant limitation upon military character evidence runs counter to thirty five years of case law and an expansive judicial view of what is pertinent. Understanding the nexus requirement for admissibility, and its weaknesses, is essential for proponents of a more restrictive standard.

#### A. Military Character as a Pertinent Trait: The Nexus Requirement

The former drafter's analysis suggests that the probative value of military character evidence is at its zenith when a clear and logical connection between military character and the charged offense, or an element thereof, exists. Admissibility in the illustrative example, disobedience of orders, is logical but is less so in offenses that are unrelated to military service.<sup>74</sup> Initial interpretations of MRE 404(a) were persuaded by the drafter's analysis and adopted a restrictive

standard, but this deferential view was rejected by the Court of Military Appeals.<sup>75</sup>

As the body of case law developed in the mid to late 1980s, military character was found pertinent in an increasingly broad array of offenses, including: drug use,<sup>76</sup> drug possession,<sup>77</sup> assault, aggravated assault, maltreatment,<sup>78</sup> larceny, wrongful appropriation, unlawful entry,<sup>79</sup> conduct unbecoming an officer and a gentleman,<sup>80</sup> and consensual and non-consensual sexual misconduct. Critically, *United States v. Vandelinder* rejected an offense or element based standard, holding that "[i]t is the substance of the alleged misconduct which is pivotal to a determination whether such evidence is 'pertinent.'"<sup>81</sup> Concurrently, the proposition that a good Soldier would be unlikely to intentionally jeopardize his or her personal readiness or the good order and discipline of a unit also became central to judicial reasoning.<sup>82</sup> The combination of this subjective standard and assumption upon behavior formed the "nexus requirement." This standard has allowed for expansive admissibility and propagated the myth that military character evidence is *always* admissible.

Thus, a standard of "questionable salience"<sup>83</sup> premised upon a behavioral assumption without any empirical basis, and the circumstances of an offense, rather than the elements of an offense has prevailed for over thirty years. This standard does not distinguish between evidence that is merely favorable to an accused versus evidence that is constitutionally required.

#### B. Tenuous Reasoning: The Nexus Requirement in Practice

<sup>71</sup> Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 135-43 (2001).

<sup>72</sup> *United States v. Court*, 24 M.J. 11, 13 (C.M.A. 1987) (Cox, J., concurring in part, dissenting in part). This point must be balanced against the reality that despite considering extraneous factors such as military character, the convening authority nevertheless referred the case to court-martial. Judge Cox's opinion appears open to the fact finder deviating from making a thorough and impartial determinations based upon fact.

<sup>73</sup> "These rules have been interpreted very expansively by this Court: 'The broad availability of the good [S]oldier defense is supported by many legal doctrines and policy arguments, but none withstand close analysis. Cloaked in the mantle of longstanding court-martial tradition, justified by doctrines of questionable salience, and preserved by judges resistant to the Military Rules of Evidence's limitations on character evidence, the good [S]oldier defense advances the perception that one of the privileges of high rank and long service is immunity from conviction at court-martial.' This comes "'at the expense of the overall fairness of the court-martial system.'" *United States v. Brewer*, 61 M.J. 425, 433-34 (C.A.A.F. 2005) (Crawford, J., dissenting) (quoting Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 881 (1999)).

<sup>74</sup> However, Lieutenant Colonel Capofari believed otherwise, writing that "disobedience of orders was a poor example. The prohibitions in general regulations define many crimes, and violations of these regulations are punished as disobedience." Capofari, *supra* note 48, at 176.

<sup>75</sup> See, e.g., *United States v. Cooper*, 11 M.J. 815, 816 (A.F.C.M.R. 1981) (providing that "there must be some direct connection between the specific character trait and the offense charged. This connection is made when the accused is charged with an offense which is exclusively military in nature, because individuals with good military character are unlikely to commit such offenses."). See also *United States v. Belz*, 14 M.J. 601 (A.F.C.M.R. 1982), *rev'd*. *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (setting aside the decision based upon its reliance upon Cooper).

<sup>76</sup> *United States v. Brown*, 41 M.J. 1, 3 (C.M.A. 1994).

<sup>77</sup> *Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985); see also *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984) (concerning character for "law abidingness," a close cousin of good military character).

<sup>78</sup> *United States v. Piatt*, 17 M.J. 442, 446 (C.M.A. 1984).

<sup>79</sup> *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1984).

<sup>80</sup> *United States v. Court*, 24 M.J. 11, 11-12 (C.M.A. 1987).

<sup>81</sup> *Vandelinder*, 20 M.J. at 44.

<sup>82</sup> See, e.g., *Piatt*, 17 M.J. at 446; *Clemons*, 16 M.J. at 44; *Court*, 24 M.J. at 11-12.

<sup>83</sup> See *supra* text accompanying note 73.

Notwithstanding the per se prohibition upon military character evidence in sexual offense cases, the legal basis for admissibility was generally poor to begin with for such offenses. The permissive standard of admissibility is reflected in the few published cases that address sexual offenses;<sup>84</sup> such evidence was found pertinent in *United States v. Wilson*<sup>85</sup> and *United States v. Hurst*,<sup>86</sup> albeit tenuously so. In these cases, the military nexus was satisfied by the location and relationship of misconduct to the military community.<sup>87</sup>

In *Wilson*, the military judge found military character to be pertinent to the offenses of maltreatment and assault upon a subordinate, but not in relation to (consensual) sodomy, adultery and indecent language.<sup>88</sup> At trial, the accused testified and denied ever making sexually-charged comments or engaging in adultery with his subordinates' wives.<sup>89</sup> Conceding that the "persuasiveness of such evidence [was] not particularly great," the Court of Military Appeals nevertheless held that the military judge erred by instructing the panel not to consider the evidence in the latter set of offenses.<sup>90</sup> The Court found a sufficient nexus because the case involved "the wife of a subordinate enlisted person under [the accused's] direct supervision," that "[t]he sexual-conduct offenses occurred in the homes of [the accused] and the subordinate soldier which were located in an overseas civilian community . . . [, and] that all these offenses stemmed from

[the accused's] military and later social relationship with the subordinate soldier."<sup>91</sup>

In *Hurst*, the nexus was based upon "[t]he location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family [that] clearly call into question [the accused's] character as a military officer."<sup>92</sup> These cases serve to illustrate how broadly judicial reliance upon the assumption that a good Soldier would not knowingly engage in conduct disruptive to readiness or adverse to his or her unit may be applied.<sup>93</sup> Despite the exclusion of pertinent evidence, neither case resulted in relief for the respective appellants. Both were examined under a four-pronged test for prejudice, assessing whether: (1) the case against the accused was strong and conclusive, (2) the defense theory of the case was feeble or implausible, (3) the proffered testimony was sufficiently material to the defense, and (4) the quality of the proffered defense evidence and whether there was any substitute for it in the record of trial.<sup>94</sup>

These cases illustrate a persistent willingness to declare military character pertinent, but concede that such evidence is not particularly compelling. This underscores the confusion between *relevant evidence* and *constitutionally required evidence*. As *Hurst* noted, "[s]uffice to say, the probative value of such generalized evidence is low."<sup>95</sup> This dissonance presents a challenge to the new rule; one that is likely to require more than commentary in the drafter's analysis to

<sup>84</sup> Cf. *United States v. Hooks*, 24 M.J. 713 (A.C.M.R. 1987) (finding no nexus in an "off-post, off-duty rape and kidnapping of a German female." Further, "[B]ased on the nature and elements of the charges and their specifications, together with the circumstances . . . direct evidence of appellant's military character which was excluded from evidence was not pertinent." Instead, character for truthfulness, law-abidingness, and peacefulness were admitted. Additionally, as a service court decision predating *Wilson* and *Hurst*, it is of limited utility).

<sup>85</sup> *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989).

<sup>86</sup> *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

<sup>87</sup> "The location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family clearly call into question appellant's character as a military officer." *Id.* at 482.

<sup>88</sup> "The military judge admitted the evidence for the obvious 'military' offenses of maltreatment and assault on subordinate servicemembers. He expressly prohibited the members from considering the evidence for what he called the 'civilian' offenses of sodomy, adultery and communicating indecent language, although they involved the wives of appellant's subordinates." *Wilson*, 28 M.J. at 49. See also *Hurst*, 29 M.J. at 482.

<sup>89</sup> Further, the statements or testimony of the respective accused amounted to affirmative denials of some or all of the elements of the charged offenses by claiming a lack of intent and memory, or outright denial. Thus, the good Soldier defense was presented largely as ersatz credibility evidence intended to bolster the core defense theories. In both cases, character for truthfulness was arguably the trait truly at issue.

<sup>90</sup> In *Wilson*, the court stated,

[T]he probative value of appellant's character evidence was not great. He attempted to buttress his denial . . . by offering evidence . . . [that] he was an outstanding professional [S]oldier. However, the persuasiveness of such evidence is

not particularly great because it failed to specifically address the particular type of conduct at issue in the charges against him. Here, no particular evidence was admitted showing his exemplary social conduct with the wives of his subordinates." *United States v. Vandelinder*, 20 M.J. 41, 49 (C.M.A. 1985). In *Hurst*, the inference that the accused was less likely to commit the alleged offense because of his excellent evaluation reports was "somewhat speculative because the reports fail to directly address his sexual morality or his performance as a father.

