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# MILITARY LAW REVIEW

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Charlottesville, Virginia



**MILITARY LAW REVIEW—VOLUME 135**

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experiences and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to writings that have lasting value as reference materials for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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### BOOK REVIEWS

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# MILITARY LAW REVIEW

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## IS THE DOCTRINE OF EQUITABLE TOLLING APPLICABLE TO THE LIMITATIONS PERIODS IN THE FEDERAL TORT CLAIMS ACT?

RICHARD PARKER\*

### I. Introduction

For many years, and with few exceptions, the Circuit Courts of Appeal have adhered to a strict, jurisdictional view of the limitations periods contained in the Federal Tort Claims Act (FTCA).<sup>1</sup> Specifically, the courts have held that these limitations periods are conditions upon the waiver of sovereign immunity contained in the Act.<sup>2</sup> They define the scope of a federal court's subject matter jurisdiction in a tort action brought against the United States. Because the limitations periods are jurisdictional in nature, they must be observed strictly by plaintiffs and construed narrowly by the courts. Moreover, their jurisdictional nature renders them unsuitable to equitable tolling. It follows, therefore, that untimely administrative

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\* Captain, Judge Advocate General's Corps (MdARNG), Deputy Staff Judge Advocate, 29th Infantry Division (Light), Assistant United States Attorney, Eastern District of Virginia; J.D., St. John's University School of Law, 1982; B.S. *summa cum laude*, Notre Dame College of St. John's University, 1979. The views expressed in this article are the author's and are not necessarily those held or advocated by the United States Department of Justice or the executive agencies of the United States. The author wishes to express his appreciation to Larry L. Gregg, Esq., and Ms. Carol Shea for their contributions to this article.

<sup>1</sup> 28 U.S.C. § 2401(b).

<sup>2</sup> See, e.g., *Gould v. United States Dept. of Health and Human Services*, 905 F.2d 738 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 873 (statutes of limitation in tort actions against the federal government under the FTCA are jurisdictional and nonwaivable); *Houston v. United States Postal Serv.*, 823 F.2d 898 (5th Cir. 1987) (FTCA limitations periods are jurisdictional, so that equitable considerations that may waive or toll limitations periods in suits between private litigants are inapplicable).

claims may not be adjudicated by the executive agencies, and untimely lawsuits may not be heard by federal district courts, because both are without jurisdiction to entertain these dilatory submissions.

Recently, in *Irwin v. Veterans' Administration*,<sup>3</sup> the Supreme Court held that, as a general proposition, the doctrine of equitable tolling is applicable to statutes of limitation in lawsuits brought against the United States.<sup>4</sup> The Court reasoned that the doctrine is presumptively applicable to statutes of limitation in suits involving private litigants. In many instances, the United States has opted to waive its sovereign immunity and to be treated as a private litigant. The Court held that in these situations the doctrine is equally applicable to lawsuits involving the federal sovereign.<sup>5</sup> One of the questions left unanswered by the *Irwin* Court is the applicability of its broad holding to the limitations periods contained in the FTCA.

This issue recently was addressed by the United States Court of Appeals for the Eighth Circuit in the case of *Schmidt v. United States*.<sup>6</sup> In its initial decision in *Schmidt*, the circuit court affirmed the district court's dismissal of an untimely FTCA suit, holding that the initiation of an action against the United States within the statutory six-month period is a jurisdictional requirement.<sup>7</sup> The Supreme Court granted Schmidts' petition for a writ of certiorari, vacated the judgment below, and remanded the case to the Eighth Circuit for further consideration in light of its decision in *Irwin*.<sup>8</sup> On remand, the circuit court held that the FTCA's limitations periods are not jurisdictional, and strict compliance with them is not a jurisdictional prerequisite to a suit against the government. Moreover, the FTCA's limitations periods may be equitably tolled over the government's objection.<sup>9</sup>

This article argues for the proposition that the Eighth Circuit's decision in *Schmidt* is erroneous, and the general rule set forth in *Irwin* "govern[ing] the applicability of equitable tolling to suits against the Government"<sup>10</sup> should not be applied to

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<sup>3</sup> 111 S. Ct. 453 (1990).

<sup>4</sup> *Id.* at 457.

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

<sup>6</sup> 933 F.2d 639 (8th Cir. 1991), previously reported at 901 F.2d 680 (1990), judgment vacated and remanded, 111 S. Ct. 944 (1991).

<sup>7</sup> *Schmidt*, 901 F.2d 680 (1990).

<sup>8</sup> *Irwin*, 111 S. Ct. 944.

<sup>9</sup> *Schmidt*, 933 F.2d at 640.

<sup>10</sup> *Irwin*, 111 S. Ct. at 457.



the limitations periods contained in the FTCA. Application of the doctrine of equitable tolling to the FTCA's limitations periods is inconsistent with clearly discernible congressional intent and well-established canons of statutory interpretation. Moreover, the general rule set forth in *Irwin* is inimical to the operation of the remedial scheme established by the Act, and unnecessary to secure equitable treatment for time-barred claims.

## II. *Irwin v. Veterans' Administration*

Shirley W. Irwin, an employee of the Veterans' Administration (VA) Medical Center in Waco, Texas, was discharged from his position on April 17, 1986.<sup>11</sup> He contacted an agency equal employment (EEO) counsellor on June 12, 1986—twenty-five days after his termination from federal employment.<sup>12</sup> He alleged, *inter alia*, that he was fired unlawfully on the basis of his race.<sup>13</sup> The VA rejected his claim because it was untimely.<sup>14</sup> Irwin appealed the VA's rejection of his claim to the Equal Employment Opportunity Commission (EEOC). The Commission affirmed the VA's decision and notified both Irwin and his attorney of its decision by mail.

On March 27, 1987, the EEOC's decision arrived at the office of Irwin's attorney. The attorney, however, was in South Korea with his United States Army Reserve unit.<sup>15</sup> Accordingly an employee signed a receipt for the decision.<sup>16</sup> Irwin later claimed to have received it on April 7, 1987; his attorney claimed to have actually become aware of the decision on April 10, 1987.<sup>17</sup> Irwin filed suit in the United States District Court for the Western District of Texas on May 6, 1987—twenty-nine days after he claimed to have received the EEOC's decision on his appeal, but forty days after it was received in his attorney's office.<sup>18</sup>

The district court determined that it lacked jurisdiction over Irwin's Title VII suit because it was filed in an untimely manner. Specifically, the court determined that the thirty-day pe-

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<sup>11</sup> *Irwin v. Veterans' Admin.*, 874 F.2d 1092 (5th Cir. 1989), *aff'd*, 111 S. Ct. 453 (1990).

<sup>12</sup> *Id.* at 1093.

<sup>13</sup> *Irwin*, 111 S. Ct. at 455.

<sup>14</sup> *Irwin*, 874 F.2d at 1093.

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

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

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

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

riod within which Irwin was required to file suit began to run on the day that the EEOC's decision was received in his attorney's office—not when Irwin received it.<sup>19</sup> Consequently, the court dismissed Irwin's suit.

The Court of Appeals for the Fifth Circuit affirmed the district court's opinion.<sup>20</sup> It determined that the district court properly applied the "constructive notice" doctrine to the attorney's receipt of the EEOC's decision. It further held that the thirty-day period within which to file a lawsuit is a condition on the waiver of sovereign immunity contained in Title VII.<sup>21</sup> It operates as a jurisdictional bar to judicial consideration of untimely suits, and is not subject to equitable tolling.<sup>22</sup> Consequently, Irwin's suit was untimely, and the district court lacked jurisdiction over it.<sup>23</sup>

The Supreme Court granted certiorari and affirmed the Fifth Circuit's decision.<sup>24</sup> In doing so, however, it completely eviscerated the jurisdictional rationale employed by the court of appeals. The Supreme Court adopted "a . . . general rule to govern the applicability of equitable tolling in suits against the government."<sup>25</sup> In this regard, the Court held,

A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.<sup>26</sup>

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

<sup>20</sup> *Id.* at 1097.

<sup>21</sup> *Id.* at 1098.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Irwin*, 111 S. Ct. at 453.

<sup>25</sup> *Id.* at 457.

<sup>26</sup> *Id.* (citations omitted)

Relying on precedent, however, the Court limited to two the circumstances in which equitable tolling may save an otherwise untimely lawsuit:

We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.<sup>27</sup>

Thus, in a few brief paragraphs, the Court struck down the time-honored principle that limitations periods contained in consent to suit statutes are jurisdictional and "mean just that period and no more."<sup>28</sup> One of the questions left open by the Court in *Irwin* is the applicability of its broad holding to cases brought under the FTCA and the applicability of equitable tolling to the limitations periods contained in the Act. The Eighth Circuit recently provided an inaccurate answer in its decision in *Schmidt v. United States*.<sup>29</sup>

### III. Schmidt v. United States

Phyllis Schmidt, an airline flight attendant, was injured when the plane on which she was flying struck a snow plow while landing in Sioux Falls, South Dakota.<sup>30</sup> On November 1, 1985, the Schmidts filed an administrative complaint with the responsible federal agency, the Federal Aviation Administration (FAA).<sup>31</sup> In their complaint, they alleged that FAA air traffic controllers negligently cleared the plane to land before ordering the driver of the snow plow to leave the runway.<sup>32</sup> The FAA denied the claim on November 19, 1986, in a letter received by the Schmidts' attorney on November 24, 1986.<sup>33</sup> The Schmidts filed suit in federal district court on May 21,

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<sup>27</sup> *Id.* at 458. *Irwin*, however, did not benefit by this decision. The Court determined that the principles of equitable tolling "did not extend to what was at best a garden variety claim of excusable neglect."

<sup>28</sup> *Soriano v. United States*, 352 U.S. 270, 276 (1957).

<sup>29</sup> 933 F.2d 639 (1991).

<sup>30</sup> *Schmidt v. United States*, 901 F.2d 660, 681 (8th Cir. 1990), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *decision on remand*, 933 F.2d 639 (8th Cir. 1991).

<sup>31</sup> *Id.*

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

<sup>33</sup> *Id.*

1987, and the United States moved to dismiss the case for lack of subject matter jurisdiction.

Essentially, the Government contended that under 28 U.S.C. § 2401(b), the Schmidts were required to commence their suit six months from the date upon which the FAA mailed its final denial—not six months from the date upon which it was received by their counsel.<sup>34</sup> The Government contended that the FAA mailed its final denial on November 20, 1986. Consequently, the Schmidts' lawsuit was filed one day beyond the jurisdictional statute of limitations and the court, therefore, lacked subject matter jurisdiction. The Schmidts argued that the lawsuit was filed timely on May 21, 1987, because the notice of final denial was mailed on November 21, 1986.<sup>35</sup>

The district court dismissed the Schmidts' case although it did not decide when the denial letter was mailed. It determined that on the Government's motion to dismiss for lack of jurisdiction, the Schmidts "bore the burden of establishing the jurisdictional facts, and they . . . failed to do so."<sup>36</sup> Additionally, the court determined that it was unreasonable for the Schmidts to wait until May 21, 1987, to file their suit when they knew full well that the denial letter was dated November 19, 1986.<sup>37</sup>

On appeal, the Court of Appeals for the Eighth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction.<sup>38</sup> It held, *inter alia*,

Institution of an action against the United States within the six-month limitations period is a jurisdictional requirement. See 28 U.S.C. § 2401(b). The district court correctly noted that the Schmidts bore the burden of establishing subject matter jurisdiction once the Government challenged it. The existence of subject matter jurisdiction is a

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<sup>34</sup> Section 2401(b) states:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1982).

<sup>35</sup> *Schmidt*, 901 F.2d at 681.

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 683.

question of law that the court of appeals reviews *de novo* [citations omitted].<sup>39</sup>

It went on to hold that the denial letter most probably was posted on November 21, 1986, and the Schmidts' untimely action was beyond the district court's subject matter jurisdiction.<sup>40</sup>

On February 19, 1991, the Supreme Court granted the Schmidts' petition for a writ of certiorari.<sup>41</sup> The Court simultaneously vacated the decision below and remanded the case for reconsideration in light of *Irwin v. Veterans' Administration*.<sup>42</sup> On remand, the Eighth Circuit determined that the limitations periods in the FTCA are subject to equitable tolling.<sup>43</sup> The Court reasoned as follows:

Irwin held that statutes of limitation in suits against the government are subject to equitable tolling. Necessary to this expressed holding is an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government. If the statute of limitations were jurisdictional, the court would have no power to consider tolling it.<sup>44</sup>

Applying this rationale to the facts of the *Schmidt* case, the Eighth Circuit concluded that the untimely nature of the Schmidts' lawsuit was merely "an affirmative defense which the defendant had the burden of establishing."<sup>45</sup> Had the district court considered the Government's motion as one for summary judgment rather than as a motion to dismiss, the Government would have been required to establish the date upon which the FAA mailed the notice, and those facts would have been considered in the light most favorable to the Schmidts. Because the Government never established the actual mailing date below, the Eighth Circuit reversed the district court's decision and remanded the case for trial.<sup>46</sup> As set forth below, the Eighth Circuit's decision in *Schmidt* cannot be reconciled with either the prevailing law concerning the jurisdictional na-

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<sup>39</sup> *Id.* (citations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> 111 S. Ct. 944, (1991).

<sup>42</sup> *Id.*

<sup>43</sup> 933 F.2d 639, 640 (8th Cir. 1991).

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

<sup>45</sup> *Id.*

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

ture of the FTCA's limitations periods or readily discernible congressional intent.

#### IV. Summary of Current Circuit Law on the Jurisdictional Nature of the FTCA's Limitations Periods

Currently, every circuit, except the Eighth Circuit, concurs in the proposition that the limitations periods contained in section 2401(b) are jurisdictional.<sup>47</sup> Consequently, they cannot be equitably tolled. Moreover, the Circuits that have had occasion to comment upon section 2675 have concluded that exhaustion of its remedial scheme is also a jurisdictional precondition to initiating a suit under the FTCA.<sup>48</sup> As set forth below, these holdings are entirely consistent with discernable congressional intent.

#### V. Equitable Tolling Is Inapplicable to the FTCA

The legislative history of the FTCA clearly reveals the existence of a steadfast congressional intention to establish and

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<sup>47</sup> See *Sexton v. United States*, 832 F.2d 629 (D.C. Cir. 1987) (§ 2401(b) is jurisdictional); *Gonzalez-Bernal v. United States*, 907 F.2d 246 (1st Cir. 1990) (requirements of § 2401 are jurisdictional and cannot be waived); *In re Agent Orange Prod. Liability Litigation*, 818 F.2d 210 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (time limitations in § 2401(b) are jurisdictional in nature); *Peterson v. United States*, 694 F.2d 943 (3d Cir. 1982) (limitations period in FTCA cannot be extended by equitable considerations); *Gould v. Department of Health and Human Serv.*, 805 F.2d 738 (4th Cir. 1990), cert. denied, 111 S. Ct. 673, (1991) (two-year limitations period is jurisdictional and cannot be equitably extended); *Houston v. United States Postal Serv.*, 829 F.2d 896 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (§ 2410(b) limitations are jurisdictional and cannot be equitably extended); *Allgeier v. United States*, 909 F.2d 869 (6th Cir. 1990) (limitations period in § 2410 is jurisdictional); *Charlton v. United States*, 743 F.2d 557 (7th Cir. 1984) (six-month period in § 2410(b) is jurisdictional); *Berti v. Veterans' Admin. Hospital*, 860 F.2d 338 (9th Cir. 1988) (six-month limitations period in § 2401(b) is jurisdictional); *Anderberg v. United States*, 718 F.2d 976 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984) (limitations period not to be extended for equitable considerations); *Adkins v. United States*, 896 F.2d 1324 (11th Cir. 1990) (two-year limitations period is jurisdictional).

<sup>48</sup> See *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987) (presentation requirement of § 2675(a) is jurisdictional); *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980) (affirming district court's dismissal for lack of subject matter jurisdiction when plaintiff failed to first provide sufficient claim before filing suit); *Willis v. United States*, 719 F.2d 608 (2d Cir. 1983); *Livera v. First Nat'l State Bank of N.J.* (3d Cir. 1989) (presentation requirements of statute are jurisdictional); *Plyler v. United States*, 900 F.2d 41 (4th Cir. 1990) (requirements of § 2675(a) are jurisdictional and may not be waived); *Houston v. United States Postal Serv.*, 823 F.2d 896 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (time limitations in § 2675(a) are jurisdictional); *Charlton v. United States*, 743 F.2d 557 (7th Cir. 1984) (presentation requirements of § 2675(a) are jurisdictional); *Lurch v. United States*, 719 F.2d 333 (10th Cir. 1983), cert. denied, 466 U.S. 927 (1984) (presentation of claims and denial by agency are jurisdictional prerequisites to suit); *Free v. United States*, 865 F.2d 840 (11th Cir. 1989) (§ 2675(a) presentation requirement is jurisdictional).

maintain definite, immutable statutes of limitation in tort claims against the United States.<sup>49</sup> From the date of its enactment, and each time it thereafter amended the FTCA, Congress declined to apply a tolling provision to the Act's limitations periods. This course of conduct inexorably leads to the conclusion that congressional design and not congressional oversight explains the absence of a tolling provision in the FTCA. Consequently, the absence of a tolling provision should not be "remedied" by applying the general tolling rule set forth in *Irwin*. In support of this contention, a brief discussion of the FTCA's legislative history is appropriate.

The FTCA was enacted in 1946.<sup>50</sup> As originally configured, it was an extremely limited waiver of sovereign immunity.<sup>51</sup> For

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<sup>49</sup> For example, on August 2, 1946, Congress enacted the Legislative Reorganization Act of 1946, Pub. L. No. 801, 60 Stat. 812 (1946). Title IV of this law contained the original FTCA. As enacted, its one year limitations period did not contain a tolling provision.

In 1948, Congress completely revised and recodified title 28 of the United States Code and amended sections of the FTCA. See Act of June 25 1948, Pub. L. No. 773, 62 Stat. 869 (1948). A contemporary congressional report explains that the words "accruing on and after January 1, 1946" were omitted from the law "[as] executed as of the date of the enactment of the revised title." H. REP. NO. 3214, 80th Cong., 1st. Sess. A122 (Apr. 25, 1947). This establishes that as early as 1948, Congress recognized the fact that claims accruing on or before Jan. 1, 1946, were time-barred, and such claimants would not be afforded relief. Congress made no provision for these individuals. For instance, it did not enact a tolling provision by which a deserving claimant could establish his or her lack of culpability and the meritorious nature of the claims. Apparently, Congress was reluctant to change the status quo.

In 1949, Congress revised the FTCA in two significant respects. See Act of Apr. 25, 1949, Pub. L. No. 55, 63 Stat. 62 (1949). The limitations period in § 2401(b) was increased from one to two years, and expired claims that accrued on and after January 1, 1946, were revived. A House report explains that Congress lengthened the statute of limitations after reviewing the limitations periods contained in analogous state and federal tort laws, some of which contained tolling provisions. H. REP. NO. 276, 81st Cong., 1st. Sess. 2-3 (Mar. 21, 1949). This review convinced the House of Representatives that the extant one year limitations period was "manifestly unjust and not in consonance with the [prevailing] practice. . . ." *Id.* Congress's ultimate solution to the problem was to revive the time-barred claims and lengthen the limitations period, instead of adding a tolling provision to the Act. This further evinces Congress's determination not to add a tolling provision to the FTCA's limitations periods.

In 1966, Congress enacted Public Law 89-605 codified at 28 U.S.C. §§ 2415, 2416 (1988); see Pub. L. No. 89-605, 80 Stat. 304 (1966). These provisions establish the time frames within which the federal sovereign must commence actions for money damages in federal courts. See 28 U.S.C. § 2415 (1988). Section 2416 permits these actions to be tolled during specified periods. *Id.* § 2416. Congress did not extend these provisions to tort suits brought against the federal sovereign. This merely reaffirms Congress's unwillingness to toll the statute of limitations in tort suits brought against the federal sovereign.

<sup>50</sup> The Legislative Reorganization Act of 1946, Pub. L. No. 79-801, 60 Stat. 812 (Aug. 2, 1946).

<sup>51</sup> For an excellent discussion of the doctrine of sovereign immunity see 6 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE 2D § 1427 (1990). For a judicial dis-

instance, it was inapplicable to claims that accrued before January 1, 1945.<sup>52</sup> Further, claims that accrued on or after January 1, 1945, were "forever barred" unless "within one year after such claim accrued or within one year after the date of enactment of the Act . . . a claim was presented to the agency (for claims not exceeding \$1,000) or an action was commenced [in district court] (for claims exceeding \$1,000)."<sup>53</sup> A suit predicated upon an agency's final denial of a claim of less than \$10,000 was required to be commenced within six months from the date that the notice of denial was mailed to the claimant.<sup>54</sup>

The definitive nature of the Act's limitations periods dictated the harsh results that befell claims that accrued before January 1, 1945, as well as untimely administrative claims and lawsuits—that is, they were "forever barred."<sup>55</sup> The Act did not contain a tolling provision, and the jurisdictional nature of its limitations provisions prevented agencies and courts from entertaining equitable cases for their redemption.<sup>56</sup>

It is worth noting that in 1946, Congress did not pass the FTCA in a vacuum. Rather, it acted against a background of extant federal legislation—including other waivers of sovereign immunity, some of which contained tolling provisions.<sup>57</sup> Clearly Congress was aware of its ability to use statutory tolling provisions when it enacted the FTCA. For example, in 1946, the Judicial Code contained a six-year statute of limitations on contract claims asserted against the government that could be tolled in certain specified circumstances.<sup>58</sup>

No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and idi-

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cussion of the FTCA as a waiver of sovereign immunity see *Gould v. United States*, 805 F.2d 738, 741-743 (4th Cir. 1980), *cert. denied*, 111 S. Ct. 673 (1991).

<sup>52</sup> Pub. L. No. 801 §§ 403(a), 410(a), 424(a); 60 Stat. 843, 846 (1946).

<sup>53</sup> *Id.* § 420; 60 Stat. 845.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* §§ 403(a), 410(a), 424(a) (1946); 60 Stat. 843, 846.

<sup>56</sup> See, e.g., *Henson v. United States*, 88 F. Supp. 148 (D.C. Mo. 1949) (suit must be brought within two years of accrual or within six months from final denial if first presented to agency).

<sup>57</sup> See, e.g., Tucker Act, 28 U.S.C. § 41(20) (1940); Death on the High Seas Act, 46 U.S.C. §§ 761, 763 (1940).

<sup>58</sup> 28 U.S.C. § 41(20) (1940) (Tucker Act).



ots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, . . . shall not be barred if the suit be brought within three years after the disability has ceased . . . <sup>59</sup>

In these circumstances Congress's failure to include in the FTCA a tolling provision evinces the intentional nature of its inaction, and undercuts the argument that the absence of a tolling provision resulted from mere oversight. In other words, in 1946 Congress knew what tolling provisions were, and if it really wanted to do so, it could have inserted one into the FTCA—just as it did with the Tucker Act. That Congress failed to insert such a tolling provision proves the existence of a congressional intention not to include that provision in the FTCA.

This contention is borne out further by the fact that, in 1948, Congress reorganized title 28 of the United States Code,<sup>60</sup> and recodified in section 2401(a) the Tucker Act's statute of limitations and its tolling provision.<sup>61</sup> At the same time, Congress recodified the FTCA's statute of limitations into subsection section 2401(b).<sup>62</sup> It has been suggested that the recodification of the Tucker Act's statute of limitations directly above

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

<sup>60</sup> The Act of June 25, 1948, was passed to "revise, codify and enact into law Title 28 of the United States Code entitled 'Judicial Code and Judiciary.'" See Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869 (1948).

<sup>61</sup> The predecessor of 28 U.S.C. § 2401(a) (1948), was 28 U.S.C. § 41(20) (1946). Section 41(20) first was enacted with the Tucker Act on Mar. 3, 1887. See *United States v. Greathouse*, 166 U.S. 601 (1897). 28 U.S.C. § 2401(a) (1948) stated:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The right of action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

<sup>62</sup> The forerunner of 28 U.S.C. § 2401(b) (1948) was 28 U.S.C. § 942 (1946), which was derived from § 420 of the Federal Tort Claims Act of 1946. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601 § 420, 60 Stat. 845, (1946). 28 U.S.C. § 942 (1946) was repealed in 1948. Act of June 25, 1948, Pub. L. No. 773, 62 Stat. 869 (1948); see *Glenn v. United States*, 129 F. Supp. 914, 917 (S.D. Calif. 1955), *rev'd*, 231 F.2d 884 (9th Cir. 1956).

As recodified in 1948, 28 U.S.C. § 2401(b) stated, in relevant part,

A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding \$1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding \$1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the federal agency or the date of mailing notice by the agency of final disposition of the claim.

that of the FTCA's made the former's tolling provision applicable to actions brought under the latter.<sup>63</sup>

Over the course of the last four decades the proposition that FTCA actions may be tolled under section 2401(a) has been rejected uniformly by the courts that have considered it.<sup>64</sup> In part, these decisions are predicated upon readily apparent congressional intent,<sup>65</sup> and are well supported by accepted canons of statutory construction.<sup>66</sup> Significantly, Congress has not acted upon these decisions. Surely, if it disagreed with any of them it legislatively could have changed their results; but it has not done so. Moreover, Congress has not addressed this issue in any of the nine substantive amendments that it has made to the FTCA since 1966.<sup>67</sup> Congress's thirty-plus years of silence in the face of this line of cases supports this article's

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<sup>63</sup> *Glenn v. United States*, 129 F. Supp. 914 (S.D. Cal. 1955), *rev'd*, 231 F.2d 884 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956).

<sup>64</sup> See *Menkarell v. Bureau of Narcotics*, 463 F.2d 88 (3d Cir. 1972); *Glenn v. United States*, 129 F. Supp. 914 (S.D. Calif. 1955), *rev'd*, 231 F.2d 884 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956); *Wesreco v. United States Dept. of the Interior*, 618 F. Supp. 662 (D. Utah 1985); *Foote v. Public Housing Comm'r of the United States*, 107 F. Supp. 270, 274 (W.D. Mich. 1952); *Whalen v. United States*, 107 F. Supp. 112, 113 (E.D. Pa. 1952).

<sup>65</sup> See, e.g., *United States v. Glenn*, 231 F.2d 884, 886 (9th Cir. 1956), *cert. denied*, 352 U.S. 926 (1956). In *Glenn*, the Court stated:

This Court does not choose to place its decision on the ground that it is clear beyond argument that [§ 2401] (b) is not qualified by the tolling sentence [in § 2401] (a). But it is here held that it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b).

In this situation, one must look and sniff for Congressional footprints around the statute. The Congressional history must be examined. When that is done, it seems certain that the government's position [that FTCA actions may not be tolled] is correct here.

*Id.*

<sup>66</sup> Statutes and regulations must be construed to avoid absurd and whimsical results, unrelated to congressional purpose. *Kelly v. United States*, 826 F.2d 1049, 1053 (Fed. Cir. 1987) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892); *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940)). Here, the separate and distinct legislative histories of subsections (a) and (b) of section 2401 clearly reveal an absence of congressional intent to have them "overlap." Thus, the interpretation urged by plaintiff-appellant in *Glenn* was clearly insupportable: it would have caused the Court to endorse a result unrelated to any discernable congressional purpose.

Moreover, it is well settled that a proviso—such as the tolling provision situated in § 2401(a)—modifies the provision which immediately precedes it. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 VAND. L. REV., 395, 406 (1950) (citing *State ex rel. Higgs v. Summers*, 223 N.W. 957 (1929)); BLACK, *CONSTRUCTION AND INTERPRETATION OF LAWS* § 130 (2d ed. 1911); SUTHERLAND, *STATUTORY CONSTRUCTION* § 352 (2d ed. 1904); C.J. *STATUTES*, § 640 (1932).

<sup>67</sup> See 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 63 (1991).

contention that the legislature's silence should be interpreted as acquiescence in the judicial precedents set forth above.<sup>68</sup>

In 1949, Congress amended the FTCA in two very significant ways.<sup>69</sup> First, it extended the limitations period in section 2401 from one to two years. Second, Congress essentially placed the January 25, 1945, date back into the statute. In essence, the amendment to section 2401(b) "revive[d] all those otherwise expired claims accruing on or after January 1, 1945, which (1) have not been determined adversely by a Federal agency or a Federal court, or (2) have been rejected by a Federal agency or a Federal court solely because of the statutory bar."<sup>70</sup>

The 1949 amendments to section 2401(b) grew out of a congressional recognition of the fact that "the existing limitation of 1 year in the Federal Tort Claims Act is manifestly unjust and not in consonance with the practice prevailing in analogous departments of law."<sup>71</sup> Congress also determined that the "temporary vexation" that the "defending Federal agencies" would experience because of the revival of dormant claims would "disappear with the passage of time." Thus, Congress concluded that, on balance, equity demanded the revival of these time-barred claims.<sup>72</sup>

In an effort to remedy properly the inequities caused by the FTCA's short statute of limitations, Congress examined the limitations periods contained in analogous federal and state tort laws.<sup>73</sup> Among the federal statutes examined by Congress

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<sup>68</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) in which the Court held,

Failure of Congress to modify the IRS rulings of 1970 and 1971, of which Congress was, by its own studies and by public discourse, constantly reminded, and Congressional awareness of tax exempt status for racially discriminatory schools when enacting other related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.

*Accord* *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 110 S. Ct. 2126 (1990) (congressional silence in the face of glaring inconsistency in the Bankruptcy Code indicates that Congress, which was presumably aware of the situation that it created, intended these results. Consequently, the courts were not free to "remedy" this situation).

<sup>69</sup> See Act of Apr. 25, 1949, Pub. L. No. 55, 63 Stat. 62 (1949).

<sup>70</sup> H.R. REP. NO. 276 81st Cong., 1st Sess. 1 (1949).

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2-3. It can be assumed that when Congress considered the limitations periods contained in the various state tort statutes, it became aware of the tolling provisions contained in some of them. See generally, 54 C.J.S. §§ 78, 87 (1987). As demonstrated herein, Congress itself has enacted tolling provisions in appropriate circumstances. See, e.g., 46 U.S.C. § 763 (1940) (Death on the High Seas Act); 28 U.S.C. § 2401(a) (1940) (Tucker Act); *id.* §§ 2415, 2416 (statutes of limitations in suits brought by the government). To date, Congress has not determined that the circum-

were the Suits in Admiralty Act<sup>74</sup> and the Public Vessels Act.<sup>75</sup> Sandwiched between these two provisions in the 1940 Judicial Code reviewed by Congress was the Death on the High Seas Act.<sup>76</sup> Section 763 thereof contained its two-year limitations period. Unlike the statutes surrounding it, an action accruing under the Death on the High Seas Act could be tolled under certain circumstances set forth in section 763.<sup>77</sup> After reviewing these statutes and considering other federal and state tort provisions, Congress opted for the present two-year period—"a happy medium which has been tested and found satisfactory in the laboratory of legal experience."<sup>78</sup>

Congress's action in these circumstances is telling. It recognized the inequities created by the Act's one-year limitations period. As a result, it considered several approaches to the problem, and determined that the best solution was to extend the limitations period, rather than to enact a tolling provision.

On other occasions and in different circumstances, Congress has not hesitated to enact a tolling provision to correct the inequities occasioned by a short limitations period. For example, in 1966, Congress amended title 28 of the United States Code by adding, *inter alia*, a statute of limitations for tort claims brought by the government.<sup>79</sup> This amendment had its genesis in a multifaceted Justice Department proposal designed, in part, to fix time limits upon affirmative government suits.<sup>80</sup> Congress's purpose in fixing these periods is clearly set

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stances created by the limitations periods in the FTCA requires enactment of a tolling provision. *Id.* § 2401(b).

<sup>74</sup> 46 U.S.C. § 745 (1940).

<sup>75</sup> *Id.* § 782.

<sup>76</sup> *Id.* § 761.

<sup>77</sup> 46 U.S.C. § 763 (1940) stated:

Suit shall be begun within two years from the date of such wrongful act, negligent, or default, *unless* during the period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has been offered.

(emphasis added).

<sup>78</sup> H.R. REP. NO. 276, 81st Cong., 1st Sess. 4 (1949).

<sup>79</sup> Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (1966).

<sup>80</sup> See S. REP. NO. 1328, 89th Cong., 2d Sess. 2, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2502, 2503. The three legislative proposals advanced by the Department of Justice were considered by Congress in a group. They were designed to "improv[e] existing procedure[s] for the disposition of monetary claims by and against the Government." Specifically, the bills in question were intended to: (1) amend the FTCA to authorize increased agency consideration of tort claims against the government; (2) establish a statute of limitations for actions brought by the government; and, (3) avoid unnecessary litigation by providing for the collection of government claims.

forth in the Senate Report that accompanied the bill. It states, in relevant part,

Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are indistinguishable from claims made by private individuals against the Government. Therefore, it is only right that the law should provide a period of time within which the Government should bring suit on claims just as it now *does as to claims by private individuals*. The committee agrees that the *equality of treatment* in this regard provided by the bill is required by modern standards of fairness and equity.<sup>81</sup>

Congress's idea of "equality of treatment"<sup>82</sup> between tort claims brought against the government and those brought by the government is somewhat skewed. The second legislative proposal advanced by the Justice Department<sup>83</sup> was enacted into law in sections 2415 and 2416 of title 28, United States Code.<sup>84</sup> Unlike the FTCA, which establishes a single two-year period for presenting claims against the government, and a six-month period in which to sue based on a denial thereof, section 2415 establishes separate periods of three and six years for tort actions brought by the government.<sup>85</sup> The longer period was provided for actions ". . . of a type which might not be immediately uncovered after some investigation."<sup>86</sup>

Additionally, because of ". . . the difficulties of Government operations due [its] size and complexity . . .," Congress enacted a tolling provision.<sup>87</sup> Under this provision, both the three-and six-year limitations periods may be tolled when the putative defendant is beyond the court's jurisdiction; exempt from legal process because of, *inter alia*, minority or insanity; or when the responsible federal official did not and could not have known the facts material to the accrued cause or action.<sup>88</sup>

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<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> *Id.*

<sup>83</sup> H.R. 13652, 89th Cong., 2d Sess. (1980).

<sup>84</sup> See S. REP. NO. 1328, 89TH CONG., 2D SESS., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2502, 2503.

<sup>85</sup> 28 U.S.C. § 2415(b).

<sup>86</sup> S. REP. NO. 1328, 89TH CONG., 2D SESS., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2503, 2504.

<sup>87</sup> *Id.* at 2507; 28 U.S.C. § 2416(c).

<sup>88</sup> 28 U.S.C. § 2416. See S. REP. NO. 1328, 89TH CONG., 2D SESS., *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS, which states in relevant part:

At the time that it enacted this tolling provision for claims brought by the government, Congress failed to enact a similar provision for tort claims brought against the government under the FTCA. Because Congress recognized that "tort claims asserted by the Government are almost indistinguishable from claims made . . . against [it],"<sup>89</sup> Congress's inaction in this regard is extremely significant. Actually, it is another manifestation of Congress's willingness to enact tolling provisions in appropriate circumstances, and its disinclination to insert this provision in the FTCA. As set forth below, Congress's unwillingness to toll the FTCA's statute of limitations is entirely consistent with the spirit of its 1966 amendments to section 2675.<sup>90</sup>

Since the 1966 amendments, a claimant must exhaust his or her administrative remedy at the executive agency level before initiating a suit on the claim in federal district court.<sup>91</sup> The major purpose of the 1966 amendments to section 2675 was to

ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the

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Section 2415 establishes statutes of limitation for the general causes of action referred to in that section. Section 2416 added to Title 28 by the bill specifies important exclusions of time which will not be applied in computing the limitations period established in section 2415. The provisions in this section provide exclusions which are also generally found in law governing State statutes of limitation. Paragraph (a) excludes the periods when the defendant or the res is outside of the United States.

Paragraph (b) excludes the time during which the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity or for any other reason.

Paragraph (c) . . . excludes the time when the facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances.

Paragraph (d) excludes the period during which the United States is in a state of war declared pursuant to article I section 8 of the Constitution of the United States . . .

*Id.* at 2507.

<sup>89</sup> S. REP. NO. 1328, 89th Cong. 2d Sess. 2503.

<sup>90</sup> See Act of July 18, 1966, Pub. L. 89-506, 80 Stat. 306 (July 18, 1966).

<sup>91</sup> See *id.* The FTCA limitations period in 28 U.S.C. § 2401(b) was amended to accommodate the administrative exhaustion requirement. Act of July 18, 1966, Pub. L. No. 89-506, § 7, 80 Stat. 307 (1966). It has not changed since that time, and reads as follows:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

United States. . . . [T]he more expeditious procedures provided by this bill will have the effect of reducing the number of pending claims which may become stale and long delayed because of the extended time required for their deliberation

. . . .

Another objective of this bill is to reduce unnecessary congestion in the courts.<sup>92</sup>

Accordingly, the application of the doctrine of equitable tolling clearly is inimical to the objectives that Congress sought to achieve with the enactment of these amendments.

#### VI. Application of Equitable Tolling to the FTCA Limitations Periods Is Unwarranted and Inconsistent with the Purpose of 28 U.S.C. § 2675

As noted above, the legislative purpose underlying the 1966 amendments to 28 U.S.C. § 2675 was to lighten the judicial workload by enabling the executive agencies to resolve, or settle, tort claims expeditiously at the administrative level. Application of the doctrine of equitable tolling to the time frames set forth in 28 U.S.C. § 2401(b), however, will frustrate—not effectuate—this objective.

Initially, it will encourage the filing of untimely claims with the agencies. A claimant with a time-barred claim has nothing to lose and everything to gain if the possibility exists that once in district court, his or her otherwise meritorious claim may be saved. Therefore, a claimant who would not otherwise file a time-barred claim will do so as a vehicle to get into district court. The agency's final denial of claim is his or her ticket.

Once in court, the untimely claimant will resort to the doctrine of equitable tolling in an attempt to save the case and have it heard on its merits. The court then must expend its resources to resolve the controversy before it. Whether the limitations period should be tolled in a given case is necessarily a fact-bound question. Judicial resolution of these questions requires the application of already limited resources—that is, personnel, calendar time, and funds. Thus, application of the

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<sup>92</sup> S. REP. NO. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2516, 2518.

doctrine of equitable tolling will result in increased FTCA litigation—not the reduction of it.

The same result will obtain with claimants who fail to commence lawsuits timely after their administrative claims have been denied. These individuals have nothing to lose by filing untimely suits and arguing for the application of the tolling doctrine to them. It will not do suggest that the Supreme Court's holding in *Irwin* is so narrow that most of them will not prevail in this regard. Resisting these claims necessarily will require the expenditure of judicial resources that Congress sought to conserve by amending section 2675 in the first place.

Clearly then, application of the doctrine of equitable tolling to the FTCA's limitations periods will exacerbate the very conditions that Congress sought to ease by amending the Act in 1966. It therefore stands to reason that the Eighth Circuit's decision in *Schmidt* is antithetical to clearly expressed congressional intent and will result in increased litigation, calendar congestion, transaction fees, and the expenditure of scarce judicial resources.

Finally, application of the *Irwin* decision to the FTCA is unwarranted. The FTCA was enacted to lighten the burden that private relief bills placed upon Congress in the early part of the twentieth century.<sup>83</sup> The Act was intended to supplement Congress's authority to remedy inequities occasioned by government operations. Nothing in it or its legislative history suggests that, by its passage, Congress divested itself of this inherent authority.<sup>84</sup> Actually, since passing the FTCA Congress has enacted private relief bills to compensate individuals who were precluded from recovering under the Act.<sup>85</sup> Clearly then, individuals who are injured by government activities and lack a remedy under the FTCA may petition Congress for relief. Furthermore, Congress has demonstrated its continued willingness to compensate these individuals appropriately.

By itself, the existence of this procedure—which has been in place since the enactment of the FTCA in 1946—is reason

<sup>83</sup> For an excellent discussion of this topic see 1 L. Jayson, *supra* note 67, 88 58, 80.

<sup>84</sup> Indeed, resort to congressional relief has always been the right of citizens who have been victimized by injustices perpetrated against them by the federal government. See generally *Bull v. United States*, 295 U.S. 247, 261 (1935).

<sup>85</sup> See, e.g., Private Law No. 86-77, 86th Cong., 2d. Sess. (Dec. 18, 1980), enacted to compensate James R. Thornwell for injuries he allegedly received as an active duty service member. Thornwell alleged that his injuries were caused by LSD experiments to which he was subjected by the United States Army. Thornwell's FTCA suit was dismissed, *inter alia*, because it was barred by the doctrine of incrimilitary immunity. *Thornwell v. United States*, 471 F. Supp. 821 (D.D.C. 1979).



enough to resist the application of the tolling doctrine to the Act's limitations periods. Its continued and demonstrated vitality<sup>96</sup> clearly indicates that application of the *Irwin* doctrine to the FTCA is unwarranted. A system already exists in which equitable remedies can be dispensed as the circumstances dictate.

The case against adoption of the *Irwin* doctrine is strengthened further when the benefits and detriments of its adoption are taken into consideration. As demonstrated above, application of the tolling doctrine will result in increased litigation, calendar congestion, and transaction costs. Additionally, its adoption is unnecessary to secure equitable results in deserving, nonjusticiable tort cases. On balance, the present combination of jurisdictional limitation periods and resort to private legislation will continue to provide a more efficient and effective remedial scheme than will application of the tolling doctrine to the FTCA's limitations periods.

## VII. Conclusion

The legislative history of the FTCA is unique. For over four decades, Congress has shown a steadfast intention to establish and maintain definite, immutable limitations periods for asserting tort claims against the United States. Time and again Congress has declined to enact tolling provisions into the FTCA, even when failure to do so would lead to seemingly harsh results for unwary claimants.

Appending an equitable tolling doctrine to the FTCA by judicial fiat, rather than by legislative choice, is unwarranted. In extreme circumstances, Congress has demonstrated that it retains the power to grant relief, even when the passage of time has left courts and agencies powerless to do so. A general tolling provision, by contrast, would engender the very evils that Congress sought to vanquish with the passage of the 1966 amendments to the Act—that is, calendar congestion, increased transaction costs, and delay. It was clearly improper for the Eighth Circuit to disregard these considerations as well as four decades of legislative experience with the FTCA. Consequently, its decision in *Schmidt* should not be followed.

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<sup>96</sup> See Private L. No. 96-77, 96th Cong., 2d Sess. (Dec. 18, 1980). See generally *Bull*, 247 U.S. at 281.



# CRIMINAL LIABILITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE FOR SEXUAL RELATIONS DURING PSYCHOTHERAPY

CAPTAIN JODY M. PRESCOTT\* AND DR. MATTHEW G. SNOW\*\*

## I. Introduction

Throughout much of recorded history, sexual relations between medical practitioners and their patients have been forbidden.<sup>1</sup> The rationale behind this prohibition is that sexual activity between a patient and an attending physician harms the patient, and therefore interferes with any cure attempted by the physician.<sup>2</sup> Because of the unique healing relationship that exists between psychotherapists and their patients,<sup>3</sup> compliance with this precept is considered a prerequisite for effective change in the fields of both psychology and psychiatry.<sup>4</sup>

In recent years, the mental health professions have focused increasing attention on the nature and the effects of sexual relationships occurring during the course of psychotherapy.<sup>5</sup> Despite the obvious ethical and legal consequences, various

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\* Judge Advocate General's Corps, United States Army. Presently assigned at Kaiserslautern, Germany, Branch Office, U.S. Army Trial Defense Service. B.A., 1983, University of Vermont; J.D., 1986, University of Maine Law School; LL.M., 1990, Georgetown University Law Center. Previous works include *Soviet Military Justice and the Challenge of Perestroika*, 129 MIL. L. REV. 129 (1989).

\*\* Psychology Associate. B.A., 1983, University of Vermont; M.A., 1985, University of Hartford; Ph.D., 1991, University of Rhode Island. Member of the American Psychological Society and the Society of Behavioral Science.

<sup>1</sup> See Hippocrates, *Physician's Oath*, in BARTLETT'S FAMILIAR QUOTATIONS 79 (1980); G. SCHOENER, J. MILGROM, J. GONSIORAK, E. LUEPKER & R. CONROE, *PSYCHOTHERAPISTS' SEXUAL INVOLVEMENT WITH CLIENTS 332-33 (1989)* [hereinafter G. SCHOENER] (briefly describing the historical development of this ethical concept).

<sup>2</sup> Not only do sexual relations interfere with the cure, they may exacerbate the preexisting problems for which treatment was sought. LeBouef, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83, 90 (1988).

<sup>3</sup> Coleman, *Sex Between Psychiatrist And Former Patient: A Proposal for a "No Harm, No Foul" Rule*, 41 OKLA. L. REV. 1, 2 (1988).

<sup>4</sup> Certain researchers believe any relationship between a patient and a therapist beyond the scope of the professional relationship—that is, a dual-role relationship—is potentially harmful. Kitchener, *Dual Role Relationships: What Makes Them So Problematic?* 67 J. COUNSELING & DEV. 217, 217-221 (1989).

<sup>5</sup> See A. STONE, *LAW, PSYCHIATRY, AND MORALITY* 191-216 (1984); G. SCHOENER, *supra* note 1, at 49. During the ten-year period between 1975 and 1986, sexual relations between patients and therapists were the most frequent causes of suits brought against psychologists insured under the American Psychological Association's policy.

surveys of psychologists and psychiatrists show that the incidence of sexual relations between male therapists and their patients ranges between 7.1% and 9.4%, and between female therapists and their patients between 2.5% and 3.1%.<sup>6</sup>

Although some practitioners were originally in favor of allowing sexual relations between psychotherapists and patients, and a minority even advocated the use of sex as a method of treatment, the practice appears to enjoy no public or professional support today.<sup>7</sup> Although there is a relative paucity of research regarding the short and long-term consequences of client-therapist sexual relations,<sup>8</sup> one study estimated that patients were adversely affected in approximately ninety percent of cases in which sexual impropriety occurred.<sup>9</sup> Adverse effects included depression and multiple interpersonal conflicts such as decreased ability to trust, inadequate sexual relations, increased drug or alcohol use, and possibly suicide.<sup>10</sup>

Many states have enacted legislation in an effort to curb the scope and severity of the problem. As a result, civilian psychotherapists who engage in sexual relations with their patients

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G. SCHOENER, *supra* at 538. These suits were resolved at a cost of \$7,018,165, and accounted for 44.8% of all sums paid to claimants during that time. *Id.*

<sup>6</sup> G. SCHOENER, *supra* note 1, at 35-36. In a survey of clinical psychologists, however, only 2.6% of the male respondents acknowledged sexual intimacies with clients. *Id.* at 35. Surveys conducted to examine the incidence and impact of dual role relationships have revealed that a 90% majority of offenses regarding sexual exploitation of a client involve male therapists, with the overwhelming majority of these interactions being heterosexual in nature. See Gartrell, Herman, Olarte, Feldstein & Localio, *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I: Prevalence*, 143 AM. J. PSYCHIATRY 1126, 1126-31 (1987). Recent research indicates that these rates appear relatively stable for male therapists, while the rate of incidence for female therapists may be increasing slightly. Seminar given by Beverly Thorn, Ph.D., Clinical Psychologist, at the West Haven DVAMC, Psychology Department, in West Haven, Connecticut, Oct. 25, 1990 [hereinafter Thorn Seminar].

<sup>7</sup> G. SCHOENER, *supra* note 1, at 19-50. Interestingly, those professionals who believe sexual relations could be and have been beneficial in the course of therapy tend to have engaged in such relationships themselves. *Id.* at 37.

<sup>8</sup> See *id.* at 31-45.

<sup>9</sup> Bouhoutsos, Holroyd, Lehrman, Forer, & Greenberg, *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 185, 191 (1983) [hereinafter Bouhoutsos]. See also *Simmons v. United States*, 805 F.2d 1363, 1364 (9th Cir. 1986) (sexual relations with therapist especially harmful to the patient, and actionable under the Federal Torts Claims Act).

<sup>10</sup> Bouhoutsos, *supra* note 9, at 190. Harm also might result from sexually abused patients possibly being less likely to seek future psychotherapeutic treatment. Although sexual contact is the most often cited precipitant of harm, "no evidence exists to prove that sexual intercourse with clients causes more overall damage than is caused by provocative verbalizations or suggestive fondling." P. KEITH-SPEGEL & G. KOOSHER, *ETHICS IN PSYCHOLOGY* 253 (1985) [hereinafter P. KEITH-SPEGEL]. These findings suggest that when therapeutic boundaries are lowered, severe harm can result from what might seem a "minor transgression" by a therapist.

now face the possibility of criminal actions in several states, as well as civil liability and professional disapprobation. Under the Uniform Code of Military Justice (UCMJ),<sup>11</sup> service member psychotherapists also may be criminally liable for engaging in sexual relationships with patients. To appreciate the criminal sanction of psychotherapeutic sexual abuse in the military properly, it first is helpful to review briefly some aspects behind the practice of psychotherapy and why the course of treatment carries with it the inherent risk of sexual involvement between therapists and patients. In this regard, it is also helpful to examine the evolving legislative and judicial treatment of psychotherapist-patient sexual relations in civilian jurisdictions.

## II. Psychotherapy and Transference

Several authors have posited that the causal mechanisms of sexual involvement between therapists and clients are best understood within a psychoanalytic or psychodynamic perspective, specifically referring to aspects of *transference* or *countertransference* that go unattended or which are dealt with unprofessionally.<sup>12</sup> Transference, broadly defined, refers to "the projection and displacement upon the analyst of unconscious feelings or wishes originally directed at important individuals, such as parents in the patient's childhood."<sup>13</sup> In traditional psychodynamic or analytic therapies, the corrective experience of working through early relationships and feelings with the help of the therapist becomes tantamount to the successful resolution of emotional difficulties. The treatment is highlighted by the augmenting of these thoughts and feelings, so that they become the major focus of the therapeutic interaction.

Conversely, countertransference represents "the arousal of the psychoanalyst's own repressed feelings through identification with the patient's experiences and problems or through responding in kind to the patient's expression of love or hostility towards him or herself."<sup>14</sup> The therapist is trained to look

<sup>11</sup> 10 U.S.C. §§ 801-940 (1988) [hereinafter UCMJ].

<sup>12</sup> Guthrie, *Borderline Personality Disorder, Boundary Violations, and Patient-Therapist Sex: Medicolegal Pitfalls*, 148 AM. J. PSYCHIATRY 597, 597-602 (1989); Holtzman, *Who's the Therapist Here? Dynamics Underlying Therapist-Client Sexual Relations*, 54 SMITH COLLEGE STUDIES IN SOCIAL WORK 204, 204-224 (1984).

<sup>13</sup> DICTIONARY OF PSYCHOLOGY AND PSYCHIATRY 759 (R. Goldstein ed. 1984); see Simmons, 805 F.2d at 1364.

<sup>14</sup> DICTIONARY OF PSYCHOLOGY AND PSYCHIATRY, *supra* note 13, at 187.

"for manifestations of transference, and is prepared to handle it as it develops."<sup>15</sup> Unfortunately, countertransference that goes unattended can set the stage for sexual transgressions to occur.

Several suggestions have been made in response to the problem of therapist-client sexual relationships. Possible precautions to prevent these events from happening include:

(1) Before considering any non-erotic touching or verbal compliment, the helping professional should be thoroughly knowledgeable about the client's psychological functioning. Such displays may not be appropriate for certain clients.

(2) Consultation with a trusted peer or colleague about the appropriate course of action if erotic feelings are sensed as emanating from the client.

(3) Dealing with such feelings in a direct manner that protects the client's sense of self-esteem. If the client is open about such feelings, the therapist might acknowledge being flattered, but firmly declare that such relations must not ever occur because it would constitute a grave ethical violation and could potentially harm the client.

(4) Practicing psychotherapy in surroundings which are not too intimate, and where others are always nearby.<sup>16</sup>

Precautions against acting upon one's countertransference reactions primarily consist of being cognizant of these feelings and dealing with them immediately.<sup>17</sup> Personal therapy for therapists in these situations is considered helpful in many cases "to avoid actions which are detrimental to themselves and their patients."<sup>18</sup> Even if sexual relations do occur, therapists who themselves seek professional assistance are less likely to engage in this behavior again.<sup>19</sup> As a last resort, therapists who feel they are unable to work through their attractions for their clients are encouraged to refer their clients elsewhere for treatment, assuming responsibility for the

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<sup>15</sup> *L.L. v. Medical Protective Co.*, 362 N.W.2d 174 (Wis. App. 1984) (quoting D. Dawidoff, *THE MALPRACTICE OF PSYCHIATRISTS* 6 (1973)).

<sup>16</sup> P. KEITH-SPEIGEL, *supra* note 10, at 260.

<sup>17</sup> R. MEYER, E. LANDIS, & J. HAYES, *LAW FOR THE PSYCHOTHERAPIST* 21-27 (1988) [hereinafter R. Meyer].

<sup>18</sup> *Id.* at 26.

<sup>19</sup> Gartrell, *supra* note 6, at 1127. This is especially important given that a sizeable percentage of therapists who engage in sexual acts with clients are repeat offenders. *Id.*

termination of therapy themselves.<sup>20</sup> Finally, increased sensitivity by professionals to their own possible shortcomings and vulnerabilities is strongly encouraged because it is "common for therapists to report that they became sexually involved with a patient due to feelings of depression, loneliness, need, or vulnerability, and most are separated, divorced, or experiencing marital problems at the time."<sup>21</sup>

### III. The Justiciability of Psychotherapeutic Abuse

#### A. Civilian Jurisdictions

Consistent with the Hippocratic Oath, psychologists and psychiatrists in every state are forbidden from engaging in sexual relations with their patients.<sup>22</sup> Psychotherapists, therefore, are subject to professional discipline for sexual relationships within the therapeutic context. Specifically, they may be subjected to reprimand, suspension, or even license revocation.<sup>23</sup> For various reasons, however, the record of the professional associations and the various state licensing authorities disciplining offenders in this regard has been inconsistent.<sup>24</sup>

Under the common law, harm resulting from sexual relations with a psychiatrist or psychologist during the course of treat-

<sup>20</sup> R. MEYER, *supra* note 17, at 26.

<sup>21</sup> *Id.* at 24 (citing Bouhoutsos, *Therapist-Client Sexual Involvement: A Challenge for Mental Health Professionals and Educators*, 55 AM. J. ORTHOPSYCHIATRY 177, 177-182 (1985)).

<sup>22</sup> The ethical codes of both the American Psychiatric Association and the American Psychological Association both specifically proscribe sexual relations with patients as unethical. AMERICAN PSYCHIATRIC ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 2(1) (1986); AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL STANDARDS OF PSYCHOLOGISTS, principles 6, 7 (1985).

<sup>23</sup> See N.Y. Educ. Law § 8509 (McKinney 1986); W. Va. Code § 80-3-14(8) (1986); Cal. Bus. & Prof. Code § 2960(n) (West 1989); Fla. Stat. Ann. § 468.331(j) (West 1988); Ind. Code Ann. § 25-22.5-6-2.1(5) (Burns 1982); Ky. Rev. Stat. Ann. § 319.082(n) (Michie/Bobbs-Merrill 1988); Colo. Rev. Stat. § 12-43-704(1)(q) (1988).

<sup>24</sup> One commentator has noted the lack of subpoena power and the investigatory inexperience of the various professional associations as possible reasons. A. STONE, *supra* note 5, at 204. Another writer has suggested that problems of proof, including the apparent incredibility of a psychiatric patient, make it difficult to successfully prosecute allegations of therapist sexual misconduct. LeBouef, *supra* note 2, at 97-98. Although license revocations by state authorities on the basis of sexual misconduct are not uncommon, Coleman, *supra* note 3, at 28-31, the effectiveness of these boards may be limited by their respective statutory empowerments and relationships with the local medical profession. A. STONE, *supra* note 5, at 205; see *Doe v. State Board of Medical Examiners*, 435 N.W.2d 45 (Minn. 1989) (although four members of eight-member board found sexual relations between psychiatrist and former patients to have been harmful to those patients, board not empowered to impose penalty without the affirmative vote of six members).

ment is actionable in tort, on grounds of malpractice.<sup>25</sup> In addition, these harms may be actionable in contract.<sup>26</sup> To facilitate civil actions, certain states have eased the burdens on patients seeking to recover damages for injuries resulting from these relationships by creating specific statutory causes of action;<sup>27</sup> providing for vicarious liability of the offending psychotherapist's employer;<sup>28</sup> adjusting the applicable statute of limitations;<sup>29</sup> and requiring mental health care providers who become aware that a patient has engaged in sexual relations with a therapist to provide that patient with an informational brochure explaining their rights and options.<sup>30</sup>

Despite specific statutory prohibitions in many states,<sup>31</sup> psychotherapists generally have not been held criminally liable for "consensual" sexual relations with their adult patients until fairly recently.<sup>32</sup> Certain state statutes provide criminal penalties for practitioners who engage in sexual relations with patients in state institutions and other long-term health care facilities,<sup>33</sup> or for those who engage in sex with persons suffering from mental impairment<sup>34</sup> but none of these measures predicates criminality solely on the basis of the unique nature of

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<sup>25</sup> See *Atienza v. Taub*, 239 Cal. Rptr. 454, 194 Cal. App. 3d 388 (Cal. App. 2d Dist. 1987); *Roy v. Hartogs*, 85 Misc. 2d 891, 381 N.Y.S. 2d 587 (1976); *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968).

<sup>26</sup> *Anclote Manor Found. v. Wilkinson*, 263 So. 2d 256 (Fla. 1972).

<sup>27</sup> Cal. Civil Code § 43.93 (West 1988); Minn. Stat. Ann. § 148A.01 (West 1986); Wis. Stat. Ann. § 895.70 (West 1987).

<sup>28</sup> Ill. Rev. Stat. ch. 70, para. 803 (1989); Minn. Stat. § 148A.03 (West 1986).

<sup>29</sup> Wisconsin extends the statute of limitations period if the victim "is unable to bring the action due to the effects of the sexual contact or due to any threats, instructions or statements from the therapist." Wis. Stat. Ann. § 893.585(2) (West 1987).

<sup>30</sup> Cal. Bus. & Prof. Code § 337 (West 1989). Knowing failure to provide a patient with this information constitutes unprofessional conduct. *Id.* The professional bodies themselves in Alabama now apparently encourage therapists to discuss a brochure describing client rights with their patients. Thorn Seminar, *supra* note 6.

<sup>31</sup> See e.g., Cal. Bus. & Prof. Code § 2960(n) (West 1989); Fla. Stat. § 490.0111 (West 1988).

<sup>32</sup> A few states, such as Michigan and New Hampshire, have rape statutes that cover situations involving patient-physician sex during the course of medical treatment or examination. Whereas New Hampshire law, N.H. Rev. Stat. Ann. § 632-A:2 (VII) (1986), has been interpreted as including nonphysician psychologists, see *State v. Von Klock*, 433 A.2d 1299, 1302 (N.H. 1981), Michigan's law, Mich. Stat. Ann. § 28.788(2) (Callaghan 1982), has been interpreted to not include practitioners of "non-medical emotional therapy." G. SCHOENER, *supra* note 1, at 547.

<sup>33</sup> See, e.g., Del. Code Ann. tit. 16, § 1136 (1983); Tenn. Code Ann. § 33-3-106 (1984); R.I. Gen. Laws § 23-17.8-1 (1987).

<sup>34</sup> See Me. Rev. Stat. Ann. tit. 17-A § 253(2)(C) (1986) ("[a] person is guilty of gross sexual misconduct . . . [i]f he engages in sexual intercourse or a sexual act with another person . . . and . . . [t]he other person suffers from mental disability that is reasonably apparent; or known to the actor, and which fact renders the other substantially incapable of apprising the nature of the contact").



the psychotherapeutic relationship itself. Because of the increased attention being given to the problem of patient-therapist sex, however, at least five states have enacted legislation that specifically criminalizes sexual relations of this nature.

In 1984, Wisconsin became the first state to make "sexual contact" between a client and a psychotherapist during treatment a misdemeanor.<sup>35</sup> The statute was amended in 1985 to make these relations a class D felony.<sup>36</sup> Currently, Wisconsin prohibits intentional sexual contact between a patient and "any person who is or who holds himself or herself out to be a therapist" during the course of psychotherapy.<sup>37</sup> A "therapist" is defined broadly as "a physician, psychologist, social worker, nurse, chemical dependency counselor, member of the clergy, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy."<sup>38</sup> Whether the patient consented to the sexual relations is irrelevant,<sup>39</sup> and offending psychotherapists may be sentenced to imprisonment for up to five years and levied a \$10,000 fine.<sup>40</sup>

Thus far, only a relative handful of cases have been prosecuted on the basis of this statute. At least two of the cases could be only prosecuted as misdemeanors under the statute as it existed before the offense was upgraded to felony status. One case brought after amendment of the statute was prosecuted as a misdemeanor because the witness did not want to testify in court. Each of these convicted therapists received a probationary sentence.<sup>41</sup> One convicted therapist, a nonlicensed counselor, was sentenced to a jail term of thirty days and two years of probation.<sup>42</sup>

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<sup>35</sup> Wisc. Stat. § 940.22(2) (West 1984), defines "sexual contact" as:

Any intentional touching by the complainant or defendant, either directly or through clothing by use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant . . . .

<sup>36</sup> *Id.* § 940.22(2).

<sup>37</sup> *Id.* § 940.22.2.

<sup>38</sup> *Id.* § 940.22.1(e).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 939.50(3)(d).

<sup>41</sup> Letter from John J. DiMotto, Jr., Senior Assistant District Attorney, Milwaukee County, Wisc. (Mar. 12, 1990).

<sup>42</sup> Waukesha Freeman, Mar. 28, 1988, at B1, col. 3.

As of 1985, Minnesota statutes provide that a psychotherapist "who engages in sexual penetration<sup>43</sup> with another person is guilty of criminal sexual conduct in the third degree" if:

(h) the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session. Consent by the complainant is not a defense;

(i) the actor is a psychotherapist and the complainant is a patient or a former patient of the psychotherapist and the patient or former patient is emotionally dependent upon the psychotherapist;

(j) the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception.<sup>44</sup> Consent by the complainant is not a defense.<sup>45</sup>

The maximum penalty for a crime of the third degree includes ten years' imprisonment and a \$20,000 fine.<sup>46</sup> Minnesota also makes it a crime of the fourth degree for acts of "sexual contact"<sup>47</sup> to occur under the same circumstances, the maxi-

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<sup>43</sup> Sexual penetration is defined in pertinent part as

"sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of the complainant's body of any part of the actor's body or any object used by the actor for this purpose, where the act is committed without the complainant's consent, except in those cases where consent is not a defense.

Minn. Stat. Ann. § 609.341 (12) (West 1987).

<sup>44</sup> "Therapeutic deception" means a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment." *Id.* § 148A.01(8).

<sup>45</sup> *Id.* § 609.344(1)(h)-(j).

<sup>46</sup> Minn. Stat. Ann. § 609.344(2) (West 1987).

<sup>47</sup> "Sexual contact" means any of the following, irrespective of the consent of a patient or former patient:

(1) sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, into the genital or anal openings of the patient's or former patient's body by any part of the psychotherapist's body or by any object used by the psychotherapist for this purpose, or any intrusion, however slight, into the genital or anal openings of the psychotherapist body by any patient's or former patient's body or by any object used by the patient for this purpose, if agreed to by the psychotherapist;

(2) kissing of, or the intentional touching by the psychotherapist of the patient's or former patient's genital area, groin, inner thigh, buttocks, or breast or of the clothing covering any of these body parts if the psychotherapist agrees to the kissing or intentional touching;

(3) kissing of, or the intentional touching by the patient or former patient of the psychotherapist's genital area, groin, inner thigh, buttocks or breast or of the

imum penalty for which includes five years' imprisonment and a \$10,000 fine.<sup>48</sup> Minnesota defines "psychotherapy" as "professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition."<sup>49</sup> As of January 1990, there had been nine prosecutions under these statutes in Minnesota, resulting in eight convictions.<sup>50</sup> Of these eight convictions, only two were the result of contested cases.<sup>51</sup> Three defendants are serving, or have served, prison terms.<sup>52</sup>

In a recent case before the Minnesota Court of Appeals, a minister was convicted of violating the emotional dependence<sup>53</sup> and therapeutic deception<sup>54</sup> proscriptions of the Minnesota statutes. The minister challenged the trial court's admission of expert testimony and the constitutionality of the Minnesota criminal statutes.<sup>55</sup> At trial, the prosecution's expert witness had testified that while the victim in the case was under appellant's care, she suffered from a dependent personality disorder that rendered "her unable to make everyday decisions by herself without excessive advice and reassurance from others."<sup>56</sup> Noting the careful manner in which the trial court considered the admissibility of the evidence and then limited the scope of the expert's testimony to avoid addressing the ultimate factual issue in the case,<sup>57</sup> the Minnesota Court of Appeals found that

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clothing covering any of these body parts if the psychotherapist agrees to the kissing or intentional touching.

"Sexual contact" includes requests by the psychotherapist for conduct described in clauses (1) to (3).

"Sexual contact" does not include conduct described in clause (1) or (2) that is a part of standard medical treatment of a patient.

*Id.* § 148A.01(7)(1)-(3) (West 1987).

<sup>48</sup> *Id.* § 609.345 (1)(h)-(j).

<sup>49</sup> Minn. Stat. Ann. § 148A.01(6) (West 1986). Similar to the Wisconsin statute, a "psychotherapist" is defined broadly as a "physician, psychologist, nurse, chemical dependency counselor, social worker, member of the clergy, marriage and family therapist, mental health service provider, or other person, whether or not licensed by the state, who performs or purports to perform psychotherapy." Minn. Stat. Ann. § 148A.01(5) (West 1987).

<sup>50</sup> Telephone interview with Mary Theisen, Special Assistant Attorney General, Criminal Division, Minnesota Attorney General's Office (Jan. 8, 1990). To the best of Ms. Theisen's knowledge, no additional cases had been brought as of June 6, 1990. Telephone interview with Ms. Theisen (June 6, 1990) [hereinafter Theisen interviews].

<sup>51</sup> For synopses of eight of these cases, see G. SCHOENER, *supra* note 1, at 553-60.

<sup>52</sup> Theisen interviews, *supra* note 50.

<sup>53</sup> Minn. Stat. § 609.345(1)(i) (1986).

<sup>54</sup> *Id.* § 609.345(1)(j).

<sup>55</sup> *State v. Dutton*, 450 N.W.2d 189, 192-93 (Minn. App. 1990).

<sup>56</sup> *Id.* at 192.

<sup>57</sup> The issue specifically was whether the victim could withhold her consent to sexual contact with the therapist. *Id.*

the trial court had acted within its discretion in admitting the evidence.<sup>58</sup> The appellant also argued that his private, consensual sexual activity with another adult was protected under the First Amendment of the United States Constitution. The court rejected this argument as well, finding that the right of privacy does not necessarily preclude this activity from being "properly regulated by the police power of the state," especially in light of the nature of the special relationship existing between patient and psychotherapist.<sup>59</sup> The Minnesota Court of Appeals also found appellant's argument that the statutes were unconstitutionally vague to be without merit. The court noted,

These statutes are meant to protect vulnerable persons and allow them to reposit trust in those who can help them. The legislature has recognized the emotional devastation that can result when a psychologist takes advantage of a patient.<sup>60</sup>

Colorado has recently criminalized sexual relations within the psychotherapeutic relationship as well. The pertinent Colorado statute now provides,

Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits aggravated sexual assault on a client if: . . . [t]he actor is a psychotherapist and the victim is a client of the psychotherapist; or . . . [t]he actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of a therapeutic deception.<sup>61</sup>

Aggravated sexual assault upon a client constitutes a class four felony.<sup>62</sup> Further, psychotherapists who subject clients to "sexual contact" are guilty of class one misdemeanors.<sup>63</sup> The maximum punishment for a class four felony includes eight years' imprisonment,<sup>64</sup> and the maximum punishment for a class one misdemeanor includes two years' imprisonment and a fine of \$1000.<sup>65</sup> Rather than list covered classes of individuals

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<sup>58</sup> *Id.* at 193.

<sup>59</sup> *Id.* at 193-94.

<sup>60</sup> *Id.* at 194.

<sup>61</sup> Colo. Rev. Stat. § 18-3-405.5(1)(a) (1989).

<sup>62</sup> *Id.* § 18-3-405.5(1)(b).

<sup>63</sup> *Id.* § 18-3-405.5(2)(a), (b). Consent is a defense to neither offense. *Id.* § 18-3-405.5(3).

<sup>64</sup> *Id.* § 18-1-105(a)(IV).

<sup>65</sup> *Id.* § 18-1-106.

as Wisconsin and Minnesota does, Colorado broadly defines "psychotherapy" as

the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social, or intellectual functioning.<sup>66</sup>

As of January 1990, only three cases under this statute had been referred by the State Attorney General's Office to the appropriate district attorneys for prosecution.<sup>67</sup> Although each involved "sexual contact"—and, therefore, only constituted misdemeanors under the Colorado statutory scheme—the respective prosecutors reportedly accepted the cases readily.<sup>68</sup>

North Dakota criminalized patient-therapist sexual relations in 1987, but there do not appear to have been any prosecutions under the statute yet.<sup>69</sup> One possible explanation is that district attorneys may favor prosecuting nonconsensual sexual offenders for gross sexual imposition, which carries a heavier penalty than the class C felony of sexual exploitation by a therapist.<sup>70</sup>

California is among the latest of the states to criminalize patient sexual abuse, having made sexual relations between a psychotherapist and a patient a misdemeanor in late 1989. The California statute provides that a psychotherapist is guilty of "sexual exploitation" if that person engages in certain sexual relations with a patient or a former patient if the therapeutic "relationship was terminated primarily for the purpose of engaging in those acts."<sup>71</sup> Although the statute provides for sentence enhancement if the offending psychotherapist is convicted of subsequent acts of sexual exploitation,<sup>72</sup> the rigor of

<sup>66</sup> *Id.* § 18-3-405.5(4)(c). "Psychotherapist" is accordingly defined as "any person who performs or purports to perform psychotherapy, whether or not such person is licensed by the state . . . or certified by the state . . ." *Id.* § 18-3-405.5(4)(b).

<sup>67</sup> Telephone interview with Mana Jennings, Assistant Attorney General, Colorado Attorney General's Office (Jan. 4, 1990). To the best of Ms. Jennings' knowledge, only an additional felony case was pending as of June 6, 1990. Telephone interview with Ms. Jennings (June 6, 1990).

<sup>68</sup> *Id.*

<sup>69</sup> N.D. Cent. Code § 12.1-20-06.1 (1987).

<sup>70</sup> Telephone interview with Robert Bennett, Assistant Attorney General, North Dakota Attorney General's Office (June 21, 1990). See N.D. Cent. Code § 12.1-20-03 (1987).

<sup>71</sup> Cal. Bus. & Prof. Code § 729(a) (West 1990).

<sup>72</sup> *Id.* § 729(b)(2).

the statute is questionable in light of the provision that excludes from coverage psychotherapists who refer their clients to independent therapists for treatment.<sup>73</sup> No cases appear to have been prosecuted under this statute as of yet.<sup>74</sup>

### B. The Military

Although instances of sexual abuse of patients by military psychotherapists are not found often in reported cases, the problem in the military is not insignificant.<sup>75</sup> Although the military—like the majority of civilian jurisdictions—does not criminalize these acts on the basis of the psychotherapeutic relationship, the military psychotherapist who engages in sexual relations with his or her patient may be criminally liable under the UCMJ for specific sexual acts performed with the patient, as well as the general course of conduct itself. Two recent Army cases demonstrate the broad scope of the UCMJ's criminal coverage of patient-therapist sex.

In *United States v. Rivera*, the victim, a service member's wife, engaged in various sexual acts with the appellant, an Army psychiatrist, for approximately two years during the course of psychotherapy for her Darvon addiction.<sup>76</sup> The appellant successfully weaned the victim of her Darvon addiction, but she became increasingly dependent upon the appellant and a codeine-containing substitute prescribed by him.<sup>77</sup> The victim testified at trial that "she 'guessed' she would have done anything to ensure that appellant would continue to treat her" and prescribe the Darvon substitute.<sup>78</sup> Rivera was convicted, *inter alia*, of sodomy, adultery, indecent acts with another, and conduct unbecoming an officer.<sup>79</sup>

Unlike the *Rivera* case, the noncommissioned officer appellant in *United States v. Thornton* was not a licensed mental health care professional. Instead, the appellant's usual duties

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<sup>73</sup> *Id.* § 729(a).

<sup>74</sup> Letter from Jacqueline C. Bouhoutsos, Ph.D., Clinical Psychologist (May 7, 1990).

<sup>75</sup> See, e.g., *Andrews v. United States*, 732 F.2d 366 (4th Cir. 1986) (Navy warrant officer performing duties as mental health counselor); *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986) (Air Force major, psychologist); and *United States v. King*, 16 M.J. 990 (A.C.M.R. 1983) (Army captain, psychologist).

<sup>76</sup> *United States v. Rivera*, 26 M.J. 638, 639-40 (A.C.M.R.), *petition denied*, 27 M.J. 459 (C.M.A. 1988).

<sup>77</sup> *Id.* at 640.

<sup>78</sup> *Id.* at 640.

<sup>79</sup> *Id.* at 639. The charge of conduct unbecoming an officer was later dismissed as being multiplicitous for findings with the other offenses. *Id.*

included only screening and intake work at the post mental health clinic. Despite his lack of qualifications, the appellant engaged in an unauthorized course of psychotherapy with a service member's wife, which included kissing, fondling, and fellatio. Appellant subsequently was convicted of dereliction of duty, indecent acts, and sodomy.<sup>80</sup>

As these two cases demonstrate, the common law, military, and general offenses that constitute the punitive articles of the UCMJ provide a comprehensive scheme by which patient-therapist sex is made subject to criminal sanction in the military. Although the consecutive sentences imposed under the UCMJ engender the possibility of much harsher punishment than could occur in civilian jurisdictions that have criminalized the conduct, considerations of multiplicity tend to make the sentences accurately reflect the circumstances of each case.<sup>81</sup>

As in civilian trials of this nature, proving that sexual relations occurred may be quite difficult in courts-martial. Frequently neither independent witnesses nor tangible evidence exist. Accordingly, the most intensely litigated issue at trial tends to be the credibility of the parties. Under these circumstances, both parties face obstacles in disproving the other's credibility. The victim bears the stigma of having sought mental health care in the first place.<sup>82</sup> Further, because of the harm he or she may have suffered through sexual relations during the course of therapy, the patient-victim may be in an especially fragile mental state at the time of trial.<sup>83</sup>

Some researchers believe they have discovered a syndrome displayed by patients who have been sexually victimized by their therapists.<sup>84</sup> In *Rivera*, the military judge allowed a government expert witness to testify on her research into the so-

<sup>80</sup> The Army Court of Military Review affirmed the conviction and sentence in *United States v. Thornton*, CM 8702653 (A.C.M.R. 5 May 1989) (unpub.).

<sup>81</sup> In *Rivera*, for example, the Army Court of Military Review upheld the military judge's instruction to the panel that the adultery specification was multiplicitous for sentencing with the sodomy and indecent acts specifications. *Rivera*, 26 M.J. at 643.

<sup>82</sup> LeBouef, *supra* note 2, at 97-98.

<sup>83</sup> An attorney experienced in this field of malpractice litigation recommends having an independent therapist examine the victim. "This therapist may then take the lead in the forensic arena and allow the treating therapist to preserve some measure of confidentiality even in the face of litigation." Epstein, *The Exploitative Psychotherapist as a Defendant*, 25 *Trial* 53, 59 (1989).

<sup>84</sup> Pope, *How Clients Are Harmed by Sexual Contact with Mental Health Professionals: The Syndrome and Its Prevalence*, 67 *J. COUNSELING & DEV.* 222, 222-25 (1988). The symptoms include: ambivalence; a sense of guilt; feelings of emptiness and isolation; sexual confusion; impaired ability to trust; identity, boundary, and role confusion; emotional lability; suppressed rage; increased suicidal risk; and cognitive dysfunction. *Id.* at 224-25; see also note 10, *supra* and accompanying text.

called patient-therapist sex syndrome and that, in her opinion, the victim in the case exhibited seventeen of the nineteen symptoms of the syndrome.<sup>85</sup> The Army Court of Military Review found the admission of evidence of the syndrome to be error, because "a sufficiently valid body of scientific knowledge [had not] been developed concerning" its reliability.<sup>86</sup> The Army Court held the error to be harmless, however, because the evidence was used only in sentencing, and other expert witnesses—both government and defense—corroborated the expert's testimony on the adverse symptoms exhibited by the victim.<sup>87</sup>

Use of the patient-therapist sex syndrome in civilian trials has not been extensive. In *Gifford v. Brotman*,<sup>88</sup> a Los Angeles Superior Court case tried before a judge alone, expert testimony as to the patient-therapist sex syndrome was admitted into evidence.<sup>89</sup> After judgment for the plaintiff, the case was settled in lieu of appeal.<sup>90</sup> Evidence of the patient-therapist sex syndrome also was admitted in an evidentiary hearing conducted by an administrative law judge in a Colorado case, which resulted in a recommendation by the judge that the offending psychologist's license be revoked for two years.<sup>91</sup> The state board, however, ordered the permanent revocation of the psychologist's license.<sup>92</sup> The board's decision was challenged on grounds other than the admissibility of the patient-therapist sex syndrome evidence, but was upheld by the Colorado Court of Appeals.<sup>93</sup> Presumably, evidence of the patient-therapist sex syndrome would be admissible at courts-martial if the original research is confirmed sufficiently in the future.

The defense, on the other hand, may have to contend with the shield provisions of the Military Rules of Evidence. Military Rule of Evidence 412 generally precludes the admission into evidence of the past sexual behavior of an alleged victim

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<sup>85</sup> *Rivera*, 26 M.J. at 641.

<sup>86</sup> *Id.* at 642.

<sup>87</sup> *Id.* at 642-43.

<sup>88</sup> No. NWC 93556 (Los Angeles Sup. Ct. 1987).

<sup>89</sup> Letter from Michael H. White, Esq., Nov. 8, 1989.

<sup>90</sup> *Id.*

<sup>91</sup> Telephone interview with Linda L. Siderius, Assistant Attorney General, Regulatory Law Section, Colorado Attorney General's Office (Dec. 11, 1989) (regarding *Davis v. State Board of Psychologist Examiners*, No. 88CA1782, slip op. at 1-2 (Colorado Ct. Apps. Dec. 28, 1989)). The Colorado Supreme Court denied *Davis'* petition for a Writ of Certiorari on June 11, 1990 (case number 90SC100). Telephone interview with Ms. Siderius (June 21, 1990).

<sup>92</sup> *Davis*, slip op. at 2.

<sup>93</sup> *Id.* at 11.



in cases involving "nonconsensual sexual offenses."<sup>94</sup> Although the rule defines nonconsensual sexual offenses as those "in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense,"<sup>95</sup> some commentators have argued that a patient undergoing psychotherapy may be unable truly to consent to sexual relations with the therapist.<sup>96</sup>

#### IV. Conclusion

Until the issue of sexual relationships during the course of psychotherapy explicitly is dealt with within graduate training programs, supervisory experiences, and professional practice,<sup>97</sup> the unfortunate and exploitative phenomena of sexual relations between therapists and their clients will continue to occur at an alarming rate. Certain researchers advocate nationwide research into the problem and significant reform of licensing and disciplinary procedures to ensure greater professional accountability.<sup>98</sup> Others have suggested a more proactive approach to the problem, through heightening client awareness of rights and of the appropriate boundaries for the therapeutic relationship.<sup>99</sup> Meanwhile, the proper treatment of offending practitioners remains a matter of debate within the professional communities. Many feel that criminal punishment is inappropriate, and instead are in favor of therapy for the offenders.<sup>100</sup> Others believe that sexual relations within the psychotherapeutic relationship are akin to rape, and should be

<sup>94</sup> Manual for Courts-Martial, United States, 1984, Mil. R. Evid. [hereinafter Mil. R. Evid.] 412. With regard to civil actions for sexual exploitation by a psychotherapist, several states prohibit the discovery and admission of evidence of a plaintiff's sexual history. See e.g., Minn. Stat. §§ 148A.04, 148.05 (1986).

<sup>95</sup> Mil. R. Evid. 412(e).

<sup>96</sup> Patients entering into psychotherapy may be vulnerable to a therapist's suggestion to engage in sex, merely because of the nature of the problem that is compelling them to seek treatment. *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, 329 N.W.2d 306, 310-11 (Minn. 1982). Offending therapists also might employ threats of termination of therapy, withdrawal of prescribed drugs, or even commitment in a mental health care facility. LeBouef, *supra* note 2, at 88. Further, sex under the guise of treatment involves consent to treatment—not sex. *Vigilant Ins. Co. v. Kambly*, 114 Mich. App. 683, 319 N.W.2d 382 (1982).

<sup>97</sup> G. SCHOENER, *supra* note 1, at 670-71. Professionals investigating cases of sexual impropriety have linked this behavior to an inappropriate crossing of therapeutic boundaries, see Vasquez & Kitchener, *Introduction to Special Feature*, 67 J. COUNSELING & DEV. 214, 214-15 (1989), and suggest that a sizeable percentage of cases might be avoided if appropriate preventative action is taken.

<sup>98</sup> G. SCHOENER, *supra* note 1, at 378, 569-70.

<sup>99</sup> Thorn Seminar, *supra* note 6.

<sup>100</sup> See A. STONE, *supra* note 5, at 193; Coleman, *supra* note 3, at 21.

treated as such.<sup>101</sup> While currently a greater awareness of the problem exists on the part of the mental health professions, the courts, and the public, it is unclear whether the specific criminalization of patient-therapist relations in civilian jurisdictions is merely an isolated example of this cognizance or whether it is the beginning of a trend of increased criminalization of this conduct. For the moment, however, the UCMJ offers victims of this type of sexual abuse a degree of protection unmatched by all but a few civilian jurisdictions.

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<sup>101</sup> Masters & Johnson, *Principles of the New Sex Therapy*, 133 AM. J. PSYCHIATRY 548 (1976). Other researchers believe that the threat of criminal sanction may have a deterrent effect on a significant number of potential offenders. Telephone conversation with Gary R. Schoener (Jan. 9, 1990).

# FRATERNIZATION: TIME FOR A RATIONAL DEPARTMENT OF DEFENSE STANDARD

MAJOR DAVID S. JONAS\*

## I. Introduction

The problems of pregnancy, single-parents, and dual service couples were made possible largely by the erosion of the age-old ban on fraternization between the ranks. To be sure, the American military has been moving toward greater and greater egalitarianism for some time, but nothing has done more to cheapen rank and diminish respect for authority than cute little female lieutenants and privates. Military customs and regulations are no match for the forces that draw men and women together in pairs without regard for differences in pay grade. Cupid mocks Mars. Lust and love laugh in the face of martial pomp and the pretensions of power.<sup>1</sup>

### A. Hypothetical

The following hypothetical highlights some of the typical problems that arise in a paradigm fraternization case. Consider the case of a public affairs officer for the United States Central Command appearing on a major television network interview regarding a fraternization prosecution in the Persian Gulf. A Marine Corps first lieutenant has been dating a female Navy dental technician. They are engaged and the female is pregnant. The two are attached to separate units, and have never worked together. The civilian defense attorney representing the lieutenant is present and makes the following com-

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\* United States Marine Corps. B.A., 1978, Denison University; J.D., 1981, Wake Forest University Law School; LL.M., 1991, The Judge Advocate General's School. Formerly assigned as Commanding Officer, Support Company, MCRD, San Diego, California, 1988-1990; Senior Defense Council, MCRD, San Diego, California, 1987-1988; 13th MAU, Staff Judge Advocate, 1985-1986; Commanding Officer, Headquarters Company, 5th Marines, Camp Pendleton, California, 1984-1985; Trial and Defense Council, Camp Pendleton, California, 1982-1983. Member of the Pennsylvania Bar. The author wishes to express his gratitude for the invaluable guidance and advice of Lieutenant Colonel Thomas J. Leclair and Mr. Daniel S. Jonas. Additionally, Mr. Daniel C. Lavering provided superior research assistance as the JAG School librarian. This article is based upon a written thesis dissertation that the author submitted to satisfy, in part, the degree requirements of the 39th Judge Advocate Officer Graduate Course.

<sup>1</sup> B. MITCHELL, *WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY* 176 (1989).

ments: "This is a moral outrage. Both parties are young, single, attractive Americans. They are here pursuant to orders, fighting for their country. Both have perfect records. They aren't in the same unit or service. All their activities were conducted in private. What about their rights to privacy and freedom of association? Those are the very constitutional rights they are risking their lives to defend.<sup>2</sup> All they did was fall in love. And for this, the Marine Corps wants to brand them criminals and send them to jail." The moderator turns to you and says, "How do you respond?" The legal ramifications to the arguments raised by defense counsel are not susceptible to simple analysis. This article explores these and similar issues.

### B. Background

Anyone who has served in the military in the last decade is aware of the concept of fraternization. Unfortunately, genuine understanding of this concept lags far behind this general familiarity. When asked to define fraternization, most military personnel focus primarily upon officer-enlisted dating and sexual relationships. Those types of relationships are the *primary* focus of this article, yet the actual definition encompasses far more.

Surprisingly, little has been written on fraternization, given the lack of genuine understanding and the constant debate and confusion that it spawns. Most military personnel agree that the frequency of fraternization is on the rise. One of the most significant factors responsible for increased fraternization is the influx of women into the military since World War II, an influx that escalated rapidly in the 1970's.<sup>3</sup> This increase has resulted in today's military, with over 221,000 women on active duty—roughly ten percent of our total force.<sup>4</sup> If nothing else, this explains increased *opportunity* for fraternization.

With the end of the draft, the institution of a volunteer military has ensured that the American military mirrors society. American culture is essentially egalitarian—a far cry from the

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<sup>2</sup> See Zillman and Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 436 (1976).

The military must remember that, although in many respects it will remain a society apart, the men and women filling its ranks are members of American society and therefore generally entitled to exercise the same civil liberties they have sworn to defend with their lives.

<sup>3</sup> See generally, J. HOLM, *WOMEN IN THE MILITARY, AN UNFINISHED REVOLUTION* (1982); B MITCHELL, *supra* note 1.

<sup>4</sup> See B. MITCHELL, *supra* note 1, at 36.

authoritarian nature of the military. The absence of *real* class distinctions in the civilian world highlights the military officer-enlisted distinction. Americans do not recognize class distinctions,<sup>5</sup> and accept them only if they are rationally related to a legitimate purpose. This is one reason for the conceptual and practical problems surrounding the fraternization regulations, especially in the context of disposition by criminal prosecutions. The failure to grapple adequately with this contemporary issue results in radically different policies and practices, and leaves virtually all military personnel in a quandary.

### C. Purpose

This article examines the fraternization regulations of all five branches of the uniformed military services<sup>6</sup> from a functional perspective—that is, what are the purposes for the regulations, and are the regulations fulfilling these goals? The article first places fraternization in a brief historical context; then it examines the reasons for the creation of the Uniform Code of Military Justice (UCMJ),<sup>7</sup> its legislative history, and its emphasis on uniformity. This article shows how the current concept of fraternization is virtually unrecognizable from its ancestry. The article then examines the current punitive article on fraternization in detail and discusses the concepts of fraternization in the civilian sector and in allied military forces to provide standards against which to measure the American military regulations. The analysis of individual regulations of the services culminates in a functional analysis specifically addressing whether the regulations are accomplishing their intended purposes. Finally, this article examines attempts to revise fraternization policy, and concludes with proposing a Department of Defense (DOD) "purple<sup>8</sup> standard" for fraternization.

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<sup>5</sup> Americans refuse to tolerate class distinctions in a much broader sense. For example, distinctions based on race, gender, age, and religion are subject to constitutional scrutiny. *Yick Wo v. Hopkins*, 118 U.S. 358 (1886).

<sup>6</sup> The Coast Guard regulations are considered because, even though that service is in the Department of Transportation in peacetime, it attaches to the Department of Defense in time of war.

<sup>7</sup> 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

<sup>8</sup> "Purple" is the term used to denote joint or multiservice activities. One who wears a "purple suit" is said to have no loyalty to any particular service. This is viewed as a positive attribute to eliminate bureaucratic infighting. A "purple standard" would apply to all services.

Four out of five services revised their regulations in the last two years. Fraternalization is a subject of heated debate, and there have been legislative attempts to create a DOD standard. The services are united in their opposition to a DOD policy,<sup>9</sup> presumably because no unit commander likes to be told how to run his or her outfit, regardless of who is doing the telling. Alternatively, mere bureaucratic inertia, or hostility to change, may be responsible.

A majority of the services stress that fraternization is a gender-neutral<sup>10</sup> concept that is not objectionable as a policy matter, but modern enforcement focuses almost exclusively on opposite sex dating and sexual relationships.<sup>11</sup> The article therefore will focus primarily on mutually consensual, nondeviant private sexual relations.<sup>12</sup> These qualifications are necessary to segregate fraternization from assault, rape, sexual harassment, and a host of other criminal offenses.<sup>13</sup>

## II. History of Fraternalization

### A. Inception and Early Development—Roman Era

Fraternalization has steadily evolved since its inception. To quote Justice Frankfurter, "Wisdom, like good wine, requires maturing."<sup>14</sup> Fraternalization appears to have originated in the Roman era.<sup>15</sup> References to the custom against fraternization appear throughout writings on military history and military

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<sup>9</sup> Report, Office of the Assistant Secretary of Defense (Force Management and Personnel), undated Working Group Report on Fraternalization.

<sup>10</sup> Fraternalization is gender-neutral in that no greater onus of compliance or punishment specifically or intentionally is placed upon males or females.

<sup>11</sup> Admire, *Fraternalization*, MARINE CORPS GAZETTE, Mar. 1984, at 63. The author discusses "that distinct difference between the fraternal emotions of camaraderie, and the sexual emotions of many male-female relationships." This is not to say that fraternization is exclusively a mixed gender issue, but it is much more likely to be so. Most current fraternization cases involve sexual escapades.

<sup>12</sup> Because nearly all personnel in the services are "of age" for purposes of exemption from statutory rape issues, this article does not address this issue. No military cases raise the issue of statutory rape in the context of fraternization.

<sup>13</sup> Sexual harassment is the most closely related offense, which, by definition, implies elements of nonvoluntariness from one party. The concept of implied nonvoluntariness—that is, lack of effective consent—will be touched on briefly in relation to student-faculty and patient-therapist relationships. In a military context, the analogue would be a recruit-drill instructor relationship.

<sup>14</sup> *Kinsella v. Krueger*, 351 U.S. 470, 486 (1955).

<sup>15</sup> For a superb and complete history of fraternization, with extensive citations and documentation, see Carter, *Fraternalization*, 113 MIL. L. REV. 61 (1986). In presenting the brief history to provide the reader with a historical backdrop, the author relied heavily upon this article.

law.<sup>16</sup> The ancient Romans have the first recorded regulations regarding associations of personnel of different rank within their military.<sup>17</sup>

### *B. European and British Concepts of Fraternization*

The origin of the current policy on fraternization stems from the class distinction between nobles and peasants in the European Middle Ages.<sup>18</sup> The military concept of social and class distinctions in the feudal era, as in Roman times, presented a microcosm of social mores. Battles were fought by knights who returned to their castles upon completion of wars. Officership was merely a part-time aspect of aristocratic existence.<sup>19</sup> The Code of Articles of King Gustavus Adolphus of Sweden prohibited close relationships between officers and common soldiers, circa 1621.<sup>20</sup> A huge social chasm existed between the officer and the soldier, even when the medieval feudal economy stalled, and capitalism arose in its place.<sup>21</sup> As this occurred, knights gave way to mercenary armies—"soldiers organized and led by nobility and financed by capitalists."<sup>22</sup> Through the standing army, the nobility found employment and leadership positions by virtue of officership.<sup>23</sup> They perpetuated the concepts of honor and superiority as prerogatives based on their "high born estate, which could not be shared by inferiors."<sup>24</sup>

<sup>16</sup> See A. STRADLING, *CUSTOMS OF THE SERVICE* (1948).

<sup>17</sup> One regulation prohibited service in a unit as a captain or any lower rank when one previously had served in that command as a tribune. The purpose for this rule was to avoid the loss of discipline that was viewed as a necessary consequence of undue familiarity. B. AYALA, *THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE* 175, 180 (Douay ed. 1582) (J. Bate trans. 1912). Note that this "novel" view of the concept disappeared only to be revived circa 1945.

<sup>18</sup> See Letter, Dep't of Army No. 600-84-2, DAPE-HRL (M), subject: Fraternization and Regulatory Policy Regarding Relationships Between Members of Different Ranks, 23 Nov. 1984; S. ROSE, *The Military Offense of Wrongful Fraternization—Updating an Old Custom* (Apr. 1983) (unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

<sup>19</sup> M. JANOWITZ, *SOCIOLOGY AND THE MILITARY ESTABLISHMENT* 26 (1959).

<sup>20</sup> J. WINTHROP, *MILITARY LAWS AND PRECEDENT* 907-16 (2d ed. 1920).

<sup>21</sup> Hemmer, *Violation of the Military Superior-Subordinate Relationship Is a Crime! Isn't It?* (Apr. 1973) (unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.*

<sup>24</sup> A. VAGTS, *A HISTORY OF MILITARISM* 39 (1937). An example of this social divide is written into the Saxon-Polish Field Service Rules of 1752:

For the officer, honor is reserved, for the common man, obedience and loyalty . . . From honor flows intrepidity and equanimity in danger, zeal to win, ability and experience, respect for superiors, modesty towards one's equals, *condescen-*

Enlisted soldiers were recruited from the lowest elements of society and were often beggars and criminals. While the vivid demarcations between nobles and peasants terminated due to the Napoleonic emphasis on skill, class-based distinctions remained.<sup>25</sup> Discipline was harsh for enlisted men, in accordance with Frederick the Great's maxim that men must fear their officers more than the enemy.<sup>26</sup>

The British were quite adept at keeping those concepts alive. At the time of America's birth, the British Articles of War, while not specifically alluding to fraternization, had provisions prohibiting both conduct unbecoming an officer and a gentleman<sup>27</sup> and conduct prejudicial to good order and military discipline.<sup>28</sup> Fraternization, as currently understood, was prosecuted under these articles.<sup>29</sup>

Many fraternization-type cases were tried in the early 1800's by the British.<sup>30</sup> These included fighting about women of bad character,<sup>31</sup> dressing in a sergeant's jacket and associating with privates in the guardroom,<sup>32</sup> "sitting in company and associating with" a private in an officer's barracks room,<sup>33</sup> mes-  
sing with noncommissioned officers,<sup>34</sup> eating and drinking with soldiers in the barracks,<sup>35</sup> and playing billiards with a soldier

*sion toward inferiors, severity against criminals . . . Nothing therefore must incite the officers but honor which carries its own recompense; but the soldier is driven and restrained and educated to discipline by reward and fear . . . The worst soldier is an officer without honor, a common man without discipline.*

*Id.* at 74-5, n.27 (emphasis added).

<sup>25</sup> HEMMER, *supra* note 21, at 10.

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

<sup>27</sup> British Articles of War of 1774, § 16, art. 23:

Whatsoever Commissioned Officer shall be convicted before a General Court-Martial of behaving in a scandalous infamous manner, such as is unbecoming the character of an Officer and a Gentleman shall be discharged from our Service.

<sup>28</sup> *Id.*, § 20, art. 3.

All crimes not capital and all Disorders and Neglects which Officers and Soldiers may be guilty of to the Prejudice of Good Order and Military Discipline, thus, not mentioned in the above Articles of War are to be taken cognizance of by a General or Regimental Court-Martial, according to the Nature and Degree of the Offense, and be punished at their discretion.

<sup>29</sup> Fraternization was a radically different concept in early America. There were no women in the military; therefore, fraternization between the sexes was unheard of.

<sup>30</sup> C. JAMES, A COLLECTION OF THE CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS-MARTIAL (1820).

<sup>31</sup> *Id.* at 36-39.

<sup>32</sup> *Id.* at 238-40.

<sup>33</sup> *Id.* at 315-17.

<sup>34</sup> *Id.* at 121-22.

<sup>35</sup> *Id.* at 392-93.



in a public tavern.<sup>36</sup> It is noteworthy that merely associating or mingling among different ranks was the common theme in each of the listed offenses.<sup>37</sup>

At this time the British were the enemy. Colonial America abhorred their aristocratic ways. Defiantly, the Declaration of Independence stated, "All men are created equal."<sup>38</sup> How unusual then, that their Articles of War were adopted nearly verbatim as our military code.<sup>39</sup> A rather obvious conflict was ingrained: an artificially aristocratic caste of officers had been set up to lead an armed populace of free independent men.<sup>40</sup>

### C. Evolution of the American Concept of Fraternization

Not surprisingly, since American punitive articles were identical, American cases also mirrored the British experience.<sup>41</sup> Nearly all of the cases involved drunkenness in public places,<sup>42</sup> and many, from a contemporary "enlightened" perspective, appear humorous. These cases included inviting enlisted men to an officer's quarters to drink,<sup>43</sup> accompanying noncommissioned officers of his company to "visit and drink whiskey at a low hovel kept by Irish and Negro women, thereby degrading himself in the opinion of the men,"<sup>44</sup> and—a true classic—"a lieutenant, while in command of the guard became drunk and had sexual intercourse with a Negro, or colored woman, in the presence of his guard, and did remain on said Negro, or colored woman, thirty minutes or more until [the guard] made him get off."<sup>45</sup> Although some of this conduct might be prosecuted today, many cases prosecuted then would not be prosecuted

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<sup>36</sup> *Id.* at 375-76.

<sup>37</sup> Interestingly, a regulation prohibiting purely associational behavior existed in the original American Articles of War. Article 4 provided that it would be considered "scandalous" for any officer to *associate* with an officer dismissed for "cowardice or fraud." No one was ever disciplined for a violation of this Article. W. WINTHROP, *supra* note 20, at 534.

<sup>38</sup> DECLARATION OF INDEPENDENCE, Preamble (U.S. 1776).

<sup>39</sup> American Articles of War of 1776, § XIV, art. 21 is identical to the British provision, with only cosmetic changes. Similarly, § XVIII, art. 5 is identical to the British regulation, with no substantive changes. See *supra* notes 27, 28.

<sup>40</sup> Hemmer, *supra* note 21, at 11-12.

<sup>41</sup> See Carter, *supra* note 15, at 88, n.44. Again, the author presents an in-depth look at case law in this area.

<sup>42</sup> Gen. Orders (no numbers), Adjutant and Inspector General's Office (22 Apr. 1815) (major general acquitted of intoxication in front of his soldiers).

<sup>43</sup> Gen. Orders No. 209, War Dep't (7 July 1863).

<sup>44</sup> Gen. Orders No. 261, War Dep't (1 Aug. 1863).

<sup>45</sup> Gen. Court-Martial Order No. 100, War Dep't (16 May 1864).

now.<sup>46</sup> In spite of this, the custom held on and dug in deeper. Officers and enlisted men were separated by a solid class boundary.<sup>47</sup>

*D. Fraternalization Based Upon the Need for Good Order and Discipline; The Death Knell of the Social-Class-Based Fraternalization Justification*

World War II confounded the entire issue, particularly because of women entering the service.<sup>48</sup> This presented an opportunity for a whole new type of fraternization.<sup>49</sup> The different handling of fraternization issues that were a normal consequence of the presence of women and men together in the services provided a further impetus to the call for uniformity in military justice. This was a confusing time to be in the military. Enlisted women in the Army were punished for "dating Naval or Allied officers who were not punishable."<sup>50</sup> Still, the consensus was that dating and socializing between officers and

<sup>46</sup> *E.g.*, Gen. Orders (no numbers), War Dep't (2 Jan. 1810) (second lieutenant convicted of playing cards with an enlisted "servant"); Gen. Orders No. 10, HQ, Dep't of Army (1826) (lieutenant convicted of compromising his position as a commissioned officer by going on a fishing trip with men of his garrison); Gen. Orders No. 37, Adjutant General's Office (31 July 1827) (lieutenant found not guilty in the "almost daily habit of living or feeding" upon company rations in the company messroom "thereby lessening his dignity and character as an officer").

<sup>47</sup> The following thoughts convey the message quite well:

There is absolutely no point of social contact between the soldier . . . and the officer. Officers who consort with enlisted men now are tried by General Court-Martial for having done an almost unspeakable thing . . . Aside from the social distinction between the white and colored races, the Army is the only institution in the United States that is so completely a caste institution. It is an anomaly among our institutions.

F. Johnson, *Discipline*, THE NEW REPUBLIC July 2, 1919, at 280-81.

<sup>48</sup> Women began to appear in fraternization caselaw at this time, as they entered the ranks in large numbers. A particularly noteworthy case was *United States v. Futrell*, 47 B.R. 339 (1945), in which a Women's Army Corps (WAC) captain allowed Navy enlisted men into her BOQ room and drank liquor with them. This conviction of "inter-service fraternization," not even discussed in the case, was clearly based upon the social-class distinction. See also *United States v. Hooey*, 27 B.R. 5 (1943) (lieutenant cook enlisted WAC into officer's quarters); *United States v. Porter*, 39 B.R. 49 (1944) (lieutenant wrote to enlisted WAC, requesting to perform cunnilingus); *United States v. Ochs*, 40 B.R. 339 (1944) (WAC lieutenant cohabited with single enlisted man); *United States v. Clark*, 2 B.R. (A-P) 843 (1945) (two lieutenants kissed two enlisted women in a truck in view of enlisted men).

<sup>49</sup> The concept of fraternization not only expanded to include American servicewomen, but also it grew to include enemy women. When American forces occupied Germany romance and sexual liaisons between United States soldiers and German frauleins, while common, were frowned upon. See *United States v. Flackman*, 10 B.R. (ETO) 225 (A.B.R. 1945); *United States v. Wilson*, 30 B.R. (ETO) 76 (A.B.R. 1945).

<sup>50</sup> M. TREADWELL, *THE WOMEN'S ARMY CORPS* (1954). This text provides an excellent overview of the legal, social, and moral problems encountered at the time.

enlisted personnel did not affect morale and discipline adversely.<sup>51</sup> Even after the war, the courts hesitated to regulate private heterosexual fornication absent aggravating factors.<sup>52</sup> Nonetheless, between men, rules against fraternization were based on the customary notion that "familiarity breeds contempt."<sup>53</sup>

Imbibing in alcoholic beverages with enlisted men, in public or private, resulted in numerous courts-martial. For example, a pilot was convicted of fraternizing with his enlisted copilot by drinking liquor at a bar with him, in 1944.<sup>54</sup> There was also a divergence of opinion within Army cases, which concluded that drinking liquor in the company of enlisted men was conduct prejudicial to good order and discipline, though not conduct unbecoming an officer and a gentleman.<sup>55</sup>

The case of *United States v. Bunker*<sup>56</sup> contains the first reference to the term "fraternization." *Bunker* completed the shift in justification for fraternization regulations from maintaining social class distinctions to the need for discipline and order. Rather than rely upon class distinctions, courts began to lean heavily upon the "custom of the service."<sup>57</sup> From that point on, routine fraternization convictions were upheld as conduct prejudicial to good order and discipline, rather than as conduct unbecoming an officer and a gentleman, unless there

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<sup>51</sup> See generally, J. HOLM, *supra* note 3.

<sup>52</sup> See generally, *United States v. Wilson*, 32 C.M.R. 517 (A.B.R. 1962); *United States v. Berry*, 20 C.M.R. 325 (C.M.A. 1956); *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952).

<sup>53</sup> See J. WINTHROP, *supra* note 20, at 715; see also Peyton, *A Comprehensive Course in Military Discipline and Courtesy*, U.S. Army Pam. D-2 (1921) (quoting MG David C. Shanks on his views):

[U]ndue familiarity between officers and enlisted men is forbidden. . . . This requirement is not founded upon any difference in culture or mental attainments. It is founded solely upon the demands of discipline. Discipline requires an immediate, loyal, cheerful compliance with the lawful orders of the superior. Experience and human nature shows that these objects cannot be readily attained when there is undue familiarity between the officer and those under his command.

<sup>54</sup> *United States v. Glover*, 14 B.R. (ETO) 67 (1944); see also *United States v. Long*, 13 B.R. (ETO) 291 (1944).

<sup>55</sup> See *United States v. Johnston*, 23 B.R. 183 (1945); *United States v. Wright*, 44 B.R. 183 (1945); *United States v. Futrell*, 47 B.R. 339 (1945); *United States v. Field*, 21 B.R. 41 (1943).

<sup>56</sup> 27 B.R. 385 (1943).

<sup>57</sup> See generally, *United States v. Pitasi*, 44 C.M.R. 31 (C.M.A. 1971); *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953); *United States v. Lovejoy*, 41 C.M.R. 777 (N.C.M.R. 1968); and *United States v. Jones*, 40 B.R. 149 (1944); see also Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG L. Rev. 124 (1970); Flatten, *Fraternization*, 10 A.F. Rep. 109 (Aug. 1981); Carter, *supra* note 15, at 77.

were additional aggravating circumstances.<sup>58</sup> But many senior officers, including General Eisenhower, disagreed with these distinctions—especially in the context of mixed-gender relationships.<sup>59</sup>

The case of *United States v. Patterson*,<sup>60</sup> illustrates this point. In *Patterson*, a lieutenant was convicted for fraternizing socially "with enlisted men in a public hotel and country club." The court stated that social fraternization between officers and enlisted personnel is "prohibited by military custom and not by any specific provision of the articles of war. The basis of the custom is military discipline. It is *not a question of social equality*."<sup>61</sup> In *United States v. Penick*,<sup>62</sup> an Army Air Corps second lieutenant was convicted of fraternizing and socially associating with a staff sergeant and a sergeant, by "talking, drinking, and playing darts with them in a public place."<sup>63</sup> It is difficult to see how military discipline was prejudiced by such innocuous conduct.<sup>64</sup> The civilian press reacted with characteristic contempt<sup>65</sup> to this type of reasoning.

But other factors were, and still are, at work rendering these distinctions less palatable. The technological revolution, still accelerating, has promoted the "dehierarchization"<sup>66</sup> of the military. As linear operations have been replaced by small groups, frequently acting independently, the need for initiative has increased in importance at the expense of obedience. Rank has also lost significance, for the expert enjoys a certain "functional autonomy"<sup>67</sup> in that he or she may be ordered as to

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<sup>58</sup> Carter, *supra* note 15, at 76.

<sup>59</sup> In 1945, General Eisenhower stated, "I want good sense to govern such things. Social contact between the sexes . . . that does not interfere with other officers or enlisted persons should have the rule of decency and deportment, not artificial barriers." S. AMBROSE, *EISENHOWER, 1890-1952*, 417-18 (1983). Of course, one must consider General Eisenhower's own reputation as a notorious fraternizer.

<sup>60</sup> 41 B.R. 365 (1944).

<sup>61</sup> *Id.* at 368 (emphasis added). The court "doth protest too much."

<sup>62</sup> 19 B.R. (ETO) 257 (1945).

<sup>63</sup> *Id.* at 260.

<sup>64</sup> Indeed, members of the court were not in full agreement on this issue. Judge Burrow dissented regarding the fraternization specification, stating that it failed to allege an offense. Citing Webster, he noted that fraternization means, "to associate or hold fellowship upon comradely terms," and "socially" as "marked by companionship of others." The allegators, then, accused second lieutenant Penick of "wrongfully being a comrade in arms which is not blameworthy, but on the contrary, precisely his duty." *Id.* at 261.

<sup>65</sup> A *Life* magazine writer gave this evaluation: "The present officer-enlisted man relationship might fit a dictatorship but it is anathema to the citizens of a democracy." Neville, *What's Wrong with Our Army?* LIFE, Feb. 25, 1946, at 104.

<sup>66</sup> F. KJIEZER, *MILITARY OBEDIENCE* 45 (1978).

<sup>67</sup> *Id.* at 46.

where to report and why, but not as to how he or she chooses to exercise his or her skill. Moreover, officers and enlisted members are recruited from similar social classes, and enlisted members now feel justified in criticizing their officers—and even expect to be consulted on decisions that affect them.<sup>68</sup>

### *E. Article 134 Fraternization*

Even amid the growing number of incidents of fraternization, and the concomitant regulations and court decisions, only one constant remained—confusion. The 1984 Manual for Courts-Martial included a specific criminal offense of fraternization under article 134 for the first time.<sup>69</sup> It was appropriately placed under article 134, the “general article,” which encompasses “all disorders and neglects to the prejudice of good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces.” Prior to discussing the article on fraternization, it is critical to analyze the general guidance applicable to all article 134 offenses.<sup>70</sup>

While broad in its application, the guidance for the general article is reasonably specific by its terms. Courts consistently have upheld its validity against frequent void-for-vagueness attacks.<sup>71</sup> The most important language of the regulation is the requirement that acts be “*directly*” prejudicial to good order and discipline. The statement that the act cannot be “prejudicial only in a remote sense” clarifies this. Thus, socializing within the chain of command would qualify, but beyond that, the impact—if any—seems quite intangible and insubstantial. Interestingly, courts rarely confront this issue, nor is it frequently raised.

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<sup>68</sup> *Id.* at 47.

<sup>69</sup> Manual for Courts-Martial, United States, 1984, Part IV, para. 83b [hereinafter MCM, 1984].

<sup>70</sup> See *Id.*, part IV, para. 83.

<sup>71</sup> See, e.g., *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), *petitioned denied*, 18 M.J. 31 (C.M.A. 1982); *United States v. Tedder*, 18 M.J. 777 (N.M.C.M.R.), *petition granted*, 19 M.J. 115 (C.M.A. 1984); *Staton v. Froehlike*, 390 F. Supp. 503 (D.D.C. 1975); *United States v. Lovejoy*, 42 C.M.R. 210 (C.M.A. 1970). The only successful use of this challenge was in *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985). See generally *Cutts, Article 134: Vague or Valid*, 15 A.F. JAG L. REV. 129 (1974); *Everett, Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 27 N.C.L. REV. 142 (1959); *Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971); *Hewitt, General Article Void for Vagueness*, 84 NEB. L. REV. 529 (1968).

For these types of fraternization, courts rely on a breach of the custom of the service. Article 134's language should give pause to many prosecutors. For example, the "custom prong" of article 134 requires that the custom "arise out of long established practices." One wonders if a service may "bootstrap" a custom into existence through promulgation of regulations. It would seem to depart radically from this standard to overhaul regulations in spite of the *actual* custom. This aspect of article 134 is unclear. While it makes sense to assert that "no custom may be contrary to existing law or regulation," what happens if the regulation is contrary to existing custom? Must the custom change to fit the regulation, or is the regulation void? The statement that "many customs of the service are now set forth in regulations of the various armed forces," does not clarify whether a regulation may establish a custom, or whether the "custom," as stated in the regulation, must have any basis in reality. As this article will illustrate, custom is the "soft" point of commonality in the service regulations—so soft that the regulations can rarely be fixed for definition or application. The resolution of this issue turns on whether one views the law in the abstract as descriptive—that is, something that reflects social practices; or as normative and instrumental—that is, a method for forcing people to conform their conduct to the requirements of the law regardless of what it otherwise would be.

Finally, one must question whether there is a need to prosecute violations of custom at all. No other violation of a custom is dealt with as a criminal offense.<sup>72</sup> The following excerpt is from a recent fraternization case, and illustrates that the courts are hard pressed to deal with this issue.<sup>73</sup>

Customs differ among the armed services. Coast Guard customs and regulations still allow the wearing of a beard, as did the Navy until recently; but the other services re-

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<sup>72</sup> There is an obscure reference to custom respecting UCMJ, art. 92(3), dereliction of duty, stating that a duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or *custom of the service*. Research disclosed no prosecutions based on custom. Only two cases even mention it. See *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986); *United States v. Pratt*, 34 C.M.R. 731 (A.C.M.R. 1963).

<sup>73</sup> The examples the court gives are violations of regulations, but they are clearly distinct from fraternization. UCMJ, art. 92 is used to charge violations of lawful general orders and regulations. Thus, it is common to see regulations as to hair length and proper wearing of the uniform in this area. Fraternization frequently arises under this article when a base order prohibits certain relationships, such as between drill instructors and recruits. The problem with many of these regulations is that they are not always punitive.

quire their members to be clean-shaven. In the Army, an officer still may not protect himself from rain with an umbrella; but in the Air Force this custom has been abandoned. Indeed, the Air Force—the most recently created of the armed services—has never honored some of the customs recognized in the senior services; and perhaps because both officers and airmen at one time served together in small flight crews, the barriers placed by custom between officers and enlisted persons have probably always been lower in that service than in others.<sup>74</sup>

The elements of the offense of fraternization<sup>75</sup> make clear that *both* the custom prong and the prejudice to good order and discipline prong must be satisfied to prove fraternization. The first element, however, requires the accused to be a commissioned or warrant officer. Presumably, this requirement reflects the custom of fraternization as essentially an officer-enlisted offense. Yet it is now accepted that fraternization may occur between officers and between enlisted members.<sup>76</sup> Since the Manual was effective in 1984, one wonders what a "long standing" custom really means.<sup>77</sup>

Different definitions of fraternization appear in virtually every service,<sup>78</sup> and in many cases within the services. The Man-

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<sup>74</sup> *United States v. Johanns*, 20 M.J. 155, 160 (C.M.A. 1985).