*Hurst*, 29 M.J. at 482.

<sup>91</sup> *Wilson*, 28 M.J. at 50.

<sup>92</sup> *Id.*

<sup>93</sup> "Admittedly, appellant's 13-year record of exemplary service would have provided 'the basis for an inference that' he 'was too professional a [S]oldier to have committed offenses which would have adverse military consequences.' However, the persuasiveness of this inference is somewhat speculative because the [evaluation] reports fail to directly address his sexual morality . . ." *Hurst*, 29 M.J. at 482 (quoting *Wilson*, 20 M.J. at 49 n.1).

<sup>94</sup> *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). This test appears permissible at the appellate level, but as *Holmes* indicates, trial courts may not conduct such an analysis without interfering with the traditional role of the fact finder by crediting or discrediting aspects of prosecution or defense evidence under the first two prongs. *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006). The latter two prongs are also more effectively assessed post-trial.

<sup>95</sup> *Hurst*, 29 M.J. at 482.

resolve. Litigation will be the primary means of changing the standard.

## V. Refining and Supporting the New Rule

### A. The Per Se Prohibition: For a Limited Time Only

The JSC has little ability to influence the survival of the per se prohibition on a constitutional challenge. The absolute nature of the prohibition prevents the JSC from adding language to the new rule that could generally preserve the rule, such as a caveat of “except when constitutionally required” added to the text.<sup>96</sup> The JSC could add its own articulation of the interests served by the per se prohibition to the drafter’s analysis, but the relative dearth of contemporary scholarly writing criticizing the good Soldier defense or empirical evidence demonstrating unjust outcomes based upon the defense presents a significant limitation.<sup>97</sup> Whether the JSC could create its own reasoning for the rule without a clear basis in law or public record is questionable. Thus, absent Congressional action to rescind or amend section 536 of the FY15 NDAA, the JSC is relatively powerless to change the parameters of judicial interpretation of the per se prohibition. Further, not including these changes or considerations upon promulgation of the rule presents the risk of events overcoming any attempt to mitigate these challenges.

Nevertheless, it would be prudent if the JSC were inclined to improve the new rule by adding, “(vi) A lesser included offense of one of the above offenses,” complimenting the attempts and conspiracy language in the rule. The new rule’s failure to address lesser included offenses presents a problem. Consider a case of abusive sexual contact: assault consummated by a battery in violation of Article 128, UCMJ, is a lesser included offense and not subject to per se prohibition. Under the current standard of admissibility, a paradoxical situation could result where military character evidence could be admitted and considered with respect to a lesser offense, but not the greater offense.<sup>98</sup> This addition would not alter the parameters of the per se prohibition’s constitutionality; however, resolving the issue

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<sup>96</sup> Such a measure would force the judiciary to resolve the line between “relevant” and “constitutionally required,” although the outcome could still be less than what is desired by advocates of reform.

<sup>97</sup> See, e.g., Hillman, *supra* note 73, at 879. See also *supra* text accompanying notes 28, 30.

<sup>98</sup> A military judge could address this inconsistency by (1) interpreting the prohibition to implicitly encompass lesser included offenses, despite any language directing this outcome; (2) admitting the evidence and providing a (somewhat incoherent) limiting instruction in conformity with the rule; or (3) declaring the per se prohibition unworkable and inconsistent with the right to present a defense.

<sup>99</sup> Consider, as an illustrative example, an assault committed by a Soldier upon a non-commissioned officer in a motorpool. This act could be charged under either Articles 91 or 128, UCMJ. The former includes an

would leave a conceptually stronger rule and improve the rule’s workability in practice.

### B. Shaping the Residual Clause with the Drafter’s Analysis

In contrast to the per se prohibition, the JSC has a stronger opportunity to improve the residual clause. Although not binding, the drafter’s analysis could provide direction to practitioners and the trial judiciary upon interpretation of the new language. As discussed previously, the drafter’s analysis has been “out-flanked” by the broad interpretation of the current rule. Ultimately, limiting what may be considered “relevant to any element of an offense” is critical to constraining the good Soldier defense in practice.

To achieve this, the JSC could prescribe an objective (or at least a less subjective) approach than provided for under the current case law in the new drafter’s analysis. This could counter reluctance within the trial judiciary to disturb decades of case law precedent and interpret the standard to be more restrictive. Assuming that the rule as written will be interpreted to require a more rigid adherence to the elements is risky for proponents of reform. Many in the trial judiciary are likely to balk at disregarding the attendant circumstances of an offense that are not directly captured by an element when determining admissibility.<sup>99</sup> As long as admissibility of character evidence under other rules is not strictly limited to an objective or elemental assessment, the adoption of stricter criteria for admitting military character evidence presents a challenge.<sup>100</sup> Crafting a drafter’s analysis that clearly rejects the current standard is almost essential to ensure the new language is interpreted to be consistent with the existing standard.

Fundamentally, the new rule is flawed: the per se prohibition went too far and the residual clause not far enough in defining change to the rule. Capturing the nuance necessary to create a rule that excludes military character evidence that is merely relevant versus that which is constitutionally required is nearly impossible to do in a succinct manner—as is capturing what an “objective” assessment would entail. The best solution is to incorporate a more detailed description of intent and purpose into the drafter’s analysis. To promote a stricter or more objective

elemental nexus to duty (the non-commissioned officer must be shown to be in the execution of his or her duty) while in the latter the duty status and location are immaterial to the non-jurisdictional elements. Could a judge rely upon the jurisdictional elements of an offense to bypass the new rule because it is alleged to have occurred on post and during a duty day? A legally sufficient specification under Article 128, UCMJ, would not have to expressly allege details such as the offense taking place in a motorpool during duty hours; however, these facts would be almost certainly be introduced at trial to prove the date and location of the offense.

<sup>100</sup> See *United States v. Wright*, 53 M.J. 476, 482-83 (C.A.A.F. 2000) (describing factors to be considered in the admission of evidence under MRE 413 and 414); see also *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (describing the admissibility of evidence under MRE 404(b)).

standard of admissibility, the JSC may declare the intent of the Committee to proscribe military character evidence except when it is *inextricable from an element of an offense*. The following language is illustrative of this principle:

In addition to the statutory elements of an offense, in cases where an element necessarily includes the identification of a named victim, military character evidence may be admitted where a direct and clearly articulable relationship between the accused's duties and the named victim exists. The existence of such a relationship should not in itself serve as a basis of admissibility, rather such relationship must be considered in conjunction with the other elements of the offense. For example, an alleged off-duty aggravated assault at a public park between Soldiers who are assigned to the same battalion would not in itself create a nexus to military duty. In contrast, such a nexus may exist where a drill sergeant is alleged to have assaulted a trainee while in the official performance of his or her duties.

Unequivocally confronting the military nexus test (defined in case law) through the drafter's analysis assures the judiciary will address this matter sooner, rather than later. Moreover, establishing that the existing standard is incompatible with the new language will make it more difficult for the trial judiciary to avoid at least some tightening of the standard. However, if the past is a guide, courts may be willing to sidestep the drafter's analysis, no matter how strongly worded or compelling the illustrative examples may be.

### C. Shaping the Residual Clause Through Litigation

Ultimately, litigation will play a necessary role in shaping the residual clause. Political considerations and public perceptions of military justice notwithstanding, justification for the use of the good Soldier defense is weaker now than a generation ago.<sup>101</sup> A broad litigation strategy to

support reform should: (1) undermine the basis for the subjective military nexus test and its assumption that a "good Soldier" will not jeopardize readiness; (2) challenge the policy arguments supporting admissibility; and, (3) potentially highlight the overly generalized and ill-defined nature of military character as a trait, so far as this generally minimizes its probative value.

It has been suggested that the archaic service-connection test for jurisdiction in courts-martial influenced judicial thinking upon MRE 404(a) when promulgated: "[m]andated by *O'Callahan v. Parker*, the prosecution was required to show that the offense was service connected to establish military jurisdiction. . . . One commentator stated that the test for service connection was dependent only upon the imagination of the prosecutor."<sup>102</sup> Although this doctrine has faded from practice, it draws attention to another doctrine that has been altered since 1980. *United States v. Miller*,<sup>103</sup> decided in 2009, rejected the principle that the terminal elements of Article 134, UCMJ,<sup>104</sup> (entailing prejudice to good order and discipline or discredit of the armed forces) were implied in all enumerated offenses. Subsequently, there has been no judicial reevaluation of the military nexus test.<sup>105</sup> The absence of an implied element conceptualizing duty provides a compelling basis for reexamination of the military nexus test, even if this principle was only a tacit form of judicial reasoning on the subject.<sup>106</sup>

*Miller* and other contemporary cases have emphasized the importance of fair notice in pleadings and the high degree of scrutiny required in determining lesser-included offenses.<sup>107</sup> The reasoning of these cases may be applied to the nexus requirement. Moreover, these cases may be construed as a basis to limit imputation of the "good Soldier ideal" into offenses: if an accused Soldier is not on fair notice that he or she must defend against an element of good order and discipline, how can evidence addressing that issue be relevant to the charged offense? Likewise, using a sexual offense or assault consummated by a battery as an example, the impact of the offense upon the military readiness of any person or the cohesion of a unit is unnecessary to sustain a

<sup>101</sup> Although not a focal point of this article, whether the idea of the military entailing a "separate society" is as compelling today as it was in the 1980s is worth considering.