<sup>75</sup> *Id.*

<sup>76</sup> *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986), held that enlisted fraternization is punishable under art. 134, if service discrediting or prejudicial to good order and discipline, so long as adequate notice is provided to the accused. In *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), the court conceded that prior law in this area was cloudy, but from this point forward, noncommissioned officers were constructively on notice that fraternizing with an enlisted subordinate was punishable under art. 134.

<sup>77</sup> The case of *United States v. Lowery*, 21 M.J. 995, 1000 (A.C.M.R. 1986), raises the unique prospect of "instant custom," based on the fact that the 1984 Manual specifically countenanced the offense of fraternization for the first time. The court stated that, "This custom has long existed in the Army, but assuming arguendo that it did not, it was instantaneously created on 1 August 1984 when the new Manual became effective." Colonel Mahoney, in his article on fraternization, states that the opposite could also be true: "By proscribing fraternization contrary to service customs, the President eradicated these service customs against fraternization, fixing them in time, on 1 August 1984, as mere definitions of the offense of fraternization in each service." Mahoney, *Fraternization: Military Anachronism or Leadership Challenge?* 28 A.F.L. Rev. 153, 156 n.14 (1988).

<sup>78</sup> In *United States v. Free*, 14 C.M.R. 466, 470 (N.B.R. 1953), the court stated the difficulty of defining the term:

The problem presented to us is to draw a line as to where acts of fraternization or association with enlisted men by officers cease to be the innocent acts of comradeship and normal social intercourse between members of a democratic military force and become a violation of Article 134 of the Code, prejudicial to good order and discipline in the armed services of the United States.

ual states that the critical point is violation of a service custom. Each case must be evaluated on its own merits, because "not all contact or association between officers and enlisted persons is an offense." The Manual offers three factors to evaluate an allegation of fraternization:

- (1) whether the conduct compromised the chain of command;
- (2) whether the conduct resulted in an appearance of partiality; [and]
- (3) whether good order, discipline, authority, or morale were undermined.

These factors serve as an adequate starting point, but the Manual does not state whether all three factors must be in issue or whether one will suffice. Ultimately, there must be some tangible prejudice to good order and discipline, and the respect of enlisted persons for officers must be somehow diminished. It is unclear whether this pertains only to the specific officer concerned, or to the officer corps as a whole. The general philosophical issue is whether the Manual seeks general or specific deterrence.<sup>79</sup>

Interestingly, article 134 goes on to countenance specific regulations that may be dealt with under article 92, which prohibit officer-officer or enlisted-enlisted fraternization. One wonders why the sample specification remained as a purely officer-enlisted offense.<sup>80</sup>

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And then the court provided what is now the most widely quoted definition:

Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

*Id.*

<sup>79</sup> See *United States v. Waies*, 91 M.J. 301, 304 (C.M.A. 1990), in which the Government was sure to elicit from a betrayed husband that he had lost all his respect for the officer accused, and some respect for officers in general.

<sup>80</sup> The history of the offense of fraternization, coupled with the evolution of the UCMJ, is a fertile area for research and writing. It is astounding that it took until 1984 to create the specifically enumerated offense of fraternization. When looking at the genesis of the initial UCMJ—the legislative history—extensive writings and law review articles provide sufficient material for in-depth study. This is unfortunately not the case with the 1984 Manual, for which there are virtually no research materials available to delve into the creation of the fraternization offense. Because nothing was available in writing, the author arranged a telephone interview with Colonel John S. Cooke, Judge Advocate General's Corps, United States Army, on 13 Nov. 1990. COL Cooke was Secretary to the Joint Service Committee for the revision of the 1984 Manual, and also served as the chairman of the working group. In this latter capacity he



### III. History of the Uniform Code of Military Justice

#### A. Purpose of the UCMJ

Legislation and regulations historically spring from confusion and disparate application in a given area. The impetus is usually a public outcry for change. That was the situation in the aftermath of World War II.<sup>81</sup> Conditions were ripe for significant changes in the administration of military justice.<sup>82</sup> The first UCMJ reflected a monumental effort to overhaul and modernize military justice.<sup>83</sup>

As demobilization progressed, the Secretary of War requested members to serve on the War Department Advisory Committee.<sup>84</sup> Concurrently, the House of Representatives gave its input on the Army's judicial system.<sup>85</sup> This resulted in the introduction of bills to revise the Army court-martial systems in both the House and Senate.<sup>86</sup>

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served as custodian of all paperwork produced by the committees. Fraternization was one of numerous issues addressed by the committee. No legislative history of the new fraternization article is available because it was not a congressional product. The Manual was signed by the President. Because the President had not seen the notes, the committee did not feel it would be fair to keep them available for public inspection, so they were destroyed. The explanation section of the offense provides a summary of the group's thought processes, reasoning, and intent.

<sup>81</sup> In the late 1940s the old Articles of War and the Navy's "Rocks and Shoals" were vulnerable to substantial change, if for no other reason than their age. With the end of World War II and in the rush of returning servicemen to make up for the war years it was quite expectable that voices would be heard from those who suffered some disability at the hands of the military justice system, those in restraint or beclouded by a discharge under other than honorable conditions. There was sufficient factual material to fan the flames of discontent, not only from those suffering a detriment as a result of service legal process but from others concerned in [sic] improving the system of military law, persons desiring a more modern military justice system, more attuned to concepts also beginning to be heard in regard to civilian criminal procedures.

Westmoreland & Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980).

<sup>82</sup> Wallstein, *The Revision of the Army Court-Martial System*, 48 COLUM. L. REV. 221 (1948), describes the major concerns as command influence, lack of lawyer involvement at courts-martial—especially lack of legally trained representation for the accused—enlisted representation at courts-martial, and excessively lenient treatment for offenses committed by officers; see also, Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269 (1947).

<sup>83</sup> See Holtzoff, *Administration of Justice in the United States Army*, 22 N.Y.U. L. REV. 1 (1947); Morgan, *The Background of the Code*, 6 VAND. L. REV. 169 (1953).

<sup>84</sup> Klein, *JAG Justice Today*, 8 CATH. U.L. REV. 2 (1969) (providing an overview of many military law issues of that day).

<sup>85</sup> H.R. REP. NO. 2722, 79th Cong., 2d Sess. 1 (1946).

<sup>86</sup> S. REP. NO. 903, 80th Cong., 1st Sess. 7 (1947); H.R. REP. NO. 2575, 80th Cong., 1st Sess. 4 (1947).

Contemporaneously, the Secretary of the Navy was promoting an overhaul of the Naval justice system.<sup>87</sup> One of his committees recommended a complete revision of the Articles for the Government of the Navy.<sup>88</sup> Other committees recommended numerous changes, and subsequently implementing legislation was introduced.<sup>89</sup> The National Security Act of 1947<sup>90</sup> created the Department of the Air Force. Secretary of Defense James Forrestal saw that, with the gross disparities between the Army and Navy systems of justice,<sup>91</sup> the addition of a third system for the Air Force would make coherent military justice a fantasy. The Navy was especially concerned that the new code's general article might not countenance "custom of the service" offenses.<sup>92</sup> Forrestal's goal was maximum justice for all servicemen.<sup>93</sup> Thus, he appointed yet another committee to draft a "uniform code of military justice"<sup>94</sup> with equal application to all services. After lengthy consideration, the committee formulated bills that ultimately became the first Uniform Code of Military Justice.<sup>95</sup> The purpose of a single code for all services was uniformity,<sup>96</sup> which simply did not exist prior to the UCMJ. Article 1, paragraph 5, of the UCMJ, states that

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<sup>87</sup> Military justice actually required significant revision. Punishments were stiff, and justice swift; too swift. For an excellent overview of these issues see Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1967); E. BYRNE, *MILITARY LAW* (3rd ed. 1961); Van de Water, PANIC RIDES THE HIGH SEAS, *Am. Heritage*, June 1961, at 20; E. COFFMAN, *THE OLD ARMY: A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898* (1986).

<sup>88</sup> Report of the McGuire Comm. to the Sec'y of the Navy (1945).

<sup>89</sup> S. REP. NO. 1338 (starred version), 80th Cong., 1st Sess. (1947); and H.R. REP. NO. 3687, 80th Cong., 1st Sess. (1947).

<sup>90</sup> H.R. REP. NO. 343, 80th Cong., 1st Sess., 61 Stat. 495. (Act of July 26, 1947.)

<sup>91</sup> The imposition of the UCMJ had the greatest impact on the Navy, which had not revised its Articles for the Government of the Navy since 1928. The Army and Air Force (Army Air Corps) had been governed by the Articles of War, 41 Stat. 787 (1920); 10 U.S.C. § 1471 (Supp. 1961), and these had been amended continuously prior to the enactment of the UCMJ. Thus, the UCMJ was based more upon the Army system of justice than the Navy's.

<sup>92</sup> See Klein, *supra* note 84, at 60.

<sup>93</sup> Forrestal, House Subcommittee Hearings, U.S. Congress, House Committee on Armed Services, Uniform Code of Military Justice, H.R. REP. NO. 491, 81st Cong., 1st Sess. 596 (1949) (to accompany H.R. REP. 4080).

<sup>94</sup> *Id.* This term indicated a goal. It in no way implied or was understood to be the name of the new code that ultimately would be created.

<sup>95</sup> Act of May 5, 1950, 64 Stat. 108 (50 U.S.C. §§ 551-736). This was codified and enacted into law as Title 10 of the United States Code, which was entitled Armed Forces Act of August 10, 1956, Pub. L. 1028, C. 1041, 84th Cong., 2d Sess. 70A Stat. 36. While there is no historical support for the basis of the name of this new code, one may assume the drafters knew what a radical departure they were making from established military justice—especially for the Department of the Navy.

<sup>96</sup> H.R. REP. NO. 491, 81st Cong., 1st Sess. 1 (1949). The report states that, "Among the provisions designed to secure uniformity are the following: (1) The offenses made punishable by the Code are identical for all armed forces." (emphasis added)

"'military' refers to *any or all* of the armed forces" (emphasis added).<sup>97</sup>

### B. Uniformity of Treatment and Application

The UCMJ is uniform in its coverage of the military person<sup>98</sup> wherever stationed.<sup>99</sup> The purpose of uniformity was to promote equity and fairness among the services, not only in application but in perception.<sup>100</sup> The UCMJ stopped the chaotic system of different codes, and uniformity prevailed.<sup>101</sup> The UCMJ allowed the services some leeway in application when based on a clear difference in mission. The UCMJ's drafters never would have countenanced the disparate results currently produced by divergent service fraternization policies. Undoubtedly they also would have recognized the need for the code to change with the times.<sup>102</sup>

The lesson of the UCMJ is that military justice cannot remain static during changing times. In a nation of citizen-soldiers, military law must approximate civilian justice enough to be recognizable. The UCMJ represented a compromise between the push from civilian desires for military justice to emulate the fairness of civilian justice, and the pull of the military desire to maintain as much command discretion and control as possible.<sup>103</sup> Much of the fairness ultimately attained by the UCMJ is attributable to uniformity.

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<sup>97</sup> See H.R. REP. NO. 481, 81st Cong., 1st Sess. 52 (1949), stressing the purpose of the UCMJ as being "uniformly applicable" to all services.

<sup>98</sup> UCMJ art. 2, covering persons subject to this chapter, begins with "members of a regular component of the armed forces . . . wherever they serve."

<sup>99</sup> Article 5 ensures that the UCMJ will have uniform territorial application by simply stating, "this chapter applies in all places."

<sup>100</sup> Certainly there is no supportable reason why any one of our armed forces should have a brand of justice inferior to that of the other. Nor should there be any substantial differences, unless clearly required by corresponding differences in function, organization, or deployment of one of the services. Justice is not, according to American standards at least, justice at all unless it is equal justice.

Ward, *UCMJ—Does It Work?*, 6 VAND. L. REV. 2, 4 (1953).

<sup>101</sup> See generally Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense (1949). This is widely referred to as the Morgan Report; see H.R. REP. NO. 491, 81st Cong., 1st Sess. (1949); S. REP. NO. 486, 81st Cong., 1st Sess. (1949).

<sup>102</sup> The protection of individual human rights is more than ever a central issue within our society today . . . Military as well as civilian law is dynamic and of necessity must change to fit the needs of a changing society.

Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971).

<sup>103</sup> Crump, *History of Military Justice*, 17 A.F.L. REV. 55 (1975).

## IV. A Civilian Perspective on Fraternalization

Many civilians have little respect for military justice.<sup>104</sup> Yet, the concept of fraternization is not foreign to civilians,<sup>105</sup> who share the military's difficulty in grappling with this perplexing issue.<sup>106</sup> Some incidents of corporate fraternization have attracted national media attention.<sup>107</sup> Articles frequently describe lurid tales of patients suing their psychiatrists for sexual relationships foisted upon them.<sup>108</sup> Similar stories and cases abound concerning attorney-client, faculty-student,<sup>109</sup> and employer-employee<sup>110</sup> relationships. Many professional organizations, corporations, and universities regulate these relationships. Organized religions regulate sexual conduct between clergymen and their congregants.<sup>111</sup> While recognized as a

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<sup>104</sup> The following typifies civilian reaction to military justice decisions they cannot understand: "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, *Justice and Captain Levy*, 12 *COLUMBIAN* 46, 49 (1969).

<sup>105</sup> Several cases have been considered at the federal circuit court level involving associational issues that approximate fraternization. See *Hollenbaugh v. Carnegie Free Library*, 436 F. SUPP. 1928 (1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978) (two library employees fired for living together in "open adultery"); *Lomans v. Crenshaw*, 354 F. SUPP. 868 (S.D. Tex. 1971) (alleged violation of equal protection by discouraging association between married and unmarried high school students); *Chem Fab Corp.*, 27 N.L.R.B. 996 (1981) (rule prohibiting fraternization between workers in two plants during working hours held not unlawful), enforced in 691 F.2d 1252 (8th Cir. 1982) (many other types of associations may be prohibited by standards of conduct regulations).

<sup>106</sup> See generally Jamison, *Managing Sexual Attraction in the Workplace*, 28 *PERSONNEL ADMIN.* 45 (1983) (considers the problems that may arise from perceived preferences to employees because of relationships with managers).

<sup>107</sup> Perhaps the most well publicized case of civilian fraternization involved Mary Cunningham dating the President of the Bendix Corporation, William Agee. When she was appointed to a high position within the company, all who knew of her relationship with Mr. Agee assumed that it was the reason she attained the appointment.

<sup>108</sup> *Doe v. Swift*, No. 87-1312 (15 Cir. Ct. Ala. Dec. 29, 1989); see also, Gunnells, *Patient-Therapist Sexual Relations: Professional Services Rendered?* 14 *LAW & PSYCHOL. REV.* 87 (1990).

<sup>109</sup> See *Korf v. Ball State Univ.*, 725 F.2d 1222 (7th Cir. 1984) (tenured professor terminated for sexual advances toward students); see also Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 *J.L. & EDUC.* 437, 459-60 (1982) (when female student is in sexual relationship with professor, others assume she has an advantage).

<sup>110</sup> *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) (former police officers unsuccessfully sue for reinstatement after demotion and resignation because of off-duty dating and cohabitation). This case is *apropos*, and supports fraternization regulations in much the same way the courts uphold military regulations—a simple rational basis test—the lowest level of scrutiny.

<sup>111</sup> The Central Conference of American Rabbis (CCAR) recently has considered a regulation prohibiting sexual relations between rabbis and counselees, spouses or partners of members of their congregation, student rabbis, or junior colleagues. This draft recently was approved by the CCAR Committee on Ethics and Appeals for inclusion in its Code of Ethics. CCAR Code of Ethics draft 9 (June 25, 1990).

problem, however, it is not a *criminal* offense.<sup>112</sup>

The threshold question in the civilian sector is whether the corporation, university, or professional association has the legal or moral right to forbid romance between individuals within the organizational structure. But once a civilian entity decides to adopt an antifraternization policy,<sup>113</sup> experts recommend that "the policy should be narrowly drawn to accomplish legitimate management concerns."<sup>114</sup> This concern for managerial authority equates to the military's prohibition on fraternization within the chain of command of a unit. That is precisely the civilian focus—those who work together in the same department, office space, or section. Organizations recognize that those who work closely on the same projects spend time together and begin to see things the same way.<sup>115</sup> Yet, it is widely recognized that romance in the workplace is counter-productive.<sup>116</sup> As the number of women in the workforce and in the military increases, the opportunity for, and the overall number of, romantic interludes—and problems—will increase.<sup>117</sup>

<sup>112</sup> The only exception to this general rule is that in certain jurisdictions, state legislatures have begun to make it criminal for a therapist to sexually exploit a client. A new California law makes it a crime for a therapist to have sexual contact with a client. For a first offense, an offender would be charged with a misdemeanor. Second and following offenses may be a misdemeanor or a felony, and an offender may be fined up to \$1000 and sentenced to a county jail for up to one year, or fined up to \$5000 and sentenced to state prison for up to one year. Cal. S.B. 1004, chap. 795, Business and Professions Code § 729 (1989).

<sup>113</sup> The term "fraternization" is generally and historically a military concept, but occasionally, the civilian sector uses this term. This thesis applies the term to similar civilian conduct. See generally Driscoll and Bova, *The Sexual Side of Enterprises*, MGMT. REV. 51 (July 1980).

<sup>114</sup> Neese, Cochran, & Bryant, *Should Your Firm Adopt an Anti-Fraternization Policy?* 54 ADVANCED MGMT. J. 4, 6 (Autumn 1989).

<sup>115</sup> M. SHAW, GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR 95 (1971); Collins, *Managers and Lovers*, HARV. BUS. REV. (Sept.-Oct. 1983).

<sup>116</sup> Specifically, when a love relationship exists within an organization, internal communication channels and power alliances shift. Co-workers may feel threatened by the "pillow talk" they assume the lovers are conducting. If they believe a colleague has gained access to a powerful person in the organization as a result of a love relationship, they may feel jealous. This is particularly likely if the employee has tried to win the favor of a powerful male manager by demonstrating competencies and abilities, only to watch that man fall in love with and devote his attention to a female colleague. . . . Our findings suggest that overt sexual behavior and business do not mix. They indicate that strong sexual attractions interfere with work.

A. Warfield, *Co-Worker Romances: Impact on the Work Group and on Career-Oriented Women*, 25 PERSONNEL J. 5 (May 1987).

<sup>117</sup> See Anderson & Hunsacker, *Why There's Romancing at the Office and Why It's Everybody's Problem*, 62 PERSONNEL 57, 62 (Feb. 1986) (office romances involve perceptions of favoritism in roughly one-third of cases); Quinn & Lees, *Attraction and Harassment: Dynamics of Sexual Politics in the Workplace*, 13 ORG. DYNAMICS 35, 42

While the military is a society apart from the corporate and civilian worlds, it is illuminating to see how civilians deal with this phenomenon. For example, the view of faculty-student relations as "fundamentally asymmetric"<sup>118</sup> illustrates that the civilian concern is nearly identical to the military's. But civilians look at what the military is doing also. Some of the military's most embarrassing publicity stems from fraternization cases.<sup>119</sup> Many commanders attempt to keep fraternization cases quiet, even when they result in courts-martial. This reflects an instinctive recognition that civilians abhor punishing someone for a simple romance. Put in simple terms, sending someone to jail for a mutually consensual, nondeviant, private sexual relationship is rather medieval in this day and age.

As long as men and women work together in organizational confines, romance and sex will occur. No legislation or regulation will change that. Civilian organizations wrestle with and accept this fact. Colleges and universities now regulate student-faculty sexual or romantic relationships. These regulations typically deal with mutually consensual relationships, and treat nonconsensual conduct such as sexual harassment<sup>120</sup>

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(Autumn 1984); Quinn, *Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, 22 ADMIN. SCI. Q. 30, 42 (1977) (adverse effects of office romance include lowered productivity, gossip, distorted communications, hostilities, and damage to the reputation of the worksection). GORDON & STROBERS, BRINGING WOMEN INTO MANAGEMENT 39-58 (1975)

<sup>118</sup> See University of Iowa, Policy on Sexual Harassment and Consensual Relationships (July 28, 1986); Letter from Harvard Dean Henry Rosovsky to the Faculty of Arts and Sciences (1983) (declaring relationships between students and faculty "always wrong" if the teacher has a professional responsibility for the student). Both of these sources use the term "fundamentally asymmetric." See also Oklahoma University College of Law Regulations (using the same term).

<sup>119</sup> *Mocking Military Justice*, L.A. TIMES, May 15, 1988, at V-4. The *Los Angeles Times* and numerous local papers gave high profile coverage to the Marine Corps prosecution of a Navy lieutenant who dated and then married a Marine lance corporal. No chain of command relationship existed and their relationship was conducted off-base. The *Times* stated, "It's hard to see how such relations . . . can in any way be regarded as prejudicial to good military order." This statement was made after acknowledging the validity of punishing fraternization in the chain of command. This case so inflamed the media and the public that the Marine Corps did not prosecute: see also THE WASH. POST, Dec. 25, 1978, at A9. This article on "sex fraternization" describes the Army's losing battle against it. The article acknowledges that "It's kind of hard for the sergeant to order Mary to scrub out the latrine the next morning when they were sleeping together the night before." The article points out that many Army personnel are angry with fraternization regulations as violative of the First Amendment's guarantee of freedom of association, as well as the "laws of nature." THE WASH. POST, Mar. 7, 1978, at A5 (detailing cases of cadet fraternization at the United States Air Force Academy and United States Military Academy); THE WASH. TIMES, Mar. 1, 1980, at F1 (discussing problems with fraternization in general).

<sup>120</sup> Sexual harassment and sex discrimination frequently are litigated areas in their own right. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

elsewhere. Consent<sup>121</sup> is not usually a defense,<sup>122</sup> both because of the "supervisory, educational, or advisory responsibility for that student" and the asymmetric balance of power involved. But once a student is no longer under a professor's academic cognizance, they may date. The required nexus is analogous to the military's chain of command.<sup>123</sup> Interestingly, civilian concerns rarely focus on the issue of loss of respect for the superiors, which is the principal focus of the military.

If any profession has been hard hit by allegations and revelations of sexual escapades within its ranks, it is psychiatry. The American Psychiatric Association (APA) has established that sexual relations between psychiatrists and their patients are *always* unethical.<sup>124</sup> But other more nebulous areas, such as relations with psychiatrists' students, employees, co-workers, and colleagues arise. In deciding whether ethical issues are involved, the APA looks at inequalities in status and power, whether the inequalities are exploited, and whether the fraternization causes harm.<sup>125</sup> The footnoted extract details the great

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<sup>121</sup> Faculty-student regulations, similar to drill instructor-recruit relationships, are viewed in a special category because of the inherent inequality of power. This inequality theoretically makes consent not fully informed and voluntary; much like statutory rape, it may be a strict liability offense.

<sup>122</sup> That policy is identical to military interpretation of regulations in caselaw. See *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986).

<sup>123</sup> See *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985).

<sup>124</sup> American Psychiatric Association, *Ethics Newsletters*, vol. II, at 2 (Apr./May 1986).

<sup>125</sup> An extremely instructive analysis, with a characteristically psychiatric bent is provided below, and is relevant in the context of the chain of command.

With many students, especially younger ones and those dependent on their teachers for learning and/or advancement, relationships may appear to be consenting and yet be very problematic. They involve, by definition, an inequality in which the student expects the teacher to be trustworthy and a model. These relationships are commonly affected by transferences similar to those developed by patients, which involve adulation for the teacher that is easily mistaken for "love" (the crush). The transference further exaggerates the participants' inequality and makes these relationships very vulnerable to acting out. Thus, in various ways, sexual activity with students, even if it appears consenting, may well constitute exploitation of an unequal relationship for the teacher's own gratification. The sexual involvement, while not harassment by strict definition, may exploit both the student's wish to be loved by the teacher, and the power the teacher has over the student: the power to give a good or bad grade, to give a good or bad reference, or to affect advancement at a particular institution or within the profession.

Psychiatrists, even more than other teachers, need to be careful not to take advantage of their students' transference, its manifestations and powers, and its management. Anything less fails the student and sets a poor model for young professionals. Indeed, a recent study of psychotherapists (psychologists) suggests that therapists who were sexually involved with their teachers/supervisors during training years are considerably more likely to be sexually involved with their own students and "clients" than those who were not so involved.

potential for abuse and shows that the line between consensual and nonconsensual relationships can be hazy. This is all the more reason for the military to retain the offense of fraternization; but beyond the chain of command, prosecutions for fraternization are unjustified. Indeed, once the working relationship or supervisory issues disappear, fraternization issues are diminished substantially.

The American Psychological Association<sup>126</sup> and the American Board of Examiners in Clinical Social Work<sup>127</sup> also regulate these relationships. After determining that frequent sexual involvement existed between lawyers and their clients,<sup>128</sup> the California legislature ordered the state bar to regulate this area. The proposed "sex with clients" rule prevents California lawyers from taking advantage of their clients—"at least physically."<sup>129</sup> Marriage and family therapists have similar regulations.<sup>130</sup>

The civilian view on marriage resulting from fraternization is that, "We are apt to engage in revisionist history and declare the relationships nonexploitive."<sup>131</sup> This is remarkably similar to the way the military treats "mixed" marriages.<sup>132</sup>

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*Id.*

<sup>126</sup> American Psychological Association, *On Ethical Principles of Psychologists* (1987).

<sup>127</sup> American Board of Examiners in Clinical Social Work, Code of Ethics (1988).

<sup>128</sup> While not a burning issue in the military, because of its relative infrequency, the issue of judge advocates having or attempting to have relationships with their clients has arisen. In the Judge Advocate General's Professional Responsibility Committee (U.S. Army), Professional Responsibility Opinion 90-1, the committee reviewed an Army legal assistance attorney's alleged attempt to initiate an affair with a dependent wife of an active duty enlisted soldier. When the client revealed that her husband had committed adultery and that she had not engaged in sexual relations for several months, the attorney "jokingly" suggested that the two of them should initiate an affair, and stated that she could move in with him. The attorney also embraced her at the conclusion of the meeting. The committee took a dim view of his conduct. Moreover, using language likely to be seen in the fraternization arena, the committee stated that "the appearance of impropriety is as devastating as the actual existence of impropriety."

<sup>129</sup> *Simply Stated, It'll Be Hands Off for These Long Arms of the Law*, WALL ST. J., Nov. 13, 1990, at B1, col. 1.

<sup>130</sup> The California Association of Marriage and Family Therapists offered the following regulation in its Ethical Standards of 1989:

Marriage and family therapists are cognizant of their potentially influential position with respect to patients, and they avoid exploiting the trust and dependency of such persons. Marriage and family therapists avoid dual relationships with patients that could impair their professional judgment or increase the risk of exploitation. Sexual intercourse, sexual contact or sexual intimacy with patients or a patient's spouse or partner is unethical.

<sup>131</sup> See generally, Chamailas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 864 (1988).

<sup>132</sup> A "mixed" marriage in the military refers to an officer-enlisted marriage



Civilians have only begun to scratch the surface of this complex issue.<sup>133</sup> Yet their perspective and approach is undeniably instructive. The military learned from the history of the UCMJ that it is unwise to stray too far from civilian standards. Thus, while considering civilians' handling of this problem, the military also should pay attention to their perspectives on the military's policy.

On balance, the military's attitude towards fraternization seems unnecessary. Two issues are involved. First, should the armed services continue their policy of strictly discouraging officer-enlisted social contact? Second, should criminal sanctions be used to enforce the prohibition?

Little evidence suggests that the present social caste system enhances military performance. Other armed forces operate with looser control and no notable loss of effectiveness. Combat conditions typically reduce the barriers between enlisted men and junior officers. . . . Many current enlistees share the same social, intellectual, and cultural values of their officers. Discouraging normal social contacts arising from these mutual interests infringes on the freedom of both parties. Even if the military determines to maintain its attitude toward fraternization, the retention of criminal sanctions is indefensible.<sup>134</sup>

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<sup>133</sup> See Shearer, *Paramour Claims under Title VII: Liability for Co-Worker/Employer Sexual Relationships*, 15 EMPL. REL. L.J. 57 (Summer, 1989) (discussing the current and potential impact of title VII of the Civil Rights Act of 1964 on office romance, and highlights section 1604.11(9)). Section 1604.11(9) provides:

Other related practices: where employment opportunities are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment or benefit.

See generally, Annotation, *Burden of Proof Aspects of Paramour Claims*, 86 A.L.R. Fed. 230 (1988); see also Broderick v. Ruder, 685 F. Supp. 1268 (D.D.C. 1988) (female Securities and Exchange Commission attorney denied promotion after complaining of sexual harassment by supervisors); King v. Palmer, 598 F. Supp. 65 (D.D.C. 1984), *rev'd*, 778 F.2d 878 (D.C. Cir. 1985) (D.C. jail nurse complained of younger, less qualified nurse promoted ahead of her because of her sexual intimacy with doctor who promoted her); Toscano v. Nimmo, 570 F. Supp. 1197 (D.C. Del. 1983) (woman denied promotion received by less qualified clerk who had an affair with the boss); Kersul v. Skulls Angels, Inc., 495 N.Y.S.2d 886 (Sup. Ct. Special Term 1985) (woman fired for criticizing female subordinate for having affair with company president).

<sup>134</sup> Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 386, 414 (1976). Perhaps by liberalizing the military attitude toward fraternization, but maintaining the criminal sanctions, an acceptable compromise can be reached that will provide insulation from criticism.

Thus, while many civilians have a positive view of military justice,<sup>135</sup> the current fraternization regulations are increasingly coming under fire, to the extent of being compared to racial separation statutes.<sup>136</sup> The Department of Defense must pick up on these cues and act decisively, now.

## V. An International Military Perspective on Fraternization

The regulations of other countries' military services provide yet another invaluable perspective on fraternization.<sup>137</sup>

### A. Canadian Armed Forces<sup>138</sup>

The Canadian Armed forces published formal fraternization regulations for the first time in 1988. Most personnel applauded the regulation, but there was some dissent.<sup>139</sup> A major increase in the number of women in the Canadian Forces (CF), as a result of the passage of the Human Rights Act,<sup>140</sup> provided the impetus for the regulation. Because of the close relations of the Canadian and American military services and their geographical proximity, the Canadians carefully studied American fraternization regulations prior to formulating their own. The Canadians drafted a regulation based on the Navy's definition of fraternization, because of its "greater emphasis on the sexual connotations."<sup>141</sup> Dispassionately analyzing American regu-

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<sup>135</sup> Gilligan & Wims, *Civilian Justice v. Military Justice*, CRIM. JUST., vol. 5, no. 2, at 2 (Summer, 1990). The authors quote Melvin Belli and F. Lee Bailey, who both have expressed a preference for military courts; see also Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L. REV. 1 (1971).

<sup>136</sup> The criminal enforcement mechanism for fraternization violations has been compared to racial separation statutes. See Zilman & Imwinkelried, *supra* note 136, at 412; *Adickes v. Kress and Co.*, 398 U.S. 144 (1970).

<sup>137</sup> The author interviewed seven international students currently studying at The Judge Advocate General's School, U.S. Army (TJAGSA).

<sup>138</sup> Interview with Lieutenant Colonel Patrick J. McCaffrey, Office of the Judge Advocate General, Canadian Forces at TJAGSA (Jan. 15, 1991). McCaffrey's last assignment was Director of Law/Materiel-2, Ottawa, Canada. The author is extremely grateful to him for his assistance in procuring all available Canadian regulations, cases, and background materials pertaining to the development of its fraternization policy.

<sup>139</sup> See Mackenzie & Acreman, *Women in the Combat Arms—A New Dimension to the Fraternization Threat* (paper presented to the National Defence University, Canadian Forces (Jan. 1990)); (an excellent paper arguing against the new liberal policy).

<sup>140</sup> This landmark legislation opened all positions in the Canadian Forces to women, to include combat infantry assignments. The Canadians wisely kept the infantry standards the same, so as a practical matter, very few have entered the combat arms. The Human Rights Act dramatically expanded individual rights vis a vis institutional authority. See Unclassified Memorandum MARCOM 5200-0 (DCOS PIT), subject: Fraternization, 27 Mar. 1987.

<sup>141</sup> *Id.* at 1.

lations, the Canadians adopted this recommendation: "Rather than three or four separate command promulgated policies/guidelines, the promulgation of one which has . . . wide applicability is strongly recommended."<sup>142</sup> Correspondence from the highest levels of command concurred. The drafters acknowledged that classic fraternization (prior to the entry of women into the forces) was really not the problem. The major concerns were male-female relationships, and thus the title of the regulation: "Mixed-Gender Relationships."<sup>143</sup>

Then Lieutenant General A. J. G. D. de Chastelain, Assistant Deputy Minister of Personnel and now the Canadian Chief of Defense Staff,<sup>144</sup> played an instrumental role in formulating the final regulation. His thoughts are most instructive:

In drafting the [Canadian Forces Administrative Order (CFAO)] . . . , we were cognizant of the delicate balance between providing firm policy and guidance, and appearing out of step with today's social norms. I believe that we have struck a balance that is workable and acceptable.<sup>145</sup>

The regulation is applied exactly as it is written,<sup>146</sup> without nuance or hidden meaning. Individual services are free to promulgate their own mixed-gender relationship orders *consistent* with the CFAO. The Canadians regulate relations between cadets and between cadets and noncommissioned officers.<sup>147</sup> Only trainer-trainee type offenses are actually prosecuted, and this is rare. The Canadian fraternization policy most closely resembles the Coast Guard's. It is an extremely liberal policy, certainly by United States Navy and Marine Corps standards. Yet, it exemplifies a common sense approach that obviously considered civilian views on the matter.<sup>148</sup>

In the Canadian Forces there is no regulatory obstacle to a captain dating an enlisted woman outside the chain of com-

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<sup>142</sup> *Id.* at 2. "Forces wide" refers to drafting a Canadian Forces Administrative Order (CFAO), which was the final result. This would be similar to a Department of Defense (DOD) order for the United States military.

<sup>143</sup> CFAO 19-38.

<sup>144</sup> He has since been promoted to the only four-star position in the Canadian Forces. The Canadian position of Chief of Staff is similar to our Chairman, Joint Chiefs of Staff.

<sup>145</sup> Unclassified Memorandum MARCOM 5200-0 (DCOS PIT), subject: Fraternization, 27 Mar. 1987.

<sup>146</sup> Lieutenant Colonel McCaffrey confirmed that the regulation means what it says, as opposed to American regulations, which may not be applied exactly as written.

<sup>147</sup> Canadian Military College Regulation section 640(1) (1989).

<sup>148</sup> Lieutenant Colonel McCaffrey defended Canada's more liberal regulations, stating that "You have to trust people's good sense and professionalism."

mand. The only "problems" they perceive with this type of relationship is the inconvenience to the parties concerned because the enlisted woman may not join her beau at the officer's mess, and vice-versa.

There are several interesting aspects to the Canadian regulations. First, they apply to relationships with members of foreign military forces because Canadian forces work so frequently with foreign military units. Second, the relationship must be "in public" before it may be subject to regulation. Third, and significantly from a fairness aspect, the regulation applies to dating as well as marriage. Finally, if a relationship is formed while CF members serve together, they will normally be allowed to complete the assignment unless aggravating circumstances develop.<sup>149</sup>

There are no obscure references to the countless ways these relationships can manifest themselves, as seen in American regulations and caselaw. The ways fraternization manifests itself are far from infinite. The CF regulation sums up the issues of public conduct rather well. The regulation does not even mention sexual relations because if conducted in private, they are not covered by the order. Thus it is a fair, workable policy that places a high degree of trust in the ability of servicemembers to use good judgment, while recognizing that "hormones are hormones."<sup>150</sup> Mixed-gender relationships will occur, at an increasing rate, regardless of what regulations say. But if soldiers know that only the people in their own chains of command are off limits, they are likely to acknowledge the wisdom and utility of that policy and look elsewhere. An outright prohibition on mixed-gender relationships is unrealistic given human nature, and merely encourages widespread rule breaking and hypocrisy.

### *B. Kenyan Armed Forces*<sup>151</sup>

Although there is no specific, written regulation prohibiting fraternization in the Kenyan forces, there is an unwritten policy that no male member of the military may date anyone from the Women's Service Corps. This is a long standing policy and has served them well. Although Kenyan women serve in all

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<sup>149</sup> CFAO 19-38, at 8.

<sup>150</sup> McCaffrey Interview, *supra* note 138.

<sup>151</sup> Major Frederick Ayugi is one of only five judge advocates in Kenya's defense department, and they service all forces in Kenya. His last posting was at the Army's headquarters as a Staff Officer-2. He was interviewed at TJAGSA on 10 Jan 1991.

branches, there is a separate Women's Service Corps under Army cognizance. To enter the service, women must be single, with no children, and sign a contract agreeing to remain this way. Pregnancy is a breach of contract and provides grounds for separation. A Kenyan commission looked into this rule due to objections based upon freedom of association, but the military view prevailed because these rights are voluntarily sacrificed by joining the service. This has never been challenged in court.

When fraternization occurs, it can be prosecuted under an article similar to the American article 134. Normally, the individual concerned is administratively discharged; no one has ever gone before a court-martial charged with fraternization. Fraternization is not a major problem because, when it occurs, the woman typically will leave the service voluntarily and is then free to date or marry the man. Because no one may date anyone else on active duty, those who date must date civilians. This is unique, and fair in the sense that it obviates the need to draw lines based on rank, which is feasible in Kenya due to the comparatively small number of women in the military. The policy is announced to all personnel at accession and at legal training, which occurs every three months in all units. As in America, when fraternization is discovered, the individual is first counseled prior to any adverse action. Thus, there is a preference for leniency. Since the policy is so well known, crystal clear, and all-encompassing, it has survived the few challenges that have arisen. By establishing this issue as one of contract law, the Kenyans have neatly sidestepped a potentially troublesome problem.

### C. *Australian Army*<sup>152</sup>

There is no written regulation on fraternization pertaining to members of Australia's Regular Army, because fraternization is not a significant problem in its forces. The only specific regulations that address this issue are at basic training installations and schools; instructor-recruit relations are prohibited. Interestingly, at the Royal Military College the fraternization policy pertains to cadets only, and prohibits relations among them while in training.

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<sup>152</sup> Interview with Lieutenant Colonel Andrew H. Braban, Australian Army Legal Corps, at TJAGSA (Jan. 15, 1991). His last billet was Staff Officer, Grade I, Administrative Law, Directorate of Army Legal Services, Canberra.

Officer-enlisted marriages are not prohibited, but are not common. When favoritism and partiality are shown within the chain of command, fraternization could be prosecuted under a general article similar to the American article 134. When cases of fraternization arise, administrative sanctions may be employed—that is, discharge, censure, or transfer. A common sense approach to this issue is used and members are trusted to exercise discretion.

Given the similarities between Australian and American societies, the obvious question is why fraternization is a problem in the American military and not nearly as troublesome in the Australian military. One typical response is, "Because you Americans seem to have a need to have a rule for everything." That comment is most illuminating. The Australian military does not regulate the personal conduct of its members to the extent that the American military does. If all else fails, the American military may consider this successful approach—trusting officers and noncommissioned officers to act responsibly.

#### *D. Royal Netherlands Army*<sup>153</sup>

The Royal Netherlands Army has no written policy on fraternization. Its soldiers are expected to act in a strictly professional manner while on duty and in uniform; yet what a soldier does off-duty and off-base is his or her own business. The Army perceives no benefit in meddling in purely private affairs. Therefore, no problem arises when officers date enlisted personnel or in officer-officer and enlisted-enlisted relationships. There are no criminal sanctions available for fraternization.<sup>154</sup>

Public displays of affection on base are considered unprofessional. In cases of fraternization when favoritism is being shown, administrative sanctions—including adverse reports or transfers—may be used.

#### *E. Turkish Armed Forces*<sup>155</sup>

Fraternization is not an issue in the Turkish military because few women are in its armed forces. Nonetheless, regulations

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<sup>153</sup> Interview with Major Gerard A.J.M. van Vugt, Judge Advocate General's Corps (JAG), Royal Netherlands Army, at TJAGSA (Jan. 23, 1991). He recently joined the JAG department. His last assignment was at the JAG staff of the Royal Netherlands Army at The Hague.

<sup>154</sup> Significantly, no criminal sanctions against adultery exist.

<sup>155</sup> Interview with Captain Feyiz Erdogan at TJAGSA (Jan. 11, 1991). His last assignment was as a military judge, Turkish Army.

govern official relationships between the four classes of Turkish military personnel: general officers, officers, noncommissioned officers, and enlisted personnel.<sup>156</sup> Primarily, these regulations govern the conduct between personnel on duty only. For example, the regulations stipulate that a noncommissioned officer cannot enter the general's mess. There is no prohibition on male-female relationships off duty, nor is there any criminal sanction available for violation of any of these rules. Administrative sanctions are deemed adequate.

#### *F. Royal Thailand Armed Forces*<sup>157</sup>

Thailand has no formal, written rules regarding fraternization. Custom provides the only guidance, yet custom is adequate guidance because this is not a criminal issue in Thailand. Fraternization simply is not a major problem in the Thai forces. Customary rules of professionalism dictate that no outward manifestations of romance should be visible between any personnel when on base, on duty, and in uniform. Certain exceptions to this general rule exist for relatives and married couples. Once off duty, off base, and out of uniform, fraternization is not an issue. Personnel, therefore, may freely associate with whom they please. Accordingly, a captain may marry or date a corporal.

#### *G. British Army*<sup>158</sup>

One would guess that the British have a strict fraternization policy because American law was principally derived from British law.<sup>159</sup> British forces do have rules dealing with customs, courtesies, and separations by rank at clubs, messes, and quarters. Additionally, local orders exist to deal with men en-

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<sup>156</sup> These regulations are called the IC Hizmet Kanunu and the IC Hizmet Yonetmeliği.

<sup>157</sup> Interview with Captain Piyachart Jaroenpol of the Judge Advocate General's Department, Royal Thailand Army, at TJAGSA (Feb. 7, 1991). His prior billet was with the Advisory Division, Judge Advocate General's Department, Ministry of Defense.

<sup>158</sup> Interview with Major Michael D. Conway, Army Legal Corps, British Army, at TJAGSA (Feb. 21, 1991). His last assignment was Staff Officer Grade 2, in the Army Law Training and Publications Branch, Army Legal Group, United Kingdom.

<sup>159</sup> Available British military regulations revealed no article on fraternization, or even any use of the term. Major Conway confirmed this. The British actually never prosecute fraternization cases, to his knowledge, meaning that illegal fraternization probably is not prevalent. Manual of Military Law, Great Britain, Ministry of Defence (1972); Manual of Air Force Law, Great Britain (1978). These were the most recent publications available.

tering women's quarters and vice-versa. These, however, are minor disciplinary matters and do not specifically pertain to fraternization. Army General and Administrative Instruction, volume 2, deals with, *inter alia*, "misconduct by officers" but does not specifically address fraternization. Fraternization conceivably could constitute an offense under the Army Act general provision, which is identical to article 134, but the offense would have to be strictly proven. A mixed gender relationship between two soldiers that is kept off base and out of uniform would not, without further aggravation, constitute an offense.

It is painfully obvious that the American military goes to great lengths to regulate fraternization, relative to our allies and civilians. Canada is the only notable exception, having recently promulgated very unobtrusive fraternization regulations. The most troubling revelation from this comparison is the American compulsion to regulate every aspect of military personnel's lives. The Army, in particular, is notorious for having shelf after shelf of regulations. This distinction is hardly favorable since it is attained through unnecessarily intrusive regulations. Allied military organizations are effective with their minimalist approach to fraternization.<sup>160</sup> The American military should get in step.

## VI. The Current Fraternization Regulations of the military Services<sup>161</sup>

### A. *Military Service Policies*

This section will compare and contrast the current regulations of the United States Navy, Marines, Army, Air Force, and Coast Guard.

1. *United States Navy policy.*—The Navy has published one of the broadest regulations.<sup>162</sup> This regulation is intended to be specific in what has been a very nebulous area to put all hands on notice of what is expected of them.

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<sup>160</sup> Other foreign military services have civilized their military justice systems significantly in comparison to the American standard. See Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973).

<sup>161</sup> Many arguments used in the context of analyzing individual service regulations may be applicable to others, but may not be repeated for brevity's sake.

<sup>162</sup> OPNAVINST 5370.2 (6 Feb. 1989) (not duplicated herein due to space limitations, but perusal of the regulation would be helpful to the reader)



(a) *Analysis.*—The inherent ambiguity of fraternization shines through this bold attempt to define it. For example, what does the regulation's reference to "unduly familiar" mean?<sup>163</sup> This vague definition brings to mind Justice Stewart who said he could not define pornography, "but I know it when I see it."<sup>164</sup> Does "unduly familiar" mean eating lunch together at the chow hall? Does it mean having a drink at an off-base bar or at an on-base all-hands club?<sup>165</sup> Is it playing tennis together on a weekend? Is it addressing one another on a first name basis? These questions are far from rhetorical;<sup>166</sup> they are difficult and fact specific, as most cases of fraternization are.<sup>167</sup> One reason to keep fraternization policies ambiguous is to permit commanders greater flexibility. On a continuum from precise to ambiguous regulations, the fraternization regulations of the Navy and other services—except the Coast Guard—are the most ambiguous and allow commanders broad, if not unfettered, discretion and latitude.

To compound the confusion, the regulatory provision "does not respect differences in rank and grade" is unclear.<sup>168</sup> There are countless ways this lack of respect may be demonstrated, and one may safely assume that deeds constituting insubordination would be prosecuted under article 89, UCMJ.<sup>169</sup> Therefore, this must refer to failure to maintain an appropriate distance. Since the distances maintained between ranks vary dramatically between services, and within commands of an individual service, the intent of this provision is difficult to fathom. Paragraph (2) significantly broadens the scope and application of fraternization to include relationships between officers and between enlisted personnel, "where a senior subordinate relationship exists." This paragraph creates a subset of the traditional officer-enlisted fraternization domain. Section 4b states that in a joint service working relationship, the Naval servicemember will be held accountable if a "senior-subordi-

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<sup>163</sup> *Id.* at para. 3(n).

<sup>164</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>165</sup> An "all-hands" club is open to all ranks. One must ask why the Navy has these clubs when its policy against fraternization is so strict.

<sup>166</sup> Colonel Flatten called fraternization, "more describable than definable." Flatten, *Fraternization*, 10 A.F. REP. 109, 112 (1981).

<sup>167</sup> The same problems posed by different customs in the military are visible in pornography prosecutions in the wake of *Roth v. United States*, 354 U.S. 476 (1957), which applies a contemporary community standards test. Obviously, as one moves to different communities, similar conduct may vary as to its legality.

<sup>168</sup> OPNAVINST 5370.2 at para. 2(a).

<sup>169</sup> This article is used specifically for the offense of disrespect to a superior commissioned officer.

nate relationship" exists. That the regulation is silent as to which party is to be punished suggests that both parties are responsible.

The Navy relies heavily upon "custom and tradition"-based notions of fraternization,<sup>170</sup> but it is precisely these bases that

<sup>170</sup> The Navy actually is the only service ever to prosecute solely for violating a custom of the service. This explains its unwillingness to part with its beloved Articles for the Government of the Navy. The pertinent provision of those Articles follows:

*Article 22, Articles for the Government of the Navy (1934 edition) provided:*

(1) *Offenses not specified.*—All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct.

In explaining the meaning of Article 22(a), *Articles for the Government of the Navy (1934 edition)*, section 5 of *Naval Courts and Boards (1937)* (the Navy's former court-martial manual), stated:

The sources of unwritten naval law are:

(a) Decisions of the courts.

(b) Decisions of the President and the Secretary of the Navy and the opinions of the Attorney General and the Judge Advocate General of the Navy.

(c) Court-martial orders.

(d) Customs and usages of the service.

Circumstances from time to time arise for the government of which there are no written rules to be found. In such cases customs of the service govern. Customs of the service may be likened, in their origin and development, to the portions of the common law of England similarly established. But the custom is not to be confused with usage; the former has the force of law, the latter is merely a fact. There may be usage without custom, but there can be no custom unless accompanied by usage. Usage consists merely of the repetition of acts, while custom is created out of their repetition.

*Custom.*—The following are the principal conditions to be fulfilled in order to constitute a valid custom

(1) It must be long continued.

(2) It must be certain and uniform.

(3) It must be compulsory.

(4) It must be consistent.

(5) It must be general.

(6) It must be known.

(7) It must not be in opposition to the terms and provisions of a statute or lawful regulation or order

As usage constantly observed for a long period results in the establishment of a custom, so long-continued nonusage will operate to destroy a particular custom, that is, to deprive it of its obligatory character. The field of operation of the unwritten naval law is extensive. It is applied in defining certain offenses against naval law and in determining whether certain acts or omissions are punishable as such, as in cases coming under article 22 of the articles for the government of the Navy. At times, also, custom is appealed to as a rule of interpretation of terms technical to the naval service

*Usage.*—Mere practices or usages of service, although long-continued, are not customs and have none of the obligatory force which attaches to customary law. The fact that such usages exist, therefore, can never be pleaded in justification of

are most susceptible to attack during periods of rapid change. The difficulty with a custom-based regulation providing any flexibility within a reasonable period of time is self-evident.<sup>171</sup> But when, during social change, does someone with the requisite authority acknowledge that custom has changed? In a military organization steeped in tradition, resistance to change is a valid concern. That customs change slowly might argue in favor of using custom as a basis for fraternization regulations. But some areas must be responsive to the times.

Ultimately, custom is a poor device for defining criminal offenses.<sup>172</sup> It is, at the same time, inflexible and indescribable.<sup>173</sup> After all, who provides the standard?—the admiral or the yeoman?—the surface line community or the submariners?—the aviators or the hospital corpsmen?

Different services are held to radically different standards of grooming, etiquette, and discipline. The differences in custom and conduct *within* services is yet another aspect of the difficulty inherent in a custom-based fraternization regulation. If different customs exist within a service, then there really is no custom at all. The Navy finds itself caught on the horns of a dilemma. It must acknowledge in paragraph 3a, that "proper social interaction among officer and enlisted ranks [is encouraged] . . . as it enhances morale and esprit de corps." Yet, the next sentence offers this caveat: "At the same time, *unduly* familiar personal relationships . . . have traditionally been contrary to naval custom." This only serves to reignite the debate about what is acceptable and what constitutes fraternization.<sup>174</sup> The Navy acknowledges that this "uniquely mili-

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conduct otherwise criminal or reprehensible, nor be relied upon as a complete defense in a trial by court-martial. With the permission of the court, however, they may be introduced in evidence, with a view to diminishing to some extent the degree of criminality involved in the offense charged.

This regulation was upheld in *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). The court dismissed warnings that the article could be abused because of its "indeterminateness" because the customs of the Navy are "well known."

<sup>171</sup> It is a ludicrous assumption to contemplate a change in custom—at least as perceived by those promulgating regulations—progressing at anything but a slow pace.

<sup>172</sup> One longstanding Navy custom prohibited women from boarding a naval vessel. By implication, if any fraternizing occurred, it was of a homosexual nature. Now women are permitted on ships, and this would seem to qualify as a new custom. The Navy still wants to use its "customary" rule to prohibit shipboard romance, and it successfully prosecuted the first such case between enlisted members in *United States v. Carter*, 23 M.J. 883 (N.M.C.M.R. 1986) (Male noncommissioned officer had sexual relations aboard ship with female enlisted subordinate).

<sup>173</sup> More accurately, it is flexible, but over far too great a time span.

<sup>174</sup> Naturally, fraternization can and does arise in numerous contexts. Historically, fraternization rarely involved sex, and when it did, it was generally homosexual. In his concurring-and-dissenting-in-part opinion in *United States v. Johanns*, 17 M.J. 862,

tary concept might be offensive in a civilian organization."<sup>175</sup>

While servicemembers enjoy first amendment freedoms, these protections may be restricted based on the needs of the military to accomplish its mission.<sup>176</sup> Military personnel actually give up many rights.<sup>177</sup> "By statute and regulation, soldiers are also prohibited from forming unions, protesting, assembling against their commanders, publishing papers urging disobedience of orders, and fraternizing with subordinates."<sup>178</sup> The Navy asserts in a conclusory manner, "In the context of military life, however, it serves a valid and necessary purpose."<sup>179</sup> But this "valid and necessary purpose" of the regulation is only relevant in the context of assisting commanders in maintaining good order and discipline.<sup>180</sup> "First and foremost, the military justice system should deter conduct which is prejudicial to good order and discipline."<sup>181</sup>

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882 (A.F.C.M.R. 1983). Judge Miller noted in footnote 15 that he personally reviewed 237 appellate cases dealing with officer-enlisted misconduct. He fit all these cases into one of four categories: (1) alcohol related, (2) gambling related, (3) "borrowing" money, and (4) sex related.

<sup>175</sup> OPNAVINST 5370.2 at para. 3(c).

<sup>176</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986). This case is best known for the degree of deference given to the military, which is thoroughly legitimized by this opinion. Nevertheless, Justice Brennan's dissent is so vociferous that it will not be forgotten.

A deferential standard of review, however, need not, and should not, mean that the court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest. Unabashed *ipse dixit* cannot outweigh a constitutional right.

*Id.* at 518. Justice Brennan goes on to state, in footnote two to the above quotation, that First Amendment restraints imposed on military personnel by the government "may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation." See, e.g., *Brown v. Glines*, 444 U.S. 348, 367 (1980) (Brennan, J., dissenting).

<sup>177</sup> See generally Cox, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 M.L. REV. 1 (1987).

<sup>178</sup> *Id.* at 24; see also 10 U.S.C. § 976 (1982) (prohibiting membership in, organizing of, and recognition of military unions); 18 U.S.C. § 2387 (1982) (prohibiting interference with morale, discipline or loyalty of the armed forces); Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces (12 Sep. 1969); see also *Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Greer v. Spock*, 424 U.S. 828 (1976).

<sup>179</sup> OPNAVINST 5370.2 at para. 3(c).

<sup>180</sup> Regulations and the UCMJ have different, but related, functions. Not all regulations implement the UCMJ.

<sup>181</sup> Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 78 (1971).

(b) *Ambiguities.*—The Navy's definition of fraternization<sup>182</sup> prohibits any romantic or sexual relationship between officers and enlisted personnel. Even a date would be "inappropriate." It is ironic that a feeble term such as "inappropriate" carries criminal implications. The word "prohibited" would have been more "appropriate." Anything less than a prohibition attenuates the criminality of the conduct.<sup>183</sup> The most interesting aspect of the Navy regulation is the blanket prohibition on officer-enlisted fraternization, while there is a narrow prohibition against officer-officer and enlisted-enlisted fraternization when a senior-subordinate relationship exists. This suggests a class distinction. It also clouds the issue because even though "senior-subordinate" relationships can exist between members of different services, whether officer-enlisted fraternization can occur with a member of another service is not addressed—either internal or external to the chain of command.

Another critical area of the naval regulation is the "prohibited relationships" paragraph. This description begins with an inherent contradiction. "Fraternization . . . is punishable as an offense under the UCMJ when it is prejudicial to good order and discipline or brings discredit to the naval service." By definition, then, fraternization does not become actionable without proof of prejudice to good order and discipline or discredit to the naval service. This is true, however, of all acts punished under article 134. Yet nowhere does the regulation state that certain types of conduct are "per se" fraternization. Even though "dating, cohabitation, and sexual intimacy . . . are clearly inappropriate" does this make them per se actionable fraternization? If it does, then why not say so?

Discredit to the service,<sup>184</sup> primarily is defined by civilian perception.<sup>185</sup> Civilians, however, rarely if ever have perceived

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<sup>182</sup> OPNAVINST 5370.2 at para. 4.

<sup>183</sup> Odder still is the fact that the Navy should use this weak language in an arguably punitive regulation. See *Id.* para. 5(a). It is understandable to use this language in nonpunitive regulations, such as the Army and Air Force did. In this context, it only creates confusion.

<sup>184</sup> See UCMJ art. 134(3) ("conduct of a nature to bring discredit upon the armed forces"). The aspect of this regulation that involves bringing the service "into disrepute" or lowering the service "in public esteem" seems almost exclusively oriented to a civilian perspective of the conduct in issue.