<sup>102</sup> Capofari, *supra* note 48, at 185 (quoting *O'Callahan v. Parker*, 395 U.S. 258 (1969)). Under the current standard, the nexus required for admissibility is often dependent only upon the imagination of the defense or military judge.

<sup>103</sup> *United States v. Miller*, 67 M.J. 385, 389-90 (C.A.A.F. 2009). *Miller* expanded upon *United States v. Medina*, 66 M.J. 21, 26-29 (C.A.A.F. 2008), and rejected the longstanding view expressed in *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994), that every enumerated offense under the UCMJ includes an implied element of either prejudice to good order and discipline in the armed forces or service discrediting conduct. The analysis focused upon fair notice to the accused and ascertaining lesser included offenses.

<sup>104</sup> 10 U.S.C. § 934 (2015).

<sup>105</sup> However, at least one judge has recognized the impact of *Medina*, *Miller*, and *Jones*, writing, "The character trait of 'good military character,' formerly deemed relevant to contest almost every charge under the Code, will now be limited, on the basis of relevance, to those offenses where the trait is truly implicated—it will not be available to defend against battery, but it might be available to defend against battery on a commissioned, warrant, noncommissioned, or petty officer." *United States v. McMurrin*, 69 M.J. 591, 601 (N. M. Ct. Crim. App. 2010) (Booker, S.J., concurring).

<sup>106</sup> The presumption that a good Soldier would not jeopardize readiness or good order and discipline formerly enjoyed an articulable relationship to an element, albeit implied, for all offenses. Although never articulated to be the dispositive basis of admissibility, this understanding may have contributed to judicial deference when determining admissibility of military character evidence.

<sup>107</sup> See, e.g., *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

finding of guilt.<sup>108</sup> These considerations never require proof, and thus, are not relevant if an objective, strictly elemental analysis is conducted. This serves as a strong argument to limit the good Soldier defense outside of Article 134, UCMJ, offenses or offenses containing an element that directly encapsulates some aspect of military service. This change in the construction of offenses has weakened the validity of the current military nexus analysis and is a useful starting point for advocates of more restrictive standard of admissibility.

Beyond legal arguments, the policy justifications<sup>109</sup> for the good Soldier defense are weak in many offenses, with the “tradition” of admissibility the most troubling. Defense teams have probably benefited from this “tradition” by seldom having to fully establish a foundation of military character evidence.<sup>110</sup> Case law reveals that the defense often succeeds in admitting such evidence when the probative value is low, and rarely if ever must demonstrate any degree of predictive power associated with good military character.<sup>111</sup> If forced to do so, defense counsel will find it difficult to provide empirical evidence that good duty performance is indicative of a decreased propensity to commit offenses, especially offenses like sexual assault.<sup>112</sup>

Next, again considering victim based crimes, the view that military life entails a “separate society” and involves constant “surveillance” may be misplaced. The good Soldier defense tends to favor or have greater benefit to individuals who have served a longer period of time, often at higher grades<sup>113</sup>—a segment of the military population more likely to live off-post or in private quarters. Other changes in military housing—including the degree privacy afforded to junior enlisted Soldiers in their barracks—and technology may reduce the persuasiveness of this argument versus the 1980s.<sup>114</sup>

The final policy justification, the “unique military nature of offenses,” is unpersuasive in the setting of many offenses.

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<sup>108</sup> The impact upon the unit or the reputation of the armed forces is never an element of these offenses, even if such evidence would be aggravating for presentencing purposes.

<sup>109</sup> See Katz, *supra* note 71.

<sup>110</sup> See, e.g., *United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989); *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

<sup>111</sup> “The location of the offenses on base, their abusive and degrading nature and their deleterious impact on the military family clearly call into question appellant’s character as a military officer.” *United States v. Hurst*, 29 M.J. 477, 482 (C.M.A. 1990).

<sup>112</sup> See, e.g., Judith V. Becker & William D. Murphy, What We Know and Do Not Know about Assessing and Treating Sex Offenders, 4 *PSYCHOL., PUB. POL’Y., & L.* 116, 121 (1998), <http://psycnet.apa.org/journals/law/4/1-2/116.pdf> (“[T]here is no one theory that will explain the heterogeneity of offending, and it is likely that these disorders are multicausal.”).

<sup>113</sup> See Hillman, *supra* note 73.

<sup>114</sup> The assumption that military personnel remain distinctly separate from local civilian communities is worth reconsidering, based upon changes in the size of the military and changes in housing patterns since the 1980s (e.g.

Victim-based offenses charged under Articles 120 or 128, UCMJ, are not inherently of a military nature.<sup>115</sup> These offenses are not aimed specifically at readiness, compliance with regulations, or enforcing social norms within the ranks. Rather, they are a codification of common law crimes that may be charged and applied irrespective of a putative victim’s status or relation to the military.<sup>116</sup> These crimes are fundamentally the same in their nature whether committed by military personnel or by civilians. Of course, within civilian courts, there is no such thing as “the good plumber defense” or the “good barista defense.”<sup>117</sup> In those professions, the fact that an employee is on time, technically proficient at unclogging sinks or making iced lattes, physically fit, and able to maintain accountability of copper pipes or coffee beans is not compelling or pertinent to whether that individual committed a crime. Litigation is the most effective means to challenge the nexus requirement and breadth of the good Soldier defense’s admissibility. However, achieving a strictly objective standard is unlikely given the obstacles created by the preference for balancing interests, the totality of circumstances, and the right to present a defense.

#### D. The Road Not Taken

A more prudent course of action may have been for Congress to limit direct prohibition to sexual offenses (including attempts, conspiracies, and lesser included offenses thereof) as the legislative history suggests was the original purpose and impetus of reform.<sup>118</sup> Evidence of good military character is not inherently confusing, inflammatory, or salacious. Instead, the prejudice of this evidence may be measured by its impact upon the fairness of the trial process.

consolidation under base realignment and closure, changes in the style of military housing, and the potential changes in the degree of privacy afforded to Soldiers).

<sup>115</sup> As the second vignette in Section III discussed, in the case of a senior using authority to compel acquiescence to a sexual offense upon a subordinate, the duty relationship is an exception to this general conclusion.

<sup>116</sup> For example, in *United States v. Hooks*, 24 M.J. 713 (A.C.M.R. 1987), it is conceivable that the military nexus analysis could have resolved in favor of admissibility had the victim had been a dependent rather than a German civilian. The potential for such disparate treatment is problematic from a policy perspective, if not a legal one.

<sup>117</sup> Military character, irrespective of whether it is appropriately a specific or a general trait, is amalgamated from other traits such as technical proficiency in a military occupational specialty (MOS), high physical fitness aptitude, timeliness, and adherence to orders. In essence, it is a catch all term to describe an individual’s job performance. Some of the factors Soldiers encompassed in “military character” are misplaced in the context of a sexual offense case. For example, when could the accountability of office equipment ever be relevant to an alcohol-facilitated sexual assault?

<sup>118</sup> See H.R. REP. NO. 113-714 (2014).

The critical question is whether this evidence confers an unfair advantage upon the accused.

This concern is amplified and apparent in victim-based offenses, namely sexual offenses. Under the Military Rules of Evidence, the defense may attack a putative victim's potential biases or motives under MRE 608(c), as limited by MRE 403 or 412, and then bolster the accused by introducing military character evidence (without the accused testifying). No comparable means of bolstering the reputation of a victim with character evidence is available, except when a character trait (e.g. truthfulness) is first attacked by the defense at trial.<sup>119</sup> Despite the relatively stronger policy basis for limiting the good Soldier defense in sexual offense cases, the constitutionality of an outright prohibition remains doubtful, as the preceding senior-subordinate vignette demonstrates.

A more effective reform effort may have limited its scope to the offenses defined by MRE 413(d) and MRE 414(d), prescribed more precise terms for modification of the standard, and incorporated a notice requirement for military character evidence—forcing the defense to affirmatively establish the basis of admissibility.<sup>120</sup> However, to mitigate the impact on the right to present a defense a prohibition could include “except when constitutionally required” as a caveat to a prohibition. If the new rule is overturned, Congress and the JSC would be wise to respond with more focused limitations aimed at sexual offense (and even domestic violence) cases.

## VI. Conclusion

Irrespective of Congressional action or intent, many judges and practitioners will continue to believe that past “good, honorable, and decent service to [the] country is always important and relevant evidence for the triers of fact to consider.”<sup>121</sup> Conversely, a failure of reform will reinforce perceptions that the military justice system is antiquated, incapable handling sexual offense cases, and in need of drastic reform. When admitted beyond constitutionally-required circumstances, the good Soldier defense credits the idea that the military has made itself a separate society—and will use this status as a justification to protect its own at trial. Ultimately, the best intentions of Congress have left practitioners with a deeply-flawed rule, unlikely to survive judicial review intact. The good Soldier defense is not dead yet.

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<sup>119</sup> MCM, *supra* note 35, MIL. R. EVID. 404(a); *see also id.* MIL. R. EVID. 608(b).