<sup>185</sup> In *United States v. Bunker*, 27 B.R. 385 (1943), the court upheld the conviction of an Army major for fraternizing with enlisted men by consuming alcohol in public with them. The court pointed out, ostensibly as an aggravating factor, that approximately twenty-five civilians came into the bar while the major drank with his subordinates. Service discrediting conduct, then, is largely as seen through civilian eyes. In *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952), a Marine was charged with enticing other

problems with two service personnel dating.<sup>186</sup> Ironically, the prosecution of this conduct often is service-discrediting. This irony is reinforced each time a fraternization court-martial receives public scrutiny.<sup>187</sup> "Pure" fraternization<sup>188</sup> can never be service discrediting except when it involves homosexuality, which is not contemplated in this article. Therefore, the Navy must rely on prejudice to good order and discipline, which is also inadequate to explain prosecutions for "pure" fraternization.

The Navy's approach encourages counseling and administrative remedies prior to disciplinary action.<sup>189</sup> "If the two are really in love then you move them to another department. If you still can't solve the problem, then disciplinary action would solve the problem."<sup>190</sup> But love is such a pesky problem that it frequently results in marriage. What then? "Fraternization is not excused by a subsequent marriage between the offending parties."<sup>191</sup> But then what is one to make of the very next paragraph,<sup>192</sup> which states, "Servicemembers who are

servicemen to engage in sexual intercourse with a female. This conduct was not considered service discrediting because it "transpired in the semi-privacy of a military reservation." *Id.* at 17. This further illustrates that discredit must be in the public eye. The court went on to state that simple fornication would not violate UCMJ art. 134.

<sup>186</sup> See *Mocking Military Justice*, L.A. TIMES, May 15, 1988, at V-4.

<sup>187</sup> The military's regulation drew national attention last year when a Navy dentist stationed at the Air-Ground Combat Center, 29 Palms, California, was charged with fraternization by the Marine Corps for dating LCpl Scott Price, whom she married. The Marine Corps eventually dropped the charges.

Another case involved a one-star rear admiral, John W. Gates, Jr., who was "administratively removed" from his naval reserve command in Newport, R.I., last April for dating enlisted Reservist-Intelligence Specialist First Class Carol Lund.

The two had been dating for two years but they never attended any official Navy functions together in uniform and were not in the same chain of command. And Gates said last year: "We were not aware we were an embarrassment to anyone."

NAVY TIMES, Feb. 20, 1989, at 3. Perhaps the admiral had not yet learned the "custom of the naval service." If only he had served a few more years, perhaps he would have known better. For those new to the military, who may not yet know or understand the custom, it could potentially be violated unknowingly; a trap for the unwary.

<sup>188</sup> The author has coined the term "pure fraternization" to denote, under current regulations, a mutually consensual, nondeviate sexual relationship carried out in private and offbase, out of uniform, where there is no issue of taint through any chain of command relationship, influence attempt, mild coercion or the like.

<sup>189</sup> All service regulations make this same point of resolution at the lowest possible level. It is a sound, economical policy, which also is required by the Manual. See MCM, 1984, Rule for Courts-Martial 306(b).

<sup>190</sup> *Familiar Rules on Relations Among Ranks Put in Writing*, NAVY TIMES, Feb. 20, 1989, at 3 (comments by Vice Admiral Boorda).

<sup>191</sup> OPNAVINST 5370.2 at para. 5(a)(2).

<sup>192</sup> *Id.*, para. 5(b).

married . . . to other servicemembers must maintain the requisite respect and decorum attending the official relationship while either is on duty or in uniform in public." Does this mean that fraternization really is authorized *sub rosa* when solemnized by wedding vows, so long as it remains out of sight? This problem is identical to the Marine Corps' experience, and neither service will satisfactorily resolve the inherent conflict between their fraternization and marriage policies until they adopt a more realistic stance.<sup>193</sup>

In spite of the Navy's noble effort to promulgate an understandable regulation, it ultimately only has added to the confusion. In an effort to clarify the issue, senior commanders have from time to time sent messages to their subordinate commanders.<sup>194</sup> The common aspect to these naval regulations,

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<sup>193</sup> Marriage poses the most difficult obstacle to logical fraternization regulations because a "mixed marriage," or a marriage in the chain of command, stands as an authorized exception to the rule—an inherent paradox. Marriage always has been a thorn in the side of the military. The difficulties became apparent in World War II, and continue to this day. The following passage illustrates how absurd marriage in the military had become in that era:

The command policy that forbade married couples to cohabitate was also a source of great annoyance. The logic behind it remains an enigma to this day. It applied only to couples in which the wife was military; if she were a civilian, there was no hassle. This situation was aggravated by the common knowledge that many men had taken to living openly with local women.

The policy results were both ludicrous and predictable. For example, one Army Captain married to a military woman was admonished by his commander in a letter saying, "It has come to the attention of this headquarters that you are living with your wife. This must cease at once."

J. HOLM, *supra* note 3, at 85.

<sup>194</sup> Message, COMNAVAIRPAC, 250010Z Feb. 88, subject: Fraternization.

2. A necessary part of this effort is a firm stand against fraternization. By fraternization I mean sexual and other excessively familiar behavior between seniors and juniors in the chain of command that tends to subvert the traditional senior-subordinate relationship and thereby compromises the senior's position of leadership. It is sometimes difficult to recognize the line between acceptable social contact that promotes morale and unacceptable fraternization that destroys it. Furthermore, because of the infinite variety of professional and social settings that could present the opportunity to fraternize, it is impossible to set forth a checklist of rules that would apply in all cases. The answer to this problem of recognizing fraternization is the same one that works whenever discretion must be exercised: sound judgment. Our senior people, in both officer and enlisted grades, routinely demonstrate this quality in all areas of professional life; they must do so here as well and set the example on a daily basis.

3. Fraternization cannot be tolerated for two fundamental reasons, both of which go right to the heart of effective leadership. First, when an intimate or overly familiar relationship develops between a senior and his/her subordinate, good order and discipline fall by the wayside. The chain of command has been compromised. Second, the reality, or even the appearance, of the favoritism that inevitably results from undue familiarity will devastate unit morale, and, in turn, personnel readiness, especially among the junior member's peers. Respect for the senior will disappear and his/her effectiveness as a leader along with it.

comments, and messages is the concern for conduct *within* the chain of command. Why officer-enlisted fraternization external to the chain of command presents a problem is simply not addressed, except through off-hand, nebulous references to custom. This omission is the fatal flaw of this regulation, and may be intentional—that is, because it *only* applies to officer-enlisted relationships, the prohibition is clearly based on the out-moded social and class-based distinction.

Fraternization is a touchy subject, and everyone knows it.<sup>195</sup> Thus, each service drafted its fraternization regulation meticulously—perhaps with greater care than other punitive policies. In the latest Navy regulation on the subject of fraternization, the term "custom" does not appear. This deletion, with the use of the term "tradition" in its stead seems particularly ill-advised in light of the mandates of article 134, UCMJ.<sup>196</sup> The intent of the regulation, however, is to clarify its applicability. Prior to the publication of the regulation, input was requested and received from all areas of the Navy.<sup>197</sup> The final draft for the 1988 United States Navy Regulations was significantly different from the original.<sup>198</sup> The actual regulations replaced the word "prohibited" with "inappropriate"—a strange decision

<sup>195</sup> 100th Cong., 2d Sess. (1988). Representative Byron of California submitted a concurrent resolution, H.R. Con. Res. 379, Sept. 29, 1988 (not passed) which began as follows:

Whereas the current fraternization policies of the Armed Forces of the United States do not adequately address the realities inherent in a modern and sexually integrated military; whereas there is currently no consistent or uniform fraternization policy among the different branches of the Armed Forces . . .

This resolution appears *in toto* in Appendix F, and provides ample cause for concern by the services regarding their fraternization policies.

<sup>196</sup> UCMJ art. 134 specifically requires, in the elements of the offense of fraternization, that the "fraternization violate the custom of the accused's service."

<sup>197</sup> The following proposal was from the Commander of Naval Sea Systems Command:

Fraternization Prohibited

No commissioned or warrant officer of the Naval Service shall knowingly fraternize with enlisted person(s), on terms of military equality.

Memorandum for the Record, Navy JAG, 5800, at 2, 23 Oct. 90.

<sup>198</sup> 1184. Fraternization Prohibited.

1. Personal relationships between officer and enlisted members are inappropriate and are counter to long-standing tradition of the naval service. Those relationships and those between officers and between enlisted personnel where a direct senior-subordinate supervisory relationship exists are *prohibited* and subject to administrative and disciplinary action when they:

a. are prejudicial to good order and discipline;

or

b. bring discredit to the naval service

2 This policy applies to all regular and reserve personnel. (emphasis added)



indeed for a punitive regulation. But the negotiations and study of the wording continued.<sup>199</sup> Clear guidance on this aspect of the offense is critical because the actual article 134 offense of fraternization does not specifically contemplate any fraternization other than officer-enlisted. Is this new law, or perhaps new custom?<sup>200</sup> In another memo to the Chief of Naval Operations, the Judge Advocate General of the Navy weighed in.<sup>201</sup> The footnoted recommendation from Code 20<sup>202</sup> within Navy JAG correctly points out a critical problem with the draft.<sup>203</sup> Specifically, the author notes that the article is "likely

<sup>199</sup> Memorandum, Naval Inspector General 5800 Ser OOL/364, 19 Dec. 1988, subject: Revision of U.S. Navy Regulations. Admiral Chang recommended that the second sentence of the above proposal be reworded to read as follows:

"Those relationships, between officers and other officers, and between enlisted personnel and other enlisted personnel, where a direct senior-subordinate supervisory relationship exists, are prohibited . . ."

*Id.* at 3. This proposes the use of the stronger word "prohibited" and a clearer explanation of nonofficer-enlisted fraternization.

<sup>200</sup> The elements of the offense require one party to be an officer. The Explanation, however, leaves open the possibility of enlisted-enlisted fraternization. The difficulty with knowing just what the custom is remains quite ambiguous.

If all customs were written, it seems clear that it could be used to clarify the general Article and thus avoid constitutional attack under the void for vagueness doctrine. But custom is almost wholly unwritten. How many new recruits, or how many seasoned veterans know the complicated customs of the Army? It is not enough to argue that every person is presumed to know the law. In civilian law, a person, or his attorney, has the opportunity to examine the written laws and opinions. But where there are no written customs a person can only speculate whether his planned conduct will be a violation of unwritten custom and thus a violation of Article 134.

Hewitt, *General Article Void for Vagueness*, 34 NEB. L. REV. 529 (1958).

<sup>201</sup> Admiral Stumbaugh recommended a complete change to Article 1184 as drafted, with the following language substituted:

1184. *Fraternization Prohibited*

1. Personal relationships between officer and enlisted members which are unduly familiar and do not respect differences in rank and grade are inappropriate and violate long-standing traditions of the Naval service.

2. When prejudicial to good order and discipline or of a nature to bring discredit upon the Naval service, personal relationships are prohibited:

a. between officer and enlisted members where direct senior-subordinate relationship exists, or not;

b. between officer members where a direct senior-subordinate relationship exists, and

c. between enlisted members where a direct senior-subordinate relationship exists.

3. The prohibitions in paragraph 2 of this article are punitive regulations, and naval personnel who violate them are subject to administrative and disciplinary action. This article applies in its entirety to all regular and reserve personnel.

Navy TJAG Letter, Ser. 133/115 20/B, 15 Nov. 1988, subject: U.S. Navy Regulations.

<sup>202</sup> The Navy Office of the Judge Advocate General uses codes for different sections within its department. Code 20 is the military justice section; code 13 is the administrative law section.

<sup>203</sup> Navy JAG Memorandum 225/88, 24 Oct. 1988, subject: U.S. Navy Regulations.

to be construed as containing both a policy statement (officer-enlisted personal relationships are inappropriate) and a punitive regulation (prejudicial and discrediting relationships are prohibited). This distinction is crucial—while violation of a punitive regulation is an offense under the UCMJ, violation of mere policy is not.<sup>204</sup> A different memo was submitted by Code 20 about two weeks later,<sup>205</sup> pointing out other problems. This was not the end of the issue. The Judge Advocate General of the Navy sent yet another memo to the Chief of Naval Operations.<sup>206</sup> Finally, the regulation was approved.

*2. United States Marine Corps Policy.*—The Marine Corps, as a part of the naval service, and within the Department of the Navy, is subject to United States Navy regulations.

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<sup>204</sup> *Id.* at 4.

<sup>205</sup> Navy JAG Memorandum 203/298, 4 Nov. 1988, subject: U.S. Navy Regulations. This memo references a Navy JAG memo (JAG Memo 5801 over M173/048/0, undated, subject: U.S. Navy Regulations), from Code 13 to Code 01 undtd), which recommended replacing the words "are counter to" (normal tradition) with the word "violate," because the Manual for Courts-Martial, 1984, Part IV, para. 83(b) makes criminal any relationship not in consonance with the "customs of the service" when service discrediting or prejudicial to good order and discipline. Therefore, the author's objection is that, "by putting the world on notice that personal relationships between officer and enlisted personnel 'violate longstanding traditions of the naval service,' policy is transferred into punitive sanction via paragraph 83(b) of the manual." *Id.* at 2. And finally, the author complains, "My lawyers are not sure what the Article says, either as proposed, or as revised by Code 13. If they can't understand it, we can't expect the troops to understand it either, or to obey it." *Id.* at 2. This illustrates the tremendous complexity of regulating this area.

<sup>206</sup> Navy Memorandum for CNO 5081 over Sep 133/11400/0, 5 July 1990, subject: U.S. Navy Regulations. This memorandum objected to referencing art. 134 as recommended by the Director of the Naval Investigative Service, Memorandum for the Record 5800 at 4 (23 Oct. 1990), as being "legally objectionable and unnecessary." The Navy JAG made this objection because of his concern that violations of regulations generally are charged under art. 92 instead of art. 134. Additionally, Navy JAG pointed out that there was no need to mention its applicability to Reserve personnel because that already was established as a general rule earlier in the Navy regulations. Finally, and most interestingly, Navy JAG objected to paragraph (3) because no other punitive regulation came out and stated that it was punitive as this one now did.

Two cases are relevant in regard to this issue. The first case was *United States v. Horton*, 17 M.J. 1131, 1132 (N.M.C.M.R. 1984), in which the court held that the "punitive character of a regulation is determined by examining it in its entirety and ordinarily, no single factor is controlling." The court went on to note that whenever the punitive character of a regulation is challenged, the key issue is whether it "evidences an intention to regulate individual conduct and to punish individuals who violate its provisions." *Id.* The second case cited was *United States v. Bright*, 20 M.J. 661, 662 (N.M.C.M.R. 1985), in which the court held that to determine if an order is punitive, "analysis of the character of the regulation requires consideration of the order as a whole."

This final issue of the punitive nature of the regulation is just one of a host of significant corollary issues any competent defense counsel should be raising in fraternization prosecutions. Thus, the "Swiss cheese" nature of the Navy regulation is no different from the others in that respect.

(a) *Analysis.*—The Marine Corps regulation stands in sharp contrast to those of the other services by virtue of its brevity and age.<sup>207</sup> Not surprisingly to many, the Marine Corps has the strictest policy on fraternization. Indeed, officer-enlisted relationships may well be strict liability affairs. Yet, given the rather vague<sup>208</sup> language of its policy, it is ironic that the Marine Corps has developed the strictest rules. An examination of its scant regulation reveals a title that covers *only* relationships between officers and enlisted Marines. That is virtually the only specific guidance in the regulation. The remainder is so nebulous that the drafters must have desired it to be that way. The next sentence covers "duty relationships" and "social and business contacts" that encompass the full spectrum of human interaction. The regulation easily could read "*all* contacts" because that would not change its meaning. Next, by mentioning "Marines of different grades," one reasonably could argue that the regulation contemplates relationships between officers and between enlisted Marines. A subsequent reference to "Marines of senior grade and those of lesser grade" makes this meaning more likely, but the title of the regulation casts too much doubt on that. Interestingly, no reference is made to "custom of the service"<sup>209</sup> specifically, even though that is the clear thrust of the language that refers to "traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade." The last sentence, then, provides all the guidance the Marine Corps has to offer. "Situations that invite or give the appearance of familiarity or

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<sup>207</sup> MC Manual para. 1100.4 (1980). The Marine Corps policy on fraternization has not been revised in over a decade.

<sup>208</sup> The Marine Corps regulation consistently has withstood constitutional void for vagueness challenges. While courts have not addressed whether Marine officers may date enlisted women of other services, the courts have stated that officers of the naval service are on notice that wrongful fraternization with enlisted personnel on terms of military equality is proscribed by UCMJ arts. 133 and 134. See generally *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985); *United States v. Tedder*, 18 M.J. 777 (N.M.C.M.R. 1984), *petition granted*, 19 M.J. 115 (C.M.A. 1984); *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984); see also *United States v. Baker*, No. 84 4043 (N.M.C.M.R. 30 Aug. 1985). In *Baker*, the court recognized that Marine Corps officers, in particular, are on notice that their relations with enlisted personnel must be consistent with good order and discipline. Arguably, however, that language apparently means that such relationships per se are not necessarily prohibited.

<sup>209</sup> In *United States v. Tedder*, 18 M.J. 777 (N.M.C.M.R. 1984), the court recognized and essentially legitimized the vast differences in custom between the Marines and the Air Force. Air Force cases were held not relevant to the Naval Service. Arguably, this places an unfair burden on officers of the Naval Service—an issue raised in an equal protection context but failed to sway the court in *United States v. Moultak*, 24 M.J. 316 (C.M.A. 1987).

undue informality among Marines of different grades will be avoided or, if found to exist, corrected."

(b) *Ambiguities.*—The flexible language—subject to different, yet plausible interpretations—allows commanders extreme flexibility in dealing with fraternization. The absence of strong language such as "prohibited" or "violate" leaves one guessing about the punitive nature of the regulation. The absence of references to personnel of other services, including Navy personnel, is also noteworthy.<sup>210</sup> By definition, this regulation specifically applies only to Marines, yet in practice it is generally understood to cover relations with other services. This is unjustifiable.<sup>211</sup> If Marines are not permitted to fraternize with members of other services, the regulation should so state. This incredible ambiguity has exasperated commanders.<sup>212</sup> They are understandably uncomfortable with the wide latitude they have in this undefined area and do not feel they stand on firm ground when attempting to interpret the regulation to the detriment of their Marines. Junior Marine officers looking for guidance will not find it in the regulation, nor in any other Marine Corps publication. Rather, they must depend on whatever their peers and commanders tell them. This is particularly unsettling because the Marine Corps frequently prosecutes fraternization cases. The Marine Corps obligation to follow the Navy Regulations confuses matters even further.<sup>213</sup>

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<sup>210</sup> The regulation applies, on its face, only to Marines. The Marines, however, are in the Department of the Navy, and the Navy and Marine Corps are considered to be the same service.

<sup>211</sup> This is the type of vagueness that the author believes will not survive scrutiny indefinitely. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 U.S. 733, 735 (1974).

<sup>212</sup> The ambiguity also exasperates prosecutors who charge art. 92 whenever applicable. See *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990) (female drill instructor fraternized with her female recruits). This ultimately is an issue of vagueness; *Parker v. Levy*, 417 U.S. 733, 769 (1974) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1971) (Stewart J., dissenting) "Vague standards offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement"). Another analogous view on vague standards was provided in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971), in which the Court stated "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis."

<sup>213</sup> The regulation covers relationships between officers and between enlisted Marines of different grades. No chain of command, or senior-subordinate relationship, need exist. And, much to its dismay, the Marine Corps was caught completely off guard by the new Navy regulation. Conceivably, this occurred because the Navy was not certain of the Marine Corps policy. In any event, the Marine Corps is attempting to undo the damage.

From a *literal* interpretation of the policy, the Marine Corps could prosecute a staff sergeant for dating a gunnery sergeant, yet it could not prosecute a first lieutenant for dating an Army sergeant. At what rank differential does dating become prohibited between officers and between enlisted Marines? Can the Marine Corps prosecute interservice fraternization?

Officer-enlisted marriages provide a particularly thorny problem. At one point, the Commandant of the Marine Corps considered sending out a White Letter<sup>214</sup> on that topic. His staff judge advocate, in a memorandum, echoed many concerns that simmer beneath the surface of the issue.<sup>215</sup> Where are Marines to look for definitive guidance on the boundaries of acceptable conduct? Even the case law abounds with ambiguity.<sup>216</sup> The regulation is the *last* place to look, unfortunately, because even though regulations usually settle arguments, this policy creates many more issues than it settles. The ultimate arbiter of a fraternization case in the Marine Corps is the highest level commanding officer aware of it. Because the regulation gives him or her very little guidance, the commander is free to superimpose his or her own notions of morality into the equation, and subject subordinates to that standard. Accordingly, the commanding officer's views often become more important than Marine Corps' policy. This is the danger, from both an institutional and individual standpoint, of overly flexi-

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Much to our surprise, article 1165, U.S. Navy Regulations, 1990, prohibits officer-officer and enlisted-enlisted fraternization (defined as "personal relationships . . . which are unduly familiar and do not respect differences in rank and grade") only when a direct senior-subordinate relationship exists. Thus, local orders and SOPs proscribing officer-officer or enlisted-enlisted fraternization are likely valid now only with respect to situations in which a chain of command relationship exists. Though article 1165 may satisfy the Navy, it appears to have been promulgated without regard to Marine Corps custom and traditions. We will seek an amendment. Stay tuned for developments.

*Res Ipsa Loquitur*, 3-90, 1 July 1990, at 27.

<sup>214</sup> A white letter is a memorandum signed by the Commandant of the Marine Corps. They are sent out periodically to address issues that are of general concern to all Marines.

<sup>215</sup> Consideration should be given to resolving these issues before issuing a White Letter. While the proposed alternative White Letter attempts to finesse these issues, it cannot preclude inconsistent actions regarding this matter. On the one hand we advise commanders by the White Letter that officer-enlisted marriages are inimical to mission accomplishment and contrary to good order and discipline, while on the other we continue to reenlist enlisted Marines who are married to officers, and to commission individuals who are married to enlisted members.

Marine Corps Letter for Deputy Chief of Staff for Manpower, JA:DMB/MER:CWM 16 May 1983, subject: White Letter.

<sup>216</sup> See *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985) ("a reasonably prudent officer is on notice to approach officer-enlisted relationships with *cautious judgment*") (emphasis added).

ble regulations.<sup>217</sup> One might legitimately point out, in response to this argument, that there is really no problem with a commander imposing his or her own notions of morality on an offense. The UCMJ is full of that type of discretion, and exercising that discretion is what commanders are expected to do. While this sounds like valid reasoning, it is fallacious. Consider a commander confronted with a lance corporal who was disrespectful to a sergeant. Assuming that the disrespect was not outrageous, the commander might decide that nonjudicial punishment was appropriate, and impose a forfeiture of pay and restriction. Ten commanders confronted with this offense would all respond in this range of punishment. This is not so with fraternization. For example, if a Marine lieutenant had a "one night stand" with an enlisted woman not in his chain of command, the same ten commanders would produce a far greater range of punishments. One commander probably would recommend a general court-martial while another could recommend no action at all.

It is worth considering this same issue regarding other article 134 offenses.<sup>218</sup> Upon studying the fraternization specifica-

<sup>217</sup> The Army is caught in an identical situation; see also *The Ronald Case and Need for a Clear Policy*, NAVY TIMES, Dec. 19, 1953, at 26. This article discusses recent Navy and Marine Corps fraternization cases and also highlights the issue of officer-enlisted marriages. Unfortunately, whether a Marine or sailor will get away with such a marriage depends solely on what his "CO decides." Correctly sizing up this situation, a Navy official commented, "This is an open invitation to *selective enforcement*" (emphasis added).

<sup>218</sup> The following are several UCMJ art. 134 offenses. The elements *other than* those common to all art. 134 offenses—that is, prejudice to good order and discipline or service discrediting—are included for consideration. Note how precise they appear to be in contrast to the fraternization specification. With most of the offenses that follow, the prejudice to good order and discipline and service discrediting aspect of the offense is so obvious that proof of the "general" elements never becomes an issue. Contrast that also to the fraternization specification, in which evidence of the general element is the major burden of proof. This incongruity is rather striking.

*Indecent Act or Liberties with a Child.*

- (a) That the accused committed a certain act upon or with the body of a certain person;
- (b) That the person was under 16 years of age and not the spouse of the accused;
- (c) That the act of the accused was indecent; and
- (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both.

MCM, 1984, Part IV, para. 87. Virtually the only term which presents a definitional issue is "indecent," yet everyone knows indecent acts when they see them, similar to issues of pornography. Thus, this really is quite precise. This is not specifically a military offense, as are the following examples, but it nonetheless illustrates the example of precision in a regulation.

*Breaking Restriction*

- (a) That a certain person ordered the accused to be restricted to certain limits;
- (b) That said person was authorized to order said restriction;

tion, a *standard* is nowhere to be found. Since "custom" arises as an issue in proving an element of the offense, one is required to go beyond article 134 to ascertain its true meaning. Because the regulation is vague, however, no other source can be used to define this standard. All this ambiguity of necessity lodges great discretion in the commander who must ultimately enforce the policy. But the law does not favor total standardless discretion based solely on personal fiat.<sup>219</sup> Even federal judges have been given rather restrictive guidelines.<sup>220</sup> Guidelines are necessary to provide due process to the policy. When neither commanders nor Marines are sure of the policy, a void for vagueness<sup>221</sup> issue naturally arises. A Marine Corps-wide policy applied differently at each command is unsatisfactory. Instead, it actually becomes policy by name only. But the

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(c) That the accused knew of the restriction and the limits thereof;

(d) That the accused went beyond the limits of the restriction before being released therefrom by proper authority.

MCM, 1984, Part IV, para. 102. This purely military offense is capable of precise definition, and that precision has been attained.

*Straggling*

(1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful.

MCM, 1984, Part IV, para. 107.

*Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.*

(1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;

(2) That the accused was not authorized to wear the item;

(3) That the wearing was wrongful.

MCM, 1984, Part IV, para. 113. The above two articles provide another vivid contrast, in their specificity, to the glaring ambiguity of the fraternization article.

<sup>219</sup> Without standards, a commander has complete discretion. This is what gives rise to the void-for-vagueness issue. See *United States v. Mallas*, 762 F.2d 361 (1985) (criminal prosecution for a violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether a particular type of conduct is legal or illegal); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (vagueness doctrine incorporates the idea of notice—laws invalid if not susceptible to objective measurement); *United States v. Critzer*, 498 F.2d 1160 (1974) (when a law is vague or highly debatable, an accused actually or impudently lacks the requisite intent to violate it).

<sup>220</sup> See United States Sentencing Commission, *Guidelines Manual*, Introduction, pt. 3 (1989). Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by different offenders.

<sup>221</sup> The void-for-vagueness issue has not had full exposure to the light of day. The courts have not considered such a challenge when the nature of the fraternization was mild. If they consider a case of interservice fraternization, the regulation likely will not hold up to a vagueness challenge posed by a sharp defense counsel. The author is aware that technically, the facts of a case are not relevant to the vagueness or specificity of a regulation. Nonetheless, the tendency for bad facts to make bad law is very real.

Marine Corps leadership is quite satisfied with the policy as it is, preferring to rely on the judgment of its commanders to deal equitably with this problem.<sup>222</sup> The options available to a commander include: (1) official or unofficial counseling; (2) fitness report comments and appropriate markings; (3) nonjudicial punishment; (4) court-martial at an appropriate level; (5) recommend commencing administrative separation processing;<sup>223</sup> (6) recommend delay of an officer's promotion;<sup>224</sup> (7) recommend removing a regular officer's name from a selection list;<sup>225</sup> (8) recommend removing a reserve officer's name from a selection list;<sup>226</sup> and (9) recommend approval of the officer's request for resignation.<sup>227</sup>

All services have essentially the same options, with differences being more procedural than substantive. The Army lists several creative additional options: (1) Relief from command; (2) Revocation of security clearance; (3) Requiring unmarried soldiers to move back to post; and (4) Reduction for inefficiency.

The alternate method of prosecution is by charging a violation of a lawful general regulation under article 92. Marine Corps practice recommends a safer approach—having the offending Marine's commanding officer order the Marine to refrain from fraternizing, and upon noncompliance, prosecuting the conduct as an article 90 violation.<sup>228</sup> This also has the benefit of providing clear notice. In its fraternization guidance—understandably necessary because of ambiguous regulatory policy—the Corps places a heavy emphasis on senior-subordi-

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<sup>222</sup> We are convinced the standard provided by the Marine Corps Manual has been successful. Marines and commanders have demonstrated a remarkable ability to recognize fraternization when they see it. The nightmare of officers having their careers ruined by *innocent* contacts and associations with subordinates has simply not materialized. Experience demonstrates that officers who are disciplined for unlawful fraternization are not unwitting victims. Typically, an officer whose fraternization requires formal processing has *ignored repeated counseling* and/or has actively *attempted to conceal* the improper relationship. These officers cannot credibly claim they were unaware of Marine Corps policy.

Marine Corps Memorandum, SCR 6299, 5800 over JARS, 14 Oct. 1986, subject: Fraternization (emphasis added).

<sup>223</sup> Administrative separation would be conducted in accordance with Marine Corps Order P1400.32.

<sup>224</sup> SECNAVINST 1420.1 gives the Secretary of the Navy the final decision on this action.

<sup>225</sup> 10 U.S.C. § 629 (1988).

<sup>226</sup> *Id.* § 5905.

<sup>227</sup> Marine Corps Order P1900.16C (Separations Manual).

<sup>228</sup> *Discussion Guide, Fraternization*, United States Marine Corps, Education Center, Quantico, Virginia (Mar. 1984).



nate relationships and maintenance of good order and discipline within the unit.<sup>229</sup> The Marine Corps teaches that it is erroneous to identify fraternization as an exclusively male-female problem, even though that is the type which almost exclusively goes to courts-martial. Phrases such as the following abound: "Fraternization is a term used to describe one type of improper personal relationship that is harmful to military organizations if allowed to continue."<sup>230</sup> Ensuing discussions state that fraternization is bad, but fail to explain why—especially when it occurs outside of the chain of command.<sup>231</sup> The emphasis on *the unit* is clear. To "disrupt good order and discipline, undermine unit morale, and destroy successful working relationships among Marines,"<sup>232</sup> one would expect that fraternization contemplated must occur within the unit. After all, there is no readily apparent deleterious effect if it occurs outside those confines. To the extent that there may be such an effect, it is *de minimis*. The remainder of the Marine Corps regulation, quoting Major General Lejeune, purports to shed further light on the issue. While these words are motivating and legendary, they provide no *real* guidance on the issue of fraternization. The term fraternization is not mentioned since it was not a problem at that time—particularly the male-female variety. These words have no relevance to the issue; they are mere surplusage from the viewpoint of legal analysis.

The Marine Corps relies heavily on continuous mandatory leadership training,<sup>233</sup> but allows training frequency to be determined by individual commanders.<sup>234</sup> Since fraternization ap-

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> —The above definitions identify the terms "good order and discipline" as something that must not be violated by conduct such as fraternization.

—"Good order and discipline" are terms used to describe the essential quality of behavior within the armed forces. As Marines, we share in the responsibility to protect our nation. This is a serious business that may require us to endure extreme hardship, privation or even to give our lives so that the nation remains secure. Marines must be organized, trained, and ready for deployment to any crisis at any time. Our organization must have a highly refined quality of order so that, as a team, everyone knows their role and job and our efforts can join together in a manner that will achieve accomplishment of the mission. Discipline is each individual Marine's responsibility for responding willingly and instantly to the directions of a senior, and in the absence of orders, initiating appropriate action. With our traditional stress on the leader's responsibility for maintaining "good order and discipline," we will retain our readiness and capability to carry out the mission at all times.

*Id.* at 5.

<sup>232</sup> *Id.* at 2.

<sup>233</sup> Marine Corps Order 5390.20, Leadership Training and Education, 12 June 1989.

<sup>234</sup> *Id.* at 7.

pears at number thirteen on a list of twenty<sup>235</sup> suggested topics for leadership training, it is safe to assume that it is not a frequently discussed topic.<sup>236</sup> Thus, the Marine Corps' reliance on leadership training to explain its amorphous standard is misplaced. Furthermore, due to the limited official guidance available,<sup>237</sup> it is conceivable that Marines in one command could reach an entirely different conclusion regarding the limits of permissible conduct than Marines in another unit. While Marines hear of fraternization cases in hushed whispers, most Marines know that it is commonplace. The Marine Corps tracks all officer misconduct cases, to include fraternization,<sup>238</sup> revealing that it is alive and well. Given the rugged competition for promotion, each number represents a career in ruins. Not included in the numbers are those cases that resulted in no punishment.<sup>239</sup> How many officer careers were destroyed by forced resignation or were cut short due to a comment on a fitness report? In addition, there are the countless undiscovered fraternization cases not covered by these statistics.<sup>240</sup>

In considering a case for disposition under the UCMJ, the Marine Corps makes no distinction between a fraternization case and another offense, and it specifically leaves broad discretion to the commander concerned.<sup>241</sup> Most relationships

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<sup>235</sup> *Id.* at enclosure (1); Sample Leadership Training Plan.

<sup>236</sup> In the author's experience, it rarely has been a topic of leadership classes or seminars.

<sup>237</sup> Virtually the only information that a nonlawyer Marine would have access to would be the Marine Corps Order, and the Manual.

<sup>238</sup> SECNAVINST 1920.6A.

<sup>239</sup> From 1982 to 1989 10% of the male officer misconduct cases and 50% of the female officer misconduct cases resulted in no punishment.

<sup>240</sup> As with any other "criminal" undertaking, those engaged in this conduct are undoubtedly clandestine in the conduct of their relationships. As most prosecutors and police will reveal, the official statistics represent only a fraction of the actual offenses occurring.

<sup>241</sup> Headquarters, U.S. Marine Corps will offer the following evaluative guidelines, if contacted for advice:

a. *Superior/subordinate command relationships.* These merit the strictest scrutiny since they are the most likely to create an appearance of partiality. Inappropriately familiar conduct between different grades within the unit pose the most obvious threat to good order, morale, and discipline.

b. *Any relationship where the senior has the opportunity to act officially on behalf of the junior.* For example, an aggravating circumstance would be the accused's having sat on the junior woman Marine's meritorious promotion board.

c. *Previous counseling.* As with any offense, continued fraternization after an official warning is more egregious. The offensive conduct becomes a direct affront to military authority. Moreover, if the counseling included an order to terminate the conduct, the offense may have shifted to an orders violation. This is especially important in the case of an *enlisted* member who may not fall within the ambit of unlawful fraternization as proscribed by Article 134, MCM (1984). Finally, coun-

evaluated as harmful are viewed as such because of their impacts upon command structures. This presupposes some on-base, in-uniform contact between the Marines concerned.<sup>242</sup> An off-base, consensual nonuniformed meeting by single Marines of opposite sex, not in each other's chain of command, seems to have minimal if any impact on the command. More specifically, it hardly runs afoul of any of the evaluative guidelines.<sup>243</sup> The official position represents that the current policy needs no further clarification.<sup>244</sup> But additional guidance is neces-

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seling removes any question regarding the member's *knowledge* of service requirements in this area.

d. *Attempts to conceal the improper conduct.* Furtive acts demonstrate the member's awareness of the wrongfulness of the conduct and indicates the taking of a *calculated risk*.

e. *The grade differential.* Greater differences in grade enhance the possibility that a Marine Corps custom is violated by the association, and,

f. *The use of grade to effect or further a relationship.* This standard of conduct violation is an aggravating factor in cases of fraternization. It is an abuse of naval position to use grade to gain the attentions of a junior. This may occur overtly by ordering the junior to enter a private office, or more subtly by "requesting" a relationship under circumstances where the junior feels compelled to respond favorably.

g. *Fraternization which includes adultery.* An egregious form of fraternization occurs when the senior becomes sexually involved with a *married* junior, particularly when the junior is married to another junior Marine. The effect on morale and discipline can be devastating when a senior uses grade to interject himself or herself into the marriages of junior Marines.

Memorandum, Judge Advocate Division, Research and Policy Branch, Headquarters, U.S. Marine Corps, 14 Oct. 1986, subject: Fraternization.

These evaluation guidelines enunciate the logical process of analysis a commander or staff judge advocate would use in determining appropriate disposition.

<sup>242</sup> See generally *United States v. Moutak*, 24 M.J. 316 (C.M.A. 1987); *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987) (both cases involve blatant fraternization on base, in uniform).

<sup>243</sup> This type of conduct surely would be authorized in the Army or Coast Guard. In *Moutak*, the court noted that the accused's blatant fraternization certainly would have sustained a conviction in other branches of the armed forces. Hence, the court denied his equal protection challenge. The reasonable inference to be drawn is that if the conduct would not run afoul of other service policies, then an equal protection challenge might be recognized. Yet, the court revealed its inherent problem with applying the regulation by noting that, "We state at the outset that we need not determine at this time whether acts of sexual intercourse and the maintenance of a romantic relationship between officer and enlisted personnel are sufficient, alone, to constitute fraternization under Articles 133 and 134." *Moutak*, 24 M.J. at 833.

<sup>244</sup> Paragraph 1000.4 of the Marine Corps Manual, in consonance with Articles 92 and 134 of the Manual for Courts-Martial, provide a broad basis for implementing and enforcing the Marine Corps fraternization policy. We have deliberately chosen not to define fraternization in all its possible manifestations, whether by Marine Corps order or other directive, preferring instead to trust that Marines will comport themselves within well known and long established customs of the Corps governing such relationships.

We trust as well that commanders at every level are capable of distinguishing between permissible and impermissible relationships, and taking appropriate action in case of the latter. This flexible but clear standard, tempered with good

sary<sup>245</sup>—through the policy's inherent vagueness and potentially unlimited scope, a Marine is "chilled" in his or her range of association through a fear that someone could perceive the conduct as violative of the regulation.<sup>246</sup> To be safe in the Marine Corps, it is wise to either get married and remain faithful, remain celibate, or date only civilians without military connections.

*3. United States Army Policy.*—The Army policy on fraternization is not as sweepingly broad as the Navy or Marine Corps policy. The Army regulation attempts, in a human and sincere way, to come to grips with fraternization, and to publish understandable and recognizable boundaries of acceptable con-

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judgment and effective leadership, has proved itself time and again. It affords commanders the latitude necessary to determine when impermissible fraternization exists within their command, the extent to which that conduct threatens good order and discipline, and the appropriate command response. Traditionally, corrective measures have extended from informal counselling in the great majority of cases, to court-martial for those most egregious.

And we ensure the parameters of permissible and impermissible relationships constituting our Marine Corps policy on fraternization are taught and well publicized throughout the Corps and at every grade. This is accomplished through both formal and informal training and information programs at the small unit level, as well as through training incorporated into our professional military education programs for both officer and enlisted Marines. These programs are designed to provide practical guidance and examples that are both instructive and easily understood. By example, the "Users Guide to Marine Corps Leadership Training" (NAVMC 2767) addresses all aspects of our fraternization policy, to include real life problems.

In sum, Marine Corps policy on fraternization is well known, effective, and fair. It is a leadership responsibility vesting in the commander. It is the commander who rightly exercises necessary authority to address and correct fraternization within the command, and it is the commander we hold accountable for doing so in a measured and fair manner. The Marine Corps has its policy on fraternization. *Additional guidance is simply unnecessary.*

Memorandum, Headquarters, U.S. Marine Corps, 5000 over MPP-55, 16 Nov. 1990, subject: Department of Defense Policy on Relationships Between Service Members of Different Grades or Ranks (emphasis added).

<sup>245</sup> As a Marine, the author, in his capacity as both a commander and defense counsel, has lived with this "guidance" in terms of advising Marines on their conduct. "Uncertainty" best describes the understanding of Marines in the field, and the written guidance is of no practical assistance.

<sup>246</sup> Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 858 (1988). The author discusses an institutional preference for broad bans on amorous relationships because expansive definitions "chill risky relationships without actually having to enforce the ban." The author notes, however, that little sexual liberty need be lost when the ban is on working or supervisory relationships. In those cases, a professor who wanted to date a student could wait until the class was over; see also, Allen, *The Adaptation of the Custom Prohibiting Wrongful Fraternization to Regulate Social Relationships in the Enlisted Training Environment* (Memoirs of a Fraternization Lawyer) (an unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia) (Apr. 1983) (discussing other deleterious effects of "chilled" officer-enlisted relations, such as retarded development of correct superior-subordinate relations, stilted views of military leadership, and failures to address issues).

duct. Rather than use the stronger language of a specific prohibition in the policy, the Army chose to use substantially weaker language, indicating that "such relationships will be avoided."<sup>247</sup> Paragraph 4-14(a) indicates that relationships between soldiers of different ranks are authorized *unless* they have one of the three enumerated effects listed in that paragraph. Commanders are to counsel soldiers involved in these relationships only if the relationships fit one or more of the three effects. The first effect—"actual or perceived partiality or unfairness"—practically requires a chain of command or supervisory relationship because without it, a senior can do little to cause *actual* partiality unless he or she holds an extremely high rank or billet. Since most fraternization occurs at the company grade level,<sup>248</sup> this article does not contemplate fraternization perpetrated by colonels, generals, and admirals.<sup>249</sup> Additionally, even though *perceived partiality* is a much easier criteria to meet, it is still tough to discern it outside the chain of command. For example, is there perceived partiality when a female enlisted soldier is dating an Army captain who works at another installation, but who happens to be best friends with her commanding officer? If so, it appears too attenuated to establish anything resembling legal sufficiency. If the female soldier flaunts the relationship, however, it might constitute actual or perceived impropriety.

The second criteria in paragraph (a) "involves the improper use of rank or position for personal gain." This conduct would constitute aggravated fraternization because it hints at lack of consent due to leverage or mild extortion exerted by the senior. This form of fraternization would best be dealt with under another criminal article.<sup>250</sup> Even so, this type of fraternization most likely would occur within the chain of command because no one really could exert such influence without possessing an extremely high rank. The only scenario in which this could arise would be when a finance or leave clerk

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<sup>247</sup> This lack of language clearly indicating that the conduct is circumscribed means that the regulation is nonpunitive.

<sup>248</sup> Army statistics are minimal and do not provide ranks of offenders.

<sup>249</sup> Although rare, it does occur. Higher ranking officers—that is, colonels, admirals and generals—are usually older, and more mature. These traits check the reckless abandon of youth, and lower rank. High ranking officers also receive a good deal of publicity when exposed. See NAVY TIMES, Feb. 20, 1989, at 3; see also A.F. TIMES, Nov. 19, 1990, at 4, in which an Air Force Lieutenant General recently was forced to retire because of "inappropriate conduct with members of the opposite sex." Another reason for the rarity of such cases may simply be the small number of officers in grades O-6 and above, and the degree of protection afforded by high rank.

<sup>250</sup> This likely would constitute a standards of conduct violation or sexual harassment.

threatened adverse action to a soldier's account unless he or she agreed to sexual relations, but this looks like extortion—and not fraternization.

The last criteria is that the relationship must "create an actual or clearly predictable adverse impact on discipline, authority, or morale." To meet this standard, the relationship again would probably have to be in the chain of command. An exception would occur when two fraternizing soldiers—perhaps a lieutenant and a corporal—were foolish enough to hold hands, kiss, or embrace on base and in uniform. Even though they may work on separate coasts, such conduct would meet this standard.

Romantic relationships between soldiers of different rank—to include officer-enlisted relationships—are authorized outside the chain of command, so long as they remain off-base and out of uniform.<sup>251</sup> In addition, fraternization can encompass officer-officer relationships.<sup>252</sup>

If the regulation stopped there, it actually would have stated a clear policy, allowing soldiers considerable latitude in their relationships. Unfortunately, the remainder of the regulation, which purports to expound upon the basic rules, serves only to render perplexing what was reasonably understandable. The next subparagraph immediately confuses the issue. It gives unit commanders wide discretion to set the "leadership climate" of the unit and, therefore, "set the tone for social and duty relationships within the command." A unit commander, therefore, could adopt either a permissive or a restrictive view on fraternization. The question this paragraph raises, however, is why one commander can have a wholly different policy on fraternization than another. Since they apparently can, then what is the Army custom? If there is no consistent custom, the regulation itself is flawed and in peril.<sup>253</sup> Paragraphs (c) and (d) are similar to the Marine Corps' inclusion of Major

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<sup>251</sup> The courts probably would agree with this analysis. In *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984), a staff sergeant consumed alcohol, had sex, and smoked marijuana with female privates not under his supervision. This was held to be no offense. While a footnote in the case discusses a draft of the Manual as requiring that the accused be a commissioned or warrant officer, that issue was not determinative. In its analysis, the court astutely noted that having sex and alcohol are not illegal and do not constitute UCMJ art. 134 violations. "Finally, despite one's moral persuasions, fornication, in the absence of aggravating circumstances, is not an offense under military law." *Id.* at 829.

<sup>252</sup> *United States v. Calloway*, 21 M.J. 770 (A.C.M.R. 1986) (lieutenant colonel had relationships with two female second lieutenants who worked for him).

<sup>253</sup> It is important to record that the Army fraternization policy, like the Air Force's, is *nonpunitive*. This explains much of the "squishy" nature of the language.

General Lejeune's comments—they provide valid commentary on leadership and command of a unit, but give no substantive guidance on fraternization and, as such, constitute surplusage. At paragraph (e), good judgment is stressed as vital. This is especially so in light of the following three sentences, which are impossibly contradictory in the context of the entire regulation.

Since the Army policy fails to define fraternization, and specifically avoids the term for the most part, references to "associations" become oblique because one cannot know whether appropriate or prohibited associations are being addressed.

An association between an officer and an enlisted soldier might not be considered fraternization yet still be inappropriate. Similarly, certain relationships between enlisted soldiers, or between officers, may be inappropriate. Just because a certain relationship does not break the law, does not mean it is acceptable or appropriate.

This paragraph of the regulation suffers from internal contradiction—that is, if certain conduct does *not* constitute fraternization, then why would it still be inappropriate? That paragraph also is inconsistent with the remainder of the policy, which attempts to do soldiers the service of providing a "bright-line" rule. Because this paragraph injects doubt about relationships that "are not fraternization" it does a great disservice to the ultimate goal of clarity. If nothing else, this allows a commander to perceive and punish fraternization when it does not exist by marking a soldier down on his officer efficiency report<sup>254</sup>—something that often is as devastating to a career as a court-martial.<sup>255</sup> If conduct is "inappropriate" yet not unlawful, how far can a commander go in terms of taking adverse action against the offender? This question is left unanswered. Thus, how can the soldier ever know exactly what conduct is "inappropriate"?

In addition, subparagraph e(2) continues to muddy the waters: "The policy applies to all relationships between soldiers of different rank. Any social or duty relationship may result in

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<sup>254</sup> All services have "report cards," known as "OERs," submitted by each officer's and noncommissioned officer's superior for the purpose of evaluating him or her for promotion and assignments.

<sup>255</sup> Commanders must have discretion, but not unbridled discretion. A rating officer always can rate an officer on appropriate, versus inappropriate, conduct. The discretion, however, should not permit the rater to apply a concept of fraternization *unique to the rater's state of mind*.

an impropriety. When soldiers date or marry other soldiers junior in rank, the potential for problems increases." Unfortunately, the term "increases" is vague—the point at which a problem "increases" to the level of criminality is not defined. Accordingly, when is a soldier who dates a junior soldier in trouble? The bounds of this regulation must be more specific. The parameters of "acceptable conduct"<sup>256</sup> must be described. This regulation exhibits a tremendous amount of equivocation in critical areas. Is "pure" fraternization wrong? Is the Army ultimately admitting that it must accommodate fraternization in some forms? The essential admission is that it must accommodate the results of undetected fraternization, which may be defined in the marriage context as most aspects of the relationship prior to the marriage. In addition, the Army surely must accommodate pregnancy out of wedlock. Obviously these decisions were made more for reasons of political expediency than out of concerns for military efficiency.

In the final analysis, marriage is the great *non sequitur* of the fraternization regulations.<sup>257</sup> This points out the greater problem of what to do with these "mixed" marriages. The regulations themselves are not at fault because they merely reflect a policy decision. Even assuming, *arguendo*, that fraternization preceded the marriage, the Army and all the services recognize that their abilities to interfere are extremely limited. Marriage—the ultimate "association"—is simply an issue—or institution—that the services do not want to "take on" in what would be a losing battle.<sup>258</sup> The logical conclusion is that the policy leads to significant compromises—and this is but one of them. While marriage is inconsistent with fraternization as a conceptual matter, the military must accommodate it any-

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<sup>256</sup> Court decisions are often necessary to define the parameters of a regulation fully. For example, in *United States v. Cooper*, C.M. 498700 (A.C.M.R. 1980) (memorandum opinion), an officer, who was the former commanding officer of an enlisted woman with whom he had sex on post in his quarters, was held to have prejudiced good order and discipline by this act because he was still in the same battalion with her.

<sup>257</sup> The reasoning of the court in *United States v. Johanns*, 17 M.J. 862, 867 (A.F.C.M.R. 1983), highlights this point.

Once it is acceptable to have officers married to enlisted members, it is logical to conclude that mere dating is also acceptable, since that is nothing more than the socially acceptable preliminary stage to such marriage. Also, using our common sense and knowledge of human nature and the ways of the world, we note that it is not an uncommon practice for men and women who are dating, with or without marriage in sight, to engage in sexual relationships; in contemporary society such a practice is not considered immoral or unusual.

<sup>258</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).



way.<sup>260</sup> *Sub silentio*, if soldiers keep relationships clandestine and then marry, they have achieved the equivalent of a grant of immunity, while the same fraternization destroys the careers of many fine officers. It is difficult to find fairness in this juxtaposition.

Both the Army and the Marine Corps have fallen into the same trap. Both have stated their true policies in one or two paragraphs. Yet, apparently feeling uneasy about simply letting their policies stand by themselves, both felt the urge to expand upon them.

The Army acknowledges that relationships in many contexts (trainer-trainee)<sup>260</sup> are "fraught with the possibility of actual or perceived favoritism, and are, therefore, potentially destructive of discipline, authority, morale, and soldier welfare." Why has the Army gone to great lengths to point out the obvious problems with such relationships, but, on the other hand, has used such weak language? The following language in the same paragraph repeats the error: "Also discouraged are relationships between senior and subordinate members of the same unit or between soldiers closely linked in the chain of command or supervision." Once again, flimsy language is used regarding what appeared to be prohibited conduct under paragraphs a(1) and (3). These very relationships referred to as "discouraged" are "prohibited" in paragraph 4-15.<sup>261</sup>

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<sup>259</sup> The Army Judge Advocate General held long ago that commanding officers may not prohibit marriage among subordinates. Command VA2, Digest of Opinions of the Judge Advocates General of the Army 1912, at 266 (1917) (opinion rendered in 1876).

<sup>260</sup> In *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), the court dealt specifically with a trainer-trainee issue and upheld the conviction. The court dismissed appellant's freedom of association claims; see also *United States v. Adams*, 19 M.J. 996 (A.C.M.R. 1985).

<sup>261</sup> The only feasible explanation for this incongruity is that the Army prefers installations to draft their own prohibitions on specific relationships, such as trainer-trainee relationships, and then to prosecute violations under UCMJ art. 92. The Army, along with the Marine Corps, seems to feel it is on firmer footing with that approach than by prosecuting under UCMJ art. 134. In an interview with Lieutenant Colonel H. Wayne Elliott, United States Army, Chief, Int'l Law Div., TJAGSA (Feb. 11, 1991), he noted that the Army, in anticipation of losing *Parker v. Levy*, 417 U.S. 733 (1974), shifted its criminal focus for UCMJ arts. 133 and 134 to UCMJ art. 92, thus making administrative and regulatory issues out of criminal law issues.

In its new incarnation as a linchpin of many local regulations, however, fraternization has taken on a more vigorous and powerful form. This evolution of fraternization from social taboo to punitive custom to modern regulation suggests that, in one configuration or another, the offense is here to stay.

Rose, *The Military Offense of Wrongful Fraternization—Updating an Old Custom* 3 (unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia) (Apr. 1983).

By continuing to wade through this tangled web of contradictory guidance, subparagraph e(6) contains significant provisions distinguishing the Army's policy as far more flexible, permissive, and realistic than either the Navy's or Marine Corps' policy. The first sentence defines situations in which there is "the strongest justification for exercising restraint on social, commercial, or duty relationships." As described, it encompasses perhaps a bit more than envisioned by direct chain of command relationships, yet it is sufficiently restrictive and specific so as to provide solid guidance to all soldiers—that is, "where the senior has authority over the lower ranking soldier or has the capability to influence action, assignments, or other benefits or privileges." This brilliantly captures the real concern of fraternization outside the chain of command. Indeed, one can envision a senior NCO who worked in a personnel section who "offers" to get a female soldier transferred to a less onerous duty on the same installation with the implied obligation of sexual reciprocity. In this hypothetical, though, this is not consensual fraternization because there is undue influence at work. To improve upon this provision, the Army could add after "or has the capability," the words, "or attempts." Even an unsuccessful endeavor at interference with the command then could be punished.

When such a relationship does not exist, however, "social relationships are not inherently improper and normally need not be regulated." This means that a sergeant major may freely date a private in the Army, so long as there is no chain of command relationship; no ability to influence actions, assignments, benefits, or privileges; and no visible conduct of the relationship on base or in uniform. The last criteria is important because of the Army's insertion of the following caveat into that subparagraph: "Soldiers must be aware, however, that even these relationships can lead to perceptions of favoritism and exploitation under certain circumstances." Indeed, a relationship between a sergeant major and a private would fit that description.<sup>262</sup>

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<sup>262</sup> In *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), the court refused to recognize noncommissioned officer-enlisted fraternization, absent a specific regulation against it. Nonetheless, this case put Army noncommissioned officers on notice that they could be prosecuted for fraternization. The new Army regulation was published within a year of this case. While *Clarke* may have put Army noncommissioned officers on notice that they may be prosecuted for fraternization, convictions are not a sure thing. The defense bar points out that the opinion in *Clarke* may be regarded as dicta and thus does not have the effect of *stare decisis*. See *United States v. Taylor*, 5 M.J. 669, 670 (A.C.M.R. 1978); *Green v. United States*, 355 U.S. 184 (1957); see also *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984), (still good law, but injecting doubt into the issue: *Vogt, Fraternization After Clarke*, THE ARMY LAWYER, May 1989, at 45; Da-

Subparagraph e(7) is surplusage, urging commanders to "exercise their best leadership." Subparagraph e(8), however provides more substance. It specifically places the onus on commanders<sup>263</sup> to define what relationships are improper and urges counseling as the initial corrective action.

A close unofficial relationship between soldiers of different rank normally should not result in an *unfavorable evaluation* or efficiency report, *relief from command* or other significant adverse action unless it *clearly* constitutes a relationship that violates this policy. (emphasis added).

This passage is substantial ammunition for defense counsel. It provides the basis for an appeal from an adverse administrative action. Additionally, what *clearly* constitutes a relationship that violates this policy? Defense counsel should argue that any relationship outside of the chain of command is authorized. Subsequently, the emphasis is renewed on allowing the soldier to terminate the improper relationship prior to taking "significant" action against him. Subparagraph e(9) states that when an unauthorized relationship exists, the Army will act to terminate it. Paragraph 4-15 "prohibits" trainee and soldier relationships.<sup>264</sup> The issue is confused by prior mention of these relationships in subparagraph e(5), which does not clearly prohibit these relationships, but merely restricts and discourages them. That apparent contradiction is unsatisfactory, and either one or the other should be deleted. Paragraph 4-16 is titled "Fraternization"—only the second time this word has appeared thus far.<sup>265</sup> Apparently, because section 4-16 "prohibits" relationships between officers and enlisted soldiers, when officers date officers and enlisted personnel date enlisted personnel, those are "relationships between soldiers of different rank." This definition is closely related to

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vis. "Fraternization" and the Enlisted Soldier: Some Considerations for the Defense, THE ARMY LAWYER, Oct. 1985, at 27.

<sup>263</sup> Even though the Army's policy is significantly more liberal than the Navy's or Marine Corps', it is widely recognized by commanders and the courts that "sexual liaisons between superiors and subordinates are fatal to discipline within any organization." United States v. McFarlin, 19 M.J. 790, 792 (A.C.M.R. 1985).

<sup>264</sup> This will usually be applied to instructor-student situations, as well. These cases generally will charge UCMJ art. 92 in the alternative for contingencies of proof. See United States v. McKinnie, 29 M.J. 825 (A.C.M.R. 1989) (staff sergeant instructor invited three female students to his apartment where they consumed liquor, they played strip poker, and he fondled one while she showered); see also United States v. Mayfield, 21 M.J. 418 (A.C.M.R. 1986).