<sup>120</sup> Military Rule of Evidence 404(a) shall be modified to clarify that the military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused in any offense of sexual assault, as defined by MRE 413(d), or any offense of child molestation, as defined by MRE 414(d), and attempts, conspiracies to commit, or lesser included offenses thereof, unless such evidence is constitutionally required. The defense shall file a written motion at least five days prior to entry of pleas specifically describing such evidence unless

the military judge, for good cause shown, requires a different time for filing or permits filing during trial. In other instances, evidence of a trait of the military character of an accused may be offered in evidence by the accused to show the probability of innocence only when pertinent to an element of an offense for which the accused has been charged and a substantial nexus between the accused's military duties or status has been established by the defense.

<sup>121</sup> *United States v. Court*, 24 M.J. 11, 13 (Cox, J., concurring in part, dissenting in part).

## “Punished As a Court-Martial May Direct”<sup>1</sup>: Making Meaningful Sentence Requests

Lieutenant Colonel Charles L. Pritchard, Jr.\*

*[U]nsupported arguments for a lopsided result are neither persuasive nor helpful . . . and result in counsel wasting the opportunity to meaningfully influence [an] appropriate sentence.<sup>2</sup>*

### I. Introduction

Do you struggle to identify a good reason for the specific sentence you want to request? Have you requested the sentencing authority adjudge a specific sentence without knowing yourself whether it was the “right” sentence? Have you given up on the idea that there is a logical connection between the crimes and a certain period of incarceration? The answers to these rhetorical questions are highlighted in the following excerpts taken from sentencing arguments of trial and defense counsel in actual courts-martial.<sup>3</sup>

#### *Trial Counsel Arguments:*

“The accused needs to go to jail for at least twenty-eight years. He is twenty-two years old right now. He will be fifty when he gets out.”

“Eighteen years in confinement will allow the victim to recover, deal with what’s been done to her, enter adulthood, and possibly have a family of her own, without the worry of the accused being free before she sees her thirtieth birthday.”

“Your Honor, you should add up the minor victims’ ages and make the accused serve confinement for that long.”

#### *Defense Counsel Arguments:*

“Return a sentence not as excessive and overreaching as the government suggests, but one that fits with what you’ve seen.”

“The accused needs to be with his family. Years in prison will only mean that he may never see them again. They need him. Any double digit number is going to be too much.”

“Give him a dishonorable discharge but only give him twenty years confinement—ten years for each victim.”

As demonstrated by these examples, court-martial practitioners struggle to formulate reasons that support the specific sentences they request. Too often, their arguments for specific sentences are illogical, meaningless, and unhelpful to the sentencing authority.<sup>4</sup> If this is true for a military judge who has the experience to know the sentencing ballpark, imagine the impact of such unreasoned arguments on a court-martial panel. Major General George S. Prugh, former Judge Advocate General of the Army, addressed this: “The initial sentencers . . . are not told what the purpose of the sentence is; they are not told what should be their goal. They are . . . generally left to their own devices to fit the pieces together in one intelligible sentence.”<sup>5</sup> This is not a good way to make, arguably, the most important decision in a Soldier’s life. However, practitioners can remedy this deficiency through professional development and a logical, empirical methodology to litigating sentencing theory. This article encourages the former and offers an example of the latter. First, this article will present an overview of civilian and military sentencing philosophy; then it will offer a method for litigating sentencing theory.

### II. Overview of Sentencing Philosophy

To understand sentencing theory is to ask why we punish. There is no one answer, and various theories have experienced zeniths and nadirs in popularity over time. This section will first recount the various theories as they came into and out of sentencing vogue and then address sentencing theory in the military.

#### A. Sentencing Philosophy Generally

Modern sentencing philosophy began at the turn of the nineteenth century in the writings of Immanuel Kant and G.W.F. Hegel. They focused on retribution,<sup>6</sup> but only retribution that restored the criminal to his status quo ante. Both Kant and Hegel believed in individual autonomy and that the infliction of harm on the individual via punishment

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<sup>1</sup> Every punitive article of the Uniform Code of Military Justice includes this language, except Articles 106 (Spies—“shall be punished by death”) and 134 (General article—“punished at the discretion of that court”). See 10 U.S.C. § 870 et seq. (2015).

<sup>2</sup> Jody Russelburg, Major, U.S. Army, *Sentence Arguments: A View from the Bench*, ARMY LAW. 50-51 (March 1986).

<sup>3</sup> Publication of these paraphrased arguments is not meant to belittle the counsel but is offered to teach others.

<sup>4</sup> The author willingly admits that he made similar arguments as a trial practitioner. As a military judge, he has listened to a few exceptional sentencing arguments that displayed much of the methodology offered in Section III.B. of this article.

<sup>5</sup> George S. Prugh, Major General (U.S. Army), ARMY LAW. 1, 4 (December 1974).

<sup>6</sup> See IMMANUEL KANT, *The Penal Law and the Law of Pardon*, in THE METAPHYSICAL ELEMENTS OF JUSTICE, § I (John Ladd trans., Bobbs-Merrill 1965) (1798); G.W.F. HEGEL, *Wrong [Das Unrecht]*, in ELEMENTS OF THE PHILOSOPHY OF RIGHT, § 101 (Allen W. Wood, ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821).

was wrong unless it fortified individual autonomy. Kant stated that each individual who participates in the social compact wrongs himself as a beneficiary of the compact when he wrongs others.<sup>7</sup> Punishment is just, therefore, because it is a physical manifestation of the wrong the individual has done to himself.<sup>8</sup> Hegel saw punishment as the righting of a wrong, but only the wrong: “[A]n injury to the [will of the criminal] is the cancellation of the crime . . . and the restoration of right.”<sup>9</sup> Both Kant and Hegel disclaimed any purpose of punishment that is utilitarian, i.e., punishment that serves some future purpose.<sup>10</sup>

In the 1820s, Jeremy Bentham challenged the retributivists by arguing for the principle of utility in sentencing. Bentham believed sentences should serve “the greatest happiness of all those whose interest is in question . . .”<sup>11</sup> Sentences, then, should serve the ends of “reformation” (i.e., rehabilitation) and “disablement” (i.e., incapacitation) of the wrongdoer; “pleasure or satisfaction to the party injured;” “coercion or restraint” (i.e., general deterrence); and “apprehension” (i.e., specific deterrence) in addition to “sufferance” (i.e., retribution).<sup>12</sup> Therefore, sentencing authorities should consider the wrongdoer’s intention and consciousness; issues of causation and material consequences; and the level of temptation inspired by the profit of the wrong and the quantum of pain required to outweigh that temptation.<sup>13</sup>

<sup>7</sup> KANT, *supra* note 6, at § I.

<sup>8</sup> *Id.*

<sup>9</sup> HEGEL, *supra* note 6, at § 99.

<sup>10</sup> Kant said, “a human being can never be manipulated merely as a means to the purposes of someone else . . .” KANT, *supra* note 6, at § I. Hegel dismissed specific deterrence stating that punishment could never claim to change a person’s disposition. HEGEL, *supra* note 6, at § 94.

<sup>11</sup> JEREMY BENTHAM, *The Utilitarian Theory of Punishment*, in AN INTRODUCTION TO PRINCIPLES OF MORALS AND LEGISLATION, Ch. I (J.H. Burns et al. eds., Athlone 1970) (1789).

<sup>12</sup> *Id.* at Ch. XIII, §§ 1 n.a., 4. Bentham also referred to “coercion or restraint” as “example.” *Id.*

<sup>13</sup> *Id.*, at Ch. XII, paras. VI, XXIV, Ch. XIV, para. IX.

<sup>14</sup> Retributivist theory exists almost in a vacuum because it does not consider the community or the offender’s individual characteristics in determining his blameworthiness. Utilitarian theory, on the other hand, permits unjust excesses: Excessive punishment for minor crime is permissible because the threat of punishment exceeds the temptation of gain from wrongdoing; and punishment of the innocent is permissible as long as it deters others.

<sup>15</sup> Antony Duff, *Penance, Punishment, and the Limits of Community*, 5 PUNISHMENT & SOC’Y 295, 301 (2003). The wrongdoer must undergo “a burdensome penalty . . . to reconcile him with the community.” *Id.*

<sup>16</sup> See, e.g., Tapio Lappi-Seppala, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry et al. eds., Oxford Univ. Press 2001).

<sup>17</sup> See, e.g., Sheldon Glueck, *Principles of a Rational Penal Code*, in CRIME AND CORRECTION: SELECTED PAPERS, (Addison-Wesley Press

Both the retributivist and utilitarian approaches suffer, however, in that the former is under-inclusive and the latter overinclusive.<sup>14</sup> Other philosophers attempted to refine both theories. Anthony Duff said retributive sentencing should be viewed as an opportunity for the wrongdoer to make moral reparations.<sup>15</sup> The utilitarian Tapio Lappi-Seppala said general deterrence is only viable if the public knows the punishment for certain crimes and whether certain offender behavior could aggravate or mitigate that punishment and to what extent.<sup>16</sup> Sheldon Glueck said that punishment should be a medicine to reform the wrongdoer.<sup>17</sup>

The rise of behavioral science pushed utilitarianism to the fore, and it maintained prominence in western sentencing until the 1970s.<sup>18</sup> In the mid-1970s, however, the pendulum swung back toward retributivism and determinate sentencing;<sup>19</sup> and in 1984, Congress passed the Sentencing Reform Act<sup>20</sup> to establish sentencing determinacy. While the federal courts experimented with the novel sentencing guidelines, new sentencing philosophies emerged in the 1990s. “Restorative justice” philosophers prioritized repairing harm over punishing offenders.<sup>21</sup> Social theorists questioned the value of incarceration.<sup>22</sup> The most prevalent, recent philosophy is a brand of mixed retribution-utilitarian theory,<sup>23</sup> which is reflected in the Federal Sentencing Guidelines. Current military sentencing philosophy is in

1952) (1927). Glueck proposed a quasi-judicial “treatment board” of doctors and psychiatrists to assess a criminal’s treatment needs and help the judge form a sentence that fulfills those needs. *Id.*

<sup>18</sup> WHY PUNISH? HOW MUCH?, at 18 (Michael Tonry, ed., Oxford Univ. Press 2011).

<sup>19</sup> See Glueck, *supra* note 17, at 20-21. Utilitarianism unsettled many because of its unpredictability, almost unbounded judicial discretion, the inability to appeal sentences because of a lack of sentencing rules by which to judge them, and the “moral appropriateness of attempting to coerce changes in human beings.” *Id.* at 21.

<sup>20</sup> 28 U.S.C. § 994 (2015).

<sup>21</sup> John Braithwaite stated that as long as the offender takes part in the healing process, it matters not whether he “takes responsibility.” See, e.g., John Braithwaite, *In Search of Restorative Jurisprudence*, in RESTORATIVE JUSTICE AND THE LAW (Walgrave ed., Willan 2002). Lode Walgrave proposed a stakeholder mediation process where the victim, the offender, and others directly affected by the wrong would make a sentence recommendation to the judge. Lode Walgrave, *Restoration in Youth Justice*, CRIME AND JUSTICE: A REVIEW OF RESEARCH 31, pts. C, E (Michael Tonry et al. eds., Chicago Univ. Press 2004).

<sup>22</sup> Some questioned whether poor minorities, which represent a majority of prison inmates, are truly members of the social compact (and thereby bound by its rules) in that they do not benefit from the compact. See *supra* note 18, at Ch. 25. Others questioned whether prison conditions should be made worse than poor minorities’ normal living conditions in order to maximize general deterrence. *Id.* at Ch. 26.

<sup>23</sup> For example, T.M. Scanlon added three “values” of punishment to retribution: affirmation of victims as respected citizens; punishing similarly situated offenders similarly; and deterrence. T.M. Scanlon, *Punishment and the Rule of Law*, in THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY (Cambridge Univ. Press 2003).

accord with this philosophy, but it took a different track to get there.

## B. Sentencing Philosophy in Military Courts

While the civilian sentencing philosophy pendulum swung from retributive to utilitarian and back to center (mixed retributive-utilitarian), military sentencing philosophy progressed like building blocks.<sup>24</sup> Prior to World War I, military sentencing was still dominated by Kantian retributivism.<sup>25</sup> The sentence was based on the crimes and not on factors associated with utilitarianism.<sup>26</sup> The military did not officially incorporate utilitarianism until the publication of the 1917 Manual for Courts-Martial (MCM).<sup>27</sup> That Manual provided sentencing considerations for panel members: retribution, the interests of the service, and the individual characteristics of the accused.<sup>28</sup> Subsequent versions of the MCM added more utilitarian considerations.<sup>29</sup> In 1950, the new Uniform Code of Military Justice permitted panel members to consider more and different sentencing evidence.<sup>30</sup> Military appellate courts clearly embraced utilitarianism in a spate of 1950s-era decisions: protection of society, general deterrence, “denunciation,” and rehabilitation.<sup>31</sup> Military sentencing philosophy never fully shed itself of retributivism, however. It merely added, albeit incrementally, utilitarian principles to a retributivist system.

Such a mixed system remains today, and military judges instruct court-martial panel members to consider rehabilitation, punishment, protection of society, preservation of good order and discipline in the military, and special and general deterrence.<sup>32</sup> However, no guidance other than a one-sentence instruction—buried in a glut of instructional language—exists to help sentencing authorities craft just sentences. If trial practitioners employ a logic-based, methodical approach to litigating sentencing theory, their arguments for specific sentences will be helpful and meaningful and rein in the sentencing authority’s almost unbounded discretion.

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<sup>24</sup> For a more thorough look at military sentencing history, see Denise K. Vowell, Captain (U.S. Army), *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (Fall 1986).

<sup>25</sup> *Id.* at 109.

<sup>26</sup> *Id.*; see also, W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 397 (2d ed. 1920). Such other factors were viewed as collateral to the crimes and therefore collateral to the sentence; their only relevance was to clemency. *Id.* at 396.

<sup>27</sup> See Vowell, *supra* note 24, at 113.

<sup>28</sup> *Id.* at 113-14 (quoting *MANUAL FOR COURTS-MARTIAL*, 1917, para. 342).

<sup>29</sup> The 1928 MCM directed panel members to consider the accused’s prior discharges to determine his character. *Id.* at 116-17. The 1949 MCM obliquely permitted consideration of rehabilitation, special and general

## III. Litigating Sentencing Theory

Forget that specific sentence you think you want to request. Instead, determine how you are going to get there. To effectively litigate your sentencing theory, you must first ensure that your merits theme and your sentencing theory are cohesive and then present your sentencing theory methodically.

### A. Selecting the Theory

Rather than working backward from a specific sentence you want to request and forcing the rest of your case to fit, work forward from your merits case to determine the specific sentence you should request.<sup>33</sup> The starting point for any sentence determination is the wrong itself—the wrong is what requires a sentence. What do the facts from the merits case say about the accused (is he a predator?; an opportunist?; a repeat offender?; a generally good person with one lapse in judgment?); good order and discipline (did the offenses cause an increase of indiscipline in the unit?; did the offenses adversely affect unit or individual readiness?); and the offenses themselves (how serious was each offense in comparison to the least and most serious versions of that offense?). The facts during the merits case tell a story—that story is your theme.

Take the case of an officer-in-charge, who, having no resident supervisors, maltreats and sexually assaults his subordinates over a significant course of time while threatening adverse administrative action if they report his wrongs. A prosecution theme might be “abuse-of-power.” In the case of a drill sergeant who has consensual sex with a trainee on the eve of the trainee’s graduation, thereby violating Army and command policies, a defense theme might be “lapse-in-judgment.” In either case, the theme points toward certain sentencing factors. In the former, the theme points to the sentencing factors of punishment, incapacitation, and good order and discipline. In the latter case, the theme points to rehabilitation and deterrence. These sentencing factors become your theory.<sup>34</sup> Developed in this manner, the

deterrence, and the need to preserve respect for the military justice system. *Id.* at 118.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 122 and n.181 (citations omitted).

<sup>32</sup> See U.S. DEP’T OF ARMY, PAM 27-9, *MILITARY JUDGES’ BENCHBOOK* para. 2-6-9 (1 Jan. 2010). See also, *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001).

<sup>33</sup> “Merits case” refers to the facts surrounding the offenses whether litigated or in a stipulation of fact.

<sup>34</sup> Although the law “recognizes” five principle theories of sentencing, a sentencing authority is not required to apply all of them to a given case. “One interest may be accepted by the sentencer as the dominant interest to be best satisfied by the sentence adjudged.” Russelburg, *supra* note 3, at 51.

theme and theory are cohesive; one logically leads to the other.

Once the facts determine the theme and the theme determines the theory, you must refine your theory. If multiple sentencing factors are applicable, will presentation of all of them support your sentence request or dilute it? For example, in the abuse-of-power case, does incapacitation really help the government's argument for confinement? If the fear is that the accused will harm others if left in a position of authority, the appropriate remedy is to remove his authority (dismissal from the service would accomplish this) so confinement would not be necessary. However, if the real goal is to exact retribution on the accused for the sake of society and the victims, the government should rely on the sentencing factor of punishment (which supports both confinement and dismissal); adding incapacitation will likely detract from the case (unless articulated as supporting a dismissal). On the other hand, the lapse-in-judgment case described above may dictate the defense argue both rehabilitation and deterrence—there is no need to reform a good person who makes a small mistake, the accused has already been deterred by the court-martial process and the conviction, and any general deterrence should be slight given the lack of harm. After refining the sentencing theory, the counsel must present it to the sentencing authority.

## B. Presenting the Theory

The presentation of the sentencing theory should show the logical connection between merits and presentencing facts (the what), sentencing theory (the why), and the requested sentence (the how).

### 1. Empirically Support the Theory

The first step is determining what additional presentencing facts are necessary to support the theory. The presentencing evidence should supplement the merits case rather than establish a separate set of facts. In other words, the presentencing evidence should feed into the sentencing theory. Some presentencing facts will be important to the theory and others less so. The method of presenting each (a letter versus an affidavit versus a phone call versus in-person testimony) should reflect its relative importance to the theory.

As a military judge astutely noted nearly three decades ago, “an accused who has just been convicted of rape and murder is not likely to benefit significantly from the fact that he has always had highly polished boots and a neat haircut.”<sup>35</sup>

<sup>35</sup> Russelburg, *supra* note 3, at 51.