<sup>265</sup> This prohibition first appeared in para. 4-14(e), in the only specific reference to officer-enlisted relationships.

the Manual's<sup>266</sup> definition of fraternization, but it is unnecessarily restrictive, and revives issues of social distinctions. Treating fraternization so briefly is inexcusable. "Relationships" are prohibited between officers and enlisted soldiers. The definition, however, does not clarify whether this is a blanket prohibition or whether it applies only within the chain of command. Nor does it clarify what a relationship is. This gives a commander the power to read it as broadly as going fishing together, or to construe it narrowly by restricting it to only sexual activity. To dismiss it by noting that it is "prohibited by the customs of the service," does a disservice to anyone attempting to search for guidance.

The regulation ultimately fails to achieve its purpose. It is sorely lacking in definitive specifics and concrete analysis. The Army is not completely at fault, however, for it is forced to rely on the Manual as promulgated by the President. Accordingly, the Army, and all the services, are forced to rely on custom-based notions of fraternization, even if they actually do not exist.

4. *United States Air Force Policy.*—The Air Force, recently battered by court decisions regarding its fraternization policy,<sup>267</sup> was painfully aware of the inadequacy of its regulations in this area.<sup>268</sup> Thus, the Air Force created a significantly more restrictive policy. In the prior regulation,<sup>269</sup> social and personal

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<sup>266</sup> UCMJ, art. 134.

<sup>267</sup> See *United States v. Parrillo*, C.M. 28143 (7 Nov. 1990); *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990); *United States v. Wales*, 31 M.J. 301 (A.F.C.M.R. 1990); *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985); *United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983).

<sup>268</sup> Actually, the Air Force should have been aware of the problems with its regulations a long time ago. In *United States v. Pitasi*, 44 C.M.R. 31 (1971), the court noted that while it might be difficult to draft a solid fraternization regulation, "we recommend it to the appropriate authorities." *Id.* at 38.

<sup>269</sup> Air Force Reg. 30-1, Professional Relationships (4 May 1983).

a. Professional relationships are essential to the effective operation of the Air Force. In all supervisory situations there must be a true professional relationship supportive of the mission and operational effectiveness of the Air Force. There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States.

b. In the broader sense of superior-subordinate relationships there is a balance that recognizes the appropriateness of relationships. Social contact contributing to unit cohesiveness and effectiveness is encouraged. However, officers and NCOs must make sure their personal relationships with members, for whom they exercise a supervisory responsibility or whose duties or assignments they are in a position to influence, do not give the appearance of favoritism, preferential treatment, or impropriety. Excessive socialization and undue familiarity, real or perceived, degrades leadership and interferes with command authority and mission effectiveness. It is very important that the conduct of every commander and su-

relationships between Air Force members were "normally matters of individual judgment."<sup>270</sup> The only exception to this general rule was when the relationship impacted adversely upon "duty performance, discipline, and morale."<sup>271</sup> Because the new regulation significantly tightens up this policy, one must assume that the custom of the Air Force has changed significantly in the past seven years.

*a. Analysis.*—The Air Force Regulation is unique because it specifically addresses "members of other uniformed services." Given the way the military frequently task organized forces and fights in unified commands,<sup>272</sup> it is inconceivable that each service's regulation would not provide specific guidance on this important and legitimate aspect of fraternization.

The Air Force encourages professional relationships among its personnel and discourages "unprofessional relationships."<sup>273</sup> Unfortunately, the definition of "unprofessional relationship" is imprecise, and the Air Force uses the "must be avoided" language rather than the word, "prohibited," which is a mistake.<sup>274</sup> One of the most worthwhile areas for analysis

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pervisor, both on and off duty, reflects the appropriate professional relationships vital to mission accomplishment. It is equally important for all commanders and supervisors to recognize and enforce existing regulations and standards.

c. Air Force members of different grades are expected to maintain a professional relationship governed by the essential elements of mutual respect, dignity, and military courtesy. Every officer, NCO, and airman must demonstrate the appropriate military bearing and conduct both on and off duty. Social and personal relationships between Air Force members are normally matters of individual judgment. They become matters of official concern when such relationships adversely affect duty performance, discipline, and morale. For example, if an officer consistently and frequently attends other than officially sponsored enlisted parties, or if a senior Air Force member dates and shows favoritism and preferential treatment to a junior member, it may create situations that negatively affect unit cohesiveness, that is, positions of authority may be weakened, peer group relationships may become jeopardized, job performance may decrease, and loss of unit morale and spirit may occur.

<sup>270</sup> *Id.* at 20.

<sup>271</sup> *Id.*

<sup>272</sup> For example, note the organization of the United States Central Command, currently deployed in Saudi Arabia. It is comprised of all American military services.

<sup>273</sup> Interestingly, the Air Force and, to a lesser extent, the government, in all prosecutions shies away from using the term "fraternization." Judge Miller noted that of 238 fraternization cases he looked at, 227 of them never used the term "fraternization" in the allegation. *United States v. Johanns*, 17 M.J. 862, 881 (A.F.C.M.R. 1983).

<sup>274</sup> The Air Force felt "cornered" by recent cases in which the court refused to enforce any Air Force custom-based regulation. *Johanns* was the real impetus to its new regulation. Painfully aware that its new policy reflected aspiration more than reality, or custom, it promulgated a new regulation, which responds directly to the *Johanns* case, in which the court told the Air Force that it had no custom. Now the Air Force can say, "We have a custom." Unfortunately, the court still does not recognize

is the custom of the Air Force on fraternization. Because the Air Force is under fifty years old—not even one-quarter the age of the other services—it seems arguable that its custom might not be well established, if it exists at all.<sup>275</sup> The regulation itself, in paragraph 2, refers to the "heritage of the American military for over 200 years." But this regulation does not address the American military in general—it specifically applies to the Air Force. It is fallacious and specious to add this gratuitous comment of historical lore.

The Air Force legitimately cannot "piggyback" a custom-based regulation from the other services to make up for time in which it did not exist. When article 134 refers to a custom of the service, it is referring primarily to *individual* services—not the collective military.<sup>276</sup> Only through this reasoning have substantially dissimilar fraternization regulations been justified. This regulation also indicates the Air Force's willingness to provide for "reasonable accommodation of married couples and related members."<sup>277</sup> Imagining a more incongruous juxtaposition would be difficult. For an officer to date an enlisted woman is forbidden, but it is permissible if he wishes to marry her. This ludicrous predicament, in which all the services have placed themselves, ultimately will force a relaxation of the fraternization regulations.<sup>278</sup>

Subparagraph 2(b) seeks to provide guidance in specific situations. The Air Force notes that relationships in the same chain of command "are almost always unprofessional," but adds "closely related units" to this category. This expands the commander's ability to apply the regulation. Specifically envisioned are cases in which the service member can "influence assignments, performance appraisals, promotion recommenda-

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it. See *United States v. Appel*, 31 M.J. 314 (C.M.A. 1990); *United States v. Wales*, 29 M.J. 586 (A.F.C.M.R. 1989).

<sup>275</sup> See *United States v. Johanns*, 17 M.J. 862, 869 (A.F.C.M.R. 1983). In the court's opinion, "the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with an enlisted member, neither under his command or supervision, unavailable." This is a good example of "pure" fraternization.

<sup>276</sup> While there is no specific authority to support this point, no other apparent justification exists for such diverse regulation of a subject that easily could be dealt with uniformly.

<sup>277</sup> Air Force Reg 35-62, Policy on Fraternization and Professional Relationships, para. 2(a) (16 Apr. 1990).

<sup>278</sup> The court hit hard on this issue in *United States v. Johanns*, 17 M.J. 862, 867 (A.F.C.M.R. 1983). "If there exists a customary ban on fraternization, and the avowed reason for such a custom is that fraternization is inimical to good order and discipline in the Armed Forces, how then could marriage change that effect? In our opinion, the situation would appear exacerbated by the closer relationship spawned by marriage."

tions, duties, rewards, and other privileges and benefits."<sup>279</sup> This part of the policy appears to have relied heavily on the Army regulation, or similar concerns.

Given the Air Force's limited history and past practices on issues of fraternization, this regulation is literally "out of the blue." This policy illustrates the dangers posed by "custom based" regulations. The menace revealed by this regulation is rather transparent. Senior Air Force officials apparently met and decided what the policy should be, and then *labelled* it custom. While promulgating a normative standard is really the way to do business in a military organization, to allow new policy to masquerade as custom is patently deceptive.

While the Air Force regulation would seem to place a blanket prohibition on officer-enlisted relationships, it does so in a very circuitous manner. Fraternization is defined<sup>280</sup> as officer-enlisted relationships that "violate the customary bounds of acceptable behavior." This type of relationship "must be avoided." The reference to custom is troubling. In an earlier article on fraternization, an Air Force colonel stated, "The ban on fraternization is at best a custom which is losing its vitality. At worst it is a lingering but enforceable relic of a bygone era. Reluctantly, one must conclude that the latter is closer to the truth than the former."<sup>281</sup> The author points out that fraternization in the Air Force is rampant, and on the rise.<sup>282</sup> Accordingly, the "bounds" to which the regulation refers apparently are not defined by custom or, if they were so defined, the custom is obsolete. The regulation's language is clarified in paragraph 2(b)(2) where, in a discussion of dating, the official advice is to "consider the potential impact on the organization." From that statement, the next sentence makes the huge leap to proclaim, "It follows that officers do not date enlisted members." Unfortunately, it does not follow—it actually follows only if the fraternization occurs within the organization. Thus, while this new policy purports to outlaw officer-enlisted dating, and is far more specific about it than the 1983 regulation, the language of the regulation that is susceptible to different meanings, coupled with the Air Force's *true* past liberal custom on fraternization, ensure that this policy will come under

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<sup>279</sup> Air Force Reg. 35-62, para. 2(b)(1).

<sup>280</sup> *Id.*, para. 1(c).

<sup>281</sup> Flatten, *supra* note 169, at 113.

<sup>282</sup> See, e.g., Letter from Colonel Henry G. Greene, View from the Ditch, HQ 3902 ABW/JA, to HQ SAC/JA, Offutt AFB, Nebraska (9 Nov. 82), quoted in Mahoney, *supra* note 77, at 163.

fire.<sup>263</sup> The other issue that clouds the officer-enlisted dating issue is in the fraternization paragraph itself. The policy indicates that only when the conduct prejudices good order and discipline will criminal charges be brought.<sup>264</sup> This dovetails neatly with the issue of impact on the organization.

Another interesting aspect of the Air Force regulation is the "Commander and Supervisor Responsibilities" section. Unlike the Army, the Air Force commander does *not* have wide discretion. Nor is the Air Force commander simply to enforce the policy against fraternization, as in the Coast Guard regulations. Rather, the Air Force compromises, charging the commander with maintaining good order and discipline within the unit, based on his or her own notions of which relationships might infringe the policy. The question, by inference, becomes whether the commander will attempt to apply his or her own understanding of Air Force "custom" to make this determination, attempt to use the new policy as a guide, or concede to understandable exasperation. Actually, this dangerous level of ambiguity coupled with broad discretion can lead to selective prosecution which actually occurs frequently when fraternization is coupled with adultery.<sup>265</sup>

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<sup>263</sup> In a very recent case, the court has made it abundantly clear that the Air Force has a long way to go towards having a coherent custom. In *United States v. Arthen*, CM 28590 (A.C.M.R. 21 Dec. 1990) (to be published), a female major pleaded guilty to conduct unbecoming an officer because of fraternization and adultery with an airman in the same hospital she served in as a nurse. This case makes for interesting reading because virtually all the couples involved as witnesses or coworkers also were "mixed couples." Borrowing novel legal reasoning from the federal courts in the case of *Donovan v. Mercer*, 747 F.2d 304, 306 (5th Cir. 1984), Judge Brown reasoned that, "If it talks like a duck, and walks like a duck . . . it is a duck." The similar test used in this case was, "If it looks like fraternization, and the parties treated it like fraternization, it is fraternization." Even though her conduct met this test, the court did not accept the guilty plea as provident because there was no proof that her conduct violated a *custom* of the Air Force. In this case, she did not supervise the airman, so without proof of custom, the court reversed the plea, but upheld the adultery conviction.

<sup>264</sup> In *United States v. Parillo*, CM 26143 (A.C.M.R. 7 Nov. 1990), a female first lieutenant had sex with enlisted men under her supervision and offered cocaine to one. The court upheld her conviction *consistent* with *Johanns* because the men were in her chain of command.

<sup>265</sup> In *United States v. Wales*, 31 M.J. 301, 312 (C.M.A. 1990), Judge Cox stated, "I must acknowledge that sexual conduct between consenting adults of the opposite sex is rarely prosecuted in the Air Force. From the cases I have seen, each prosecution was 'triggered' by the conduct becoming a problem for the accused's superiors. Thus, Captain Wales is really being prosecuted because his situation became a command problem when the cuckolded husband made loud noises about the affair. The same thing happened to Major Appel

To the author's knowledge, none of the services routinely prosecute adultery, standing alone. Instead a trigger usually exists. The issue of multiplicity arises when fraternization is charged with adultery. See *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986); *United States v. Walker*, 21 M.J. 74 (C.M.A. 1985). Under different facts, these



Many feel that the Air Force institutionally has castrated fraternization by implementing policies and procedures<sup>286</sup> that not only blurred the line of the officer-enlisted distinction, but actually bolstered the prestige of the senior enlisted ranks at the direct expense of junior officers.<sup>287</sup> Although the Air Force has adopted a new regulation, it may be too late. The courts are tired of reviewing Air Force fraternization cases.<sup>288</sup>

*b. Conclusions.*—The new Air Force regulation represents a radical departure from its true practice. The artificiality of the regulation does not match the reality of custom. This raises issues of fairness and notice. It is unfortunate that the Air Force abandoned its 1983 regulation, which was capable of punishing fraternization in the chain of command.<sup>289</sup> Now the Air Force has opened a Pandora's box, and most current fraternization case law concerns the Air Force.<sup>290</sup> Astute

offenses have been found not multiplicitous for findings or sentencing. See *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984); *United States v. Rodriguez*, CM 23545 (A.F.C.M.R. 29 Oct. 1982) at 8, in which Judge Kastl gets right down to brass tacks:

First, we only selectively prosecute adultery. When one finds both fraternization and adultery charged, it strikes me that somebody has an axe to grind. All the conversation about how we're busy "protecting the marriage" doesn't ring true when our protection is so selective. Second, we seldom prosecute fraternization unless it involves sexual intercourse. Military justice reports aren't exactly chock-full of fraternization cases involving officer/enlisted borrowing or loaning of money; drinking together; or even sexual harassment. It is only the act of intercourse which—right or wrong—generally leads us to charge fraternization. Punishable conduct is worth one label, not two in my judgment.

<sup>286</sup> Mahoney, *supra* note 77, at 168.

<sup>287</sup> This occurred through opening the messes to all ranks, mixing military family housing without regard to rank, and condoning mixed marriages. This resulted in elimination of the prohibition on fraternization, and replaced it "with an amorphous form of situational ethics." See *United States v. Rodriguez*, CM 23545 at 11 (A.F.C.M.R. 29 Oct. 1982). See generally Mahoney, *supra* note 77.

<sup>288</sup> In *United States v. Wales*, 31 M.J. 301, 302 (C.M.A. 1980), another case in which the Government failed to prove the Air Force custom against fraternization, the opinion of the court reeks with disgust at having to review yet another fraternization case:

*Once again*, we must review an officer's conviction for fraternizing with an enlisted person. *Once again*, the gravamen of the fraternization charge is that there was sexual intercourse between the two. *Once again*, the fraternization charge has been joined for trial with an adultery charge arising out of sexual intercourse between the same two persons.

*Id.* (emphasis added).

<sup>289</sup> The recent case of *United States v. Fox*, 31 M.J. 739 (A.F.C.M.R. 1990), points out that chain of command fraternization may be all the Air Force successfully can prosecute, regardless of its regulations. Interestingly, the Government prosecuted the fraternization of a captain with a master sergeant under his command under UCMJ, art. 134. The adultery, which so frequently accompanies fraternization, was held multiplicitous for sentencing.

<sup>290</sup> Significantly, the Air Force has prosecuted its recent fraternization cases under UCMJ art. 133 instead of UCMJ art. 134. The court cautioned the Air Force that using Article 133 offered "no panacea from proving the fraternization offenses." *Parillo*, slip op. at 4. The Government is free to charge UCMJ art. 133 when the allegation is

counsel should prepare to attack this regulation as being without basis in custom—something it purports to, but does not, represent. Rather, it is mere dictate, apparently grounded in ambition.

5. *United States Coast Guard Policy*—The Coast Guard recently published its first fraternization policy.<sup>291</sup> In the past, it has relied on the judgment of unit commanders to rein in unacceptable conduct. It is interesting that the Coast Guard picked this particular time to draft its regulation.<sup>292</sup>

(a) *Analysis*.—The Coast Guard has drafted a superior regulation. While it contains a good deal of excess verbiage, it also contains significant substantive guidance. The first and second paragraphs<sup>293</sup> provide background information and define fraternization in its traditional nongender-specific context. The term "inappropriate" is used rather than "unprofessional," regarding relationships to be avoided.<sup>294</sup> Thus, the word "prohibited" does not appear in this policy—not even in the context of instructor-recruit<sup>295</sup> relationships. The policy specifically "reflects the customs and traditions of the Service."<sup>296</sup>

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cognizable under another article; see MCM (1984), Part IV, para. 59c(2). It is interesting that the Air Force has done this, because the Government then must prove all elements of the underlying offense (fraternization), plus an additional element from UCMJ art. 133—that the conduct was unbecoming an officer and a gentleman (or lady). See *United States v. Ramirez*, 21 M.J. 353 (C.M.A. 1986); *United States v. Walker*, 21 M.J. 74 (C.M.A. 1985); *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984); see also, *United States v. Baker*, CM 84-4043 (N.M.C.M.R. 30 Aug. 1985) (unpub.). In that case, the court addressed the issue of whether to charge UCMJ art. 133 or UCMJ art. 134, and held that it was not conduct unbecoming an officer to "consume alcohol intemperately while socializing with enlisted Marines," one of whom the accused kissed and spent the night with, but that this conduct was prejudicial to good order and discipline.

<sup>291</sup> Coast Guard Personnel Manual, Commandant Instruction M1000.64, chap. 5 (5 Apr. 1989). This regulation is only about one year older than the Air Force regulation.

<sup>292</sup> Telephone interview with Captain William B. Steinbach, U.S. Coast Guard (5 Feb. 1991). He was Chief of the Military Justice Division at Coast Guard Headquarters when the new regulation was drafted. He also served as a member of the Joint Service Committee. Captain Steinbach stated that the Coast Guard Office of Personnel perceived a need for a fraternization regulation, so his office drafted one. He noted that previously sanctioned officer-enlisted marriages had become an issue, and other uncertainties also existed. The regulation was drafted to clarify confusion on the subject, and is contained in the Coast Guard Personnel Manual.

<sup>293</sup> 8-H-1(a) and (b).

<sup>294</sup> This would normally indicate the nonpunitive nature of the policy, but sec. 8-H-5-C states that this is a punitive regulation. The lack of strong terminology elsewhere in the regulation renders this a debatable point.

<sup>295</sup> Coast Guard Personnel Manual, Commandant Instruction M1000.64, para. 8-H-3(e).

<sup>296</sup> *Id.*, para. 8-H-2(d).

In the Coast Guard, commanders are to ensure that all hands are familiar with the policy and "take appropriate action in response to violations."<sup>297</sup> The Coast Guard regulation offers specific guidelines for assessing the propriety of a relationship,<sup>298</sup> and is the most realistic in its approach to acknowledging that relationships between members of the opposite sex are what the services are primarily concerned with.<sup>299</sup> The Coast Guard recognized the inherent immunity attaching to marriage<sup>300</sup> and it handles it deftly. "Such relationships do not, by themselves, create problems and are accepted." The issue still remains, however, over the status that a marriage confers upon a relationship. Is it any less prejudicial to good order and discipline than if the same two individuals concerned were in the same relationship and yet not married?<sup>301</sup>

The Coast Guard regulation is most likely the regulation of the future, for it contains no *per se* ban on officer-enlisted relationships, to include dating and sexual relationships.<sup>302</sup> In so doing, this is the first regulation to officially acknowledge the death of the social class distinction. Officer-enlisted relationships are to be evaluated under the same guidelines that are to be utilized for assessing any relationship. The central issue to assessing the propriety of a relationship is the authority the senior member exercises over the junior *within the chain of command*. As contemplated by the Army and Air Force regulations, any supervisory authority or capability to influence personnel actions, assignments, benefits, or privileges makes the relationship highly suspect. In these cases, the Coast Guard advises that, "there is strong justification to exercise restraint."<sup>303</sup> This language is even weaker than calling these relationships "inappropriate," and is the most ambiguous aspect of the regulation. Absent any of these specifically delineated issues, other relationships between consenting par-

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<sup>297</sup> *Id.*, para. 8-H-2(a).

<sup>298</sup> *Id.*, para. 8-H-3.

<sup>299</sup> *Id.*, para. 8-H-3(c).

<sup>300</sup> *Id.*, para. 8-H-3(c).

<sup>301</sup> No acceptable response to this question actually exists, except that the military cannot prevent marriage. Unfortunately, the military is equally unable to prevent biological drives. Obviously, some sexual "drives," such as those resulting in rape and sodomy, are proscribed, but because the underlying sexual act in most fraternization cases—except when adultery is involved—is otherwise perfectly legal, the Coast Guard is reasonable and adopts an accommodating stance.

<sup>302</sup> This is ultimately a concession to fairness, which pervades this policy. "An act should not be labelled criminal if committed by an officer but innocent when committed by an enlisted man." *United States v. Claypool*, 27 C.M.R. 376 (C.M.A. 1959).

<sup>303</sup> Coast Guard Personnel Manual, Commandant Instruction, M1000.64, para. 8-H-3(f).

ties are authorized. Thus, there would be no problem with a lieutenant stationed on a cutter dating an enlisted woman located at a separate Coast Guard station. It is safe to assume that the Coast Guard sees no problem with a Coast Guard officer dating an enlisted member of another service so long as none of the guidelines for propriety are violated.<sup>304</sup>

(b) *Conclusions.*—In comparison to the other services' fraternization policies, the Coast Guard's is the most liberal, realistic, and specific. Coast Guard commanders have reasonable latitude in disposing of cases, but nothing approximating the overbroad discretion evident in other regulations. In drafting the regulation, the Coast Guard looked to its actual custom, and made the regulation reflective of it. Thus, the "imposition" of the regulation changed nothing in practice, and served merely to codify the custom. This stands in sharp contrast to the Air Force, which stealthily drafted its regulation based on institutional aspirations. The Coast Guard method is far more consistent with the intent of custom-based regulations, and is ultimately far better for the men and women who must comply with it.

### *B. A Functional Analysis of the Regulations*

1. *Introduction.*—Having individually analyzed the regulations of each service, a broader perspective, contrasting their utilities collectively, is appropriate. The common, ostensible purpose of the fraternization regulations is to promote good order and discipline in the ranks of the services, individually and collectively. To this end, the services have used "custom of the service" as a basis for latitude in tailoring their own regulations. Good order and discipline logically refers to relations between all military personnel—not just between officers and enlisted men. The first assumption vulnerable to probing is the need for the services to regulate the same concern differently, when the goal of good order and discipline is identical. Because there appears to be no logical basis for this, the more appropriate assumption underlying such regulation is that there is no need for different policies.

2. *Analysis of Regulatory Purpose.*—The legitimacy of service regulations depends upon the validity of the services' purposes in proscribing these relationships and upon whether or

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<sup>304</sup> The Coast Guard should have covered the issue in its otherwise thorough regulation.

not the services are successful in achieving those purposes through the enforcement of these regulations.

(a) *Validity of Purposes.*—The military services require good order and discipline within their ranks. That is a fundamental tenet of military organizations because they place demands upon their members without equivalent in the civilian community.<sup>305</sup> The inherent differences in military life<sup>306</sup> require and justify the imposition of criminal sanctions for offenses such as fraternization, even though the same conduct would not be criminal in a civilian context. The service standards, and laws set up to enforce them, must be different.<sup>307</sup> A more fitting question, however, is whether the differences between civilian and military laws are justified by differences in civilian and military society and authority. While some regulation is warranted, too much may result in a loss of respect for authority.

The purpose of fraternization regulations is straightforward, and their goals—ostensibly the preservation of the integrity of the rank structure, are valid. Fraternization raises justifiable concerns. The rank structure and the military requirement and expectation of obedience to orders<sup>308</sup> would rapidly be compromised if not nullified when the person wielding authority is the lover or best friend of the "follower."<sup>309</sup> The mantle of command surely would crumble under this pressure; and even if it did not, all who knew of the relationship would assume that it had. This scenario describes circumstances antithetical to good order, discipline, and high morale in a unit. Therefore, this conduct is prohibited. The purpose of the regulation is well served by preventing or punishing this conduct. A much finer distinction lies in the perception of the practice of favoritism, or partiality, yet this is also prohibited. The prevention of the perception of favoritism is also a valid purpose for the policy.

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<sup>305</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

<sup>306</sup> In *Orloff v. Willoughby*, 345 U.S. 83, 94 (1952), the Court stated that the military is a "specialized community governed by a separate discipline from that of the civilian." See also *In re Grimley*, 137 U.S. 147 (1890) (members of Armed Forces have a different status with attendant rights and duties foreign to the civilian world).

<sup>307</sup> *Westmoreland & Prugh*, *supra* note 81.

<sup>308</sup> Current military leadership doctrine emphasizes persuasion rather than authoritarian domination and views a commander's primary goal as instilling high initiative and morale instead of harsh discipline. See M. JANOWITZ, *THE MILITARY IN THE DEVELOPMENT OF NEW NATIONS* 119 (1964).

<sup>309</sup> Flatten, *Fraternization*, 10 A.F. Rep. 109, 112 (1981). Colonel Flatten said it best: "It is difficult to envision a sir-sergeant level surviving more than the first five seconds of a courtship."

(b) *Whether Current Regulations Maintain Good Order and Discipline.*—The current regulations clearly maintain good order and discipline. The problem is that the *means* used to achieve the ends far exceeds that required to achieve the valid purpose of the policy.<sup>310</sup> This has precluded relationships that could have no conceivable adverse impact on good order and discipline, thus chilling associational rights. Highlighting the lack of uniformity in the regulations, the degree to which the purpose of the policy is exceeded spans the continuum from "not at all" in the Coast Guard, to "off the scale" in the Marine Corps. While regulatory policy need not be consistent with the Manual's definition, or even consistent among the services, the lack of a rational basis for its imposition exposes its shallow roots. It is unwise and unjust to take such liberty with the broad discretion the services have been given in this area by the courts.<sup>311</sup> To take this regulatory license too far risks having it pulled back but, more importantly, the better argument is that it simply is not fair.

The missions of the services are ultimately the same—to win wars. Joint missions support a single standard. While one service may argue a requirement for instantaneous compliance with orders, that rationale fails for two reasons: first, no service will admit that its mission does not require prompt obedience to orders; and second, the inherent diversity of mission among units within services shatters this reasoning. For example, a Navy SEAL<sup>312</sup> or Army Ranger unit arguably requires more discipline than a Marine Corps administrative unit. Ultimately, however, all services require that orders be obeyed expeditiously. The logical conclusion is that, while fraternization regulations are valid and advance a legitimate military goal, there is no need for substantially different regulations among the services, *regardless* of their customs and traditions. Historical custom and tradition underlying fraternization regulations were based on social and class distinctions—a basis now thoroughly repudiated, yet at the same time alive and

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<sup>310</sup> The means chosen are not narrowly tailored to meet a legitimate military purpose as they should be. The dissent in *United States v. Penick*, 19 B.R. (ETO) 261, 262 (1945), noted that, "No greater surrender of the freedom and dignity of men than is necessary should ever be made, and tendencies in that direction should be resisted in the Army as elsewhere."

<sup>311</sup> See generally *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Brown v. Glines*, 444 U.S. 348 (1980); *Culver v. Secretary of the Air Force*, 559 F.2d 622 (D.C. Cir. 1977); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 737 (1974).

<sup>312</sup> The acronym for sea, air, and land—SEAL—denotes a Navy special operations unit.

well.<sup>313</sup> When the application of a regulation so drastically exceeds its legitimate purpose, it should be trimmed back to the point at which it will accomplish its perceived need and no more. To go overboard, as the services have done, begs for legislative and judicial intervention.<sup>314</sup> More significantly, the services would be wise to remember that the impetus for the UCMJ was widespread dissatisfaction with the overall state of military justice. Similarly, widespread discontent with the fraternization regulations may force the same type of result; indeed, congressional intervention looms large on the horizon. The Coast Guard regulation is the only one that not only reflects its custom accurately,<sup>315</sup> but also accomplishes the minimal needs of the policy, and nothing more. As such, it provides excellent guidance for a DOD standard.

### C. Can the Services Justify Different Standards for Fraternization?

Not surprisingly, the separate missions, customs, and traditions of the services have resulted in significant differences among them. Some are superficial, such as the acronyms they use, their celebrations, and their "war stories." Others are more visible, such as the wearing of different uniforms; different grooming standards; and different height, weight, and

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<sup>313</sup> The courts unwittingly continue to validate the social basis for fraternization. Judge Snyder, dissenting in *United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983), viewed a chain of command relationship as irrelevant because an officer's status and authority transcend the boundaries of a unit. Judge Miller concurred in this same dissent, stating that

It is ludicrous to imply, as the majority did, that the officer corps can retain the dignity and respect required to maintain unquestioning obedience and trust of enlisted subordinates if officers are permitted to randomly compete with one-half of their subordinate population for the privilege of engaging that subordinate population's other half in the intimacies of recreational fornication.

*Id.* at 873. While the author does not believe that one-half of the Air Force enlisted population is female, this argument assumes that enlisted women *naturally* will prefer to date officers—an untrue assumption grounded solely in the anachronistic social-class premise.

<sup>314</sup> Courts currently will intervene, for example, when convening authorities abuse their discretion. *United States v. Brown*, 6 M.J. 338 (C.M.A. 1979).

<sup>315</sup> Telephone interview with Captain Ronald S. Matthew, U.S. Coast Guard, Legal Officer, 12th Coast Guard District, Seattle, Wash. (28 Jan. 1991). Captain Matthew was one of the drafters of this regulation. He stated that a wide range of views were considered in drafting the regulation. One senior officer suggested an approach similar to the Marine Corps'. Instead, the Coast Guard drafted a regulation reflecting actual, current practice *and* recognizing the fact that these relationships will occur. The new regulation has been successful. The drafters focused on the *impact* the relationship could have on the unit, and not on the relationship itself by simply evaluating the ranks of the parties.

physical fitness standards. These differences purportedly are based upon mission. The Marine Corps regulations are acknowledged to be the strictest, yet few object because none of these standards are enforced criminally.<sup>316</sup> Additionally, these requirements do not facially implicate a constitutional right such as the right to freedom of association. Finally, the requirements are generally known to people before they join the service. Thus, no one has any problem with seeing a chubby Marine discharged for failure to meet appearance or height and weight standards while an airman of considerably greater bulk continues to serve. The focus is on the relationship of the standard to the mission of the service. Because the Marine Corps trains all Marines as riflemen first, the disparate treatment is justified. Yet it is an easy standard to justify, because there is no corresponding burden on the individual—indeed, one might argue that the individual actually receives a benefit because of the greater pride he or she is able to take in his or her service. Applying this same rationale to fraternization regulations does not work. The burdens on the individual range from a significant reduction in freedom of association to potential imposition of criminal penalties. Moreover, it is doubtful that many Marines take great pride in their service's strict fraternization policy.

#### *D. Fraternization as an Emotional Issue*

Fraternization stands tall among American military offenses as having taken on a character of its own. Violations are treated far more harshly than the conduct itself actually merits.<sup>317</sup> The vast majority of these cases are mutually consensual, nondeviate, sexual relationships that occur in private.

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<sup>316</sup> There are circumstances in which continual to wear the uniform properly or to perform a physical fitness test could be charged under the UCMJ, but as a general rule, these issues are handled administratively.

<sup>317</sup> In *United States v. Lovejoy*, 42 C.M.R. 210, 213 (1970), Judge Darden, in his concurring opinion, stated:

Today many enlisted members of the armed forces have educational qualifications, intellectual capacity, and social standards that surpass those of some officers. Nonetheless, fraternization may have a pernicious influence on military discipline. Despite my awareness of this, I must record my conviction that undue familiarity between an officer and a subordinate is susceptible of correction by administrative action.

In this case a naval officer engaged in sodomy with a male subordinate, and the fraternization charge merged into the sodomy specification. Regardless, it illustrates the misgivings many people have with punishing criminally consensual sexual/associational acts even *within* the chain of command.



For this otherwise lawful conduct, the careers of many fine officers and noncommissioned officers are terminated.

For comparison, another hypothetical is helpful. Imagine a commander of a unit who is a bigot. Assume the evidence to this effect is overwhelming—he even admits to it. This commander has several officers on his staff and he routinely marks down the minority officers on their evaluations for no articulable reason. He even relieved one without cause. This conduct is unquestionably outrageous, prejudicial to good order and discipline, and unbecoming an officer and a gentleman. It is horrendous leadership and contrary to social policy. However, not only is this officer unlikely to be court-martialed,<sup>318</sup> but also his actions generally are not considered criminal.<sup>319</sup> Most likely, he would be relieved of command. Yet his conduct would have been far more pernicious and insidious than a mere consensual sexual relationship, for there can be no excuse for discrimination. In the case of fraternization, at least the underlying physical attraction provides a basic explanation for the conduct, although admittedly not a justification. The fraternization offense is strictly *malum prohibitum*, while discrimination is *malum in se*. Clearly, there is no justification for the disparity in disposition of such cases.

Another example involves sexual harassment. With its non-consensual overtones, it seems to be a greater offense than fraternization, yet rarely are such cases prosecuted.<sup>320</sup>

### E. The Need for Standardized Policy on Fraternization

The issue of the services going beyond the valid requirements and purposes of a policy to carry out their own respective agendas raises troubling questions and concerns. The Marine Corps is particularly susceptible to this criticism, for application of their ambiguous policy appears aggressively to go beyond the terms of the regulation into areas not specifi-

<sup>318</sup> The author found no cases involving prosecution based on racial discrimination. The only area in which this issue arises is the selection of members for courts-martial. See generally *United States v. Hlow*, 29 M.J. 641 (A.C.M.R. 1989); *United States v. Cooper*, 28 M.J. 810 (A.C.M.R. 1989); *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988); *United States v. Moore*, 26 M.J. 692 (A.C.M.R. 1988); *United States v. Hemphill*, CM S24483 slip op. (A.C.M.R. Jan. 3, 1985).

<sup>319</sup> Prosecution probably would be available under UCMJ art. 133, but this conduct undoubtedly has occurred and no cases yet exist on point.

<sup>320</sup> Very few prosecutions based on sexual harassment exist. See *United States v. Savage*, 30 M.J. 863 (N.M.C.M.R. 1990); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990); *United States v. Heffington*, N.M.C.M.R. 840196 slip op. (July 31, 1984); *United States v. Moorer*, 15 M.J. 520 (A.C.M.R. 1983).

cally contemplated by it—areas such as prohibiting a relationship between a Marine officer and an Army enlisted person,<sup>321</sup> who normally are not connected in any significant military manner. The confusion created by different regulations justify a standard policy promulgated through a DOD regulation.

## VI. Attempts to Revise Fraternization Policy From World War II to the Present

### A. *The Doolittle Board*<sup>322</sup>

After the conclusion of hostilities in World War II, Lieutenant General James H. Doolittle was appointed to lead a six-man commission to study the current state of relations between officers and enlisted men. This board constituted the most well known and formalized attempt to revise fraternization policy.<sup>323</sup>

1. *Impetus and Scope.*—Many returning World War II veterans voiced complaints about "lack of democracy," instances of incompetent leadership, and abuse of privileges.<sup>324</sup> The board considered all these complaints, along with civilian viewpoints, letters, articles, and even radio commentaries. The board considered whether enlisted men were treated differently than officers in three primary areas: (1) statute; (2) regulations; and (3) custom and tradition.<sup>325</sup> These indignities were pervasive

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<sup>321</sup> The author is not aware of any prosecutions for this type of fraternization. Nonetheless, it is potentially prohibited conduct, as is a relationship with Navy enlisted personnel. Neither of these are countenanced specifically by the regulation.

<sup>322</sup> The Doolittle Board is the name given to the Report of the Secretary of War's board on Officer-Enlisted Man Relationships; S. Doc. No. 196, 79th Cong., 2d. Sess. 1-21 (1946) [hereinafter referred to as the "Doolittle Board Report"].

<sup>323</sup> The Doolittle Board looked at a broad range of topics, but it is best known for its suggestions to drastically revise relations between officers and enlisted men.

<sup>324</sup> These complaints are noted in the Doolittle Board Report, *supra* note 322.

<sup>325</sup> Much of the information considered in this article's UCMJ discussion was considered by the Doolittle Board. The Board referenced George Washington's appraisal of the "strained relations between officers and men" during the revolutionary war *Id.* at 2. A similar reference was made to the Civil War, when men in both Northern and Southern ranks bitterly complained about "aristocratic" officers who were more "interested in rank and privilege" than in the welfare of their men. *Id.* Quoting a report to the Secretary of War during World War I, these same issues were addressed, citing the "bitterness engendered among the enlisted men by special privileges accorded the officer personnel (privileges that have no military significance nor value) who are in many instances mental and moral inferiors of half of their subordinates." *Id.*

The Board set the tone for their report initially noting that a "caste system" has no business in an American Army which utilizes democratic principles for the selection of its officers. The Board then succinctly summed up its viewpoint as follows:

By reason of their historical dislike of the military system, Americans have a deep-seated feeling against and strongly resist any growth of an old-world type of

and included signs posted prominently proclaiming, "off limits to enlisted men." Times have changed, indeed, and while officers' clubs are generally still off limits to enlisted personnel, the justification is more humane.

2. *Conclusions.*—The key conclusions—most relevant to the issue of fraternization<sup>326</sup>—were:

(1) That Americans look askance at any system that grants "unearned privileges" to a class, and find arbitrary social distinctions between any two parts of the Army "distasteful."<sup>327</sup>

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military caste because such would be out of keeping with our democratic government. Therefore, as soon as soldiers returned to civilian status, many became articulate; some vociferous; and a few outright abusive. The peak of editorial attack on the Army was reached in the Spring of 1946.

Most of this writing is a discussion of the social distinction and resultant social privileges created by the official breach, *effected by tradition and custom of the service*, between enlisted and commissioned personnel. *Id.* at 3 (emphasis added).

World War II was an eye-opener for the Army, particularly in terms of lessons learned from personnel procurement with the rapid mobilization of civilians and their entrances into the Army. The previous gap between education and training of officer and enlisted personnel not only was narrowed, but also bridged. Many enlisted personnel were "far superior by training, education, and work experience, to men in the commissioned ranks." *Id.* at 4. Thus, while a rational—albeit socially unacceptable—basis had once existed for this officer-enlisted distinction, it no longer could be justified. What clearly compounded this problem, and forced the issue to the surface, was that many of these admittedly inferior officers were quite abusive of the enlisted personnel committed to their charge. *Id.* at 9. It is most instructive to note that many of the distinctions complained of by the enlisted personnel have since been abolished, and seem demeaning and degrading by current standards. For example, post theaters were segregated, with commissioned personnel receiving special seats, and enlisted personnel and families segregated from the officers. *Id.* at 8. At officers' clubs, officers generally were waited on individually by enlisted personnel. *Id.* Enlisted personnel specifically were prohibited from associating with commissioned women personnel and from entering or attending any officer club or party except as a servant. *Id.* Enlisted personnel performed "menial tasks and subservient duties" and it was "considered demeaning for commissioned to associate with enlisted personnel off duty or off military reservations." *Id.* These factors, coupled with abuse of rank and privilege by incompetent officers, certainly show—compared to today's perspective—justifiable grievances by enlisted men. There were other examples as well, such as officers using Army vehicles for social purposes. More examples of distinctions that existed included better and more abundant food, better recreation facilities "for officers only," liquor available to officers but not enlisted personnel, a distinction in the uniform of officer and enlisted personnel, enlisted personnel being required "to assist and be a part in securing and providing many of the foregoing special privileges for commissioned personnel." *Id.* at 11. Many of the complaints raised still exist today, yet most significant ones have been abolished. The ones that were abolished were ones that rankled enlisted personnel most—those involving *social distinctions*. Because these distinctions applied and persisted both on and off duty, they "directed attention to the unnecessary indignities suffered by soldiers—indignities which had no positive effect upon discipline and military efficiency." *Id.*

<sup>326</sup> The term "fraternization" does not appear in the Doolittle Board Report.

<sup>327</sup> Doolittle Board Report, *supra* note 325, at 17.

(2) One of the main causes of poor relations between commissioned and enlisted personnel was "a system that permits and encourages a wide official and social gap between commissioned and enlisted personnel."<sup>328</sup>

(3) That the Army must develop and inculcate a "new philosophy in the military order" that would permit "full recognition of the dignities of man."<sup>329</sup>

3. *Recommendations.*—In light of the above findings, the board made the following recommendations:<sup>330</sup>

(1) That all military personnel be allowed, *when off duty*, to pursue *normal social patterns* comparable to our democratic way of life.

(2) That the use of discriminatory references, such as "officers and their ladies; enlisted men and their wives," be eliminated from directives and publications issued in military establishments.

(3) That the hand salute be abandoned off Army installations and off duty.<sup>331</sup>

(4) The abolition of all regulations, statutes, customs, and traditions that discourage or forbid social associations

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 18.

<sup>330</sup> Only the recommendations relevant to the issue of fraternization will be discussed. It is extremely important to note, however, that these recommendations—some of which seem to fly in the face of traditional military wisdom and experience—were made by a blue ribbon panel of seasoned military men, including a Medal of Honor winner. To provide a proper perspective on the recommendations, prior to "lowering the boom," the Board made its first three eminently practical recommendations, to show that the mission of the military is the highest priority, and that they had not forgotten this:

(1) There must be assurance that we, as a nation, have a modern, economical, efficient, and effective military establishments which can, if needed, win battles and a war.

(2) Maintenance of control and discipline, which are essential to the success of any military operation.

(3) Maintenance of morale which must be of the highest order and under continual scrutiny.

*Id.* The recommendations which appear in the text do not correspond to their actual numbers in the Board report. The three in this footnote were the first three in the report.

<sup>331</sup> Exceptions to this rule would occur in occupied territories and under conditions in which saluting might be appropriate to convey respect to local populations. The salute would remain in use on base and at ceremonial events.

of soldiers of similar likes and tastes, because of military rank.

4. *Impact of the Recommendations.*—While many of the board's recommendations were adopted, those dealing with the issue of fraternization were largely ignored.

5. *Analysis of the Recommendations.*—The board's recommendations retain their urgency and meaning today. The recommendations draw a sharp distinction between on and off duty statuses, and clearly endorse a liberal fraternization policy when off duty and off base. The recommendations echo the policies of foreign military services discussed earlier, and imply that no loss of discipline or control would result from adopting the board's recommendations.

#### *B. Congressional Rumblings on Fraternization*

The earliest detected concerns from Congress on the different fraternization policies of the services, *coupled* with an oblique hint at a standard policy, occurred in the Hearings on Women in the Military.<sup>332</sup> During these hearings, the following discussion occurred:

[Congressman] WHITE. I really think the DOD ought to present to Congress some kind of [specific and uniform fraternization policy]. Every day—not every day, frequently—I have some member contact me because someone is wrestling with two officers or officer and enlisted man problems as to fraternization. There are as many results or policies as there are incidents. I feel this is very destructive to morale. You are losing good officers and men and enlisted women and women officers, I am sure, as a result of not having a clear position.

When I say you, I am talking about the Department of Defense.

MR. CLARK [Army spokesman]. I am not aware, frankly, that we have any degree of dissatisfaction about that policy. I am fully aware of the one incident, of course. We simply should not judge a policy by one incident.

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<sup>332</sup> 96th Cong., 1st Sess. 118 (1979).

[Congressman] WHITE. I suggest a lot of people are winging at the problem right now, not addressing it, hoping it might go away, but it is not going to.<sup>333</sup>

Congressman White's words were quite prophetic for the problem has intensified. His suggestion was not taken seriously by the Army, nor was it picked up by anyone else. Thus, a decade passed before this idea was raised again.

### C. Congressional Resolution on Fraternization

In 1988, Representative Byron introduced specific legislation calling for a DOD fraternization policy.<sup>334</sup> The thrust of the legislation was that the current regulations are out of step with "a modern and sexually integrated military." Specifically noted, although without reference to the UCMJ, was that a *uniform* policy is lacking, and the very reason that one is required is to enforce good order, discipline, and high morale. The key point of the proposal was that the current regulations are unrealistic, because "an outright prohibition on fraternization between members of the armed forces is not feasible in a sexually integrated military." The proposed bill directs the Secretary of Defense to conduct a comprehensive review of fraternization policies in the military services.<sup>335</sup>

### D. Subsequent Department of Defense Action

Wasting little time on congressional interest in fraternization, the office of the Assistant Secretary of Defense for Force Management and Personnel noted that, "without a standard DOD definition, regulation, and specific policy guidance, confusion and disagreement will continue to exist as to what constitutes fraternization—and when a relationship is inappropri-

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<sup>333</sup> Women in the Military Hearings, 96th Cong., 1st Sess. 145 (1979).

<sup>334</sup> 100th Cong., 2d Sess. 379 (1988).

<sup>335</sup> Representative Byron's bill did not pass. A working group was formed as a result of it, and renewed DOD interest in the subject clearly can be attributed to it. The time line of significant dates is as follows:

29 Sep. 88: Representative Byron submits concurrent resolution on fraternization.

23 Feb. 89: Office of the Secretary of Defense (OSD) Working Group on fraternization formed.

3 Mar. 89: OSD Working Group recommendations forwarded

Fraternization, OAS (FM&P) Working Group Report, undated. It is interesting to note that the working group's mandate, was to *develop* a DOD policy. Somehow, that was translated into deciding "whether" DOD should do so.

ate."<sup>336</sup> The goal was to "develop a policy and directive on fraternization which will include a standard definition and examples of acceptable and unacceptable relationships."<sup>337</sup>

A working group was appointed to work towards this goal, with representation from the offices of the Assistant Secretary of Defense, DOD General Counsel, and individual services. The working group met to provide recommendations on whether DOD should promulgate a policy on fraternization. In a rather perfunctory report, the group rehashed the article 134 language on fraternization. The members noted that missions, customs, and traditions differ among the services, and therefore different fraternization regulations have resulted, each tailored to the mission of each service. One example given was that of different dress standards that exist between services. The group was unanimous in its agreement that the services could educate their members better on fraternization and the applicable policy. They also agreed, however, that a DOD policy was unnecessary and potentially counterproductive. The group's reasoning in arriving at this conclusion revealed the members' predispositions to nix a DOD standard. In spite of the working group's claims that a DOD standard would have to be vague,<sup>338</sup> DOD could establish any policy the group deemed appropriate, and the policy could have been as specific as desired.

### *E. Service Opposition to a DOD Policy*

Service representatives to the working group communicated their services' fervent desire to maintain the status quo, and vigorously resisted imposition of a DOD policy. Because this issue is still open, obtaining access to materials was extremely difficult. The fact that all services oppose a DOD policy is clear.<sup>339</sup> Only the Marine Corps and Army positions on this issue<sup>340</sup> were obtainable.

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<sup>336</sup> Memorandum, Office of the Assistant Secretary of Defense, Force Management and Personnel, 23 Jan. 1989, subject: Fraternization.

<sup>337</sup> *Id.*

<sup>338</sup> The report states: "If the Department did establish a policy it would have to be so vague and general that it would serve no useful purpose and in fact would confuse an already complex issue." Memorandum for the Assistant Secretary of Defense (Force Management and Personnel), undated, subject: Recommendation Against DOD-Wide Policy on Fraternization.

<sup>339</sup> The services have closed ranks against a DOD policy. This would not surprise Justice Douglas who stated, dissenting in *Parker v. Levy*, 417 U.S. 733, 770 (1974), "The military, of course, tends to produce homogenized individuals who think—as well as march—in unison." This article should, at least, provide evidence to the contrary of that assertion.

<sup>340</sup> Marine Corps Memorandum, undated, subject: Recommendation Against DOD-Wide Policy on Fraternization.

1. *United States Marine Corps Position.*—The Marine Corps supported the existing approach of individual service regulations,<sup>341</sup> using the customs of each service as the appropriate standard.<sup>342</sup> The Marine Corps admitted to complaints caused by its regulation's lack of "definitive" guidance and "broad mandate." Also included was a tangential reference to past attempts to formalize the policy with specific "do's and don'ts" that were "unsuccessful," although the reader is not told why, or what the prohibitions were. Ultimately, bureaucratic steadfastness and turf protection stand out as the primary reason for the Marines' argument against a DOD standard.<sup>343</sup> Once again, the word "infinite" is used in an attempt falsely to illustrate the supposed futility of drafting a more "rigid" set of rules. This underscores the unspoken fear of the Marine Corps that any new standard would be more "flexible." Thus, official Marine Corps pronouncements continue to indicate a profound satisfaction with the status quo.<sup>344</sup>

Finally, the Corps defended its regulation as viable based on its ability to survive judicial scrutiny.<sup>345</sup> Given that the courts

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<sup>341</sup> *Id.* (citing 10 U.S.C. §§ 933-934 (1988)).

<sup>342</sup> "Establishing a unified approach would defeat the central purpose of service-specific guidance and result in the further clouding of service initiatives aimed at enforcing adherence to service custom." *Id.*

<sup>343</sup> The Marine Corps defends its position as follows:

Our inability in this regard (to formalize the policy with specifics) does not indicate any shortcoming in our policy, however, nor do we imply any in the policies of the other services. Instead, it is an acknowledgement that fraternization involves complex interpersonal relationships, cast in settings which are *infinitely* varied. A rigid set of rules in this area could not hope to replace the flexible standard imposed by effective leadership and the exercise of good judgment under the customs of the individual services. (parenthetical clarification and emphasis added).

*Id.*

<sup>344</sup> See *supra* note 225. Most interesting in that paragraph is its consistent presentation of conclusions without justification. For example, it does not state who has concluded that the current standard is successful. Nor does it address why the Marine Corps' standard would not work for other services, if it has served the Marine Corps so well. Certainly, many careers have been ruined by *innocuous* contacts, which although not "innocent" had no potential for any adverse impact on good order, discipline, and morale. Regardless of whether officers actually disciplined for violation of the policy were aware of the policy is not the issue. The first issue is why *officers consistently* and continually would violate any policy; the second issue is whether the policy is prohibiting associations that could have no conceivable harm to the Corps.

<sup>345</sup> Marine Corps Memorandum, *supra* note 345, cites *United States v. Moultak*, 21 M.J. 822 (N.M.C.M.R. 1985), which states that Marine Corps and Navy officers are on notice that fraternizing with enlisted personnel on terms of military equality violates UCMJ arts. 133 and 134. Additionally, it cites *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985), holding that officers of the naval service—that is, the Marine Corps and Navy—are on notice that officer-enlisted relationships must be consistent with good order and discipline and must not give the appearance of familiarity or undue informality. This guidance is insubstantial and ambiguous.



uphold virtually all military restrictions,<sup>346</sup> this is no great achievement, and it does not mean that the regulation is fair, necessary, or the best way to accomplish the actual purpose it was intended to serve.

2. *United States Army Position.*—The Army was also quite satisfied with its policy on fraternization, and did not favor a DOD policy. Army judge advocates had staff cognizance of this issue and opposed any changes in policy.<sup>347</sup> A draft memorandum for the Deputy Assistant Secretary of Defense also opposed a DOD policy.<sup>348</sup> While maintaining its opposition to a DOD policy on fraternization, the Army presented its own version of a DOD policy, which was very similar to their own.

3. *Secretary of Defense Reaction.*—While the services had hoped that united opposition to a DOD policy would obviate the need for one, the Secretary of Defense did not concur.<sup>349</sup> Instead, the issue actually is very much alive.<sup>350</sup> A draft regulation has been prepared, but it is woefully inadequate. Specifically, it fails to address relationships between personnel of different services, chain of command issues, trainer-trainee issues, and a host of other critical matters. The term fraternization is neither defined nor used. Inappropriate relationships are defined more broadly than intended.<sup>351</sup> Clearly, DOD has a long way to go on this issue, but it almost certainly will be addressed in the 102d Congress.<sup>352</sup> Currently, DOD hoped to publish its guidance on fraternization in September 1991.<sup>353</sup>

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<sup>346</sup> See *supra* note 177.

<sup>347</sup> Army Memorandum for Record, DAJA-CL/5163, subject: DOD Fraternization and Improper Relationship Policy, 17 Apr. 1989. Interestingly, this working group had a chaplain involved as a key player, lending a philosophical bent to the issue.

<sup>348</sup> Army Memorandum DAP-MPH-L (600-20R), subject: Department of Defense Policy on Fraternization, undated.

<sup>349</sup> The author could not obtain any documents that indicate this. It definitely remains a topic of debate. Had the Secretary of Defense (SecDef) agreed with the services' advice, the possibility of a DOD regulation would be a dead issue.

<sup>350</sup> Telephone interview with Major Steve Maurmann, U.S. Air Force, Deputy Director Personnel Utilization, Office of the Assistant Secretary of Defense (OASD) (5 Feb. 1991). He advised that at the last Defense Equal Opportunity Council meeting on 18 Dec. 1990, this issue was addressed. The Assistant Secretary of Defense for Force Management and Personnel drafted a memorandum advising his subordinate assistant service secretaries that a consensus had been reached that a DOD policy on fraternization would be appropriate.

<sup>351</sup> The regulation frowns on relationships that give the "appearance of partiality," which could be any relationship with a significant rank disparity.

<sup>352</sup> Decision Options Memorandum on Fraternization, Office of the Ass't Sec'y of Defense, undated.

<sup>353</sup> The memorandum indicates decisions by the Secretary of Defense to increase training, education, enforcement, and tracking of fraternization offenses by individual service. Also, the service inspectors general may be required to include fraternization

However, DOD appears caught between the congressional pressure to regulate fraternization—or to deregulate it because the resolution implies liberalizing the rules—and the service opposition to DOD intervention. The politically acceptable result may be a bland regulation that changes nothing. The current proposal reflects this theory. The current focus of DOD's inquiries illustrates that its desire is more to maintain the status quo than to craft a meritorious policy. For example, one policy issue under consideration is whether it is "possible to convince Congress that differences in fraternization policy and enforcement among the Services are appropriate?"<sup>354</sup> This question essentially *assumes* the inappropriate nature of the current system, yet by answering the question DOD seeks to justify that system.

The DOD working group has noted some consistencies in the policies,<sup>355</sup> but they are insignificant. Nevertheless, events continue to conspire to mandate a DOD policy. A recent *Washington Post* article detailed significant problems with fraternization at the Naval Training Center in Orlando, Florida.<sup>356</sup> Recent news accounts indicated that fraternization was alive and well in Saudi Arabia.<sup>357</sup> This issue will not disappear. It is easy to anticipate that the chorus of voices calling for DOD regulation of this issue will only grow louder. Still, this is no assurance of an adequate policy being promulgated. Although some alterna-

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as part of a unit climate assessment review. The memorandum of decision's options indicate that DOD may begin some tracking of its own, to include cases involving general and flag officers, and field grade officers in command billets. Also under advisement are a DOD survey to gauge fraternization policy effectiveness, and a survey to track all court-martial cases. *Id.*

<sup>354</sup> *Id.* at 3.

<sup>355</sup> The working group noted all policies of the services are gender-neutral in application, address relationships beyond officer-enlisted fraternization, and encourage professional relations between personnel. *Id.* at 3. Of course, these similarities are at an extremely basic level. The report continues to note that the Marine Corps has the strictest application derived from its policy, which is the most general. The report also noted, correctly, that fraternization is not a problem confined to the military.

<sup>356</sup> WASH. POST, Oct. 22, 1990, at A1. This report of a Navy Inspector General study resulted in Navy representatives and Mr. Jehn, Assistant Secretary of Defense, Force Management and Personnel, being called to Capitol Hill to discuss these issues with Senators Glenn and McCain, and Congresswoman Byron on 25 Oct. 1990. This article also details problems with rape and sexual harassment.

<sup>357</sup> *Big test.* With 40,000 women stationed in the gulf, there have apparently been quite a few battlefield romances. Medics in Saudi Arabia report that a rush of urine samples submitted for pregnancy testing has kept several units working full time. A positive test was the ticket home for at least one soldier. Troops tuned to Army radio last month heard the disc jockey rejoice that she was pregnant and would be headed stateside. Perhaps the grunts didn't share her joy. A request that the listeners call in with names for the baby drew few responses.

tives may be considered acceptable,<sup>358</sup> the DOD study of the issue undoubtedly will provide the impetus for significant, if gradual, change. Perhaps the greatest accomplishment has been the compilation of additional statistics from the services on cases of fraternization and comparison of service policies.<sup>359</sup>

## VIII. The Need For a DOD Standard

### A. The Failure of Custom-Based Fraternization Regulations

Because of its constantly fluctuating definition, custom provides a shaky footing for criminal regulations and is the root cause of pervasive vagueness.<sup>360</sup> Unfortunately, only the most

<sup>358</sup> A handwritten note on the working group's report to the Secretary of Defense dated 23 Feb. 1989 indicates that he will not accept the status quo, but may be willing to accept individual service regulations so long as they are *consistent*. Given the services' current outlook on this issue, that is extremely unlikely.

<sup>359</sup> The Department of Defense has not considered the Coast Guard's policy.

<sup>360</sup> Vagueness is the most frequent basis for attack on fraternization regulations. Simply because the courts have not declared the current regulations unconstitutionally vague does not mean they provide adequate guidance. See Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) Amsterdam proposes an excellent standard for vagueness: considering the nature of the Government interests, the feasibility of more precision, and whether the uncertainty affects the fact or merely the grade of criminality. Because the fact of criminality is at issue with most current fraternization cases, vagueness is always an issue. See also, Nichols, *The Devil's Article*, 22 MIL. L. REV. 111 (1963); Cutts, *Article 134: Vague or Valid*, 15 A.F. JAG L. REV. 129 (1974); Cohen, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 UCLA L. REV. 821 (1971); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 269 (1971).

Even if the current regulations meet minimal due process standards, fairness dictates a higher standard. The typical void-for-vagueness analysis is instructive. It is well established that "[c]riminal statutes must have an ascertainable standard of guilt . . . adequate to inform persons accused of violations thereof of the nature and cause of the accusation against them." *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *accord Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids"). The void-for-vagueness doctrine has two purposes—providing notice to those subject to the law, and establishing clear guidelines for those with responsibility for its enforcement. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980); see *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (guidelines to enforcement); *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (fair warning); *Screws v. United States*, 325 U.S. 91, 151-52, 154 (1945) (Roberts, J., dissenting) (guidelines and notice).

Under the notice strand of the doctrine, a "law must therefore be struck down if men of common intelligence must necessarily guess at its meaning." *Big Mama Rag*, 631 F.2d at 1035 (quoting *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1978) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); see *Winters*, 333 U.S. at 524 ("so empty of meaning that no one desirous of obeying the law could fairly be aware"). Similarly, under the enforcement prong of the vagueness analysis, "laws are invalidated if they are 'wholly lacking in 'terms susceptible of objective measure-

egregious cases of fraternization have been reviewed.<sup>361</sup> Weaker cases with weaker facts ultimately will focus more attention on the regulations.<sup>362</sup> Sooner or later, an officer will not accept the destruction of his or her career for a mere indiscretion and the case will result in a trial rather than a bad fitness report or nonjudicial punishment.

When criminal standards are allowed to rest on the quicksand of custom, the way people have acted in the past sets the standard for conduct. Far preferable would be a normative standard, independent of custom. "Bright-line" standards in the area of fraternization zealously have been avoided, leaving the current amalgam of regulations. The failure to enunciate bright-line rules adequately has led to regulations that are perhaps the most widely disregarded in the military.<sup>363</sup> A regulation that is so blatantly ignored or broken does more to diminish good order and discipline than it does to further it. The

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ment." "Big Mama Rag, 631 F.2d at 1035 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *Cramp v. Board of Pub. Instr.*, 368 U.S. 278, 286 (1961))). It is clear that the current fraternization regulation provides minimal—albeit constitutionally sufficient—notice to those subject to it. Even if the regulation survives constitutional scrutiny, this hardly means that its enforcement engenders respect. Likewise, there is clearly some measure of inequity in allowing individual commanders virtually unfettered discretion to enforce regulations.

<sup>361</sup> *United States v. Fox*, 31 M.J. 739 (A.F.C.M.R. 1990) (Air Force captain had sex with two enlisted subordinates in his unit); *United States v. Marks*, CM 27946 (A.C.M.R. 1989) (female Air Force second lieutenant section commander had sex with enlisted subordinate and posed for nude photos for him; photos were subsequently shown to enlisted men in the unit); *United States v. Haye*, 29 M.J. 213 (C.M.A. 1989) (married female second lieutenant who was deputy crew commander at missile silo had sex with married technical sergeant subordinate; issue concerned her confession beaten out of her by her technical sergeant husband); *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989) (staff sergeant had sex with trainee in his unit and told her not to talk about it or they would both get in trouble); *United States v. Hodge*, 28 M.J. 883 (A.F.C.M.R. 1989) (second lieutenant had sex with female airman who worked directly for him); *United States v. Caldwell*, 23 M.J. 748 (A.F.C.M.R. 1987) (Air Force captain fraternized with staff sergeant in his section by engaging in sex with her and then showing her preferential treatment); *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986) (second lieutenant had sex with trainee under his charge when prohibited by local regulation); *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984) (married Marine captain publicly courted enlisted subordinate on-base, in uniform, in presence of other Marines, and continued courtship in spite of her protestations).

<sup>362</sup> At least one local regulation has been held void for being vague at the trial level. See CMO No. 4, 1st BCT Bde, Ft. Jackson, S.C. (14 Mar. 1978) (*United States v. Dexter*) digested in 21 ATLA L. REP. 216, 1 ATLA CRM. R. 28 (June 1978). See generally, Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG L. REV. 124 (1970) (Major Nelson pointed out that if UCMJ art. 133 is ever declared unconstitutionally vague, it will be a result of pushing a weak case to trial, noting that "bad facts make bad law," noting that this probably will not occur so long as restraint is exercised in its use).

<sup>363</sup> Considering the large numbers of undetected and unreported fraternization, it is likely that officers violate the fraternization regulations more than any other regulation. Whether this is factually true cannot be documented.

military requires a standard that is clear, cognizable, ethical, fair, and which above all can be explained as having a rational basis. The current rationale for fraternization regulations is the need to maintain good order and discipline. This rationale need not change, even with a significant relaxation of current policy. New policy must recognize that fraternization outside the chain of command is neither prejudicial to good order and discipline nor service discrediting. When the government is serious about regulating conduct, "bright-line" rules are usually available, in contrast to the paucity of useful guidance regarding fraternization. One might speculate that this contrast is a symptom of the military's difficulty in promulgating specific regulations dealing with intimate matters such as sex, kissing, and dating. Unfortunately, general prohibitions regarding these matters lead commanders to apply their own standards ad hoc with radically different results for identical conduct, which is antithetical to good order and discipline. Specifically, ad hoc enforcement raises the same issues of partiality and favoritism that the fraternization policies are designed to prevent.

Custom is no longer a valid standard for regulating this conduct. Development of a DOD mission-related standard is far more appropriate. Currently, the Army and Marine Corps, who share similar missions in that both are primarily ground combat forces, should have similar regulations. Likewise, the Coast Guard and the Navy would be good candidates for similar regulations. But this is not the case. Instead, the services actually have radically different regulations without rational bases. Customs inevitably change,<sup>364</sup> but when change attributed to custom appears as a radical metamorphosis, one must wonder when it becomes either a different custom or a different concept. The notion of feudal inferiority supposedly has been supplanted with the bifurcated idea of social parity and prejudice to good order and discipline. "Customary" fraternization has evolved into a regulatory phase. The services cannot remain true to original notions of custom while steering the present course.<sup>365</sup>

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<sup>364</sup> "Like life itself, the customs which man observes are subject to a constant but slow process of change." *THE OFFICER'S GUIDE* 206 (28th ed. 1962).

<sup>365</sup> Winthrop defined military custom as a service-wide practice that must have prevailed without variation over a lengthy time period. The custom must also be clearly defined, uniform in application and equitable. J. WINTHROP, *supra* note 20, at 42-43. The current disparate policies are in direct contravention to the purpose of the UCMJ—uniformity; see also Cohen, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 *UCLA L. REV.* 821 (1971).

The issue has many philosophical aspects. Those who subscribe to the maxim that military personnel are on duty twenty-four hours every day believe that a command may interfere in all aspects of a soldier's life. Fraternalization is a classic issue of striking a balance across the fulcrum between command authority and individual liberty. The broader issue in a societal context concerns the conflict between America's democratic ideals and the professional military tradition, whose hallmark is domination of the individual, tempered by a paternalistic concern for his or her welfare.<sup>366</sup> Yet, as significant changes occur in the larger society's social, legal, and moral norms, this frequently—and properly—results in changes reflected in the treatment of military personnel.<sup>367</sup>

### *B. Mission as a Substitute for Custom*

A DOD standard should be based on mission—not custom. The mission should not be viewed in the narrow context of a single service, but as the mission of the military—that is, the mission of the Department of Defense. This acknowledges that each service has such a diversity of missions that there is considerable overlap. From a DOD perspective, all services share the same mission: to win wars and defend the nation.

Two factors argue for a complete restructuring of the way the problem of fraternization has been addressed. First, the services task organize and fight predominately as unified forces. Unified forces require common standards applicable to all members. Because morale is a key ingredient of good order and discipline, it deserves significant consideration. Nothing can impact more deleteriously on morale than different treatment for similar offenses. If an Army officer dates an Air Force enlisted woman and is not punished for it, while simultaneously a Navy officer receives nonjudicial punishment for dating an Air Force woman, an adverse impact on morale is bound to occur—particularly when those two officers work together on a joint staff. When other violations of the UCMJ are handled consistently, inconsistent handling of fraternization is accentuated and legal authority for differences<sup>368</sup> does not necessarily equate to good policy.

<sup>366</sup> Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97 (1964).

<sup>367</sup> F. JANOWITZ, *THE PROFESSIONAL SOLDIER* 38-46 (1960).

<sup>368</sup> "Consistently" is not intended to mean "identically." The courts have acknowledged that service secretaries can make regulations for their services even if not uniform with the other services. See *United States v. Hoising*, 5 M.J. 355 (C.M.A. 1973). This decision was based upon the impossibility of secretarial unanimity, and acknowl-

Secondly, military society, like civilian society, evolves and changes. Fraternization has undergone radical changes—both conceptually and legally. Criminal prosecution of "pure" fraternization outside the chain of command is inconsistent with this evolution. The fraternization policy's entire purpose was changed from maintaining social class distinctions to maintaining good order and discipline. Fraternization's viability is once again at issue. Many fear that a change in the regulations will cause a host of new problems. While this fear might be well grounded were fraternization restrictions simply abandoned, that is not the thrust of this article. Rather, a "purple" standard, applicable to all services, providing both clear guidelines and reasonable restrictions, is precisely what is required to restore fairness and reason to this area so fraught with emotion.<sup>369</sup>

### *C. Structuring the DOD Regulation*

In determining a standard applicable to all services, minimal credence need be given to current regulations, for the goal is not compromise, but fairness. Also, a standard that allows dating, but prohibits sexual intercourse,<sup>370</sup> authorizes the conduct that naturally leads to the prohibited act and is therefore untenable. The standard must be narrowly drawn in regard to its criminal applicability. For example, only chain of command, superior-subordinate relationships, or cases in which influence is feasible or attempted should be dealt with criminally. It should also provide specific guidance and "bright-line" rules for commanders and their subordinates to apply. The DOD regulation must address relationships involving a significant rank disparity, yet it must do so unobtrusively and without imposing social distinctions. It must prevent amorous relationships immediately upon the termination of superior-subordinate

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edges that reasonable differences will occur. A similar circumstance exists in the application of the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (1988).

<sup>369</sup> The Department of Defense also should heed Colonel Flatten's warning to the Air Force:

If we continue to drift we will find that some cause celebre will arise between a firm commander and a determined officer. The decision will then be made for us by someone who has no experience in or regard for the institutional values and character of the Air Force. Through ignorance or malice, such a decision maker could do serious injury.

Flatten, *supra* note 169, at 116.

<sup>370</sup> This idea was suggested by Major Carter in his thesis. See Carter, *supra* note 15, at 133.

working relationships so that superiors do not begin courting subordinates just prior to their detachment from the unit.

Another issue that must be addressed in a DOD regulation is to what extent the services may police, through administrative means, fraternization violations not specifically countenanced in the regulation.<sup>371</sup> Fundamental fairness dictates that administrative sanctions not be used to circumvent the very purpose of the DOD regulation.<sup>372</sup> Thus, when no criminal action would be appropriate, no administrative action would be permitted, either. This would provide a means for redress to personnel given unsatisfactory marks on an evaluation due solely to alleged fraternization. If the conduct is prohibited, a commander still has the entire spectrum of sanctions available.

If examined from the perspective of two service members—a male and a female—who are outside each other's chain of command and keep their mutually consensual, nondeviate sexual relationship completely private, the military has absolutely no business regulating their conduct. Neither of these service members' respective commanders honestly could state that such a relationship has a *direct, tangible, and adverse* impact upon good order and discipline in their units. Thus, the relationship should not be regulated because their conduct is not ethically, morally, or legally wrong.

Additionally, in structuring a DOD regulation, it is impossible to state the size of the unit to which such a regulation would pertain.<sup>373</sup> A unit could be a company, which can have

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<sup>371</sup> Before addressing administrative concerns, it must be understood that a DOD standard, even if implemented, does not prevent the services from prosecuting fraternization violations outside the chain of command under UCMJ art. 134 in accordance with their customs. Two major roadblocks would militate against this action by the services. First, military organizations usually do not contravene higher headquarters. Second, because a DOD standard arguably would *change* the custom for all services, conviction for "pure" fraternization cases would require prosecutors to clear a very high hurdle.

<sup>372</sup> Current Marine Corps policy would seem to encourage this very practice:

In the meantime, many questions have arisen as to the means for dealing with these marriages. From a strictly legal standpoint, such a marriage does not preclude punitive action being taken for the prenuptial fraternization which most likely occurred. However, evidentiary problems as well as the public relations aspects of prosecuting such cases may make this course impracticable. The use of fitness reports by reporting seniors however should not be overlooked.

Memorandum for Staff Judge Advocates, Law Center Directors, Senior Military Judges, from Director, Judge Advocate Division, JAR. 8 Sept. 1982, subject: Officer-Enlisted Marriages.

<sup>373</sup> See McDevitt, *Wrongful Fraternization*, 33 CLEV. ST. L. REV. 547, 576 (1984-85). McDevitt drafted a suggested fraternization regulation prohibiting relationships when personnel are in the same chain of command, have a supervisory relationship, or are assigned to a battalion or smaller sized unit.



one hundred or 1000, a ship with fifty or 5000, or a hospital with one hundred or 1000. Units are too diverse to provide numerical precision through their labels alone. Furthermore, while small, discrete groups may be so defined, once a unit expands to regimental size and beyond, it is unworkable conceptually. Thus, the key is to focus on the relationship and its potential impact on the unit.

#### *D. Criticisms of a DOD Regulation*

Because the proposed DOD standard allows mixed-gender relationships even in cases of significantly disparate rank so long as they are kept off-base and out of sight, a complaint might arise that this memorializes hypocrisy. This complaint, however, assumes that these relationships are undesirable. If hypocrisy were to be a criticism, it would be far more valid now because fraternization is rampant; but when it remains discreet, it is largely tolerated. Also, condoning officer-enlisted marriages appears to be far more hypocritical than liberalizing the policy. Another criticism expresses concern about hundreds of officer-enlisted marriages—a problem experienced by the Air Force with its liberal fraternization policy prior to 1990.<sup>374</sup> Another worry concerns those who are in unrelated units who, while dating today, could be tomorrow's superior and subordinate. This has not been an unmanageable concern in the past, nor will it be in the future. In dating relationships, the senior member simply would disclose the relationship if assignment to the same unit was imminent.

Some say that if this policy were liberalized, so too should the policy on business dealings and other policies regulating conduct between service members. That argument fails to recognize that the impetuses behind the change in fraternization policy are modern social forces, large numbers of women in the service, and biological attraction.<sup>375</sup> Members of the opposite sexes are, have always been, and always will be attracted to each other. The proposed regulation acknowledges that fact and deals with it realistically.

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<sup>374</sup> Officer-enlisted marriages were so frequent that they required specific guidance in the Air Force family housing regulations. Under the provisions of Air Force Reg. 90-1, Family Housing, table 6-4, rule 1E (9 Mar. 1971), "mixed" marriage couples could choose officer or enlisted housing.

<sup>375</sup> There are also statutory prohibitions on conduct involving business dealings with enlisted personnel.

One of the most cogent and compelling criticisms of allowing officer-enlisted fraternization is the specter of overall declining respect for officers and officer status. While this concern is frequently espoused, the precise manifestations of this peril are never articulated. To assume that a single enlisted person's relationship with a single officer will cause that enlisted soldier to view all other officers in a similar fashion ignores several realities that demonstrate the fallacy of this position. For example, the enlisted member was a citizen of a democracy before enlisting and surely knows that the type of people who become officers are no different than those who become enlisted soldiers. It is only by virtue of the officers' role in the military that they assume authority over enlisted personnel. Of course, to suggest that officers are inherently superior in some way would constitute a reversion to the fully discredited class-based distinctions of yesteryear; yet, the regulations that prohibit this relationship tacitly revive this very concept. Surely an enlisted person involved in such a relationship is capable of discerning that the lack of formality and military respect is appropriate only for the relationship with the officer concerned.

Another issue regarding a relaxation of fraternization regulations is that it could pave the way to liberalizing the military policy on homosexuality<sup>376</sup> because of its similar associational aspects. This is simply not the case, however. The courts have employed a completely different rationale and justification to uphold the discharge of homosexuals.<sup>377</sup> Homosexuality actually can be prosecuted under article 125 as consensual sodomy.

One thing is certain—the military is an extremely conservative and bureaucratic institution. Change occurs at an extremely slow pace. During the debates that raged prior to the creation of the first UCMJ, one might have thought that the

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<sup>376</sup> See, e.g., SECNAVINST 1900.9A; Army Reg. 635-200, Enlisted Personnel: Personnel Separations, chap. 15 (15 Dec. 1998).

<sup>377</sup> Homosexuality, as contrasted with fraternization, is a status, not a course of conduct. In *Dronenberger v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), the court upheld the discharge of a petty officer who engaged in repeated homosexual acts with a seaman. The court noted the certainty of prejudice to morale and discipline when the senior-subordinate relationship is "sexually ambiguous," and because so many military personnel find homosexuality "morally offensive." Given the nature of the rank structure, the possibility of "homosexual seduction" also would arise *Id.* at 1398; see also, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Martinez v. Brown*, 449 F. Supp. 207 (N.D. Ca. 1978); *Champagne and Stout v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974). Regrettably, however, at least one recent case implies that homosexuality soon may be forced upon the military. See *Watkins v. United States Army*, No. 85-4006 (9th Cir. 1988).

entire military would have collapsed.<sup>378</sup> Similar criticism and fear pervades any discussion of a DOD standard on fraternization. The most frequent comments echo the UCMJ debates, claiming that liberalizing fraternization regulations would "civilianize" the military.<sup>379</sup> These fears are unfounded. A few cases have provided excellent arguments for maintaining strict regulation of fraternization.<sup>380</sup> Even though the courts will likely continue to validate whatever the military does, including according less weight to First Amendment rights,<sup>381</sup> the freedoms of privacy and association should not be abridged unnecessarily.<sup>382</sup>

### *E. Unique Twists in Fraternization Case Law Illustrate Further Confusion*

1. *Expansion of Fraternization's Applicability?*—In regulations of such amorphous nature, it is a predictable consequence that the meaning of fraternization will continue to be applied liberally when convenient for the court and the accused. This highlights further dangers with current regulations and adds force to the argument for a DOD standard.

In *United States v. Cannon*,<sup>383</sup> the accused was a married Air Force captain. He engaged in an on-base adulterous affair with

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<sup>378</sup> Here is an example typical of this debate:

Now, unless that system remains, we will have no discipline in the Army. You may talk all you please about leadership; there can be no discipline unless there is also the power of military punishment. Discipline will disappear as soon as we lose our system of courts-martial.

Report of Judge Advocate's Conference, 15-17 Mar. 1944, Office of the Judge Advocate General, Army Service Forces, at 36. (Comments by Colonel Morissette.)

<sup>379</sup> The Military Justice Act of 1983, Advisory Commission Report 155 (1984) (minority report).

<sup>380</sup> In *United States v. Van Steenwyk*, 21 M.J. 796, 808, n.10 (N.M.C.M.R. 1985), Judge Mitchell noted that relationships are complex regardless of who is involved; but when an officer is involved, the normal problems of jealousy, envy, and perceptions of favoritism and advantage are magnified. In *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), the court advanced compelling reasoning to prohibit a married officer from fraternizing. Yet these, like so many other effective arguments, address only chain of command fraternization.

<sup>381</sup> *Parker v. Levy*, 417 U.S. 733, 769 (1974).

<sup>382</sup> Courts are not likely to grant relief on the basis of freedom of association because that right protects political rather than social associations. *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-61 (1958); see also, *Staton v. Froehke*, 390 F. Supp. 503 (1975) (fraternization conviction of Army chief warrant officer for drinking alcohol, undressing, and bathing with enlisted woman not infringement of right to associate). Claims invoking the right to privacy also have failed. *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985) (right to privacy not absolute); see also, *Middendorf v. Henry*, 425 U.S. 25 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>383</sup> 30 M.J. 885 (A.F.C.M.R. 1990).

an enlisted maintenance crew chief's dependent wife. The court equated this to fraternization.<sup>384</sup> At his court-martial, the accused was prosecuted for conduct unbecoming an officer and a gentleman under UCMJ article 133 and for violating his commanding officer's order to stay away from the dependent wife under UCMJ article 90. The court made the following illuminating remarks:

Although RL [the dependent wife] was a willing participant, the airman [her husband] was clearly victimized by this crime. The impact upon the airman—his marriage, his job, and his perception of Air Force officers, was significant and foreseeable. Furthermore, while RL's nonmilitary status precludes a technical charge of fraternization, her status as the dependent wife of an airman gives this offense many of the attributes of fraternization in terms of its impact upon the military community and upon the perceived integrity of the officer corps.<sup>385</sup>

In *Unger v. Ziemniak*,<sup>386</sup> a female Navy lieutenant<sup>387</sup> refused to provide a urine sample in accordance with applicable Naval regulations.<sup>388</sup> Her objection pertained to the female enlisted subordinate who was required to observe her performing this delicate procedure from eighteen inches away. The accused then refused a direct verbal order from her superior to comply.<sup>389</sup> She refused again, based on her assertion that her constitutional right to privacy was abridged, and her opinion that direct observation by an enlisted person *constituted fraternization and demeaned her status as an officer.*

This case illustrates a novel view of "coercive fraternization." The court did not acknowledge her argument of the inherent impropriety and paradoxical nature of the episode in

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<sup>384</sup> Some authority exists for viewing this type of conduct as fraternization. A similar circumstance arose in *United States v. Nelson*, 22 M.J. 550 (A.C.M.R. 1986), in which the accused pleaded guilty to two specifications of fraternization. One specification was for conduct unbecoming an officer by engaging in sexual intercourse with the wife of a subordinate. The other specification was for conduct unbecoming an officer by soliciting a male soldier of his command to arrange social engagements with an enlisted female soldier under his command in violation of UCMJ arts. 134 and 133.

<sup>385</sup> *Id.* at 891 (parenthetical clarifications added).

<sup>386</sup> 27 M.J. 349 (C.M.A. 1989).

<sup>387</sup> This officer had eight years of service, was a Naval Academy graduate, and had a superb record.

<sup>388</sup> By regulation, she was required to "disrobe from the waist down, sit on a toilet, and urinate into a collection bottle." OPNAVINST 5350.4A.

<sup>389</sup> The lieutenant did provide a sample, but without direct observation. The sample tested negative.

question. There is no doubt that fifty years ago, this procedure never would have been allowed. A logical conclusion is that officers have suffered a considerable erosion of the prestige they once enjoyed, and are now on an equal footing with enlisted personnel such that enlisted personnel can now supervise officers in certain circumstances. One must candidly wonder whether this is the same court that consistently upholds the validity of most fraternization regulations. The court's reasoning, in denying the validity of her argument, was as follows:

Although her pleadings are phrased in terms of fraternization, her real complaint is that, in the *hierarchical* military society, it is demeaning and degrading for an officer to be observed by an enlisted person while she performs an activity that typically is performed in private.<sup>390</sup>

Unfortunately, both parties have missed the real issue. Fraternization was not applicable in *Unger* because it involved a coerced event, orchestrated by the command, and did not involve a consensual relationship. The court, on the other hand, totally missed the mark. The accused's real complaint was not one of privacy,<sup>391</sup> but of *honor*. Actually there is something inherently and tangibly wrong with having a subordinate watch over a superior, to ensure compliance with a regulation, if there is a factual distinction between officers and enlisted personnel. If there is not—as this case suggests—then there is no purpose in prohibiting officer-enlisted fraternization. The court went on to make a statement that becomes almost incredible if one bears the same court's fraternization holdings in mind: "The armed services are sufficiently *egalitarian* that every person in the armed services may be required to provide a urine specimen under direct observation."<sup>392</sup> The word "egalitarian" is never found in the court's rationale upholding fraternization convictions. The court's flexible, ad hoc standard of appropriate officer-enlisted relations is most discomfiting.

## XIX. Conclusion

This article has analyzed the many ambiguities in the different services' fraternization regulations to show not only that

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<sup>390</sup> *Unger*, 27 M.J. at 368 (emphasis added).

<sup>391</sup> We must assume that she did not raise these issues when she had to share locker and shower facilities with enlisted personnel.

<sup>392</sup> *Unger*, 27 M.J. at 368 (emphasis added).

commanders and soldiers have nebulous standards to follow, but also that the current regulatory scheme offends the purpose of the UCMJ. Although regulation of fraternization is clearly a legitimate military governmental interest, and the current regulations reasonably relate to a legitimate end—that is, maintaining good order and discipline—the more penetrating question is whether the regulations achieve their purposes at too great a cost by exceeding legitimate objectives and by allowing disparate treatment for similar conduct. A proper balance must be struck between First Amendment rights and disciplinary needs, without naive appeals to maintaining the historical status quo of unduly restrictive regulations.

The practice in the civilian world and the policies of other military forces demonstrate that the only legitimate justification for regulating fraternization is a concern for maintaining the integrity and authority of the chain of command. Civilian practices also suggest that an overly broad military fraternization regulation breeds contempt among civilians for military justice—especially by permitting the personal predilection of commanders to dictate standards of enforcement, which vary wildly.

The current custom-based fraternization article contains the seeds of its own destruction. Custom is difficult to discern, and subject to varying interpretations and definitions depending on whose conduct creates the custom. Class-based fraternization was founded on artificial and antiquated social distinctions rejected by Americans since the Revolution, but masquerading in different guises throughout our military's history. Indeed, maintaining the viability of fraternization regulations has become an end in itself.

In terms of the role of law, a custom-based regulation allows those whose conduct is being regulated to change the custom, albeit over time. In other words, the followers conceivably could be directing the leaders—a perversion of authority that is a direct threat to any military organization. By allowing *past* custom to dictate *current* rules, the military guarantees its domination by outmoded standards. In times of rapid social change, this is a dangerous way to proceed. Even less acceptable, however, is to set a standard that is not in consonance with reality, and to label it as a custom. The need for a precise DOD standard is obvious. Rather than having a reactive regulation, the military needs a normative fraternization policy that imposes clear and reasonable standards of conduct from above, thus earning the respect and compliance of those below.

My father told me never to give an order unless I was certain it would be carried out. I wouldn't issue a no-fraternization order for all the tea in China.<sup>393</sup>

— *General Douglas MacArthur*

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<sup>393</sup> W. MANCHESTER, *AMERICAN CAESAR* 546 (1985) (in reference to American servicemen having relationships with German and Japanese women). This would appear to apply with equal force to fraternization outside the chain of command today.





## APPENDIX

### Proposed Department of Defense Standard on Fraternization

#### 1. Background

The Department of Defense (DOD) recognizes diversity among the military services based on historical differences in mission, history, custom, and tradition. While diversity is a source of pride, esprit de corps, and is desirable in many areas, it should not lead to inconsistent policies, especially when violation of such policies is subject to criminal sanction. The application of different service fraternization policies has led to anomalous results. Without a uniform standard to guide the services, application of service customs have led to significantly dissimilar treatment for identical conduct. The inconsistency, inequity, and perception of unfairness this has created is not conducive to good order and discipline. In light of the trend towards joint operations, and in recognition of a greater number of women on active duty in the services, this Department deems necessary the promulgation of a single standard for fraternization.

#### 2. Purpose

a. This policy sets the standard and provides guidance to be used throughout DOD. While this regulation will be considered definitive, individual services are free to promulgate their own regulations in this area, *consistent* with this policy.

b. This policy is intended to promote uniformity in the criminal and administrative processing of fraternization cases. This regulation applies to all DOD organizations and uniformed personnel, active and reserve. This policy is punitive in nature, and violation of its provisions may subject DOD personnel to action under the UCMJ or other adverse administrative action.

#### 3. DOD Policy on Relationships and Fraternization Between Service Members

a. *Fraternization.* Fraternization denotes unlawful relationships subject to criminal prosecution under Articles 92, 133 and 134 of the UCMJ. If administrative action is deemed ap-

propriate, it will be accomplished in accordance with applicable service regulations. In the context of this regulation, fraternization refers primarily to mixed-gender relationships, although same gender relationships may also result in fraternization. Fraternization is any close, personal, non-professional, social relationship between two military uniformed members of DOD, or between a uniformed member and a civilian subordinate, regardless of rank, gender, or service, where the two individuals are in the same chain of command or sphere of influence, and relate to each other on terms of military equality, disregarding normal considerations of military etiquette, or where the relationship involves or is *justifiably* perceived to involve partiality, preferential treatment, or abuse of rank or position, and impacts adversely upon good order and discipline.

*b. Prohibited Relationships.* The following relationships are prohibited and are considered fraternization *per se* upon proof of the status of each member:

1. drill instructor-recruit
2. trainer-trainee
3. faculty-student
4. instructor-student
5. recruiter-pooiee
6. married-single
7. married-married
8. attorney-client
9. doctor-patient
10. chaplain-penitent

The above prohibitions assume a chain of command relationship for numbers 1, 2, 3, 4, and 5. Numbers 6 and 7 pertain to adultery between servicemembers.

*c. Additional clarifying definitions:*

1. *Relationship*—Any association or acquaintance, including marriage, regardless of duty status, geographical location, attire, time, or public or private locale. Relationships imply mutually voluntary conduct.

2. *Chain of command*—Chain of command refers specifically to supervisory duties over a subordinate such as a commander to anyone in his command, or an OIC/NCOIC to anyone in his section. This contemplates either direct authority exercised over a subordinate through command, rank, billet, reporting authority (fitness reports, evaluations, proficiency/conduct mark input, etc.), or indirect authority exercised over

an individual in a closely related unit, or the succession of supervisors, superior or subordinate, through which command is exercised. This determination is always made from the perspective of the senior member of the relationship. No actual difference in rank is required, however, if one is senior to the other in billet, or duty assignment. This prohibition applies when the junior is in the same chain of command *and for one year* thereafter.

3. *Sphere of influence*—Any instance where the senior member of a relationship actually influences, attempts to influence, or is in a position to influence the assignments, performance appraisals, promotions, duties, benefits, burdens, or privileges of the junior member of the relationship.

4. *Military equality*—Conduct between members in a relationship implying familiarity or undue informality not normally appropriate to the professional relationship of two military personnel of the same ranks in the same circumstance. Thus, dating, cohabitation, vacationing, gambling, and any intimate personal or physical contact is unauthorized between members in the same chain of command.

5. *Justifiable perception*—To allege the perception of fraternization, *articulable*, specific factors giving rise to the perception must be stated short of proof of actual fraternization. Factors to be considered in assessing allegations of such perceptions include the size of the unit, and whether good order, discipline, or morale has been compromised in any direct, tangible, and cognizable fashion. Actual instances of partiality, preferential treatment, or abuse of rank or position assume *proof* of such conduct. Perceptions are a different matter. Technically, anyone may claim to perceive something amiss in a relationship regardless of the factual basis for such an assertion. The *perception* alone of these factors is as difficult to prohibit as it is to define.

#### 4. Avoiding the Appearance of Impropriety

a. An important goal of this regulation is to maintain and enhance good order and discipline in the Armed Forces. To that end, utmost professionalism is expected of all personnel at all times. Certain outward manifestations of personal relationships between military personnel are prohibited while *on duty* or *in uniform*. These prohibitions include but are not limited to the following: kissing, touching, hand-holding, hugging, and other actions which typify romance or publicly display affec-

tion. This does not prohibit appropriate conduct of this type at occasions of welcome aboard or farewells, where such conduct *might* be appropriate.

b. Certain customs of the services impact on relationships between couples of significantly disparate rank. To avoid the appearance of impropriety, the following guidance applies where participants in any personal relationship are separated by three or more pay grades or by officer-enlisted status:

1. Personnel engaged in such a relationship must exercise discretion in the conduct of their affairs. No public displays of affection are authorized on base regardless of duty status or attire—off base displays of affection are limited to areas of privacy where not likely to be seen or heard by other military personnel or civilians, and are strictly prohibited when in uniform.

2. *Assignment policy.* Military personnel involved in a relationship not prohibited by this regulation or who are married will not be assigned to the same unit, where they would be in the same chain of command. In dating relationships or engagements, however, it is the duty of the senior member of a relationship to disclose the relationship where it appears imminent that they will be assigned to the same unit. Service detailers and commanders will ensure that personnel involved in such relationships are not placed in the same chain of command.

#### 5. Authorized relationships.

a. Social and/or sexual relationships to include dating and marriage between military personnel are authorized where not specifically prohibited by this regulation.

b. No punitive or adverse judicial, nonjudicial, or administrative action may be taken against personnel involved in relationships not prohibited by this regulation.

#### 6. Guidelines for Imposition of Adverse or Punitive Sanctions on Personnel Involved in Prohibited Relationships

a. The senior member of a prohibited relationship bears the primary responsibility for the relationship. While both members may be subject to adverse action, the senior member should be held to a higher standard.

b. Commanders will make every reasonable effort to identify and terminate prohibited relationships at an early stage. Resolution of all fraternization cases should occur at the lowest level appropriate to the infraction and consistent with the need to maintain good order and discipline. Commanders are free to choose from the entire spectrum of administrative and judicial sanctions.

#### 7. Continuing Education

Commanders at all levels will ensure continuous education on fraternization and are expected to lead by example. Each service shall ensure that this policy is disseminated and fully understood by all personnel. Programs to ensure continued explanation of the policy will be established.



# FREEDOM OF NAVIGATION AND THE BLACK SEA BUMPING INCIDENT: HOW "INNOCENT" MUST INNOCENT PASSAGE BE?

LIEUTENANT COMMANDER JOHN W. ROLPH\*

## I. Introduction

A common theme in discussions concerning freedom of navigation is the inevitable conflict generated by competing interests of coastal states and the international community regarding use of the world's oceans—in particular, territorial waters. Balancing the sensitive considerations of continually expanding coastal state sovereignty claims with the international community's global navigation needs has been a central focus of almost all Law of the Sea negotiations. At the heart of this conflict is the struggle that major naval powers—including the United States—are experiencing in keeping the oceans open so that they may pursue their various strategic and diplomatic interests.<sup>1</sup> Much of the discontent is caused by the increasing "territorialization" of previously unrestricted waters by coastal nations concerned with protecting state security, environmental, and economic interests.<sup>2</sup> This may be the product of some states' tendencies to view their particular interests as somehow separate and distinct from those of other nations.<sup>3</sup>

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\* Judge Advocate General's Corps, United States Navy. Presently assigned as Instructor, International Law Division, The Judge Advocate General's School, U.S. Army. B.S., 1978, University of Texas-El Paso; J.D., 1981, Baylor University Law School; LL.M., 1991, The Judge Advocate General's School. Previously assigned as Staff Judge Advocate, U.S.S. *Independence* (CV-62), San Diego, Cal. (1988-1990); Staff Judge Advocate, COMNAVAIRPAC, Naval Air Station North Island, Cal. (1987-1988); Staff Judge Advocate, Naval Amphibious Base, Coronado, Cal. (1985-1987); Senior Trial Counsel, Yokosuka, Japan (1983-1985); and Trial/Defense Counsel, Subic Bay, Republic of the Philippines, (1982-1983). Member of the Texas State Bar.

<sup>1</sup> Negroponce, *Who Will Protect Freedom of the Seas?*, DEP'T ST. BULL., Oct. 1986, at 41.

<sup>2</sup> F. NGANTCHA, *THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA* 1 (1990).

<sup>3</sup> See Negroponce, *supra* note 1, at 42.

The danger . . . is that there is a tendency for each state to see the waters and circumstances off its coast as in some way unique. In this way the coastal state justifies assertions of new or broader forms of jurisdiction to satisfy its coastal appetite. This tendency, which has been dubbed "creeping uniqueness," is the latest threat to the freedom of the seas.

*Id.*

Whatever the impetus, as littoral states have enlarged their territorial sea jurisdictions and other Law of the Sea claims, maritime powers have witnessed a continuing erosion of, and challenge to, the freedom of navigation.<sup>4</sup> This is especially true in relation to warships.

The regime of innocent passage, as it exists in customary international law, and as negotiated and codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III),<sup>5</sup> represents an attempt by the powers involved to compromise upon, and harmonize, these competing interests. "Simply stated, [the] regime is designed to provide a framework for achieving accommodations of the coastal State's exclusive interests and the [international] community's inclusive interests in the territorial sea."<sup>6</sup> Innocent passage allows coastal states to pursue their various policies of national sovereignty, while at the same time maintaining global freedom of navigation by which other nations may pursue their economic and political objectives.<sup>7</sup> In practice, however, innocent passage—as both an academic and applied concept—has many interpreters, not all of whom agree on exactly how "innocent" the passage must actually be under this regime. The importance of specifically defining the concept was never illustrated more graphically than it was during the Black Sea bumping incident of 1988. World superpowers stood head to head in opposition and confrontation over whether innocent passage is an absolute right in international law, or simply a privilege afforded on coastal states' terms. The incident unequivocally demonstrated the need to clarify the regime further, and to identify who decides when passage is innocent or noninnocent.

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<sup>4</sup> Coll, *International Law and U.S. Foreign Policy: Present Challenges and Opportunities*, 11 WASH. U.L.Q. No. 4, at 104 (1988).

<sup>5</sup> United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), opened for signature Dec. 10, 1982, reprinted in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS III].

<sup>6</sup> Smith, *Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection*, 21 COLU.M. J. TRANSNAT'L L. 48, 49 (1982); see also de Vries Reilingh, *Warships In Territorial Waters, Their Right of Innocent Passage*, Vol. 2, in NETHERLANDS YEAR-BOOK OF INTERNATIONAL LAW, 29, 30 (1971).

<sup>7</sup> G. SMITH, RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 37-38 (1980). The author argues that the term "innocent passage" itself implies that a test of "reasonableness" will be applied when adjudging state standards regarded as excessive impingements on the freedom of navigation. "When conflict arises over the validity of state standards, an attempt is made to strike a balance between promoting international needs for unrestricted and unburdened navigation and protecting the sovereign integrity of coastal states" *Id.*



## II. The Black Sea Bumping Incident

On February 12, 1988, warships of the United States and the Soviet Union "shadow boxed" over the issue of innocent passage in the Black Sea. The United States, in a direct and open challenge to Soviet legislation that severely curtailed the right of innocent passage in Soviet territorial waters, commissioned a "Freedom of Navigation" exercise in the Black Sea to challenge those restrictions.<sup>8</sup> Specifically, the 1982 Law of the Union of Soviet Socialist Republics on the State Frontier of the U.S.S.R.,<sup>9</sup> and subsequent implementing regulations, purported to limit innocent passage in Soviet territorial waters to the following predesignated "routes ordinarily used for international navigation":

In the Baltic Sea, according to the traffic separation systems in the area of the Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse;

In the Sea of Okhotsk, according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the Fourth Kurile strait (Paramushir and Makanrushi islands); and

In the Sea of Japan, according to the traffic separation system in the region around Cape Kril'on (Sakhalin Island).<sup>10</sup>

Ostensibly, these five traffic separation schemes were the only areas in which the Soviets would allow passage of foreign warships and still consider the passage to be "innocent."<sup>11</sup> Excluded from the legislation was any provision allowing for in-

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<sup>8</sup> The "Freedom of Navigation" program identifies various maritime claims that are inconsistent with international law and which threaten freedom of navigation. Thereafter, diplomatic action and "nonprovocative" operational activity are used to challenge the illegal assertion openly and peacefully. The tenets of the program are outlined in U.S. Dept't of State, Bureau of Pub. Aff., *U.S. Freedom of Navigation Program*, GIST 2 (Dec. 1988) [hereinafter GIST 2].

<sup>9</sup> Law of the Union of Soviet Socialist Republics on the State Frontier of the USSR 24 Nov. 1982, *entered into force* 1 Mar. 1983, *reprinted in* 24 I.L.M. 1716 (1985) [hereinafter the 1982 Law on the State Border]. Pursuant to this law, the Soviet Union promulgated The Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) and Internal Waters and Ports of the U.S.S.R. (1983 Soviet Navigation Rules), which were implemented by decree of the U.S.S.R. Council of Ministers on 28 April 1983. *Id.*

<sup>10</sup> 1983 Soviet Navigation Rules, *supra* note 9, art. 12.

<sup>11</sup> As one Soviet commentator noted, "In short, one may enter [via one of the five separation schemes] 'without knocking' there. In any other place, as not only good manners but also international norms suggest, one should knock first." Gorokhov, *What Business Do They Have Off Our Coast?*, PRAVDA, Feb. 14, 1988, at 4, *reprinted in* 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 19.

nocent passage through any of the Soviet Union's territorial waters in the Black Sea. The United States found this legislation unacceptable under international law and mounted an independent challenge via the Freedom of Navigation program.<sup>12</sup>

On the morning of February 12, 1988, two United States Navy warships, conducting routine operations in international waters in the Black Sea, altered their courses in a manner that would guide them directly into Soviet territorial waters.<sup>13</sup> The U.S.S. *Caron* and the U.S.S. *Yorktown* were tasked by Pentagon officials to enter Soviet waters off the southwestern tip of the Crimean peninsula and traverse eastward, parallel to the Crimean coastline, until they reentered international waters a few hours later.<sup>14</sup> The goal of the passages—which were to be continuous, expeditious and nonprejudicial to Soviet territorial sovereignty—was to manifest a nonprovocative exercise of the right of innocent passage.<sup>15</sup>

The U.S.S. *Caron* is a heavily armed Spruance class destroyer, with a 7800-ton displacement, configured for sophisticated intelligence gathering. A "modern-day Pueblo" as one author called it,<sup>16</sup> the *Caron's* missions routinely have involved freedom of navigation exercises, as well as intelligence related activities.<sup>17</sup> The U.S.S. *Yorktown*, an Aegis-class guided missile cruiser, with a 9600 ton displacement, is also heavily armed,

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<sup>12</sup> See *infra* notes 43-77, and accompanying text.

<sup>13</sup> Wilson, *Soviets Bump U.S. Ships in Black Sea*, WASH. POST, Feb 13, 1988, at A23, col. 1.

<sup>14</sup> Carroll, *Black Day on the Black Sea*, 18 ARMS CONTROL TODAY 14, at 16 (May 1988).

<sup>15</sup> UNCLOS III, *supra* note 5, art. 17: "[s]ubject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

<sup>16</sup> Arkin, *Spying in the Black Sea*, BULL. OF THE ATOMIC SCIENTISTS, May 1, 1988, at 5.

<sup>17</sup> *Id.* Arkin's article painstakingly traces the *Caron's* missions between 1980 and 1988, including 24 intelligence collection missions in the Atlantic Fleet, 16 separate intelligence missions off the coast of Central America, and three previous surveillance operations in the Black Sea. The following chronology, "compiled by the author from U.S. Navy sources," is included in Arkin's article:

1980:

March 20: Adm. Thomas Hayward, Chief of Naval Operations, visits the USS *CARON* (DD-970) at Norfolk, Virginia, to attend a briefing on the upcoming "Aggressive Knight" surveillance of the Soviet Kiev aircraft carrier battle group in waters above the Arctic Circle.

April 18-28: "Aggressive Knight" operations. September 30 - October 9. *CARON* conducts surveillance operations in the Baltic Sea, including port visits to Stockholm and Helsinki.

1981:

May 31- June 9: *CARON* and the frigate USS *MILLER* (FF-1091) conduct Baltic Sea surveillance operations

June 2-7: *CARON* and *MILLER* visit the port of Constanta, Romania.

having the primary mission of serving as a defensive escort for other ships. In tandem, these two very capable American warships entered the twelve nautical mile territorial sea claimed

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July 17: CARON conducts "Operation Eagle Eye," surveillance of the Soviet aircraft carrier KIEV in the western Mediterranean.

August 18-19: CARON conducts surveillance operations in the Gulf of Sidra, including the first tracking of Libyan Fitter fighters.

August 27- September 3: CARON participates in exercise "Magic Sword" in the Norwegian Sea, part of "Ocean Venture '81," and conducts over-the-horizon surveillance and targeting.

1982:

February 16-27, March 2-7, March 20- April 1: CARON conducts Central American intelligence collection operations.

1983:

April 15-22: CARON conducts southern Caribbean special operations and intelligence collection.

October 21: CARON is detached from the USS INDEPENDENCE (CV-62) battle group while transiting to the Mediterranean and is directed to Grenada. CARON is ordered to proceed at "max speed" to take up station as soon as possible.

October 23: CARON is the first United States Navy ship to arrive on station for "Operation Urgent Fury," the invasion of Grenada.

October 23 - November 2: CARON participates in the Grenada invasion, including artillery fire support, surveillance, and search and rescue operations. The ship spends most of its time 1-2 miles off the coast of Grenada.

November 15 - December 12: CARON conducts surveillance operations in the eastern Mediterranean off the coast of Lebanon.

1984:

January 3: CARON takes up position for 82 days of intelligence collection and artillery fire support off of Beirut. Much of the time, the destroyer is anchored only 1000 yards from the Lebanese coast.

March 30 - April 16: CARON conducts surveillance operations in the eastern Mediterranean.

November 6 - December 18: CARON conducts Central American special operations, including transit of the Panama Canal and intelligence collection in the eastern Pacific.

1985:

November 20 - December 9: CARON conducts surveillance operations in the eastern Mediterranean, including a port visit to Haifa, Israel.

December 9-13 the USS YORKTOWN (CG-48) and the CARON enter the Black Sea for the second United States Navy "Black Sea Ops" of the year. This is the first Aegis/Outboard team ever to go into the Black Sea.

1986:

January 1: CARON begins four months of duty in various "Operations in the vicinity of Libya," including Gulf of Sidra operations January 7 - February 1 and February 7-17.

March 10-17: CARON takes time out of Libya surveillance to conduct Black Sea operations with the USS YORKTOWN (CG-48), entering on March 10. On March 16 the ships come within six miles of the Crimean peninsula near Sevastopol. There are three Black Sea deployments in 1986.

March 18: The Soviet Union delivers a note to the American embassy in Moscow protesting the incursion of two United States Navy vessels into Soviet territorial waters. A White House spokesman says the vessels were testing the "right of innocent passage," and insists it was not meant to be [a] "provocative or defiant" deployment.

by the Soviet Union<sup>18</sup> and sailed eastward along the Crimean peninsula, coming within seven to ten miles of the Soviet coastline.<sup>19</sup> The *Caron* entered Soviet territorial waters first, followed closely thereafter by the *Yorktown*. Within fifteen minutes after their entry, the *Caron* and the *Yorktown* found themselves being "shadowed" by two Soviet naval vessels: the *Bezzavetny*, a Krivak I-class frigate with a 3900-ton displacement, and the *SKR-6*, a Mirka II-class light frigate with a 1100-ton displacement.<sup>20</sup> Both Soviet vessels had been dispatched from Sevastopol, homeport for the Russian navy's southern fleet, with directions to "intercept" the *Caron* and the *York-*

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March 22-29: CARON serves as flag ship for Destroyer Squadron 20 which leads a three-ship surface-action group to be the first vessel to cross the "line-of-death" in the Gulf of Sidra

April 16: CARON ends its operations in the vicinity of Libya.

1987:

April 13 - May 20: CARON conducts surveillance of Central America, including operations in the Caribbean and the eastern Pacific.

October 15-16: CARON conducts operations in the Gulf of Sidra.

December 1-6 CARON conducts surveillance operations in the eastern Mediterranean and finishes with late December port calls to Alexandria, Egypt, and Haifa, Israel.

1988:

February 12: CARON and USS YORKTOWN are bumped by two Soviet Navy frigates nine miles from the Crimean coast in the Black Sea.

*Id.* at 6

<sup>18</sup> The breadth of the Soviet territorial sea was not at issue. Cf. UNCLOS III, *supra* note 5, art. 3 ("[e]very state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention"). Although the United States is not a signatory to the UNCLOS III as a result of its controversial deep seabed mining provisions, it specifically has stated that it recognizes the nonseabed provisions of the Convention as an accurate reflection of customary international law that it is prepared to recognize and uphold, including those provisions relating to the creation of a 12 nautical mile territorial sea. See Statement on United States Ocean Policy, 19 Weekly Comp. of Pres. Doc. 383-85 (Mar. 14, 1985), reprinted in 22 I.L.M. 464 (1983); reprinted in U.S. Navy Dept., Naval Warfare Publication 9, Rev. A (NWP-9), THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS annex AS1-3 (1989) [hereinafter NWP-9]. For a thorough discussion concerning United States policy on the UNCLOS III—particularly regarding the deep seabed mining provisions and freedom of navigation—see 186 Cong. Rec. S3547-5550 (Apr. 18, 1990) (statement of James L. Malone).

<sup>19</sup> Cushman, *2 Soviet Warships Reportedly Nudge U.S. Navy Vessels*, N.Y. TIMES, Feb. 12, 1988, at A1, col. 1.

<sup>20</sup> Tisdall, *Senate Probes Black Sea Collision*, MANCHESTER GUARDIAN WEEKLY, Mar. 13, 1988, at 8; see SOVIET NAVY VESSELS BUMP U.S. WARSHIPS IN BLACK SEA; BOTH SIDES PROTEST, FACTS ON FILE WORLD NEWS DIGEST (Int'l Aff's Sec.), Feb. 19, 1988, at 99, col. F3; Levin, *Soviet Protest to USA Over Naval Vessel's Collision in Black Sea*, British Broadcasting Corporation radio broadcast (Feb. 13, 1988) (transcript available in BBC SUMMARY OF WORLD BROADCASTS, pt. 1, A(1), at 75).

town for their violations of the 1982 Law on the State Boundary and the 1983 Soviet Navigation Rules.<sup>21</sup>

Approximately eight miles off the southern tip of Crimea, between Sevastopol and Yalta, the Soviet vessels assumed a position between the American ships and the Crimean coastline. They then began to parallel the movement of the *Caron* and the *Yorktown*.<sup>22</sup> Apparently acting upon direct orders from Moscow,<sup>23</sup> the Commander of the Soviet Mirka-II class light frigate, the *SKR-6*, maneuvered to within fifty meters of the *Caron*. At the same time, the Krivak-class frigate, the *Bezzavetny*, positioned herself similarly in relation to the *Yorktown*.<sup>24</sup> Upon reaching her position opposite the *Yorktown*, the *Bezzavetny's* commander radioed the American guided missile cruiser and advised her that she had entered Soviet territorial waters.<sup>25</sup> The *Yorktown* acknowledged the communication, but continued forward on a steady course and speed.<sup>26</sup> The *Caron* did likewise. One more radio warning from the Soviets followed, but it went unacknowledged by the American war-

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<sup>21</sup> See *supra* notes, 9, 10; Lodge, *Soviet Union Says Ships Incident Undermines Relations With U.S.*, THE REUTER LIBRARY REP., A.M. cycle, Feb. 13, 1988.

<sup>22</sup> *Soviet Ships Tried to Oust Americans, PRAVDA Says*, THE REUTER LIBRARY REP., A.M. cycle, Feb. 14, 1988.

<sup>23</sup> Sale, *Analysts Believe Soviet Ramming Orders Came From Moscow*, UNITED PRESS INT'L, P.M. cycle, Feb. 29, 1988.

<sup>24</sup> See *Soviet Navy Vessels Bump U.S. Warships in Black Sea; Both Sides Protest*, *supra* note 20.

<sup>25</sup> Commander Vladimir Bogdashin of the *Bezzavetny* was quoted by Pravda as follows regarding his communications with the *Yorktown*:

I went on the 16th radio channel, the international one, and warned them. They answered that they understood. They did not change their course and speed. We took a position between the ships and the coast and tried to signal that their course was dangerous. There was no effect. The decision had already been taken: it was necessary to fulfill the order to force out the intruder, but it was not easy, at the speed of 18 to 20 knots to approach and drive [them] away.

*Soviet Ships Tried to Oust Americans, Pravda Says*, *supra* note 22. Bogdashin was further quoted by Pravda as follows:

It [the warning] had no effect! I made my decision: the order—[']shoulder out the violator[']—had to be fulfilled, but nonetheless, it wasn't easy: to close with and shoulder out a violator at a speed of 18 to 20 knots. It felt as if we were alongside a tanker . . . . As authorized, I had announced 'emergency quarters' a little earlier. I could hear them do the same. There was no thought of using weapons. It was the same with [the Commander] on board the *SKR-6*, by the way . . . . To be honest, no one in the command center put on his lifejacket, although the order had been given. The helmsman . . . did his work like a jeweler, executing all commands precisely. In short, we carried out our battle orders.

*U.S., Soviet Naval Ships Collide Off Crimea*, 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 20.

<sup>26</sup> *U.S., Soviet Naval Ships Collide Off Crimea*, *supra* note 25.

ships.<sup>27</sup> Almost immediately thereafter, and within minutes of one another, both the *Caron* and the *Yorktown* were "bumped"<sup>28</sup> on their port sides by their respective escorts—the *Caron* first by the Mirka-II class light frigate, then the *Yorktown* approximately three minutes later by the Krivak-I class frigate.<sup>29</sup> The Soviet vessels involved in this incident were significantly smaller than the American ships with which they made contact, and overall damage was negligible.<sup>30</sup> Thereafter, both the *Caron* and the *Yorktown* continued on course and completed their transit through Soviet waters. No further incidents took place, but the American ships remained under escort until they reentered international waters.<sup>31</sup>

Both the United States and the Soviet Union exchanged a series of diplomatic protests over the Black Sea bumping incident.<sup>32</sup> Admiral Konstantin Markov, First Deputy Commander

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<sup>27</sup> Gorokhov, *What Business Do They Have Off Our Coast? Impermissible Actions of the U.S. Navy*, PRAVDA, Feb. 14, 1988, at 14 translated and reprinted in 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1988, no. 7, at 19. Captain Jerry Flynn, a spokesman for the Chief of Naval Operations, reported that the warning contained in the radio message was as follows: "Soviet ships have orders to prevent violation of territorial waters. I am authorized to strike your ship with one of ours." The American ships failed to respond in any manner to this second warning. As Captain Flynn put it in statements he made to reporters at the Pentagon, "[w]e made no response . . . our response was to continue on course and speed as any prudent mariner would have." Aldinger, U.S., *Soviet Warships Collide in Black Sea, Pentagon Says*, REUTER LIBRARY REP., A.M. cycle, Feb. 12, 1988; see also Wilson, *supra* note 18.

<sup>28</sup> The Soviet action has been described variously in news articles and periodicals as "bumping," "shouldering," "nudging," "grazing," "sideswiping," and "colliding." This article uses the term "bumping" in its literal sense—that is to come, more or less, violently in contact with.

<sup>29</sup> Hitt, *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VA. J. INT'L L. 713, 714 (1989).

<sup>30</sup> *Soviet Navy Vessels Bump U.S. Warships in Black Sea; Both Sides Protest Incident*, *supra* note 20. It has been speculated that the Soviets intentionally dispatched vessels "a seventh the size of the intruders" to conduct this operation to minimize the potential for actual hostilities and keep the confrontation in check. Tisdall, *supra* note 20. *Russia and America; Things That Go Bump*, THE ECONOMIST (Int'l Ed.) Feb. 20, 1988, at 46.

<sup>31</sup> Levin *supra* note 20.