<sup>36</sup> HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE, 400-01 (Oxford Univ. Press 1979).

<sup>37</sup> Criminologist John Braithwaite noted that the core restorative justice intuition is that because crime hurts, justice should heal. *See* Braithwaite, *supra* note 21.

More to the point, such evidence may not reinforce the selected sentencing theory. Perhaps that evidence is best presented by a letter enclosed in the accused's “good Soldier book.”

### 2. Articulate the Theory

The second step is to articulate the theory to the sentencing authority. First, transition from theme to theory. Demonstrate how the merits case demands consideration of the particular sentencing theory. Second, describe the sentencing theory. Get beyond the maxim and explain the theory. Waxing eloquent about Bentham or Hegel likely will not help, but explaining to the sentencing authority what the sentencing theory aims to achieve will.

For example, retribution is not simply about vengeance; rather, it is a balancing of scales, giving the offender what he deserves so he can be made right, and preventing “the dissipation of [the laws'] power that would result if they were violated with impunity.”<sup>36</sup> Good order and discipline is not just about general deterrence; it is also about maintaining readiness, ensuring the validity of the military disciplinary system, and demonstrating that the military is responsible to the law. Rehabilitation is more than the accused's aphoristic “potential to be returned to a useful place in society”; it is about realizing a society where citizens depend on and trust each other to maximize each person's benefit to the social compact—the sentencing authority can create one more or one less taxpayer with a job that helps other people. Incorporating short but cogent quotes from philosophical writings that capture the essence of the various theories can be helpful to the sentencing authority.

Finally, after describing the selected theory, undermine your opponent's theory. Know what theory opposing counsel is likely to select, understand that theory as well as your own, and explain why it is not applicable. If your theory is rehabilitation and your opponent's theory is retribution, ask the sentencing authority whether it is more consistent with human dignity to “wreak vengeance” or to heal<sup>37</sup> and whether it is more helpful to society to punish or to build constructive societal partners. If your opponent argues that the accused need not be rehabilitated because he knows his wrong and apologized to his victims, argue that “[b]eing remorseful, by itself, is not atonement . . . .” and that an insistence on “mitigation for remorse is to undercut the sincerity of the remorse itself.”<sup>38</sup> In explaining why your sentencing theory is the better fit, direct the sentencing authority's attention back to the merits and presentencing facts that support the theory (reinforcing the theme-theory cohesion). Once you

<sup>38</sup> Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of 'Restorative Justice'*, 2003 UTAH L. REV. 375, 382 (2003). Robinson said that “the punishment discount for remorse will always be a pleasant surprise to the truly remorseful.” *Id.* at 383 n.20.

place the sentencing theory firmly in the sentencing authority's mind, you must draw the link between the theory and a particular sentence.

### 3. Identify Appropriate Types of Punishment

The third step in presenting the theory is determining which types of punishment are appropriate based on the identified theory. This depends on whether your theory is retributivist or utilitarian. For example, is it appropriate to consider confinement? Incapacitation does not always mean confinement; for purely military offenses, incapacitation could mean taking away the accused's ability to impact the military (i.e., a discharge). For specific and general deterrence, how can you measure what level of punishment will deter? Certainly confinement can deter; the better question, however, is whether a sentence can deter without confinement. If the answer is yes, confinement is not appropriate for deterrence.<sup>39</sup> Does retribution demand confinement? Taking a Kantian view of retribution, confinement will only be appropriate if the accused deprives someone of their liberty.<sup>40</sup> This is a difficult principle to employ: Does the accused deprive anyone of their liberty by stealing \$50,000 of Basic Allowance for Housing?; sexually assaulting a sleeping or unconscious victim?; or using controlled substances? These questions must be asked because the only purpose of retribution is to right the wrong. Utilitarian principles might approve of confinement to serve some other purpose, but retribution does not.

To illustrate this, consider the abuse-of-power and lapse-in-judgment cases, above. In the abuse-of-power case, the sentencing theory is retribution. Did the accused deprive his subordinates of their liberty by assaulting and mistreating them such that he should also suffer deprivation of liberty? Although difficult, the argument is not impossible. While assaulting them, the accused "confined" them for the period of his assaults; they were not free to go about their duties or enjoy the safety of the laws by which they were abiding; and they were subject to his orders and could not exercise their freedoms for fear that he would deprive them of their livelihoods. On the other hand, in the lapse-in-judgment case the government's sentencing theory is likely deterrence, a utilitarian principle. The argument for confinement is easier, because its purpose is to convince others who are similarly situated not to engage in the same misconduct. The difficulty for the government, however, will be explaining the need for this message and that some lesser sentence than confinement will not serve that end.

<sup>39</sup> See BENTHAM, *supra* note 11, at Ch. XIV, pt. XIII ("punishment ought [not] be more than what is necessary").

<sup>40</sup> See KANT, *supra* note 7, at § 1 ("underserved evil that you inflict on someone else is one that you do to yourself").

<sup>41</sup> See, e.g., ROBERT A. FERGUSON, *INFERNO*, 14 (Harvard Univ. Press 2014) ("The basis of a sentence ... exists not in the number of years assigned, but in what that number means in relation to ... years in prison for more serious crimes"). Given that a court-martial panel is not instructed on

### 4. Determine the Sentence Range

The fourth step in presenting the sentencing theory is to identify the range of appropriate punishment for each offense and for all offenses taken together. It is difficult to determine where a sentence falls in the range of no punishment to the maximum punishment authorized. First, determine how serious each offense is in relation to other possible factual permutations of that same offense. Did the accused smoke one marijuana cigarette on Friday night, smoke five marijuana cigars the night before a helicopter preflight check, sniff cocaine inducing bleeding from the nose, inject heroin while pregnant, or jump off a second-story balcony in a crystal methamphetamine-induced psychotic state? In a sexual assault case, did the accused engage in digital, oral, or penile penetration? Was the victim unconscious? Did he violently subdue her? Determining gradations of seriousness within each offense can help narrow the range of appropriate punishment.<sup>41</sup>

Second, determine how the various offenses interact. Are there separate sentencing goals for each offense? Did the accused inflict disparate harms or violate separate and distinct societal norms? Do the offenses reflect essentially one transaction even though there may be multiple victims, multiple harms to one victim, or multiple offenses over a course of time (regardless of whether the military judge finds an unreasonable multiplication of charges<sup>42</sup>)? The answers dictate whether the separate offenses should be treated separately—and therefore whether the range of punishment should be increased. The sentencing theory matters here as well. In retributivist philosophy, each wrong must be righted and determining the number of wrongs affects the punishment range. In utilitarian philosophy, the number of wrongs is less important. If the accused had a single criminal impulse but committed several crimes, should he suffer more pain to deter him from future misconduct than if that single impulse had resulted in only one crime? Do multiple crimes demonstrate that the accused is less susceptible to reformation than if he had committed one crime? If the answer to these questions is no, then aggregating punishment for different offenses does not serve the end of that sentencing principle.

This punishment range is only the starting point. Although Kant and Hegel would end the inquiry there, modern retributivists recognize that other factors influence the "value" or seriousness of the crime. Joel Feinberg states that in determining the "moral gravity" of the crime, the

the maximum punishment for each offense, counsel can only articulate these gradations in the abstract. Counsel should not give a court-martial panel the impression that it may do other than return a single, specific sentence.

<sup>42</sup> See RULE FOR COURTS-MARTIAL 906(b)(12), MANUAL FOR COURTS-MARTIAL (2012); *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

offender's motive is important.<sup>43</sup> Therefore, an accused's specific intent or benign motive could shift the appropriate sentence upward or downward within the punishment range. Herbert Morris implores consideration of "different degrees of fault."<sup>44</sup> Jeffrey Murphy might agree that an accused who has begun paying his debt has reduced that debt, and his punishment should be commensurately reduced.<sup>45</sup> Non-retributivist philosophers have offered other measurements for determining the value of crimes. Some argue that, because retribution is aimed primarily at the offender, the offender's background and social susceptibility to crime must be considered.<sup>46</sup> Therefore, those at the lower end of the socio-economic spectrum should be punished less because they have benefited less from the social compact. Others encourage sentencing authorities to consider issues of causation.<sup>47</sup> Whether the accused's act was the sole, or a contributing, cause of harm impacts the "materiality" of the wrong and could increase or decrease the sentence. The selected sentencing theory should determine the availability of these adjustments. Moreover, counsel should explain why the sentencing theory permits such adjustments in order to sustain the logic of the sentence request.<sup>48</sup>

#### IV. Conclusion

Sentencing arguments often seem to be an afterthought, and requests for specific sentences are woefully devoid of any connection to facts or logic. When counsel request a sentence that appears to be a "randomly selected result" rather than a "carefully considered conclusion,"<sup>49</sup> counsel are merely dumping the considerable burden of sentence determination on the sentencing authority. In doing so, they are not helping their clients. The counsel who helps the sentencing authority understand why the facts dictate a particular result is the counsel who shapes the sentence to benefit her client. Major General Prugh noted, "[F]ar too little attention has been paid to the *reasons* underlying [argued for] sentences. We should ask ourselves the question, 'What are we trying to have the sentence achieve?'"<sup>50</sup> More importantly, counsel should effectively litigate sentencing theory that explains what the sentence should seek to achieve. Practitioners best accomplish this by expanding their professional development programs to include writings on sentencing philosophy and by taking a forward-looking, logical approach to requesting a specific sentence.

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<sup>43</sup> Joel Feinberg, *The Expressive Function of Punishment*, THE MONIST 49(3): 397, 422 (1965).

<sup>44</sup> Herbert Morris, *A Paternalistic Theory of Punishment*, AMERICAN PHILOSOPHICAL QUARTERLY 18(4): 263, 266 (1981).

<sup>45</sup> Jeffrey Murphy, *Marxism and Retribution*, PHILOSOPHY AND PUBLIC AFFAIRS 2: 217, 228 (1973).

<sup>46</sup> See, e.g., Michael Tonry, *supra* note 19, at 217-18; Lappi-Seppala, *supra* note 17.

<sup>47</sup> BENTHAM, *supra* note 11, at Ch. XII, pt. XXIV.

<sup>48</sup> NB: Counsel should not give the sentencing authority the impression that it may return a sentence of a range of punishment (e.g., "to be confined for one to two years").

<sup>49</sup> Russelburg, *supra* note 3, at 51.

<sup>50</sup> Prugh, *supra* note 6, at 1.

# Team of Teams: New Rules of Engagement for a Complex World<sup>1</sup>

Reviewed by Captain Mark E. Bojan\*

*If we were the best of the best, why were such attacks not disappearing, but in fact increasing? Why were we unable to defeat an underresourced insurgency? Why were we losing?<sup>2</sup>*

## I. Introduction

“This isn’t a war story,” cautions retired Army General Stanley McChrystal in the introduction to *Team of Teams: New Rules of Engagement for a Complex World*.<sup>3</sup> “Far beyond soldiers, it is a story about big guys and little guys, butterflies, gardeners, and chess masters. The reader will meet slimy toads, mythical beasts, clanging machines, and sensitive ecosystems.”<sup>4</sup> *Team of Teams* is an after-action report delivered in the engaging style of *Freakonomics*.<sup>5</sup> It is also a thought-provoking look through the eyes of a senior commander at the historical development of organizational management models and the effectiveness of those models in the twenty-first century. Leaders tempted to reach for a bigger hammer would be wise to consider General McChrystal’s hard-won lesson in problem-solving.<sup>6</sup>

In 2004, General McChrystal commanded the Joint Special Operations Task Force in Iraq (the Task Force).<sup>7</sup> “[B]y any objective standard we were the finest special operations fighting force in the world—‘the best of the best.’”<sup>8</sup> The Task Force was pitted against Al Qaeda in Iraq (AQI), the “most prominent and savage of the many terrorist operations that had sprung up in the wake of the U.S. invasion.”<sup>9</sup> General McChrystal gives the tale of the tape:

On paper, the confrontation between AQI and our Task Force should have been no contest. We had a large, well-trained, superbly equipped force,

while AQI had to recruit locals and smuggle in foreign fighters one by one through dangerous, unreliable ratlines. We enjoyed robust communications technology, while they were often dependent on face-to-face meetings and letters delivered by courier to minimize the risk of detection. Our fighters had persevered through the most demanding training in the history of special operations; theirs had attended a smattering of madrassas scattered across the Arabian Peninsula and North Africa. We could, at will, tap into an unmatched well of firepower, armored vehicles and cutting-edge surveillance; their technology consisted of [Improvised Explosive Devices (IEDs)] assembled in safe-house basements from propane tanks and expired Soviet mortars.<sup>10</sup>

The Task Force’s advantages seemed overwhelming. However, the reality was that they were unable to prevent AQI from carrying out devastating terror attacks that inflicted enormous loss of life. “The tragedy of the September 30 sewage plant attack was an unwelcome reminder that, despite our pedigree, our gadgets, and our commitment, things were slipping away from us.”<sup>11</sup> In examining this improbable situation, *Team of Teams* provides a fascinating explanation of why the fight against AQI was a new kind of war that had to be fought in a new way.<sup>12</sup>

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<sup>1</sup> STANLEY MCCHRISTAL WITH TANTUM COLLINS, DAVID SILVERMAN AND CHRIS FUSSELL, *TEAM OF TEAMS: NEW RULES OF ENGAGEMENT FOR A COMPLEX WORLD* (2015).

<sup>2</sup> *Id.* at 19.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.*

<sup>5</sup> See generally STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005) (using detailed discussion of historical examples to illustrate the application of economic principles).

<sup>6</sup> ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* (1966), at 15 (“I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”).

<sup>7</sup> MCCHRISTAL, *supra* note 1, at 3, 18. General McChrystal also commanded the Joint Special Operations Task Force in Iraq (Task Force’s parent organization, the Joint Special Operations Command (JSOC), which had been organized years earlier in response to the catastrophic failure of the attempted rescue of American hostages in Iran in 1980. *Id.* at 48-49; see also Mark Bowden, *The Desert One Debacle*, *THE ATLANTIC*, May 2006,

<http://www.theatlantic.com/magazine/archive/2006/05/the-desert-one-debacle/304803/> (discussing the failed rescue attempt and the tragic series of events that led to the deaths of eight U.S. servicemembers).

<sup>8</sup> MCCHRISTAL, *supra* note 1, at 18.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 18.

<sup>11</sup> *Id.* at 19. On September 30, 2004, in a meticulously planned and tightly coordinated operation, Al Qaeda in Iraq (AQI) suicide bombers drove two vehicle-borne improvised explosive devices (VBIEDs) into a crowd of locals gathered to celebrate the opening of a new, American-built sewage pumping plant in Baghdad. *Id.* at 13-17. Coalition forces opened fire on a third VBIED, causing it to detonate prematurely. *Id.* at 17. However, the attack resulted in the deaths of at least thirty five children, with ten Americans and 140 Iraqis wounded. *Id.* at 16-17.

<sup>12</sup> The conflict provides context, but the real value of *Team of Teams* lies in the broader application of the lessons learned. The Army has taken these lessons to heart. See generally U.S. DEP’T OF ARMY TRAINING AND DOCTRINE COMMAND, PAM. 525-3-1, *THE U.S. ARMY OPERATING CONCEPT: WIN IN A COMPLEX WORLD* (31 Oct. 2014) (incorporating the concept of complexity discussed throughout *Team of Teams* into the Army’s strategic development plans for 2020-2040).

## II. One of These Things Is Not Like the Other

The Task Force was initially organized in accordance with standard Army doctrine.<sup>13</sup> Unable to account for AQI's success in the face of what should have been overwhelming opposition, the Task Force tried to identify exactly what it was that made AQI so effective. "We examined a litany of possible variables—the history of the region, the virulence of AQI's ideology, and the no-holds-barred tactics they adopted—but none could adequately account for what we were seeing on the ground."<sup>14</sup> A key insight came when Task Force staff used low-tech whiteboards to diagram connections and relationships in AQI's organizational structure. They were convinced that the familiar structures of conventional military units must be present, but the reality proved to be something new and entirely unexpected:

[I]n place of the straight lines and right angles of a military command, we found ourselves drawing tangled networks that did not resemble any organizational structure we had ever seen. The unfamiliar patterns that blossomed on our whiteboards seemed chaotic and riddled with contradictions—taking them in was like reading a technical document in a foreign language.<sup>15</sup>

Critically, the networked nature of AQI had apparently not been designed, but had instead "evolved through ongoing adaptation" to take advantage of its operating environment.<sup>16</sup> But what drove AQI's adaptation? What conditions make having a small, networked organization an advantage in a military conflict against a large, traditionally-organized enemy?

For AQI, the short answer was that the technological advances of the last fifty years had made information available instantly and globally, resulting in an unprecedented level of interconnectedness. "AQI was successful because the environment allowed it to be."<sup>17</sup> General McChrystal observed that although the Task Force was the best staffed

and equipped special operations force in the world, "we were not—as an organization—the best suited for that time and place."<sup>18</sup> The root of the problem the Task Force faced was that the "twenty-first century is a fundamentally different operating environment than the twentieth."<sup>19</sup>

The challenge for the Task Force was how to adapt to this environment to get back into the fight. General McChrystal describes the Task Force as a "veritable leviathan in comparison with AQI. How do you train a leviathan to improvise?"<sup>20</sup>

## III. Prediction Versus Adaptation

To answer that question, *Team of Teams* examines the origins of organizational management models. In the military context, the drive has historically been toward efficiency, to allow troops and their commanders to do the most with the fewest resources.<sup>21</sup> Efficiency promotes predictability. By eliminating variables, commanders are better able to predict what forces are necessary to win the fight.<sup>22</sup>

On the civilian side, efficiency in business translates to profit. Frederick Winslow Taylor's "scientific management" movement had an enormous impact on worldwide industrial development throughout the twentieth century.<sup>23</sup> As Taylor's ideas bled over into government and military operations, the drive to create more efficient fighting forces only increased.<sup>24</sup>

Over time, Taylor's concept of workers as fundamentally lazy, unthinking cogs in a machine has largely been left behind.<sup>25</sup> "Nevertheless, Taylor's *foundational* belief—the notion that an effective enterprise is created by commitment to efficiency, and that the role of the manager is to break things apart and plan 'the one best way'—remains relatively unchallenged."<sup>26</sup> Indeed, says General McChrystal, Taylor would have been delighted to tour the Task Force's facilities in Iraq and see the clockwork operation of the forces there.<sup>27</sup> However, despite the greatly increased operational tempo of

<sup>13</sup> Readers from all walks of life will likely be familiar with traditional organizational charts that depict a single leader at the top, with successive, branching areas of subordinate command and responsibility as one reads down the chart. See generally U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND (17 May 2012) (C2, 12 Mar. 2014); U.S. DEP'T OF ARMY, PAM. 10-1, ORGANIZATION OF THE UNITED STATES ARMY (14 June 1994) (providing multiple examples of typical military organizational charts).