<sup>32</sup> On Feb. 12, 1988, American officials filed a formal protest over the incident with Yuri Dubinin, then Soviet Ambassador to Washington, alleging that the Soviets deliberately had rammed American vessels that were engaged in innocent passage. The following day, Soviet Foreign Ministry Spokesman Gennadi Gerasimov formally complained on behalf of the Soviet Government that the American ships were at fault. Lee, *Soviets Protest Collision of Warships in Black Sea; Moscow Blames Incident on U.S. Vessels*, WASH. POST, Feb. 14, 1986, at A46, col. 1. The U.S.S.R. Ministry of Foreign Affairs protest stated:

On Feb. 12, 1988, two U.S. naval vessels, the destroyer CARON, at 10:45 a.m. (Moscow time), and the cruiser YORKTOWN, at 11:08 a.m., violated the USSR's state border in the vicinity of the south coast of the Crimea, at a point with the coordinates 44 degrees 15.8 minutes north latitude and 33 degrees 30.0 minutes east longitude. The U.S. ships did not react to warning signals, given in good time by Soviet border craft, that they were nearing the USSR state border, and they did

in Chief of the Soviet Navy, initially denied that Soviet vessels had rammed the American ships deliberately. He alleged that the American vessels caused the "collision" by ignoring warning signals and by maneuvering dangerously after entering Soviet territorial waters.<sup>33</sup> However, because incontrovertible evidence was gathered proving that the Soviet ships had intentionally bumped the *Caron* and the *Yorktown* while they maintained steady courses and speeds,<sup>34</sup> Markov retreated from his position. The Soviets then proffered the argument that the American vessels' passages through Soviet territorial waters in the Black Sea was not innocent because they violated the Soviet Union's 1982 Law on the State Border and the 1983 Soviet Navigation Rules.<sup>35</sup> Marlen Volosvov, Chief Secretary of the Soviet Law of the Sea Association, opined that the passages were illegal because "[m]aritime laws specify that warships while exercising the right of innocent passage should strictly observe the requirements of the littoral state so as to prevent breaches of safety and good order in foreign territorial waters."<sup>36</sup> Because the passages of the *Caron* and the *Yorktown* had not taken place in one of the five routes specified for transit by the 1983 Soviet Navigation Rules, the Soviets viewed them as violations of their sovereignty in contravention of their domestic legislation, customary international law, and the UNCLOS III.<sup>37</sup> Furthermore, the Soviets argued that the passages of the American warships were not innocent because they were navigationally unnecessary—that is, the

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not make suggested changes in their course. After having gone a considerable distance into USSR territorial waters, the U.S. warships did some dangerous maneuvering, which led to a collision with Soviet warships. Despite the collision, the cruiser *Yorktown* and the destroyer *CARON* remained inside the territorial waters and left them only at 12:49 p.m. . . . The responsibility for the provocation that was committed that led to the collision between warships of the two countries, rests wholly and completely with the American side. . . .

*Resolute Protest of the Ministry of Foreign Affairs of the USSR*, PRAVDA, Feb. 14, 1986, at 4, reprinted in 40 CURRENT DIGEST OF THE SOVIET PRESS, Mar. 16, 1986, no. 7, at 19.

<sup>33</sup> See authorities cited *supra* note 32.

<sup>34</sup> The United States Navy produced videotapes taken from the bridge of each vessel that had recorded both bumping episodes, and which clearly demonstrated that neither the *Caron* nor the *Yorktown* were "maneuvering dangerously." Additionally, recordings of the radio transmissions from the Soviet ship Commander indicating that "I am authorized to strike your ship with one of ours" were available to demonstrate that the Soviets had initiated the incident. Lee, *supra* note 31; and see U.S. Navy videotape (copy on file, International Law Division, The Army JAG School, Charlottesville, Va.).

<sup>35</sup> *supra* notes 9 and 10.

<sup>36</sup> *Soviet Lawyer on the Incident in the Black Sea*, TASS (Feb. 16, 1986).

<sup>37</sup> *Id.*

*Caron* and the *Yorktown* could have transited the Black Sea in international waters instead of through Soviet territorial sea.<sup>38</sup>

The position of the United States was clear and unambiguous—the transits of the *Caron* and the *Yorktown* were valid exercises of the right of innocent passage.<sup>39</sup> Richard L. Armitage, then Assistant Secretary of Defense for International Security Affairs, acknowledged that, from an operational standpoint, the transits were not necessary.<sup>40</sup> He asserted that, despite the absence of necessity, as long as a passage is continuous, expeditious, and conducted in a manner not prejudicial to the peace, good order, or security of the littoral state, it is innocent.<sup>41</sup> The United States went on to acknowledge that the Black Sea transits specifically had been commissioned as part of its ongoing Freedom of Navigation program.<sup>42</sup>

### III. The Freedom of Navigation Program

The United States' commitment to preserving and protecting maritime rights and freedoms is no better exemplified than in its Freedom of Navigation (FON) program. Recognizing that the many navigational rights it currently enjoys may be lost over time if not used, this program charts a steady course for actively asserting these freedoms globally to ensure their continued viability.<sup>43</sup> Because the United States did not sign or ratify the UNCLOS III, but nevertheless accepts its navigational principles as customary international law, a continuing obligation exists to exercise these rights to preserve them.<sup>44</sup> At the heart of customary international law is assertion and activism. In other words, "[t]o protect our navigational rights and freedoms we must exercise them."<sup>45</sup> The Freedom of Navigation program accomplishes this by targeting and operationally challenging maritime claims that are in contravention of

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<sup>38</sup> Carroll, *supra* note 14, at 15; Rubin, *Innocent Passage in the Black Sea?* CHRISTIAN SCI. MONITOR, Mar. 1, 1988, at 14, col. 1; see Schachte, *The Black Sea Challenge*, 114 U.S. NAVAL INSTITUTE PROCEEDINGS 62 (June 1988).

<sup>39</sup> Armitage, *Asserting U.S. Rights On the Black Sea*, 18 ARMS CONTROL TODAY, May 1988, at 17.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Campbell, *USS Caron's Black Sea Scraps Furthered International Law, National Interest*, THE VIRGINIAN-PILOT AND THE LEDGER STAR, June 12, 1988, at C3, col. 1.

<sup>43</sup> Negroponte, *supra* note 1, at 42.

<sup>44</sup> Leich, *U.S. Practice (Law of the Sea)*, 84 AM. J. INT'L L. 237, 240-241 (Jan. 1990). Negroponte, *Current Developments in the U.S. Oceans Policy*, Dep't St. Bull., Sept. 1986, at 84; see also Negroponte, *supra*, note 1.

<sup>45</sup> Schachte, *supra* note 38, at 62.



international law. The 1982 Soviet Border Rules and the 1983 Soviet Navigation Rules, which attempted to thwart innocent passage in the Black Sea, are exactly the type of maritime claim that the program was designed to challenge.<sup>46</sup>

The program was created in 1979 during the final year of the Carter Administration.<sup>47</sup> The feeling at the time was that "even with a widely ratified Law of the Sea Treaty to which the United States was a party, it still would be necessary to exercise the rights set forth in the convention in order not to lose them."<sup>48</sup> President Carter himself made this point clear in announcing the new program. "Due to its preeminent position [in world affairs], the United States feels compelled actively to protect its rights from unlawful encroachment by coastal states."<sup>49</sup> The 1983 presidential ocean policy statement by President Reagan further committed the United States to this concept:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 Law of the Sea] Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related uses of the high seas.<sup>50</sup>

The Bush Administration has continued this course, essentially adopting the 1983 ocean policy statement as its own fundamental platform.<sup>51</sup>

The exercise of navigational rights by the United States is not intended to be provocative or threatening, nor does it seek to challenge lawful exercises of coastal state sovereignty over its territorial waters.<sup>52</sup> "Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more."<sup>53</sup> Noteworthy also is the fact

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<sup>46</sup> Rose, *Naval Activity in the EEZ—Troubled Waters Ahead*, 39 NAVAL L. REV. 67, 85-86 (1990); see GIST 2, *supra* note 8.

<sup>47</sup> Rose, *supra* note 46, at 85.

<sup>48</sup> Negroponce, *supra* note 1, at 42.

<sup>49</sup> Dep't of St. Bureau of Pub. Aff., U.S. Freedom of Navigation Program, GIST 1 (Dec. 1988) [hereinafter GIST 1].

<sup>50</sup> Statement on United States Ocean Policy, *supra* note 18, at 384.

<sup>51</sup> Malone, *Law of the Sea—Again*, Statement to Congress, 136 CONG. REC. S5547-5550, at 5548 (Apr. 18, 1990).

<sup>52</sup> GIST 2, *supra* note 8.

<sup>53</sup> Negroponce, *supra* note 1, at 42.

that, in theory, no state is immune. The program purports to reject impartially the excessive maritime claims of "allied, friendly, neutral, and unfriendly states alike."<sup>54</sup>

The goals of the Freedom of Navigation program are accomplished by the following three-step approach:

#### *A. Informal Diplomatic Assertion*

The United States endeavors to resolve alleged unlawful maritime claims at the lowest level possible. This is done in two ways. First it will make a diplomatic attempt to guide state practice toward general acceptance of the UNCLOS III provisions through bilateral negotiations.<sup>55</sup> Influencing state legislation prospectively is much easier than attempting to change it retrospectively, and American representatives involve themselves with other countries to encourage conformance with the Law of the Sea.<sup>56</sup> Second, the State Department will select an unlawful maritime claim and seek, through informal diplomatic channels, to convince the state involved to conform its claim to international law. Most often this action is taken through informal protests and negotiations.<sup>57</sup>

#### *B. Formal Diplomatic Assertion*

When appropriate, the State Department will file a formal, written diplomatic protest that addresses specific objectionable maritime claims of other states.<sup>58</sup> More than seventy of these protests have been filed since 1948, and more than fifty since the inception of the Freedom of Navigation program in 1979.<sup>59</sup>

#### *C. Operational Assertion of Rights*

When diplomatic efforts prove to be inadequate, components of both the Navy and the Air Force may be called upon to assert freedom of navigation rights. "Operational assertions

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<sup>54</sup> GIST 2, *supra* note 8.

<sup>55</sup> Negroponte, *supra* note 44, at 84.

<sup>56</sup> A good example of how this process takes place is the negotiations that took place with Fiji to convince that state to conform its archipelagic legislation to the archipelagic articles in the UNCLOS III. *Id.* at 85.

<sup>57</sup> GIST 2, *supra* note 8.

<sup>58</sup> *Id.*

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

tangibly manifest U.S. determination not to acquiesce in excessive claims to maritime jurisdiction by other countries."<sup>60</sup> Carried out against friend and foe alike, Freedom of Navigation exercises are the most controversial prong of the three-step approach. Generally speaking, this assertion-of-rights program has been used to challenge:

- (1) Inflated historic waters claims;<sup>61</sup>
- (2) Improperly drawn baselines for measuring maritime claims;<sup>62</sup>
- (3) Territorial sea claims greater than twelve nautical miles;<sup>63</sup>
- (4) Territorial sea claims that impose impermissible restrictions on the right of innocent passage for any type of vessel, such as requiring prior notification or authorization for passage;<sup>64</sup>
- (5) Excessive jurisdictional claims in areas beyond the territorial sea of a nation that have the effect of restricting high seas freedoms, such as in the exclusive economic zone (EEZ), or in so called "security zones."<sup>65</sup>

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<sup>60</sup> Since World War II, more than 75 coastal nations have asserted various maritime claims that the United States believes are inconsistent with the Law of the Sea and threaten the freedom of navigation. *Id.*; see Leich, *supra* note 44, at 241.

<sup>61</sup> Perhaps the most notorious of these was Libya's claim that the Gulf of Sidra is an "historic bay" permitting closure across its mouth—a closure line of approximately 300 miles—and qualifies for treatment as "internal waters." This claim, first advanced in 1979, has not been accepted by the international community and is frequently challenged. See UNCLOS III, *supra* note 5, art. 10(6); see NWP-9, *supra* note 18, at 1-10, n.10.

<sup>62</sup> Articles 5 through 14 of UNCLOS III, *supra* note 5, provide details on the various types of baselines and how they are drawn. Maritime boundaries, as determined by the proper or improper drawing of the various baselines, are frequently a source of contention among nations. See NWP-9, *supra* note 18, 1-3, n.9.

<sup>63</sup> Article 3 of UNCLOS III, *supra* note 5, proclaims that "[e]very state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this convention." Currently, there are 20 nations that claim territorial seas in excess of 12 nautical miles. The following nations claim a 200 nautical mile territorial sea: Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia, and Uruguay. NWP-9, *supra* note 18, table ST1-5.

<sup>64</sup> See NWP-9, *supra* note 18, annex A52-17B.

<sup>65</sup> *Id.* at 2-44, n.91. Freedom of navigation and overflight may not be unduly restricted or impeded in the EEZ. UNCLOS III, *supra* note 5, arts. 56, 58, 60; see also Rose, *supra* note 46, at 73-76. Similar rules apply in regard to declared security and defense zones in time of peace. NWP-9, *supra* note 18, at 2-44.

(6) Archipelagic claims not in conformance with UNCLOS III,<sup>66</sup>

(7) Territorial sea claims that overlap international straits, but prohibit or inhibit the right of innocent or transit passage.<sup>67</sup>

To reduce the inevitable political friction that results from the conduct of Freedom of Navigation exercises, they are almost always highly classified in nature.<sup>68</sup> This approach, however, conflicts with the notion that these challenges should be open and notorious to clearly communicate that the United States does not recognize the particular claim involved.<sup>69</sup> The impact of "stealth" Freedom of Navigation exercises on customary international law formulation is, no doubt, a matter subject to much debate.<sup>70</sup>

The United States recognizes that there will be times when the political costs of asserting Freedom of Navigation rights will be high.<sup>71</sup> However, if the major maritime powers do not jointly take action to regularly assert their international rights in the face of claims by others that do not conform to the law, "they will be said to acquiesce in those claims to their disadvantage."<sup>72</sup> The world community may not allow itself to be "coerced into lethargy" in the protection of the freedom of the seas.<sup>73</sup>

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<sup>66</sup> Frequently, these claims involve improper drawing of archipelagic baselines, or conduct that inhibits archipelagic sealane passage, such as submerged transit by submarines or overflight by aircraft. See NWP-9 *supra* note 18, at 2-44, n.91; UNCLOS III, *supra* note 5, arts. 52, 53, 54.

<sup>67</sup> These claims would include requirements for advance notification or authorization prior to exercising transit passage rights, or the application of requirements in a discriminatory manner. NWP-9, *supra* note 18, at § 2.3.3.1.

<sup>68</sup> Coll, *supra* note 4, at 112-13.

<sup>69</sup> *Id.*

<sup>70</sup> One author commented on this problem as it relates to excessive EEZ claims:

So long as challenges to objectionable EEZ's go undetected or are left unpublished, they have little impact on reducing coastal nation expectations or influencing any rollback of excessive claims . . . . To keep the public thrust of our FON program in balance . . . the United States needs to increase the tempo of its visible FON operations within such EEZ's, and also to make public those challenges actually conducted.

Rose, *supra* note 46, at 86-87.

<sup>71</sup> The political notoriety of the 1986 U.S. Freedom of Navigation challenge to Libya's closing of the Gulf of Sidra as an "historic bay" and the drawing of a so-called "line-of-death" across the Gulf's mouth, is a good example of what is at stake in this program. See Parks, *Crossing the Line*, U.S. NAVAL INST. PROC., 41-43 (Nov. 1986); Blum, *The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668 (1986).

<sup>72</sup> Negroponte, *supra* note 1, at 44-45.

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

There was nothing at all lethargic about the American challenges to disputed Soviet maritime claims in the Black Sea. The 1988 bumping incident was the culmination of at least two prior Freedom of Navigation exercises by the United States in those waters.<sup>74</sup> Ironically, on each of the three known occasions when Black Sea challenges were conducted, the *Caron* and the *Yorktown* were involved.<sup>75</sup> From 1984 on, their biennial presence in the Soviet territorial sea steadfastly demonstrated American resolve in asserting global freedom of navigation and the right of innocent passage, despite the potential for political friction. The use of United States naval warships in the exercise of disputed navigational rights carries the very real risk of conflict:

Within DOD, there is also a sober appreciation that the literal testing of the waters required by a FON strategy involves risk of confrontation and escalation . . . . The FON program serves as a barometer of American willingness to run risks to preserve maritime freedoms . . . . As long as American policy makers choose to reject the 1982 Convention and rely instead on customary law, there is no viable alternative to the FON strategy. The essence of customary international law is activism—the will to act in situations where law is made, and unmade, by acquiescence.<sup>76</sup>

The right of innocent passage through the territorial waters of coastal states is integral to American interests, which span the world's oceans—both politically and economically.<sup>77</sup> The "activism" required to maintain this fundamental customary law regime will continue to place maritime nations potentially in harm's way unless consensus can be reached. The UNCLOS III purported to provide the world community with an exhaustive and objective list of criteria that would define passage as innocent or noninnocent. Nevertheless, state practice since 1982

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<sup>74</sup> The March 13, 1986, Freedom of Navigation exercise was virtually identical to the 1988 exercise. The 1984 exercise resulted in no official Soviet protest. The 1986 exercise, on the other hand, created a storm of controversy and resulted in the U.S.S.R. filing formal diplomatic protests with the United States. See Wilson, *Soviet Ships Shadowed U.S. Vessels' Transit: Black Sea Maneuver Similar to One in 1984*, WASH. POST, Mar. 20, 1986, A33, col.1; Hanson, *U.S. Says Its Ships Entered Soviet Waters Legally*, REUTERS NORTH EUROPEAN SERV., A.M. cycle, Mar. 18, 1986; *U.S. Denies Charges of Violating Soviet Territorial Waters*, THE XINHUA GENERAL OVERSEAS NEWS SERV., Mar. 19, 1986; Halloran, *Two U.S. Ships Enter Soviet Waters Off Crimea To Gather Intelligence*, N.Y. TIMES, Mar. 19, 1986, at A1, col. 4.

<sup>75</sup> See Arkin, *supra* note 17.

<sup>76</sup> *Id.* at 87.

<sup>77</sup> GIST 2, *supra* note 8.

has demonstrated that the regime is still very unclear and yet unsettled. Reaching a consensus on the fundamental concept of "innocence" has proven to be virtually impossible, and the resulting uncertainty threatens to incapacitate this most essential navigational principle.

#### IV. How "Innocent" Must Passage Be?

##### A. *Innocent Passage Under the UNCLOS III*

The UNCLOS III, which opened for signature in Jamaica on December 10, 1982, addressed innocent passage in a manner thought to represent the definitive and conclusive statement on the navigation of foreign vessels in a coastal state's territorial sea.<sup>78</sup> Article 17 of the UNCLOS III guarantees to ships of all states, coastal or landlocked, the "right of innocent passage through the territorial sea."<sup>79</sup> Article 18 examines the meaning of the term "passage" in some detail, and mandates that it be conducted in a "continuous and expeditious" manner.<sup>80</sup> The "heart" of the innocent passage provisions is contained in article 19, which seeks to define the right objectively by specifying noninnocent activity as follows:

(1) Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

(2) Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in viola-

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<sup>78</sup> Ngantcha, *supra* note 2, at 43

<sup>79</sup> UNCLOS III, *supra* note 5.

<sup>80</sup> 1. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

tion of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence [sic] or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence [sic] or security of the coastal State;

(e) the launching, landing or taking onboard of any aircraft;

(f) the launching, landing or taking onboard of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity which does not have a direct bearing on passage.<sup>81</sup>

Article 20 mandates that a submarine navigate on the surface and show its flag for its passage to be innocent. Article 21 allows coastal states the right to adopt laws and regulations relating to innocent passage that have in mind the following:

(a) the safety of navigation and the regulation of maritime traffic;

(b) the protection of navigational aids and facilities and other facilities or installations;

(c) the protection of cables and pipelines;

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<sup>81</sup> *Id.* art. 19.

- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal state;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal States.<sup>82</sup>

When safety of navigation is a concern, article 22 allows coastal States to require foreign ships exercising the right of innocent passage to use specifically designated sea lanes and traffic separation schemes.<sup>83</sup> Article 24 cautions coastal states not to "hamper the innocent passage of foreign ships through the territorial sea", and specifically not to

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.<sup>84</sup>

Article 25 provides coastal states with an enforcement mechanism for handling noninnocent passage. All "necessary steps" may be taken within a state's territorial sea to prevent passage that is not innocent, including any breach of a condition of admission to internal waters or for a port call.<sup>85</sup> This article also allows the temporary suspension of the right of innocent passage if essential for the protection of coastal state security.<sup>86</sup> Articles 29 and 30 purport to tailor the innocent passage provisions to warships. Article 29 defines a warship as "a ship belonging to the armed forces of a State . . . under the command of an officer duly commissioned by the government of [that] State . . . and manned by a crew which is under regu-

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<sup>82</sup> *Id.* art. 21.

<sup>83</sup> *Id.* art. 22(1). "In particular tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes." *Id.* art. 22(2).

<sup>84</sup> *Id.* art. 24(1) (emphasis added).

<sup>85</sup> *Id.* art. 25(1), (2).

<sup>86</sup> *Id.* art. 25(3).



lar armed forces discipline."<sup>87</sup> Article 30 makes it abundantly clear that if a warship fails to comply with a coastal state's rules adopted pursuant to articles 21 and 22, it may be required to leave state territorial waters immediately.<sup>88</sup>

In considering these provisions against the backdrop of the Black Sea bumping incident of 1988, it is important to note what specifically was *not* mentioned in the UNCLOS III. First, there is no provision stating that a warship must request authorization for, or give prior notification of, its exercise of the right of innocent passage through another state's territorial waters. Second, there is no requirement that passage through a state's territorial waters be necessary for it to be innocent. Finally, no provision states that, to be innocent, the passage must be via the shortest, most direct means available.<sup>89</sup>

Those who view the UNCLOS III as a codification of customary international law principles frequently claim that the exclusion of these matters indicates that they have no continuing efficacy in international law. That, however, may be too simple an explanation. A persuasive counter-argument cites the language in the preamble to the UNCLOS III, which states, ". . . matters not regulated by this Convention continue to be governed by the rules and principles of general international law."<sup>90</sup> The proposition that the preamble makes is that the UNCLOS III clarified many existing principles of the Law of the Sea, but was not intended to exclude matters that had gained general acceptance as customary law.<sup>91</sup> Support for this interpretation also is found in article 19(1), which not only defines innocent passage, but also states that "[s]uch passage shall take place in conformity with this Convention *and with other rules of international law.*" The United States has taken the position that article 19 contains an "all-inclusive" listing of

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<sup>87</sup> *Id.* art. 29.

<sup>88</sup> *Id.* art. 30.

<sup>89</sup> Article 18 does define "passage" as "continuous and expeditious" navigation through the territorial sea. *Id.* art. 18(2). Some have read into this provision a collateral obligation that the route taken during innocent passage must be the shortest and most direct for it to be truly "expeditious." See R. SOROKIN, INNOCENT PASSAGE OF WARSHIPS THROUGH TERRITORIAL WATERS, *MORSKOISBORNIK*, no. 3 (1986); Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, 41 *NAVAL WAR COLLEGE REV.*, 52 (Spring 1988); see also Tarhanov, *The International Law Aspects of the Activities of the Naval Fleet of USSR in the World Ocean*, quoted in Jin, *The Question of Innocent Passage for Warships After UNCLOS III*, 19 *MARINE POLICY* 56, 64-65 (Jan. 1989).

<sup>90</sup> UNCLOS III, *supra* note 5, preamble.

<sup>91</sup> *Id.* (*emphasis added*); see F. NGANTCHA, *supra* note 2, at 147.

activities incompatible with innocent passage.<sup>92</sup> To be noninnocent, the activity must be expressly proscribed by article 19.<sup>93</sup>

### B. The Soviet Union's Position on Innocence of Passage

With the above discussion in mind, it is important to clarify the specific objections that the Soviet Union voiced to the 1988 transits by the *Caron* and the *Yorktown* through its territorial waters in the Black Sea. The objections were twofold. First, passage of warships through Soviet territorial waters is not innocent when it fails to comply strictly with coastal state domestic laws—in this case, the 1982 Law on the State Border and the 1983 Soviet Navigation Rules.<sup>94</sup> Secondly, because the transits through the Soviet territorial sea were not necessary, and were undertaken solely to challenge Soviet domestic law, they were not innocent.

Notably absent was any allegation by the Soviet Union that the *Caron* and the *Yorktown* were engaged in intelligence collection activity. This is somewhat surprising considering the *Caron's* configuration for sophisticated intelligence collection and her history of assignments.<sup>95</sup> Numerous non-Soviet pundits were quick to leap to the conclusion that this passage was tainted because of the intelligence gathering past of the *Caron*.<sup>96</sup> The Soviets ostensibly "knew better."<sup>97</sup> Had intelligence gathering actually been involved, there is little doubt that the transit would have been in violation of the innocent passage regime.<sup>98</sup> In determining innocence, a distinction must

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<sup>92</sup> See NWP-9, *supra* note 18, at 2-9, n 26; Neubauer, *supra* note 89, at 54.

<sup>93</sup> *Id.*

<sup>94</sup> See 1983 Soviet Navigation Rules, *supra* note 9.

<sup>95</sup> See Arkin, *supra* note 16; *supra* note 17 (chronology of the *Caron's* alleged intelligence gathering activity).

<sup>96</sup> See Carroll, *supra* note 14; Arkin, *supra* notes 16, 17; Rubin, *supra* note 38.

<sup>97</sup> See Campbell, *supra* note 42.

It is noteworthy that . . . accusations of intelligence collection in the Soviet territorial sea were not made by the Soviet government. Neither in bridge-to-bridge communications during the incident, nor in their protests thereafter did Soviet authorities assert that the ships were illegally gathering intelligence. The Soviets knew better. On the contrary, they confined their complaints to the bald proposition that the ships were purportedly violating Soviet borders.

*Id.*

<sup>98</sup> Article 19(2)(c). UNCLOS III, *supra* note 5, specifically states that ". . . any act aimed at collecting information to the prejudice of the defence (sic) or security of the coastal State . . ." will render passage not innocent. This Article, frequently referred to as the "PUEBLO clause," envisions that a voyage undertaken in whole or in part to test coastal state defenses, or for passive listening and sensory activities, will not be

be drawn between the actual activity of the vessel during its passage as opposed to simply its capabilities.<sup>99</sup> Prohibited activity in the territorial sea is the only way passage may be rendered improper. Mere possession of passive characteristics, such as combat or intelligence gathering capabilities, does not disqualify passage from being innocent.<sup>100</sup> No evidence exists that would suggest that the *Caron* or the *Yorktown* were engaged in intelligence gathering, and the fact that they were clearly capable of this activity is irrelevant in determining the innocent nature of their passages.<sup>101</sup>

Soviet policy on innocent passage as reflected in its 1982 Soviet Border Rules and the 1983 Soviet Navigation Rules<sup>102</sup> represented a complete reversal of Soviet doctrine on this matter as it had existed since World War II. The claim that coastal states were entitled to limit the passage of warships to specific or traditional routes, thereby excluding them from other areas, was a new Soviet assertion.<sup>103</sup> Prior to the adoption of its 1983 Navigation Rules, "Soviet legislation and practice . . . was fully consistent with the prevailing customary rules of international law governing the right of innocent passage in the territorial waters of a coastal state."<sup>104</sup> As one of the predominant maritime powers, the Soviet Union was at the forefront of the coalition striving for liberal interpretation for innocent passage during the negotiations leading up to the UNCLOS III.<sup>105</sup> This is perhaps best evidenced by the fact that the Soviets specifically had opposed the notion that innocent passage could be conditioned upon prior approval from, or notification of, the coastal state.<sup>106</sup> Accordingly, the United States was surprised when the Soviets objected to the transit of American

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considered innocent. See Butler, *Innocent Passage and the 1982 Convention: the Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331, 345 (1987).

<sup>99</sup> de Vries Reilingh, *supra* note 6, at 36.

<sup>100</sup> Burnett, *Mediterranean Mare Clausum in the Year 2000?: An International Law Analysis of Peacetime Military Navigation in the Mediterranean*, 34 NAVAL L. REV. 75, 107 (1985).

<sup>101</sup> Campbell, *supra* note 42. UNCLOS III, *supra* note 5, art. 19 protects warships' rights in that "it states an objective rule under which a ship's actual conduct, rather than its capabilities or the coastal State's subjective fears, determine the innocence of passage." Hitt, *supra* note 29, at 721; see also Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 853.

<sup>102</sup> See *supra* note 9.

<sup>103</sup> Neubauer, *supra* note 89, at 50; see Jin, *supra* note 89, at 63-65.

<sup>104</sup> Butler, *supra* note 98, at 332.

<sup>105</sup> Neubauer, *supra* note 89, at 53-54.

<sup>106</sup> *Id.* at 54.

warships through its Black Sea territorial waters—not because of their behavior, but simply because of their presence.<sup>107</sup>

The Soviet's legal argument for objecting was pedestrian, at best—because there were "no traditional seaways" in the Black Sea, entry by American vessels was per se improper.<sup>108</sup> Admiral Markov and Soviet Foreign Ministry spokesman, Genady Gerasimov, attempted to clarify this position in a briefing held for foreign correspondents on February 13, 1988.<sup>109</sup>

[T]here exists a [1982] law on the protection of the state borders of the Soviet Union. This law does not provide for the right, as you put it, of peaceful passage of naval vessels of any country through Soviet territorial waters in the area of the Black Sea. I think that the strict observance and respect, mutual respect, of the inviolability of the state borders of the sides (sic) is in the interests of the entire world community . . . .<sup>110</sup>

Professor Marlen Volosov, Chief Secretary of the Soviet Law of the Sea Association, reasoned that "[m]aritime laws specify that warships, while exercising the right of innocent passage, should strictly observe the requirements of the littoral state so as to prevent breaches of safety and good order in foreign territorial waters."<sup>111</sup> He went on to allege that

[American] allusions to the so-called "right of innocent passage" won't hold water. . . . Under the legislation existing in the USSR foreign warships may not exercise this right in the given area of the Black Sea, because there are no designated routes for international shipping. The U.S. navymen (sic) knew that well enough. Nevertheless they resorted to an unlawful action.<sup>112</sup>

In a nutshell, the position of the Soviets was that innocent passage in its territorial waters could occur only where it de-

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<sup>107</sup> Butler, *supra* note 98, at 345.

<sup>108</sup> Walker, *Moscow Claims U.S. Ships Were Spying*, THE TIMES (London), Mar. 21, 1986, at 7, col. 1.

<sup>109</sup> See Levin, *supra* note 20, at A(1).

<sup>110</sup> *Id.* (comments of Admiral Markov) Mr. Gerasimov added,

As regards the legal side of the issue, there is a handbook of international law which says precisely that during passage through territorial waters naval vessels must conform to the instructions which they may receive from the local naval or border command. There were such instructions, and [the U.S.] ignored them.

*Id.*

<sup>111</sup> *Soviet Lawyer on the Incident in the Black Sea*, *supra* note 36.

<sup>112</sup> *Id.*

creed that the right existed. This was a position that the United States was unwilling to recognize or accept—a position that obviously was ripe for challenge via the Freedom of Navigation program.

*C. The United States' Position: The Presumption of Innocence*

The United States was quick to respond to what it viewed as an unreasonable assertion by the Soviet Union. Applying a strict interpretation of the international law rules as codified by the UNCLOS III, it argued that a presumption of innocence applied to passage of warships through foreign territorial waters until such time as noninnocence clearly could be demonstrated within the context of article 19.<sup>113</sup> The burden of rebutting this presumption of innocence falls upon the coastal state, which is relegated to using the objective and specific criteria contained in article 19.<sup>114</sup> Ostensibly, the article 19 list is finite, and "makes certain" noninnocent activities.<sup>115</sup> Nowhere in the article 19 criteria, or anywhere else within the UNCLOS III, is authority expressly or implicitly given to coastal states to preclude innocent passage by an act of omission. In other words, "the right of innocent passage is not a 'gift' of the coastal state to passing vessels but a limitation of its sovereignty in the interests of international intercourse."<sup>116</sup> The Soviets could not preclude the right of innocent passage simply by failing to designate a "traditional sea lane" for that passage. Article 24 specifically cautions against any state action aimed at hampering innocent passage of any vessel, or having the "practical effect of denying or impairing the right. . . ."<sup>117</sup> Furthermore, no logical argument could be made that the preclusion of passage in the Black Sea was required for reasons of "safety of navigation" so as to allow the operative provisions of article 22 to come into effect.<sup>118</sup>

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<sup>113</sup> See UNCLOS III, *supra* note 5, art. 19.

<sup>114</sup> Neubauer, *supra* note 89, at 55.

<sup>115</sup> *Id.*; see Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 659 (1984); Ghosh, *The Legal Regime of Innocent Passage Through the Territorial Sea*, 20 INDIAN J. INT'L L. 216, 238 (1980). For a contrary view arguing that the list of activities contained in art. 19 is not intended to be exhaustive, see Burnett, *supra* note 98, at 108.

<sup>116</sup> Butler, *supra* note 98, at 346.

<sup>117</sup> UNCLOS III, *supra* note 5, art. 24.

<sup>118</sup> *Id.* art. 22.

The coastal States may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

The United States was similarly acrimonious over the Soviet claims that, for passage to be innocent, it must be necessary, and that Freedom of Navigation exercises are, by definition, not "necessary" passage.<sup>119</sup> Professor Richard Grunawalt of the Naval War College addressed the "necessity" argument this way:

[The implication is] that if the passage is undertaken for the purpose of demonstrating that the international community may lawfully engage in navigational freedoms articulated in the 1982 LOS Convention, it is somehow prejudicial to the peace, good order, or security of the coastal state. That notion stands the concept of innocent passage on its head.<sup>120</sup>

Grunawalt correctly reiterated a long-recognized principle in international law that "passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal state."<sup>121</sup> The fact that alternate routes outside territorial waters are available does not disqualify passage from being innocent, nor does the fact

*Id.* In the designation of sea lanes pursuant to this Article, the coastal state must take into account:

- (a) the recommendations of the competent international organization;
- (b) any channels customarily used for international navigation;
- (c) the special characteristics of particular ships and channels; and
- (d) the density of traffic.

*Id.*

<sup>119</sup> See Carroll, *supra* note 14, at 14; Rubin *supra* note 38, *cf.* Armitage, *supra* note 39. Rubin states the Soviet position when he says, "[i]t appears to have been conceded . . . that the rules permitting 'innocent passage' apply only when there is reason for the passage other than naval exercises or display of the flag. In the Black Sea incident there was no such reason. Thus there is serious question as to whether a military passage, not in a normal sea lane, qualifies as 'innocent' under general law before the 1982 Convention." Rubin, *supra* note 38.

<sup>120</sup> Grunawalt, *Innocent Passage Rights*, THE CHRISTIAN SCI. MONITOR, Mar. 12, 1988, letters to editor.

<sup>121</sup> Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 27 BRITISH Y.B. INT'L L. 28 (1950). The Special Working Committee on Maritime Claims of the American Society of International Law had a practical suggestion in this regard:

[P]rograms for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of and underlying legal position. Those responsible relations with particular coastal States should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at latter (sic) time.

AM. SOC. INT'L NEWSLETTER, Mar.-May 1988, at 6 quoted in NWP-9, *supra* note 18, at 2-43, n.91.

that shorter routes may exist through that territorial sea.<sup>122</sup> Pentagon officials easily could have mandated that the *Caron* and the *Yorktown* skirt the Crimean peninsula by more than twelve nautical miles to avoid controversy. Instead, they deliberately passed where they did to manifest the United States' determination to maintain access within waters that are not recognized as "sacred."<sup>123</sup> This action was intended to communicate to the Soviets that the right of innocent passage cannot be denied by any coastal state law or regulation.<sup>124</sup> The Soviet legislation was attempting to impose security-related, instead of safety-related, requirements upon foreign warship transit in Black Sea territorial waters. This action fell clearly outside the areas of permissible state regulation under article 21, and violated the fundamental principle underlying article 24.<sup>125</sup>

#### D. The Illegality of the "Soviet Remedy"

A state's "bumping" a foreign vessel out of its territorial sea, or any similar use of force, for an alleged violation of that state's sovereignty is not a dispute settlement technique contemplated by the drafters of the UNCLOS III. Any resort to the use of force to compel compliance with one nation's view of the "rules" actually violates the fundamental tenets of all international instruments regulating the conduct of international interaction. Inspired by the provisions of the United Nations Charter that prohibit "the threat or use of force" in the settlement of international disputes,<sup>126</sup> the drafters of the UNCLOS III mandated the settlement "by peaceful means" of any dispute over the interpretation or application of its provisions.<sup>127</sup> The UNCLOS III reproduces verbatim the United Nations Charter provisions on the nonuse of force.<sup>128</sup> Additionally, it pro-

<sup>122</sup> See *supra* note 88 (discussion regarding this contention).

<sup>123</sup> Jin, *supra* note 89, at 67.

<sup>124</sup> See Froman, *supra* note 115, at 660 (citing D. O'Connell, 1 *THE INT'L LAW OF THE SEA* 2, 273-274 (1982)).

<sup>125</sup> Article 21 essentially allows coastal state to adopt laws or regulations concerning "the safety of navigation and the regulation of maritime traffic", a scheme that does not contemplate coastal security measures. See UNCLOS III, *supra*, art. 21(a)-(h), note 5. Article 24 prohibits state action that "hampers the innocent passage of foreign ships through the territorial sea." *Id.* art. 24; see also Froman, *supra* note 115, at 662.

<sup>126</sup> U.N. Charter, arts. 2(3), 2(4).

<sup>127</sup> UNCLOS III, *supra* note 5, art. 279, reads as follows:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

<sup>128</sup> *Id.* art. 301 cautions,

vides for compulsory arbitration or adjudication of disputes between states when its provisions are in contest.<sup>129</sup> Third-party settlement is contemplated for resolving conflicts over the exercise of the freedoms and rights of navigation when it is alleged that a state, in exercising these rights, acted in contravention of the UNCLOS III.<sup>130</sup> The Soviet Union therefore was obligated to act in accordance with the provisions of the UNCLOS III in any dispute it claimed to have had over the *Caron's* and the *Yorktown's* exercises of the right of innocent passage.<sup>131</sup> The appropriate response of the Soviet Union to what it perceived as an infraction of the UNCLOS III by the United States was "to direct the offending ship[s] to leave those waters forthwith."<sup>132</sup> If compliance was not obtained, then resort to the arbitration and adjudication provisions should have occurred. The use of force under the circumstances present on February 12, 1988, was illegal in every sense of the word.<sup>133</sup> This crude version of "high seas justice" demonstrated that the rule of law still has a long way to go in the Soviet Union.

### *E. A Move Towards "Minimum World Order" at Sea*

An encouraging step forward toward resolving the impasse between the United States and the Soviet Union over the right of innocent passage occurred on September 23, 1989. On that date, the two superpowers, after significant and meaningful discourse, signed an agreement entitled Uniform Interpretation

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In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

<sup>129</sup> *Id.* arts. 281-286. All disputes between states that cannot be settled by alternate means, and are not subject to binding third-party arbitration or adjudication pursuant to some other treaty, are subject to binding arbitration or adjudication under the convention. *Id.*; see Oxman, *supra* note 101, at 823.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* art. 297(1)(a).

<sup>132</sup> Grunawalt, *supra* note 120; see UNCLOS III, *supra* note 5, art. 80.

<sup>133</sup> The utilization of force under the provisions of UNCLOS III appears to be governed by the same principles allowing the use of force under the U.N. Charter. First and foremost is the proposition that force, or the threat thereof, should never be employed against another nation. The only possible justification for the use of force being that which may be taken in individual or collective self-defense in the event of an armed attack or enforcement measures authorized by the United Nations. U.N. Charter, art. 51; see UNCLOS III, *supra* note 5, art. 301.



of Rules of International Law Governing Innocent Passage.<sup>134</sup> This document was signed shortly after a separate agreement dealing with the Prevention of Dangerous Military Activities (DMAA),<sup>135</sup> and both were intended to supplement the existing 1972 agreement on the Prevention of Incidents On and Over the High Seas (INCSEA).<sup>136</sup> In combination, these bilateral accords seek to "diffuse the tension associated with provocative naval incidents between the two parties which had been occurring . . . with increasing frequency."<sup>137</sup> Most significant is the fact that the Soviet Union, in the Joint Interpretation on Innocent Passage, acceded to the position earlier espoused by the United States. Specifically, it was acknowledged that article 19(2) of the UNCLOS III contains an exhaustive listing of activities that will be considered noninnocent in judging innocence of passage.<sup>138</sup> The Soviets also conceded that "[i]n areas where no [traditional sea lanes exist, or where no traffic separation schemes] have been prescribed (i.e., in the Black Sea), ships nevertheless enjoy the right of innocent passage through Soviet territorial waters."<sup>139</sup> This capitulation evidences the successes of both the Freedom of Navigation program and the 1988 Black Sea exercise in helping to guarantee free passage rights and establish a "minimum world order" for use of the oceans. The nations agreed upon procedures that would be followed when the coastal state seeks to question the innocence of a vessel's passage.<sup>140</sup> Furthermore, when a warship engages in noninnocent conduct and does not take corrective action upon request, the coastal state may demand that it immediately depart the territorial sea.<sup>141</sup> It also was decreed that differences over the exercise of innocent passage shall be settled

<sup>134</sup> Union of Soviet Socialist Republics—United States: Joint Statement With Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, entered into Jackson Hole, Wyoming, Sept. 23, 1989, reprinted in 28 I.L.M. 1444 (1989) [hereinafter Joint Interpretation on Innocent Passage].

<sup>135</sup> Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, Sept. 23, 1989, reprinted in 28 I.L.M. 877 (1989).

<sup>136</sup> Agreement Between the Government of the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents on and Over the High Seas, May 25, 1972, reprinted in 11 I.L.M. 778 (1972).

<sup>137</sup> Nagle, *The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World's Oceans*, 31 VA. J. INT'L L. 124, 124-25 (Fall 1990).

<sup>138</sup> Joint Interpretation on Innocent Passage, *supra* note 134, at para. 2.

<sup>139</sup> *Id.* at para. 5.

<sup>140</sup> *Id.* para. 4, states, "[a] coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time."

<sup>141</sup> *Id.* para. 7.

through diplomatic or other agreed means, not by resort to force—that is, no “bumping.”<sup>142</sup>

Although the Joint Interpretation on Innocent Passage is only a bilateral agreement, it significantly contributes to the clarification of the regime of innocent passage for the entire world community. Customary international law on the subject, as expressed in the UNCLOS III, is made even more certain as a result of this concurring interpretation by the world's predominant maritime powers.<sup>143</sup>

## V. Conclusion.

The only plausible compromise in balancing a coastal state's sovereignty over its own territorial waters, with the navigational needs of the international maritime community, is a healthy, viable regime of innocent passage. A symbiotic relationship between the two competing interests can be achieved only through uniform application of rules that acknowledge fundamental freedoms of navigation. Continuous, expeditious and unimpeded passage of a truly innocent nature through the territorial sea of all coastal states appears to be one of the fundamental freedoms contemplated by the UNCLOS III. A foreign vessel claiming this valuable right must be willing to accede to reasonable restrictions upon its passage in deference to its host state's legitimate security, economic and environmental needs. Coastal state's necessarily will have to be reasonable regarding conditions that they impose upon the right of innocent passage.

For this concept to work in actual practice, “innocence” of passage must be capable of unambiguous and objective definition. An “eye of the beholder” approach injects subjective elements into the formula that cannot and will not satisfy the international need for uniformity. The criteria established in article 19(2) of the UNCLOS III was thought to be a clear and comprehensive delineation of rules that would provide the criteria for defining the right of innocent passage. Unfortunately, the Black Sea bumping incident demonstrated that the definition of “innocence” is not as clear and discernable as the drafters of the UNCLOS III may have intended. While Freedom of Navigation exercises help to sharpen the definition by forcing issues to a head, they carry very real risks of precipitating

<sup>142</sup> *Id.* para. 8.

<sup>143</sup> Hitt, *supra* note 29, at 742.

violent interaction between nations or, at a minimum, generating political ill-will.

It appears clear, however, that we are moving in the right direction toward uniformly defining innocent passage. The Joint Interpretation of Innocent Passage between the United States and the Soviet Union is significant for two reasons. First, it helps to clarify the "exhaustive list" contained in article 19(2) of the UNCLOS III, from which all nations will benefit. Second, it demonstrates that freedom of navigation disputes can be resolved peacefully through negotiation and accord within the context of the UNCLOS III. The world community certainly will not miss the significance of two world superpowers coming together at the bargaining table to resolve their international disputes through words and not deeds. Future generations should view the Black Sea bumping incident as a very temporary "blackout" for the otherwise strong rule of law in the new world order.

Today, maritime nations enjoy a right of innocent passage that is stronger and more firmly entrenched than at any previous time in history. It will be important for nations to understand and apply the intricate art of compromise to keep the world's oceans open and free. A clear, concise right of innocent passage is the mechanism by which competing interests in this area will be harmonized. Each nation must be ever watchful and vigilant in ensuring that this critical concept receives its full, deliberate, and faithful compliance.



# DETERMINING CLEANUP STANDARDS FOR HAZARDOUS WASTE SITES

MAJOR WILLIAM D. TURKULA\*

## I. Introduction

With the impending closures or realignments of military bases nationwide, both private and public parties recognize the problems incident to the private resettlement of formerly publicly held lands. In particular, installations that had unique military missions may manifest environmental problems that, while tolerable when balanced against the paramount necessities of maintaining national security, are impossible to reconcile with traditional private and commercial uses. Consider the hauntingly analogous case of Sandra DeVantier who, on November 28, 1990, moved into a newly purchased house in the Love Canal neighborhood of Albany, New York.<sup>1</sup> Buying a house usually is a pretty ordinary event, but Ms. DeVantier moved into a neighborhood that was so polluted by hazardous waste<sup>2</sup> that it served as a *nom de guerre*, or rallying cry to clean up the environment.<sup>3</sup> Can Love Canal now be looked to as an example of a successful environmental cleanup effort? This question, at least at present, appears to remain unanswered. Similarly, how clean must a military installation be before the federal government can retrocede its ownership to the state or to private parties, also is controversial.

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\* Judge Advocate General's Corps, United States Army Reserves. B.A., 1973, University of North Dakota; J.D., 1981, University of North Dakota Law School; LL.M., 1991, The Judge Advocate General's School. Previous works include DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER (Butterworth Pubs. 1990); *Advocacy and Administrative Boards: A Primer*, THE ARMY LAWYER, July 1987, at 45. This article is based upon a written thesis dissertation that the author submitted to satisfy, in part, the degree requirements of the 39th Judge Advocate Officer Graduate Course.

<sup>1</sup> Silverman, Resettlement of Love Canal Begins, But Banks Sour on Mortgages, 21 Env't Rep. (BNA) 1590 (1990).

<sup>2</sup> A hazardous waste or substance is defined by the Comprehensive Environmental Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 (1988), as any toxic or hazardous substance as listed or defined under other federal statutes including the Clean Water Act, 33 U.S.C. § 1251 (1988); the Clean Air Act, 42 U.S.C. § 7601 (1988); the Solid Waste Disposal Act, 42 U.S.C. § 8901 (1988); and the Toxic Substances Control Act, 15 U.S.C. § 2601 (1988). The definition is generally expansive but is narrowed by the various statutory and regulatory applications and requirements. See 40 C.F.R. pt. 300.5 (1990).

<sup>3</sup> Silverman, *supra* note 1, at 1591-16. Even after 10 years of cleanup efforts at Love Canal, thousands of tons of hazardous waste remain there and some environmental groups still are trying block resettlement of the area. *Id.*

Whether or not buying property in Love Canal, or on land that previously was an impact area, as a prudent investment is an individual choice. The response from mortgage lenders, however, has been less than enthusiastic.<sup>4</sup> The DeVantier purchase, for instance, was for cash, underscoring mortgage lenders' reluctances to finance purchases of properties at the infamous site. John Blyth, Chairman of the New York Bar Association's Real Property Law Section was reported as saying, "banks and secondary lenders are becoming increasingly wary about making loans on properties with an environmental problem."<sup>5</sup> Some of the lenders' reluctances are undoubtedly caused by the opposition to resettlement of areas like Love Canal by environmentalists. In a recent article, one commentator stated that Love Canal may be a negative—not positive—example for environmental cleanup.<sup>6</sup> The author stated,

Environmentalists have long opposed the resettlement of Love Canal, contending that the area is still not safe and that the habitability study was based on faulty methodology. They also fear that resettlement of Love Canal would set a dangerous precedent for other superfund [sic] sites, establishing a new—and inadequate—standard for safety.<sup>7</sup>

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>8</sup> was designed to deal with so-called Superfund sites such as Love Canal. Among other things, section 121 of the Act<sup>9</sup> describes the cleanup standards applicable to a hazardous waste site under the Superfund definition.<sup>10</sup> The statute itself does not spell out what constitutes an acceptable or safe level of contamination. It does, however, prescribe that applicable federal and state standards will be used to determine things such as the amount of lead in water or the soil. These standards generically are called applicable or

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<sup>4</sup> *Id.* at 1591.

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

<sup>6</sup> See generally *id.*

<sup>7</sup> *Id.* at 1592.

<sup>8</sup> Pub. L. No. 96-510, 94 Stat. 2767 (1982), codified at 42 U.S.C. §§ 9601-9675 (1988).

<sup>9</sup> CERCLA or Superfund often is referenced by authors according to the paragraph numbers in the original legislation. Those numbers run from 100 to 176 and correspond to title 42 of the United States Code §§ 9601-9675. For example, section 121 the CERCLA legislation, referred to as the Act, corresponds with 42 U.S.C. § 9621.

<sup>10</sup> 42 U.S.C. § 9601(33) (1988). The definition of a hazardous substance under CERCLA is far broader than it is under other environmental statutes and it covers more than just waste—it refers to any substance that reasonably can be expected to cause any kind of adverse effects to living things.

relevant and appropriate requirements (ARARs).<sup>11</sup> They can include air emissions, water quality, soil percolation levels, movements of hazardous materials, and containments of contaminants.<sup>12</sup> Section 121 of CERCLA is the longest section of the statute and contains very broad, as well as many specific, requirements for removal of hazardous substances or for the treatment of others that may fall under the statute's purview.

The degree of cleanup required under CERCLA for a given site is described in section 121(d) as

Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.<sup>13</sup>

The "relevant and appropriate" language of the statute is the source of the ARAR acronym. Although the term is inherently vague, it serves as an economical way to refer to the plethora of laws and regulations that may apply to a site cleanup. The United States Court of Appeals for the Tenth Circuit recently defined an ARAR succinctly as whatever cleanup standards the Environmental Protection Agency decides are applicable under a remedial cleanup plan.<sup>14</sup>

#### A. CERCLA and Other Federal Legislation

Legislation regarding cleaning up the environment from pollution and contamination caused by man exploded in the 1970's and early 80's.<sup>15</sup> The Solid Waste Disposal Act has been on the books—as amended by the Resource Conservation and Recovery Act (RCRA)—since 1976, but Congress realized that

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<sup>11</sup> *Id.* § 9621(d). The title, "Applicable Relevant and Appropriate," actually does not appear in the statute, but the language requiring these standards is called the ARAR requirement. These ARARs regularly are referred to as part of the applicable remedial actions to be taken at Superfund sites.

<sup>12</sup> *Id.* § 9621(d)(2)(A)(i). This section incorporates several other statutes that specify standards for water quality, clean air, and other applications.

<sup>13</sup> *Id.* § 9621(d).

<sup>14</sup> *Colorado v. Idarado Mining Co.*, 916 F 2d 1486, 1495 (10th Cir. 1990).

<sup>15</sup> D. SIVE & F. FRIEDMAN, *A PRACTICAL GUIDE TO ENVIRONMENTAL LAW* (1987).

legislation alone fell short of the requirements to deal with what we had learned to be hazardous and toxic wastes.<sup>16</sup> In simple terms, as the title of the statute implies, the Act is a regulatory mechanism for the safe disposal of solid waste, as defined by the statute. As Love Canal graphically demonstrated, we no longer can simply dig a hole and bury our waste without fear of future consequences. Making sure we do not create future environmental messes by our means of waste disposal, however, does not deal with the vexing problem of cleaning up the already contaminated sites all over the country.

While RCRA sets standards for regulating the handling toxic or hazardous wastes, the "big stick" for cleaning up dangerous environmental sites falls under the broad scope of CERCLA and the Superfund.<sup>17</sup> The fundamental difference between RCRA and CERCLA is that CERCLA is designed to target and fund the cleanup of areas that already are contaminated, whereas RCRA is better viewed as a regulatory mechanism to avoid creating the same kinds of problems in the future. The corrective action requirements of RCRA, however, which require present waste generators and handlers to take corrective action for disposal methods used in the past, can cause some confusion.<sup>18</sup>

A good deal of confusion also surrounds the interplay of the RCRA and CERCLA statutes. A good discussion of that interplay and differences between the statutes is found in *The Environmental Law Handbook* of 1989 published by Government Institutes, Inc.<sup>19</sup> The authors note that the EPA, when replying to information requests, provides a schematic drawing showing a circle labeled as RCRA surrounded by a larger and concentric circle labeled CERCLA.<sup>20</sup> The obvious implication that RCRA is somehow consumed by CERCLA is not entirely accurate. The key to the breadth of CERCLA is that, unlike RCRA, which regulates *waste*,<sup>21</sup> CERCLA covers any substance that falls within the broad purview of CERCLA's hazardous sub-

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<sup>16</sup> Solid Waste Disposal Act, Pub. L. No. 94-580, 90 Stat. 2395 (1982), is *codified as amended* at 42 U.S.C. §§ 9601-9657 (1988).

<sup>17</sup> See 42 U.S.C. § 9621(d) (1988). The statute clearly states that it covers RCRA and a host of other statutory and regulatory mechanisms for environmental cleanup.

<sup>18</sup> See *id.* §§ 6924(u), 6924(v), 6928(b).

<sup>19</sup> J. ARBUCKLE, *Environmental Law Handbook*, (10th ed. 1990).

<sup>20</sup> *Id.* at 78.

<sup>21</sup> 40 C.F.R. pt. 261.2(a) (1990). To be a hazardous waste under RCRA, the waste must be a solid waste under the definition.



stance definition.<sup>22</sup> The Code of Federal Regulations section listing of presently identified "hazardous substances" under CERCLA has more than 700 entries and can be changed as the agency deems necessary.<sup>23</sup> Other substances that may not be on the list can include any other substance that reasonably can be determined to cause harm.<sup>24</sup> Therefore, just because a substance is not on the EPA's hazardous substance list does not mean it could not potentially be regulated under CERCLA. The concentric circle diagram offered by EPA to demonstrate the relationship between RCRA and CERCLA is overly simplistic, however, and conflicts between the statutes and their applications persist.

### *B. State Legislation*

The federal government is not alone in setting standards for environmental cleanup. Each state has some form of regulatory scheme dealing with creating or maintaining a clean environment.<sup>25</sup> These laws can be based on federal RCRA or CERCLA standards, or legislation peculiar to a particular state.<sup>26</sup> Not surprisingly, the laws are not all the same and some may conflict or overlap with their federal counterparts. All fifty states have some statutory provision for dealing with hazardous wastes.<sup>27</sup> Not all the statutes are of recent vintage or in response to federal environmental cleanup programs, such as CERCLA or RCRA. The State of Washington, for instance, enacted a statute in 1909, making it unlawful to "deposit, leave or keep" any "unwholesome substance" on land or waters in the state.<sup>28</sup>

Some states also have established environmental statutes that are different from, more restrictive than, or more demanding than federal standards. These state laws have come in conflict with the federal government's prosecution of

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<sup>22</sup> 42 U.S.C. § 9601(14) (1988).

<sup>23</sup> 40 C.F.R. pt. 302 (1990).

<sup>24</sup> See 42 U.S.C. § 6901(22) (1988).

<sup>25</sup> In 1989, Clean Sites, an nonprofit environmental study group based in Alexandria, Virginia, consolidated summaries of environmentally related laws from each of the 50 states. The summary, entitled *A Report on State Hazardous Waste Laws*, is an undated loosely bound table of state laws available from Clean Sites at 1199 North Fairfax Street, Alexandria, Virginia.

<sup>26</sup> Clean Sites, *A Report on State Hazardous Waste Laws (1989)* (1199 North Fairfax St., Alexandria, VA).

<sup>27</sup> *Id.* at 5-7.