<sup>14</sup> MCCRYSTAL, *supra* note 1, at 24.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 27.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* "It was more than just chat rooms and YouTube: AQI's very structure—networked and nonhierarchical—embodied this new world." *Id.* at 28.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 34-36.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 36-42. See generally FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911) (promoting the theory that management's role is to see the big picture, and that workers should execute discrete, repeatable tasks as rapidly as possible).

<sup>24</sup> MCCRYSTAL, *supra* note 1, at 44. "In the years leading up to World War I . . . [r]eductionist master planners broke down offensives into the number of feet and inches that each brigade would be expected to advance each hour." *Id.* During World War II, "reductionist systems enabled tens of thousands of untrained sharecroppers to become welders and shipbuilders in the span of a few months." *Id.*

<sup>25</sup> *Id.* at 46.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 48.

the Task Force—the bigger hammer—the Task Force had still not stopped AQI.<sup>28</sup>

#### IV. Form and Function

Taylor's management model is designed to allow large organizations to perform *complicated* tasks efficiently. "Complicated" is a term of art that refers to multi-part systems (such as machines) where the parts interact in relatively known, simple ways.<sup>29</sup> The machine operates with a predictable result and the impact of changes to the machine may also be predicted, if not perfectly.<sup>30</sup> By contrast, in a *complex* system, "[T]he number of *interactions* between components increases dramatically," making the outcome of the interactions unpredictable.<sup>31</sup> What did this mean for the Task Force?

[O]ur actions were the product of our planning, and our planning was predicated on our ability to predict. (Or more precisely, our perception of our ability to predict—our belief that we understood the workings of the clock.) But by 2004 our battlefield behaved a lot more like the capricious movements of a cold front than like the steady trajectory of Halley's Comet. New communications technologies [had created] a dense tangle of interconnectedness. These events and actors were not only more interdependent than in previous wars, they were also faster. The environment was not just complicated, it was *complex*.<sup>32</sup>

And so, General McChrystal had identified the structural problem: "In Iraq, we were using complicated solutions to attack a complex problem. *For decades we had been able to execute our linear approach faster than the external environment could change.*"<sup>33</sup> But that was no longer possible. At its core, the issue was lag time: by the time a plan was approved, battlefield conditions had changed and

made the plan useless. "We could not predict where the enemy would strike, and we could not respond fast enough when they did."<sup>34</sup> AQI, on the other hand, had scaled the connectivity and adaptability of small teams to the enterprise level.<sup>35</sup> The Task Force had to change how it did business to minimize the lag between information and action.

#### V. Changes

General McChrystal's solution, which he compared to "redesigning the plane in midflight," was as elegant as it was untested.<sup>36</sup> In a complex (and therefore unpredictable) environment, adaptability is a survival trait. In order to create a more adaptable organizational structure, General McChrystal proposed to scale up to the full Task Force the characteristics that made the small special operations teams under his command so effective. But how to do that? Clearly, it was unrealistic to attempt to create a single, seven-thousand-member team. Simply calling the Task Force a "team" would not make it function as one.<sup>37</sup> In truth, the Task Force was already a "command of teams," with multiple individual teams operating under a centralized command structure.<sup>38</sup> However, the individual teams were still operating in silos, answerable to higher command but not cross-connected.<sup>39</sup>

To allow the Task Force to leverage the teams' individual adaptability and responsiveness at the macro level, General McChrystal built a *team of teams*, in which the relationships between the constituent teams resembled those among the individuals on a single team: each team needed to trust the other teams, and so be bound by a cooperative sense of common purpose.<sup>40</sup> That trust allowed the evolution of a Task Force-wide shared consciousness, in which everyone became aware of the overall mission and the relationship between their personal and team missions (and the missions of other teams) to the Task Force's overall goal.<sup>41</sup>

<sup>28</sup> *Id.* at 50.

<sup>29</sup> *Id.* at 57; see, e.g., Ariel Adams, *Ultimate Guide to Watch Complications*, THE WATCH GALLERY (Aug. 16, 2013), <http://www.thewatchgallery.com/magazine/ultimate-guide-to-watch-complications/> (referring to the functions of a mechanical watch as complications).

<sup>30</sup> MCCHRISTAL, *supra* note 1, at 57.

<sup>31</sup> *Id.* Note the use of the term *complex* in the full title of *Team of Teams*. The book contains an extensive discussion of complexity theory and its impact on systems of all kinds. *Id.* at 53-69. Although well-written and of great interest, deeper analysis of that discussion is beyond the scope of this review.

<sup>32</sup> *Id.* at 59.

<sup>33</sup> *Id.* at 69 (emphasis added).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 114. "None of AQI's individual elements was better than ours, but that did not matter; a team, unlike a conventional command, is not the sum of its parts. Even if their nodes were weak, their network was strong." *Id.*

<sup>36</sup> *Id.* at 84.

<sup>37</sup> See *id.* at 126-27 (discussing the concept of diminishing returns for increased size as applied to teams).

<sup>38</sup> *Id.* at 129.

<sup>39</sup> *Id.* The authors' graphical representations are helpful in understanding the organizational structures at issue.

<sup>40</sup> *Id.* at 128. One hurdle was the deliberately inculcated squad-centric nature of special operations forces. This internal focus was a function of training and service culture. "The squad is the point at which everyone else sucks," said one SEAL. *Id.* at 127. Changing that focus for the good of the Task Force as a whole would require years of focused effort.

<sup>41</sup> *Id.* at 164-70 (discussing the building of trust via constant contact and information transparency). One reviewer observed that there is "no mention of the 160,000 non-[Special Operation Forces] SOF military members

Among the significant changes General McChrystal made, one stands out. It is a rare, self-aware leader who asks whether he is part of the problem:

The wait for my approval was *not* resulting in any better decisions, and our priority should be reaching the best possible decision that could be made *in a time frame that allowed it to be relevant*. I came to realize that, in normal cases, I did not add tremendous value, so I changed the process.<sup>42</sup>

That process, which later came to be called *empowered execution*, pushed decision-making authority down the chain of command so long as the decision supported the Task Force and was both moral and legal.<sup>43</sup> Unexpectedly, this resulted in both faster and better-quality decisions by subordinates.<sup>44</sup>

By 2006, this empowered decision-making process had engendered an organization-wide responsiveness to current conditions. The Task Force was back in the fight against AQI and working more effectively than ever before.<sup>45</sup> General McChrystal's unorthodox experiment had worked.

## VI. Conclusion

*Team of Teams* is part history lesson, part roadmap, and part cautionary tale. It is a candid assessment of the effectiveness of traditional management models in the information-dense and cross-connected environment of the twenty-first century. It is a case study in how the application of the principles underlying those models (including the courageous decision to abandon those that were not working) transformed an organization. Most importantly, it is a frank challenge to military and civilian leaders and their organizations to either adapt to the changing demands of the world around them or be left behind.

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[who] shared the Iraqi battle space with [the Task Force], or their complimentary role as the admittedly non-cool, non-special team in the team of teams." David Fastabend, *Team of Teams: The New McChrystal Book is Good But a Bit Heavy on SEAL Role*, FOREIGN POLICY (May 12, 2015), <http://foreignpolicy.com/2015/05/12/811593/>. This is true, as far as it goes, but—without taking a position on relative coolness—there is a good reason for the SOF-centric writing (beyond the fact that two of the authors are former SEALs). The SEALs and other SOF teams carried out the Task Force's direct, daily mission against AQI. The adaptability and interconnectedness that made those teams so successful ultimately served as models for the macro-reorganization of the Task Force. Personnel worldwide supporting the Task Force were unquestionably vital to its mission. However, their characteristics were different and the same level of fluidity of action and adaptability necessary in the SOF teams was not required for the majority of support personnel to be successful in their individual missions. *Team of Teams* may be forgiven for focusing on its central message.

<sup>42</sup> MCCHRISTAL, *supra* note 1, at 209.

<sup>43</sup> *Id.* at 214.

<sup>44</sup> *Id.*

<sup>45</sup> By 2006, this "eyes on—hands off" approach allowed the Task Force to conduct upward of three hundred raids per month, a seventeen-fold increase from 2004. It also resulted in the successful termination of Abu Musab al-Zarqawi, the leader of AQI, and multiple high-level AQI operatives in a single night. *Id.* at 218, 236-41; *see also* Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader Al-Zarqawi Killed in Iraq*, WASH. POST (June 8, 2006, 5:57 PM), <http://www.washingtonpost.com/wpdyn/content/article/2006/06/08/AR2006060800114.html> (providing additional background on the death of al-Zarqawi).

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