<sup>28</sup> Wash. Rev. Code § 9.66.050 (1909).

cleanup campaigns.<sup>29</sup> Colorado has been one of the most aggressive states in attempting to enforce state cleanup standards which may differ from federal requirements under CERCLA. In the case of *Colorado v. Idarado Mining Co.*,<sup>30</sup> Colorado challenged the EPA's cleanup program by insisting that the state's remedial plan for cleanup of mine tailings should be enforced over the EPA-selected remedies.<sup>31</sup> One issue addressed by the court in that case was whether or not the federal government can control remedial cleanup action under section 121 of CERCLA, or whether section 121(e)(2) of the statute allowed the state independently to select a cleanup plan.<sup>32</sup> The court, in essence, said that the remedial action plan mentioned in CERCLA is one selected by the federal government or its delegates—not one selected by the state.<sup>33</sup> The court went on to say permitting a state to select its own remedial actions under section 121 would render the federal reservation of authority "irrelevant."<sup>34</sup> The *Idarado* case may serve as an indicator that at least the Tenth Circuit may view each Superfund cleanup as the sole responsibility of the federal government.<sup>35</sup> The Army faces a similar state authority challenge from Colorado over the cleanup of Rocky Mountain Arsenal in a case pending before the same district court that first heard the *Idarado* case.<sup>36</sup> It remains to be seen if the Tenth Circuit's interpretation that CERCLA cleanup is a distinctly federal remedy will directly affect the Rocky Mountain Arsenal case.

Whether the state can exercise control over the cleanup of a Superfund site, and what cleanup standards are enforceable, will be analyzed further as existing authority is examined to determine remedy selection and enforcement under CERCLA section 121.

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<sup>29</sup> See K. Breslin, *Colorado Case Turns on Jurisdiction over Hazardous Waste Cleanup*, 21 Env't Rep. (BNA) 523 (1990). The focus of the article is the dispute between the United States and the State of Colorado over the cleanup of the Army's Rocky Mountain Arsenal site. Although there has been little direct litigation in the area, the federal-state clash of authority also came up in cases in Ohio, New Mexico, and Washington. *Id.* at 524, 525. Those cases, however, dealt with financial responsibility for cleanup costs—not who had the authority for remedy selection.

<sup>30</sup> 916 F.2d 1486 (10th Cir. 1990).

<sup>31</sup> *Id.* at 1488.

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

<sup>33</sup> *Id.* at 1495.

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

<sup>35</sup> The *Idarado* case's focus was on the state's authority to invoke the injunctive relief provisions of CERCLA. The court, however, made it clear that CERCLA is a federal program and not one through which a state can create its own remedial plan for site cleanup. See *id.* at 1496.

<sup>36</sup> *United States v. Colorado*, No. 89-C-1646 (D. Colo. 1989).

## II. State and Federal Conflicts: RCRA versus CERCLA?

There is no shortage of litigation over environmental issues, but most of the focus has been on determining financial liability for cleaning up the mess. Notably, two recent texts—the *Environmental Law Handbook*<sup>37</sup> and *A Practical Guide to Environmental Law*<sup>38</sup>—devote most of their discussions about CERCLA to liability concerns. In the *Environmental Law Handbook*, Richard G. Stoll states, “CERCLA’s most basic purposes are to provide funding and enforcement authority for cleaning up the thousands of hazardous waste sites created in the United States in the past and for responding to hazardous substance spills.”<sup>39</sup> To date, the 10th Circuit stands virtually alone among the appellate courts in wrestling with the remedy selection process and enforcement authority of CERCLA section 121.<sup>40</sup> Federal and state interplay under CERCLA and RCRA presently is unclear, but evolving.

### A. Are RCRA and CERCLA in Concert or Conflict?

In examining the interplay between the statutory schemes of CERCLA and RCRA, it is important to remember that RCRA is an amendment to the Solid Waste Disposal Act.<sup>41</sup> Accordingly, it affects thousands of sites—both big and small—and regulates the day-to-day handling of wastes.<sup>42</sup> CERCLA’s scope is broad and it covers substances which may not even qualify as wastes under RCRA but which are still considered “hazardous” for the purpose of CERCLA regulation.<sup>43</sup> Furthermore, CERCLA, as amended by the Superfund Amendment and Reauthorization Act,<sup>44</sup> takes aim at the cleanup of sites listed on the National Priority List for Superfund cleanup.<sup>45</sup> Theoretically, the statutes do different things, but the tangle of statutes and regulations implementing the provisions of RCRA and CERCLA apparently create inevitable conflicts.

Section 121(e)(2) of CERCLA provides that a state “may enforce any Federal or State standard, requirement, criteria, or

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<sup>37</sup> J. ARBUCKLE, *supra* note 19, ch. 3.

<sup>38</sup> D. SIVE & F. FRIEDMAN, *supra* note 15, ch. 5.

<sup>39</sup> See J. ARBUCKLE, *supra* note 19, at 75.

<sup>40</sup> See *supra* note 35.

<sup>41</sup> 42 U.S.C. §§ 6901-6991 (1988).

<sup>42</sup> J. ARBUCKLE, *supra* note 19, at 93.

<sup>43</sup> See statutes cited *supra* note 2.

<sup>44</sup> Pub. L. No. 99-499, 100 Stat. 1613 (1986).

<sup>45</sup> 40 C.F.R. pt. 300.66(c)(2) (1990).

limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located."<sup>46</sup> Does this language mean that the state is free to enforce remedial standards of its own at a Superfund site when those standards may differ from those selected by the federal government? The court's initial answer appears to be "no." As noted earlier, the Tenth Circuit in *Idarado* is the only appellate court to examine in depth the state's authority for remedy selection under CERCLA. The court's analysis is not focused on the fact-specific remedy itself, but instead looks at the legal basis asserted by the state to require compliance with state requirements under CERCLA.<sup>47</sup> Use of the *Idarado* case as a vehicle for this federal-state conflict analysis is curious, considering that the United States appeared in the case only as *amicus curiae*.<sup>48</sup> In that case, the state brought action against private defendants for injunctive relief, among other claims, under section 121 of CERCLA. The central decision of the Tenth Circuit related to the authority of the district court to grant the state injunctive relief under section 121. The court, however, decided to tackle the state versus federal authority issue because "Failing to comply with CERCLA Section 121 and the NCP [National Contingency Plan] selection process would appear to carry far more significant consequences than *amicus* United States and the defendants are willing to admit."<sup>49</sup>

Although the *Idarado* case is not one in which RCRA conflicts with CERCLA, it does clearly say that while CERCLA cleanup actions may have to comply with applicable state standards, it is a statute for federal enforcement, and not one through which the state can enforce its independent remedial actions, whether under RCRA or some other state standard.<sup>50</sup>

The RCRA-CERCLA conflict of authority is clearly at issue in the case of *United States v. Colorado*,<sup>51</sup> which involved the cleanup of Rocky Mountain Arsenal. The *Idarado* case is further relevant to this conflict resolution, not only because it is in the Tenth Circuit, but also because it centers on who has authority to enforce cleanup at a CERCLA site. Reviewing the dispute between Colorado and the United States, the Bureau of

<sup>46</sup> 42 U.S.C. § 9621(e)(2) (1988).

<sup>47</sup> *Idarado*, 916 F.2d at 1491, 1492.

<sup>48</sup> *Id.* at 1486, 1494.

<sup>49</sup> *Id.* at 1494 n.8.

<sup>50</sup> *Id.* at 1495.

<sup>51</sup> No. 89-C-1646 (D. Colo. 1989).

National Affairs recently reported that "behind the conflicting legal positions lies the central question: Who will control the cleanup of the arsenal?"<sup>52</sup> Considering the Tenth Circuit's reversal of the trial court's interpretation of states' rights under CERCLA in *Idarado*, the trial court's interpretation of state RCRA authority at the Rocky Mountain Arsenal site may not withstand similar appellate examination. Although litigation over cleanup of the arsenal began in 1983, Colorado and the United States became adversary litigants in 1986, when Colorado sued the United States to enforce compliance with a state closure plan for Rocky Mountain Arsenal.<sup>53</sup> Since that time, the court has been consistent in finding that the state had RCRA enforcement authority at the site.<sup>54</sup> The United States maintains that because the arsenal is Superfund site, cleanup is regulated exclusively under CERCLA.<sup>55</sup>

The clear issue the courts have to decide is whether or not Congress gave the federal government plenary authority for Superfund cleanup and how RCRA and CERCLA work together, if they actually do. Some commentators contend that mixing RCRA and CERCLA to specify cleanup standards is a dangerous combination. In the *Environmental Law Handbook*,<sup>56</sup> one author states that there is a trend toward a RCRA-CERCLA merger:

From the perspective of one who is interested in assuring health and environmental protection, but who hates to see billions of dollars wasted on excessive cleanup efforts, there may be significant concerns with the trend toward presuming that RCRA requirements should be lifted and imported wholesale into CERCLA cleanups. This trend can have either or both of the following unfortunate results: (a) impose cleanup costs at old sites that have no reasonable relationship to the risks presented at the site; and/or (b) weaken RCRA requirements for current and new sites

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<sup>52</sup> 21 Env't Rep. (BNA) 523 (1990).

<sup>53</sup> *United States v. Colorado*, No. 86-C-1646 (D. Colo. 1986); *United States v. Shell*, No. 83-C-2379 (D. Colo. 1983). A good synopsis of the litigation history of the case is found at 21 Env't Rep. (BNA) 525 (1990). Shell and the United States filed a consent decree in the case in 1988.

<sup>54</sup> *Colorado*, 21 Env't Rep. at 524. The accompanying article traces Judge Jim R. Carrigan's role in the case since his first ruling in 1986 on the issue. The author notes that Judge Carrigan sees CERCLA and RCRA as different, but not as mutually exclusive.

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

<sup>56</sup> J. ARBUCKLE, *supra* note 19, at 83.

that often should not as a preventative matter be weakened.<sup>57</sup>

Whether or not RCRA requirements apply in a CERCLA cleanup action is a critical question in the debate over who has authority to determine cleanup standards at Superfund sites. This raises the question of "who's the boss?" when parties encounter situations like the Rocky Mountain Arsenal<sup>58</sup> and the cleanup requirements that are really necessary at that site. The *Environmental Law Handbook* authors take the position that in some respects, RCRA and CERCLA are categorically different and should not be confused. They label CERCLA as a "response" statute and RCRA as a "regulatory" statute aimed at preventing the creation of messes with which CERCLA is designed to deal.<sup>59</sup> "To impose RCRA standards at old sites will, however, often impose great costs where health and the environment could be fully protected for much less cost."<sup>60</sup> Under that rationale, the state-federal authority issue is compounded by the cost factors associated with remedy selection.

Is cost the proper criterion for determining cleanup remedies? In the agency commentary to the EPA Proposed Corrective Action Rule for Solid Waste Management Units, published in July 1990, the EPA indicates that economic considerations are indeed a policy factor.<sup>61</sup>

EPA's goal in RCRA corrective action is, to the extent practicable, to eliminate significant releases from solid waste management units that pose threats to human health and the environment, and to clean up contaminated media to a level consistent with reasonably expected, as well as current, uses. The timing for reaching this goal will depend on a variety of factors, such as the complexity of the action, and the financial viability of the owner/operator.<sup>62</sup>

The agency commentary goes on to say that, in the case of ground water, for instance, the water should be cleaned up to the point in which it is safe to drink, regardless of whether or not the water actually will be consumed.<sup>63</sup> Not much farther

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<sup>57</sup> *Id.*

<sup>58</sup> *United States v. Colorado*, No. 89-C-1646 (D. Colo. 1989).

<sup>59</sup> J. ARBUCKLE, *supra* note 19, at 93.

<sup>60</sup> *Id.*

<sup>61</sup> 21 *Env't Rep.* (BNA) 666, 672 (1990).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 672.

along in the same paragraph, however, the agency says, "Alternative levels protective of the environment and safe for other uses could be established," when the water is not actually going to be used for drinking water.<sup>64</sup> That apparently contradictory language is the kind of ambiguity that led to harsh criticism of the EPA and its process for selection of cleanup standards. *Chemical Engineering* magazine quotes the Washington, D.C., environmental study group, Clean Sites, as saying, "The lack of a clear framework for remedy selection has led to repeated criticism of EPA for failing to comply with the law and for inconsistent levels of cleanup."<sup>65</sup> That comment was made in November 1989—seven months before the EPA published its commentary on the RCRA remedy selection process in July 1990. Although the *Chemical Engineering* article dealt pointedly with CERCLA cleanup standards and remedy selection, the agency did little to allay criticism of its remedy selection process by saying, on the one hand, we have to make *all* ground water drinkable; but, on the other hand, we do *not* always have to make ground water drinkable.

Although the EPA commentary on its proposed RCRA cleanup standards does not mention CERCLA, it is obvious from the language of the commentary that not all cases call for application of the same remediation standards. That does not settle the RCRA/CERCLA turf war between state and federal authority; it merely emphasizes that the same cleanup standards are not appropriate in all cases. Although the Tenth Circuit has clearly said that CERCLA is a peculiarly federal bailiwick,<sup>66</sup> resolution of the direct conflict between federal and state authority at Superfund sites yet is to be determined. How we select a cleanup remedy, whether under CERCLA or RCRA, has been the subject of considerable study and will generate continuing debate.

### III. The National Contingency Plan and Selection of Remediation Standards

How to select a cleanup remedy for a hazardous or toxic waste site<sup>67</sup> has been the subject of rancorous debate among

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<sup>64</sup> *Id.*

<sup>65</sup> Melamed, *Fighting Superfund* in *CHEMICAL ENGINEERING*, Nov. 27, 1989, at 31.

<sup>66</sup> *Idarado*, 916 F.2d at 1495.

<sup>67</sup> See generally, statutes cited *supra* note 2. As described in the referenced statutes, a hazardous waste site could be defined under a multitude of statutes and regulatory measures. Hazardous waste is referred to in the remainder of the text as relating to all those applications, unless otherwise stated.

many involved in environmental rehabilitation. Clean Sites, a nonprofit study organization,<sup>69</sup> collected a large group of people involved in environmental programs, including representatives from state and federal government, private industry, and citizens groups to explore the issues related to remedy selection for Superfund sites. The group was charged with the task of coming up with specific recommendations on how to determine uniform and workable standards for remedy selection at Superfund sites.<sup>69</sup> Clean Sites focused its study on the National Contingency Plan<sup>70</sup> criteria for selecting a site cleanup remedy. The organization released a report in October 1990 entitled "Improving Remedy Selection: An Explicit and Interactive process for the Superfund Program." The conclusions and recommendations of that report will be examined further.

#### A. *Criteria for Selecting a Remedy: the National Contingency Plan*

Environmental statutes enacted by Congress get their "teeth" through the implementation provisions of the Code of Federal Regulations. Those regulations are the executive agency administrative rules, which first are published in the *Federal Register*, and then which the agency publishes as regulations to govern the administration of the statutory provisions.<sup>71</sup> Under CERCLA, the implementing regulations are referred to in general terms as the National Contingency Plan (NCP).<sup>72</sup> Regulations for determining remedy selection criteria essentially fall into three categories:

- (1) *threshold criteria*—overall protection of health and the environment and compliance with appropriate relevant and appropriate standards (ARARs).

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<sup>69</sup> Clean Sites is a nonprofit organization that periodically issues studies and information on environmental matters. In a recent publication, *Improving Remedy Selection*, (Oct. 1990), a statement on the cover leaf says the organization offers mediation services to parties involved in site cleanups and is funded by government and private grants. Among its board of directors are listed Russell E. Train, chairman of the World Wildlife Fund, former Attorney General Archibald Cox, and officers of major corporations such as Occidental Chemical and Syntex Corporation.

<sup>69</sup> Clean Sites, *Improving Remedy Selection: An Explicit and Interactive Process for the Superfund Program*, (1990). More than 80 people from private industry, state government and federal government participated in the year-long study of remedy selection. *Id.* at A-1.

<sup>70</sup> 40 C.F.R. pt. 300 (1990) (setting out the goals and procedures for the federal Superfund cleanup program through the National Contingency Plan).

<sup>71</sup> *E.g.*, EPA Proposed Corrective Action Rule for Solid Waste Management Units, 55 Fed. Reg. R 30798 (1990).

<sup>72</sup> 40 C.F.R. pt. 300 (1991)



(2) *primary balancing criteria*—long term effectiveness, short term effectiveness, reduction of contamination by treatment, cost, and feasibility.

(3) *modifying criteria*—state acceptance and community acceptance.<sup>73</sup>

These criteria were the genesis of the Clean Sites evaluation of the EPA remedy selection process. The Clean Sites study involved more than ninety participants from private industry, state government, and federal government.<sup>74</sup> Unfortunately, none of the material in the report is individually attributable. It is published only as a compilation of the various participants. Nevertheless, the critical nature of the study suggests that, despite EPA funding for the project, neither bias in favor of the EPA, nor in favor of private organizations—such as the co-sponsoring Andrew W. Mellon Foundation—is apparent. The work is probably the most comprehensive and objective study on the matter of remedy selection. Although, the text of the study is replete with bureaucratic platitudes, scores of acronyms, and broad generalizations of the problems of environmental cleanup, it does spell out two conclusions for remedy selection.

(1) The EPA should develop a clear, comprehensive, and useful guide for selecting remedies.

(2) The EPA should develop a headquarters task force comprised of a select group of experienced senior employees to work directly with the regions.<sup>75</sup>

Those conclusions do not simply mirror the text of the study, which is highly critical of the EPA's present procedures in remedy selection. For instance, the study notes that the EPA states in its corrective action rules that toxicity and carcinogenic levels should be measured in powers of ten.<sup>76</sup> The Clean Sites study report states,

Several participants felt that too much emphasis is placed on numerical representation of risk as a means of communicating risk to the public. In many cases these numbers are meaningless to the community and only help

<sup>73</sup> Melamed, *supra* note 64, at 20-22.

<sup>74</sup> See generally Clean Sites, *supra* note 68.

<sup>75</sup> *Id.* at 35.

<sup>76</sup> See EPA Proposed Corrective Action Rule for Solid Waste Management Units, 50 Fed. Reg. 30798 (1990), reported in 21 Env't Rep. (BNA) at 667 (1990).

fuel their fears and misunderstanding. The use of powers of 10 to express risk is also confusing. Some [study] participants did not fully understand what the numbers represented and which represented the greatest risk.<sup>77</sup>

Despite the criticism, the EPA continues to express risk factors using the "powers of ten" rule. According to the EPA, a cancer risk of one in 10,000 is considered a level of contamination that is protective of human health, although higher levels of protection are desirable. In a recent consent decree, entered in *United States v. Seymour Recycling*,<sup>78</sup> the EPA and the responsible parties agreed on health protective levels as high as one in 100,000 and one in 1,000,000. The ultimate issue is the determination of what constitutes a "safe" level of risk.

In many, if not most, cases the risks that may be present at, and the future consequences of, a contaminated site are largely unknown and not prone to meaningful quantification or definition. In a recent book entitled *Chemical Contamination and its Victims*<sup>79</sup> the authors stated,

At the heart of the problem presently confronted by the courts in toxic tort suits is the inability to determine causation quantitatively when transscientific issues are involved—when questions asked of science, such as the statistically significant effects of a chemical on human health, cannot be answered at the time.<sup>80</sup>

The authors pointed out that actual risk quantification for exposure to a toxin is morally and ethically impossible in most situations. We realistically cannot expect to expose thousands of people to a toxic substance to see what might happen. Therefore, risk assessments have to be somewhat hypothetical and will change as we learn more over time.<sup>81</sup> Those hypothetical expressions of risk in powers of ten can be deceiving to many because by increasing the value of the exponential factor does not always reduce the risk dramatically. Reducing a risk factor from  $10^{-2}$  to  $10^{-4}$  reduces the risk factor by ninety-nine percent, but reduction by each additional exponential lessens risk by only less than one additional percent. For example, risk expressed as  $10^{-4}$  power is the EPA benchmark for expressing

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<sup>77</sup> See *Clean Sites*, *supra* note 68, at 29.

<sup>78</sup> No. IP-80-457-C, consent decree (S.D. Ind. 1988).

<sup>79</sup> D. SCHNARE & M. KAUTZMAN, *CHEMICAL CONTAMINATION AND ITS VICTIMS* (1990).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 87.

a health risk of one in 10,000, or ninety-nine percent free of risk. That means that we have only one additional percent to work with. Accordingly, by adding a zero to the 10,000, risk reduction has increased by one additional tenth, or one-tenth of one percent. Emotionally, a risk factor of one in 100,000 may seem dramatically better than one in 10,000, but mathematically it is insignificant. Just how meaningful in terms of site cleanup is the requirement that risk factors be reduced more than ninety-nine percent, or  $10^{-4}$ ? Even the EPA says it favors remedies to achieve risk factors greater than  $10^{-4}$ . The consent decree and record of decision (ROD) in the *Seymour Recycling* case reflects that philosophy when the parties agreed to a "maximum excess lifetime cancer risk level of  $1 \times 10^{-5}$  at and beyond the site boundaries and of  $1 \times 10^{-6}$  at the site's Nearest Receptor . . . ." <sup>82</sup> That statement related to present clean water standards, but only a few lines farther down in the decree, the parties recognized that future risk calculation will be based on the most current data available from the *Superfund Public Health Evaluation Manual* and the EPA's Cancer Assessment Group.<sup>83</sup> That reference underscores the fact that, despite scientific efforts at risk assessment, determinations of what constitute acceptable levels of contaminant exposure are largely guesses. What might be acceptable now, based on available technology and information, may not be adequate in the future. The obvious danger of a consent decree like *Seymour* is that it is open-ended and leaves unanswered the question of when cleanup is complete. If we determine later that the standards set out in the decree are inadequate, who will be responsible for paying for the increased cleanup cost? If new technology only reduces risk by an additional one-tenth of one percent at a cost of \$100 million, it is difficult to argue that such a level of cleanup is practical even if it is possible.

### B. Centralizing the Remedy Selection Process

The *Seymour* case exemplifies the fact that while we may find some assurances in mathematical expressions of risk, we really do not know what may be required or appropriate in the future. The EPA and the private parties in *Seymour* selected a centralized source for reference regarding cleanup standards,<sup>84</sup>

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<sup>82</sup> See generally *Seymour Recycling Co.*, slip op.

<sup>83</sup> *Id.*

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

but the *Idarado* and *Rocky Mountain Arsenal* cases demonstrate the dichotomy that exists over cleanup authority and applicable standards. The district court in *Rocky Mountain* seemed to favor state control over remedy selection authority, while the Tenth Circuit in *Idarado* seemed to say that the state has no authority in a Superfund cleanup case and has only limited authority to intervene by insisting on state requirements.<sup>85</sup> According to the Clean Sites study on remedy selection,<sup>86</sup> "Even the best remedy selection process will be difficult to implement and will be prone to inconsistency under a decentralized program."<sup>87</sup> Is centralized remedy selection a practical alternative? Although Clean Sites' study group advocates that approach, there is an inherent contradiction in that position. CERCLA section 121(f)(1) requires that the President establish regulations providing for "substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State."<sup>88</sup> If the remedy selection process is centralized with the EPA, what influence can the states have in the process? Although the Tenth Circuit has held that a state does not have jurisdiction to use CERCLA in its own right, section 121 does give the state fundamental elements of control over federal cleanup activity. CERCLA provides,

If the State does not concur in such selection, [of a remedy] and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under Section 9606 entry of the consent decree, to seek to have the remedial action so conform. Such Intervention shall be a matter of right. The remedial action shall conform to such standard, requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attrib-

<sup>85</sup> *Idarado*, 916 F.2d at 1486.

<sup>86</sup> See Clean Sites, *supra* note 65.

<sup>87</sup> *Id.* at 81.

<sup>88</sup> 42 U.S.C. § 9621(f)(1) (1988)

utable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.<sup>89</sup>

The statute also contains language that requires the federal government to give the affected state an opportunity for involvement and comment at various stages of the remedy selection process, including the remedial investigation and site cleanup feasibility study.<sup>90</sup> Whether or not that comment and involvement will be recognized is subject to the court's determination. In the case of *Johnson v. United States*,<sup>91</sup> the court rejected the opinions of two expert witnesses on the injury causation in a toxic tort case because the "experts" could do no more than quantify potential harm in hypothetical terms.<sup>92</sup> That case involved a suit by aircraft plant employees claiming damages from cancers caused by exposures to radioluminescent instrument dials.<sup>93</sup> Although unrelated to CERCLA, the court's recognition of the inexactitude of risk quantification is directly analogous.

#### IV. Analysis of Remediation Methods Selection

Everyone wants a clean environment, but there is no clear consensus on how clean to make it. Study groups such as Clean Sites do little to give us concrete bases on which to make fundamental decisions on remedy selection. That group recently observed,

The remedy selection process used by EPA in administering the Superfund program involves the application of nine evaluation criteria developed using requirements of Section 121 and other factors. Numerous problems associated with the criteria and the remedy selection process have been identified in reports prepared by government agencies, congressional committees, and environmental and industry groups. These problems include inconsistency in decision-making, inconsistency in compliance with ARARs, lack of clear cleanup objectives, inadequate characterization of risk at sites, inadequate attention to environmental protection, inappropriate use of cost criterion

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<sup>89</sup> 42 U.S.C. § 9621(f)(2)(B).

<sup>90</sup> *Id.*

<sup>91</sup> 597 F. Supp. 374 (D. Kan. 1984).

<sup>92</sup> *Id.* at 409-15.

<sup>93</sup> *Id.*

(sic), failure to implement permanent and treatment remedies, poor justification for selected remedies, and selection of unproven technologies.<sup>94</sup>

The nine criteria used by the EPA leave the agency too much flexibility in site cleanup remedy determination, according to critics. Linda Greer, a congressional lobbyist with the Hazardous Waste Action Coalition, says that the problem relates to the EPA's present framework for the nine-factor analysis.<sup>95</sup> Those factors include the following:

- (1) overall protection of human health and the environment;
- (2) compliance with applicable or relevant and appropriate requirements (ARARs);
- (3) long-term effectiveness;
- (4) reduction of toxicity;
- (5) mobility or volume of waste;
- (6) short-term effectiveness;
- (7) ease of implementation;
- (8) state acceptance of the plan;
- (9) local acceptance of the plan; and
- (10) the cost of the plan.<sup>96</sup>

In practical terms, remedy selection is largely driven by the economic considerations involved. Conceivably, site treatment that would result in a risk factor ranking of  $1 \times 10^{-4}$  might cost \$10 million while reducing the risk factor to  $1 \times 10^{-6}$  might escalate that cost to twice that much. Depending on the remedy selected, and technology employed, it could cost \$40 million to clean up a site to a given standard using one technology, while the same level of cleanup may cost ten times that much using another approach to the problem.<sup>97</sup> "In hazardous waste engineering, the uncertainties are often more than an order of magnitude," according to the American Council of Consulting Engineers<sup>98</sup>. The uncertainty lies in the fact that

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<sup>94</sup> Clean Sites, *supra* note 68, at B-17.

<sup>95</sup> *Fixing Superfund*, CHEMICAL ENGINEERING, Nov. 27, 1989, at 31.

<sup>96</sup> Clean Sites, *supra* note 68, at B-7, C-2.

<sup>97</sup> J. ARBUCKLE, *supra* note 19, at 86.

<sup>98</sup> *Fixing Superfund*, *infra* note 99, at 32.

much of the contamination at any given site is underground, and finding out just what the contaminants are and how they might affect the environment are largely unknown parts of the remedial equation.<sup>99</sup>

*A. Cleanup Method Selection Criteria: An Enigma Within a Conundrum*

The federal legislation known as CERCLA gives only vague guidance on what parties must do to meet environmental cleanup requirements. The statute states that the President, through EPA, "shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable."<sup>100</sup> In the same section, however, the statute says that if a preferred remedy is not selected, the President simply must publish an explanation of why it was not selected. If the remedy selected by the EPA is not acceptable to a state, and the EPA has made the requisite publication of why a certain treatment is not to be used, the state's only recourse under CERCLA is section 121(f)(2)(B).<sup>101</sup> Under that provision, the state has a statutory right to intervene. It must show, however, that the federal executive decision was not supported by "substantial evidence."<sup>102</sup> What constitutes "substantial evidence" at present remains a legal standard that no court yet has defined in an environmental case.

One of the study groups in the Clean Sites symposium<sup>103</sup> concluded,

Despite clear Congressional intent and specific directives in the statutory requirement to use permanent remedies, the cleanups being prescribed by the Superfund program are virtually indistinguishable from those of previous years. In most cases, EPA is failing to use treatment at all, let alone use treatment to the "maximum extent practicable" as required by Superfund.<sup>104</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> 42 U.S.C. § 9621(a) (1988).

<sup>101</sup> 42 U.S.C. § 9621(f)(2)(B).

<sup>102</sup> *Id.* at § 9621(f)(2)(A).

<sup>103</sup> Clean Sites, *supra* note 68.

<sup>104</sup> *Id.* at B-11.

"Treatment," rather than disposal or removal, is a key word in the CERCLA legislation, but not one subject to easy definition for any particular site. The statute clearly says that treatment on site, rather than removal, is the favored approach. It states, in pertinent part, that "treatment which permanently and significantly reduces" the problem is preferred over other potential remedial actions.<sup>105</sup> The people "on the ground" dealing with contaminated site remediation, however, do not seem to have a concrete grasp of what is required. Moreover, they concede that permanent treatment is not always possible. "Permanence will not be achieved at all sites, but the statutory requirement to achieve permanence 'to the maximum extent practicable' suggests that the feasibility of achieving a permanent solution should be specifically evaluated at each site," according to the Clean Sites study.<sup>106</sup> What is practicable—that which is capable of being put into practice—and what is truly practical in terms of economics or technology, may not be the same thing.

### *B. The Practical Considerations of Toxic Site Cleanup*

Study groups like Clean Sites<sup>107</sup> have the luxury of musing in Socratic fashion about environmental cleanup remedies. Hard reality, however, is something else. Everyone may want to clean up a contaminated site, but then the parties are faced with the question of who is going to pay for it. Recently, two national real estate developers found, to their chagrin, that a site selected for a multimillion dollar condominium development was contaminated by spills from a gasoline station that existed on the site many years earlier. Calhoun Associates, a limited partnership, and Lincoln Properties, Inc. had fought a protracted legal battle for approval to build a high-rise condominium complex on several seemingly park-like acres next to one of the urban lakes in Minneapolis, Minnesota.<sup>108</sup> Although they overcame difficulties with city building permit require-

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<sup>105</sup> 42 U.S.C. § 9621(b) (1988).

<sup>106</sup> Clean Sites, *supra* note 68, at B-7.

<sup>107</sup> *Id.*

<sup>108</sup> Interviews with Richard Johnston, President, Braun Environmental Laboratories, Inc. (BELI), chief environmental engineer for the Lake Calhoun Associates/Lincoln Properties site in Minneapolis, Minnesota (July-Aug. 1990). The author served as counsel to BELI during the settlement procedures over who would pay for the engineering costs expended on site cleanup and investigation. When the developer and the landowner failed to agree on payment to BELI, BELI served notice of a mechanic's lien on the site to force settlement, or to have the parties committed to litigation, while development stalled.



ments and site restriction complaints voiced by neighboring property owners, they ran directly into the problem of remediation of the construction site before any development could begin. The parties employed an environmental engineering firm to evaluate the property and to design the necessary remediation methods, but when it came time to pay for the work, the developer—Lincoln Properties—and the land owner—Calhoun Associates—came to loggerheads over who would pay.<sup>109</sup> Under CERCLA liability standards, the problem is significant because former and present owners may be jointly and severally liable for cleanup at a contaminated site.<sup>110</sup> As one author pointed out,

It is important to note that this liability scheme applies not only to cleanup costs, but also to "natural resources damages." EPA and the states may assert claims for the damages that hazardous substance releases (including waste sites) have caused to federal or state-owned natural resources. These claims are to be defined and addressed under regulations which have been issued by the Department of the Interior.<sup>111</sup>

The "natural resources" damages refer to the effect or potential effect of contamination off the immediate site of concern. For instance, sealing the surface of a toxic waste site may prevent future direct human contact, but if the contamination has affected an aquifer, the effects of that contamination on natural resources could be vast—if not entirely incomprehensible. That enormous financial liability exposure effectively can thwart a cleanup effort even when the parties agree what should be done.

In the Minneapolis case, the economic aspects of the liability issue—although small by comparison to other site cleanups—took precedence over the question of the appropriate remedy authorized by the potentially responsible parties. Braun Environmental Laboratories, Inc. (BELI) was forced to file a mechanic's lien against the site because the developer and the landowner disagreed over who was responsible for the detection of the contamination and the remedial process employed. The property owner and the developer contended that BELI went far beyond what was authorized under their contract, but BELI countered that it did only what was required by federal

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

<sup>110</sup> J. ARBUCKLE, *supra* note 19, at 95.

<sup>111</sup> *Id.*

and state law and by their contract. Because of the petroleum contamination, the site could have greater problems than ever imagined.<sup>112</sup> In that case, a \$28,000 mechanic's lien caused a \$3.5 million project to crunch to a halt because the potentially responsible parties could not agree on who had to pay for a site remediation to which everyone had agreed.<sup>113</sup> Contract issues aside, this case underscores the role real dollars play in any site remediation process. As noted above, if the petroleum spill had affected a "natural resource," financial liability could have been enormous. CERCLA is replete with references to economic considerations in remedy selection. These are to be balanced against the protectiveness to human health and the environment. Actually, CERCLA sections 121(b)(1)(E) and 121(b)(1)(F) specifically refer to costs of future remedial actions.<sup>114</sup> As discussed previously, "how clean is clean" truly—and perhaps unfortunately—be a matter of money.

In the case of Love Canal,<sup>115</sup> no mortgage lenders seem willing to take the risk of financing home purchases in the area, despite the fact that the area has been deemed fit for human habitation, at least by the state authorities in New York.<sup>116</sup> It is not surprising that we would look to something as definable as the economic impact of site cleanup when the scientific community often has little hard data on which to base risk assessment. With the exception of asbestos exposure, there is a great deal of uncertainty as to what constitutes a health risk from exposure to an environmental contaminant.<sup>117</sup> Indeed, the EPA has been criticized for employing cleanup remedies that are unproven and of unknown value in attempting to rid the environment of pollutants. Although the EPA is encouraged to seek out new technologies,<sup>118</sup> some critics claim the agency sometimes requires implementation of a remedial technology it has no idea will work.<sup>119</sup> Even the critics, however, are not in one camp. More than ninety government, academic, and industry representatives, studying the subject during 1990, were unable to reach a consensus on how available or future technology ought to be applied at a cleanup site.<sup>120</sup>

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<sup>112</sup> See *Fixing Superfund*, *supra* note 99.

<sup>113</sup> *Id.*

<sup>114</sup> 42 U.S.C. §§ 9621(b)(1)(E), (F) (1988).

<sup>115</sup> See Silverman, *supra* note 1.

<sup>116</sup> *Id.* at 524-25.

<sup>117</sup> D. SCHNARE & M. KAUTZMAN, CHEMICAL CONTAMINATION AND ITS VICTIMS 174 (1989).

<sup>118</sup> Clean Sites, *supra* note 68, at B-12.

<sup>119</sup> Melamed, *supra* note 64, at 30.

<sup>120</sup> Clean Sites, *supra* note 68, at 67.

#### IV. Environmental Cleanup Litigation

In practical terms, site remediation may be driven more by public perception than by either technological considerations or risk assessment. "In setting standards, the regulator prefers to err on the cautious side. Consequently, the public tends to confuse remote possibility with great likelihood."<sup>121</sup> In one recent case, the court apparently found that to be an acceptable position. In 1987, the New Jersey Supreme Court in *Ayers v. Township of Jackson*,<sup>122</sup> determined that even though an expert witness could not quantify the extent of enhanced cancer risk from groundwater contamination from a landfill, the jury, which awarded more than \$15 million in damages, "could reasonably have inferred from [the expert] testimony that the risk, although unquantified, was medically significant."<sup>123</sup> That kind of potential liability for what may be unknown risks certainly contributes to the decision of any site remediation. As noted in the *Environmental Law Handbook*, "Obviously, from the private responsible party's perspective, the answer to 'how clean is clean' can make all the difference in the world to the most fundamental question: 'How much do I Pay?'"<sup>124</sup>

The author goes on to say that this kind of hysteria has resulted in "inexorable" escalation in cleanup costs in "almost total disregard of whether there will be further health/environment benefits at a site."<sup>125</sup> Practical cleanup standards appear largely indeterminable. According to one commentary,

The law implicitly assumes that all sites are worth the cost of providing protection of human health and the environment. Beyond that, there are currently no workable guidelines for the decision maker to determine the value of achieving higher levels of longterm effectiveness or a permanent remedy.<sup>126</sup>

The only judicial benchmark we have at present is the *Idarado* case, which holds that states—and conceivably private parties—may intercede in Superfund cleanups to urge greater levels of cleanup than determined appropriate by the EPA, if they are willing to foot the bills. A state can incorporate a more rigid standard in a CERCLA cleanup plan "provided the

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<sup>121</sup> *Id.*

<sup>122</sup> 525 A.2d 287 (N.J. 1987).

<sup>123</sup> *Id.*

<sup>124</sup> J. ARBUCKLE, *supra* note 10, at 87.

<sup>125</sup> *Id.*

<sup>126</sup> *Clean Sites, supra* note 68, at 114.

state pays the additional costs."<sup>127</sup> With litigation over CERCLA cleanup standards and the authority of federal and state governments in its infancy, there is little guidance as to how the courts eventually will determine the legal basis of "how clean is clean."

## V. Conclusion and Recommendations

### A. Conclusion

Remedy selection for hazardous waste sites will be determined by economic considerations, relative to optimum environmental considerations. CERCLA imposes cost liability for site cleanup under a draconian determination of joint and several liability.<sup>128</sup> In chapter 5 of the *Practical Guide to Environmental Law*, the author contends,

Issues relating to the imposition of joint and several liability under CERCLA have been perhaps the most hotly contested subjects of Superfund litigation. The government has insisted that in multiparty cases, liability is indivisible and the Government cannot be forced to bear the burden of proving each defendant's share.<sup>129</sup>

The Clean Sites study<sup>130</sup> on remedies and the remedy selection process reached one fundamental conclusion: cost of cleanup is a reality that will determine to a large extent what remedies may be employed.<sup>131</sup> The question of "how clean is clean" presently remains unanswered, but when lenders are willing to finance mortgages in Love Canal, we may have a practical—if not esoterically acceptable—yardstick to measure the effectiveness of hazardous waste site cleanup efforts.<sup>132</sup> The director of planning for the Love Canal Area Revitalization Agency recently said resettlement of the area against efforts to stop it is "sort of like the change in tide. It may be slack water, but the motion is the other way."<sup>133</sup> An issue remains, however, over what responsibility will be borne by the affected government or private sector landowner for future health risks at a site.

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<sup>127</sup> *Idarado*, 916 F 2d at 1496.

<sup>128</sup> D. SIVE & F. FRIEDMAN, *supra* note 15, at 119.

<sup>129</sup> *Id.* at 119.

<sup>130</sup> Clean Sites, *supra* note 65.

<sup>131</sup> *Id.* at C-7.

<sup>132</sup> See Silverman, *supra* note 1, at 1591.

<sup>133</sup> *Id.* at 1591.

When parties attempt to clean up a site, they also face the problem of overcleaning, absent some standard of safety. The problem is acute in the chemical industry for the cleaning of chemical containers. A professor of chemical engineering at North Carolina State University stated that lack of clearly defined standards can result in excessive use of cleanup mediums. "Without a clear definition of surface cleanliness, there is a tendency to overclean vessels using an excessive amount of solvent," said Professor Christine Grant.<sup>134</sup> Cleaning up one problem can create another. In New Brighton, Minnesota, the Army and the city face an ironic problem. The United States agreed to pay the City of New Brighton some \$9 million for CERCLA response costs involving the cleanup of water contamination from a contractor-operated munitions facility in the city.<sup>135</sup> Although there is now a water treatment facility in place to decontaminate the city's water source, tons of carbon from the plant's filters will soon have to be disposed of as a hazardous waste. The remedy for cleaning up the city's water—an activated carbon filter system—has created a new problem. Now that the contaminants from the water are in the charcoal, what is to be done with the now-contaminated charcoal? The city and the United States, as of this writing, are negotiating the disposal of this newly created hazardous waste and the replenishment of the carbon filter system.<sup>136</sup>

Remedy selection at present is an inexact process of balancing competing requirements for health and environmental protection against and the money available to achieve the desired standards of environmental well-being. No standardized basis for determining how clean is clean presently exists. The CERCLA statute itself states,

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable.<sup>137</sup>

Another further definition of this broad language remains to be determined, the provision effectively requires the President

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<sup>134</sup> *Cleaning Vessels So as to Generate Less Waste*, CHEMENTATOR, Oct. 1990, at 19.

<sup>135</sup> See M. Connor, *Government Owned-Contractor Operated Munitions Facilities*, 131 MIL. L. REV. 8 (1991).

<sup>136</sup> Interview with David C. Roland, associate private counsel to the City of New Brighton, Minnesota, Mar. 22, 1991.

<sup>137</sup> 42 U.S.C. § 9621(a) (1988).

to balance the protection of human health and the environment against the cost of accruing that protection. Even though it may be desirable to try to turn Love Canal into an environmental Garden of Eden, that just may not be practical or affordable.

According to the Clean Sites symposium study,

The final remedy decision will always be subjective, but the more specific the evaluation of costs and benefits, the more sensible and defensible the cost-effectiveness determinations will be. . . . [T]he alternative which achieves the site cleanup objectives at the lowest possible cost should be identified. Since all alternatives that meet objectives will protect human health and the environment, then this alternative represents the "floor" for the cost-effectiveness evaluation. In like manner, the cost of achieving a permanent remedy sets the "ceiling." If there are two or more permanent remedies, the lowest cost permanent remedy should be selected.<sup>138</sup>

That statement sounds good, but it does little to cement a practical reference for site remedy selection. The study group simply said that we should clean up the environment, but do it as economically as possible. For the time being, hazardous waste site cleanup remains an amorphous goal that is undefined in practical terms.

### *B. Recommendations*

CERCLA and RCRA requirements must remain distinct. Application of current RCRA standards to Superfund (CERCLA) sites for water quality, air emissions, and soil contaminants are unworkable and entirely impractical. To create an effective remedy selection process, the following measures should be implemented:

(1) The EPA should be solely responsible for remedy selection at Superfund sites. As provided by the statute, states may intervene to require stricter standards of cleanup if the state is willing to pay the cost.

(2) Congress should amend 42 U.S.C. § 9621(d)(2)(A) (section 121 of CERCLA) to eliminate language that ostensibly gives states the power to insist on more stringent

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<sup>138</sup> Clean Sites, *supra* note 68, at 45.

cleanup standards than may be proposed by the agency without the state's assuming the additional financial burden.

(3) Because of the uncertainty of injury causation from contaminants at a Superfund site, and the unknown financial liability of responsible parties once remedy selection is determined, the responsible parties should be immune from any further liability once EPA selects a site remedy.

(4) Once a site has been remediated to a level that the EPA determines to be acceptable, states should be free to pursue further measures they may deem necessary, without further expense to the site's responsible party or parties.

(5) Numerical expressions of risk in mathematical exponentials should be eliminated because they are confusing and patently misleading. If EPA has determined that ninety-nine percent of the risk has been eliminated, that should stand as a benchmark for cleanup standards.

(6) Site cleanup standards must be site-specific and formulated with regard to the historic and future use of the site.

Society often has tried in the past simply to bury its messes or to ignore them. We have to clean up these messes, but plenary federal authority over Superfund cleanups is the only practical alternative for dealing with past problems. We should view RCRA as the means to avoid the necessity of CERCLA in the future—not as a hobble on the legs of CERCLA's progress.





## BOOK REVIEWS

### GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM\*

REVIEWED BY MAJOR FRED L. BORCH\*\*

A doctor testifies that cancer of the jaw was caused by a cut on the lip from a cardboard carton. Another physician testifies that getting hit by an orange juice container caused breast cancer. Yet another medical doctor testifies in support of a psychic who claims to have lost her "powers" after a CAT scan. *Galileo's Revenge: Junk Science in the Courtroom* is about these and other examples of scientific quackery, and about how such bogus science has come into American courts disguised as "expert" testimony. Author Peter Huber, an engineer and lawyer by training, has written a humorous and instructive expose of "junk science" in America's courtrooms. Military lawyers acting as trial or defense counsel or defending the United States in civil litigation will enjoy reading his book and, afterwards, will be more skeptical of "expert" testimony in court.

Expert witnesses first appeared in English common-law courts in the fourteenth century. They were not called by the parties; instead, they were called by the court. They usually testified on technical subjects, such as shipping or accounting. American courts initially followed this common-law tradition of court-appointed expert witnesses. By the late nineteenth century, however, experts hired by the parties in a case had replaced court-appointed experts. These hired experts "were not given a free hand to speculate; their function was to convey the consensus views of their profession." Trial and appellate judges in the first decades of this century understood that the rules of evidence carefully had to limit the role of expert witnesses. Otherwise, trials might have become "battles of the experts" rather than truth-finding processes.

Huber argues convincingly that the well-known case of *United States v. Frye*, 293 F. 1013 (D.C. Cir. 1923), represented

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\* Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1991); pages 274; \$23.00; hardcover.

\*\* Judge Advocate General's Corps, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

a balance between a party's "right" to call an expert and the need to eliminate incompetent, crackpot testimony from the courtroom. *Frye* held that experts were permitted to testify only if their views were based on ideas, theories, and methods "generally accepted" as a valid by the scientific community.

*Frye* set the standard for expert testimony until the 1970's. Huber, however, fails to explain in detail just why *Frye* fell out of favor. Nevertheless, the courts over the years gave up trying to distinguish a serious expert from a quack. As a result, the drafters of the 1975 Federal Rules of Evidence abandoned the *Frye* standard. Federal Rule of Evidence 702 simply says that an individual may testify as an expert if he or she can "assist the trier of fact to understand the evidence or determine a fact in issue." In sum, a court can permit any expert testimony it finds helpful. The "expert" need not be a recognized authority or specialist, and he or she need not show that his or her "expert" opinions are "generally accepted." Huber points out that the rules of evidence "give equal dignity to the opinions of charlatans and Nobel Prize winners." The result—"expert" testimony with little or no scientific validity is used by unscrupulous plaintiffs and their attorneys to win cases. These victories in court, however, do not advance the truth-finding process because the fact-finder ultimately has to make a decision based on spurious evidence. These irrational jury verdicts harm the rule of law and undermine the role of law in society.

*Galileo's Revenge* uses well-known cases to illustrate how Federal Rule of Evidence 702 and similar rules are used to get bogus science into court. For example, based on accidents caused by the car's "sudden acceleration," several plaintiffs' lawyers filed some \$5 billion in claims against the maker of the Audi 5000. Audi's experts *proved* that any sudden acceleration was caused by the driver stepping on the gas pedal instead of the brake pedal, but no one listened. *Car and Driver* magazine and the Canadian and Japanese ministries of transportation agreed with Audi. No one listened to them either. Instead, dozens of self-styled scientific experts testified in court that the Audi 5000 had a design flaw, by which an "electronic glitch" in the computer that determines the air-fuel mix, or maybe "defects in the shift-linkage" caused the mysterious accelerations. The juries that believed these "experts" and the appellate courts that affirmed the verdicts cost Audi millions of dollars in damages and settlements. Its car sales were ruined. The plaintiffs' attorneys, however, did well financially.

*Galileo's Revenge* also looks at the Benedectin drug suits in which "expert" witnesses claimed that the drug—manufactured to treat morning sickness in pregnant women—caused birth defects. The Centers for Disease Control in Atlanta, the World Health Organization, the Food and Drug Administration, and the March of Dimes Birth Defects Foundation all agreed with Dow Chemical—Benedectin's manufacturer—that the drug did *not* cause birth defects. Nevertheless, "experts" continued to testify in support of claims that Benedectin caused birth defects. Huber writes that Dow spent about \$100 million to defend against these Benedectin suits. Furthermore, Dow took the drug off of the market. Thus, an excellent treatment for morning sickness was no longer available. Ironically, the *Journal of the American Medical Association* reported in 1990 that the disappearance of Benedectin created a "significant therapeutic gap." The nausea and vomiting accompanying morning sickness can be so debilitating that it "starves the pregnant mother's body of normal nourishment," and harms the health of the unborn child. The lack of Benedectin to treat morning sickness actually may increase the number of birth defects. Huber concludes that the Benedectin cases demonstrate that junk science in the courtroom rewards greedy lawyers, and hurts corporations and insurance companies. It also can harm the physical health of our society.

*Galileo's Revenge* also examines asbestos and Dalkon Shield litigation, and the new expert field of "clinical ecology." Experts in this area testify in court that environmental pollution causes "chemically induced AIDS." Huber's discussion of these subjects is crisp, informative, and never boring.

Do the Federal Rules of Evidence and Military Rules of Evidence need rewriting to keep bogus science out of the courtroom? Should we resurrect the *Frye* standard for expert testimony? Huber suggests that both questions should be answered in the affirmative. In a recent article in *Forbes* magazine, however, he advocates that American judges should be able to do what European judges can do—that is, appoint their own experts. Is this practical given our adversarial system? Would not the accused in a criminal trial always be allowed to call an expert witness, given the "constitutional right" to present a defense?

Military attorneys know that experts at courts-martial now testify about various "syndromes" to explain victim behavior. Is this junk science? Consider the urinalysis expert who testifies for the defense that an accused stationed near New York

City may be "positive" for cocaine because he touched paper money in circulation there. This currency, an expert may say, often has cocaine on it because of wide-spread drug trafficking in New York City, and the accused unknowingly may have absorbed this cocaine through the skin pores on his fingers. Would these assertions be legitimate expert testimony or one expert's idiosyncratic view?

Huber concludes that these types of questionable assertions, which often constitute nothing more than scientific quackery, must be banished from the courtroom. Readers of *Galileo's Revenge: Junk Science in the Courtroom* will have a better understanding of the problem—and perhaps the solution—after reading this fine book.

## OTHER LOSSES\*

REVIEWED BY MAJOR FRED L. BORCH\*\*

Did General Dwight D. Eisenhower order the mass starvation of one million German prisoners of war (POWs) at the end of World War II? Did he and others then cover up these killings? James Bacque claims in *Other Losses* that the answer to both questions is "yes." His book, first published in Canada in 1989, has received world-wide attention. It was featured in a British Broadcasting Corporation documentary, and discussed in *Time* magazine, in *The New York Times*, and on network television. It was translated into German and was a best-seller in Germany. American booksellers and publishers, however, refused to distribute *Other Losses* because of its controversial content; it therefore was not widely available in this country. It has, however, recently been published in the United States. The book likely will cause much excitement—and anger—among its American readers.

*Other Losses* charges that Eisenhower used his power as the head of the Allied occupation intentionally to starve to death "quite likely over a million" German soldiers held in American-run POW camps. Why? Because Eisenhower hated the Germans, and wanted revenge for the pain and suffering they

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\* James Bacque, *Other Losses* (St. Martin's Press 1991); 170 pages plus appendices; \$22.95; hardcover.

\*\* Judge Advocate General's Corps, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, Charlottesville, Virginia.

inflicted on all Americans and members of the world community.

Eisenhower did feel strongly about the German enemy. In 1943, he complained to Army Chief of Staff George Marshall about the number of German POWs in his care. Their huge numbers were a logistical headache, and Eisenhower wrote that it was "a pity we could not have killed more." In 1944, he told his wife, Mamie, that "the German is a beast." Apparently, he also suggested that the 3000 officers of the German General Staff should be "exterminated." *Other Losses* offers these and other intemperate remarks as proof of Ike's murderous intent.

After the war, as head of the Allied occupation, Eisenhower took his revenge on the Germans. Presumably, he decided that the nearly four million German soldiers held as POWs were the easiest target. Of course, these men could not be shot out of hand; questions would be asked. *Other Losses* alleges that Eisenhower decided to kill these German POWs by starving them to death. The Geneva Convention relating to the treatment of POWs, however, required that POWs receive the same rations as Allied soldiers. Eisenhower allegedly side-stepped the letter of the law by "creating a new class of prisoners." In late April 1945, German POWs were reclassified as Disarmed Enemy Forces (DEFs). Because the Geneva Convention did not protect these DEFs, they could be fed much less than the 4000 calories a day available to Allied troops. Furthermore, Eisenhower could claim that he was doing nothing illegal in directing that DEF rations be set at a woefully inadequate 1500-calories-per-man per day. The German POWs would die slowly and painfully from a lack of food. Disease also would take many in an undernourished, weakened state of health. Eisenhower would have his revenge.

How were these mass deaths to be concealed from the German civilian population, and from Americans at home? *Other Losses* charges that records of the status of DEFs in the some 200 American-run camps were falsified deliberately. Starvation was called "emaciation," and the mass deaths became "Other Losses" on prisoner tally sheets. In this way, some one million men were "casually annihilated" from 1945 to 1946. No one was the wiser, until Bacque uncovered the truth. *Other Losses* details this discovery in some 170 pages. It is very troubling reading.

Can it really be true that Ike was a murderer? Could he actually have intended the deaths of a million men? Were he and

others guilty of the greatest war crime in American military history? These questions and more are the natural consequence of turning the pages of this book. What is the truth?

Because Bacque claims to be the first to uncover these crimes, his scholarship relies chiefly on original sources such as official military documents, personal correspondence, and interviews. *Other Losses* has thirty-one pages of appendices and some 450 footnotes, which lend an aura of credibility to Bacque's scholarship. An individual reader who wants to examine Bacque's most damning evidence, however, will find this a difficult task. Most footnotes, for example, refer to written materials found only in The National Archives, The Library of Congress, the Public Record Office in London, and the Eisenhower Library in Abilene. In sum, it is impractical for any reader personally to check the historical accuracy of *Other Losses*.

Fortunately, Dr. Stephen Ambrose, the head of the Eisenhower Center at the University of New Orleans, met recently with a group of historians to examine the allegations against Eisenhower. These historians first concluded "that Mr. Bacque had made a major historical discovery. There *was* widespread mistreatment of German prisoners in the spring and summer of 1945." American soldiers beat German POWs, and denied them water. German captives were made "to live in open camps without shelter." They received grossly inadequate food; in some camps, the POWs were so hungry they "made a 'soup' of water and grass." Little or no medical care was available. Mail also was withheld from the POWs. "Men did die needless and inexcusably. This must be confronted, and it is to Mr. Bacque's credit that he forces us to do so."

The historians determined, however, that Bacque's allegations against Eisenhower are untrue. Eisenhower actually was angry with the Germans. They concluded, however, that because his men were dying by the thousands, Ike's despise of the Germans was understandable and excusable. Similarly, most Americans were just as angry. The discovery of German atrocities in the concentration camps did nothing to diminish this anger. There is absolutely no evidence, however, that Eisenhower masterminded the death of any German POWs. For example, the historians agree that German POWs *were* reclassified as DEFs. The reclassification, however, was not a result of any sinister motive, nor was the reclassification Eisenhower's personal decision. Rather, Ike's superiors created the DEF category because they feared a famine in the winter of

1945 to 1946. The Allies did not have enough food to feed more than five million POWs at the level required by the Geneva Convention. In addition to the POWs, there were millions of civilians in liberated Europe who needed food. The Allies did not want to violate their treaty obligations, but they also decided that it would be wrong to feed German POWs better than the civilian population. The reclassification of POWs as DEFs meant equal rations for both civilians and POWs. The historians concluded that the reclassification was a sound policy decision. The historians also concluded that Bacque's figure of one million dead is wrong. German POWs actually did die of exposure and malnutrition. The "Other Losses" listed in prisoner tally sheets, however, did not simply reflect dead POWs who perished in the camps. Rather, they also reflected POWs transferred to the custody of another nation, escapees and those "old men and young boys in the militia"—called the *Volksturm*—who were released without much formality from the camps.

Those who read *Other Losses* may want to follow-up with *Eisenhower and the German POWs: Facts Against Falsehoods*. To be published by Louisiana State University Press in early 1992, this book records the findings of Dr. Ambrose and the team of historians who investigated Mr. Bacque's charges.

Military lawyers should read *Other Losses* for two reasons. First, in seeking to prove that Eisenhower was guilty of mass murder, the book reveals that some American soldiers did mistreat German prisoners. These violations of the Geneva Conventions concerning the treatment of POWs will interest judge advocates because they are actual examples of American misconduct. Second, *Other Losses* is worth reading because it illustrates how difficult it is for the average reader—even those trained as lawyers to weigh conflicting evidence—to know if a book's claims are historically accurate. *Other Losses* is proof that the truth is not always easy to find.





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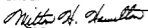
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