IN DEFENSE OF THE GOOD SOLDIER DEFENSE[1]

RANDALL D. KATZ[2] & LAWRENCE D. SLOAN[3]

The trial counsel . . . in a court-martial at Fort Anywhere has presented the government's case-in-chief. . . . The government rests and trial counsel prepares to "cut another notch in the handle of his pistol," quite secure in the knowledge that the facts will carry the day. The defense case consists of four witnesses—the accused's platoon sergeant, platoon leader, first sergeant, and company commander. Collectively, they testify that the accused is the best soldier they have ever seen; that he sets the example for his peers, subordinates, and superiors; and that on a scale of one to ten . . . the accused is nothing less than a nine. The defense case never remotely addresses the facts of the alleged drug offenses. In final argument . . . [d]efense counsel argues that before a finding of guilty can be returned the members must be convinced of the accused's guilt beyond a reasonable doubt and that the character evidence he presented raises such a doubt. . . . Approximately fifteen minutes later the members return and announce the finding: Not Guilty.[4]

I. Introduction

The above example illustrates the potential impact of the good soldier defense on the results of a court-martial. What is commonly referred to as the good soldier defense involves the presentation by an accused service

1. The authors wish to sincerely thank Judge and Professor Robinson O. Everett for his inspiration and invaluable assistance in producing this article.

2. Law Clerk to the Honorable Gerald B. Tjoflat, U.S. Court of Appeals, Eleventh Circuit. J.D., *with high honors*, 2001, Duke Law School; B.A. & B.S., *magna cum laude*, *Phi Beta Kappa*, 1998, University of Maryland, College Park. Author, Note, *Friendly Fire: The Mandatory Military Vaccination Anthrax Program*, 50 DUKE L.J. 1835 (2001).

3. Associate, Sullivan & Cromwell. J.D., *with honors*, 2001, Duke Law School; B.A., *magna cum laude*, 1998, University of Pennsylvania. Author, Note, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467 (2001).

4. Captain Robert Smith, *Military Rule of Evidence 404(a)(1): An Unsuccessful Attempt to Limit the Introduction of Character Evidence on the Merits*, 33 FED. B. NEWS & J. 429 (1986). This quote provides a significantly abridged excerpt from a hypothetical situation described by Captain Smith.

member of evidence that highlights his good military character in an effort to convince members of the court-martial panel that he did not commit the crime of which he is accused. The accused submits written performance evaluations and oral testimony during trial to showcase his good military character. The military justice system has a strong tradition of permitting this evidence to be considered at courts-martial; such evidence has been permissible for almost seventy-five years. Recently, however, there has been increased criticism of the good soldier defense. While there are certainly valid arguments that can be made for both retaining and prohibiting the defense, the authors of this article believe that the good soldier defense serves a valid purpose and should be maintained.

Part II of this article begins with an overview of the contours and operation of the good soldier defense. It discusses Military Rule of Evidence (MRE) 404(a), which permits the introduction of evidence of good military character, and the manner in which the courts have interpreted this rule. Part II concludes with a comparison of MRE 404(a) and its counterpart in the Federal Rules of Evidence (FRE). Part III then turns to a discussion of the controversy surrounding the good soldier defense. This section advances four arguments that weigh strongly in favor of maintaining the good soldier defense, and then identifies the primary arguments raised by the critics of the defense. While these criticisms appear valid on their face, they can all be credibly rebutted.

II. The Good Soldier Defense

A. What is the Good Soldier Defense?

What is commonly termed the "good soldier defense" refers to an accused service member's introduction of evidence of good military character in an attempt to convince the military judge or members that he did not commit the offense for which he is charged. Generally, the introduction of evidence of a defendant's good military character is intended to provide the basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged.[5] The good soldier defense is not an affirmative defense. It will not be sufficient to exonerate a service member who is shown or admits to having committed all the ele-

5. *See* Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171, 171 (1990).

ments of the crime for which he is charged.[6] Instead, defense counsel rely on the good soldier defense to create sufficient doubt in the minds of the judge or jury such that they could find reasonable doubt that the accused committed the charged offense.[7]

The Supreme Court has recognized that evidence of the character of the accused "alone, in some circumstances, may be enough to raise a reasonable doubt of guilt."[8] This quoted language has been incorporated into the military judge's instructions related to character evidence.[9] It is obviously preferable for the defense to utilize other means of creating doubt regarding the accused's guilt in addition to character evidence, but the defense may create sufficient doubt relying solely on character evidence. Therefore, although the good soldier defense is not an affirmative defense, the accused may rely solely on good character evidence for his defense.

One must remember that the military trial process is a bifurcated one in which the determination of guilt or innocence is separate from sentencing.[10] While evidence of good military character can be relevant at both stages of the process, the good soldier defense refers generally to use of evidence of good military character during the assessment of guilt or innocence. [11] Thus, the following discussion of the good soldier defense specifically addresses the use of character evidence for the purpose of assessing the guilt or innocence of the accused. Even though similar evidence bearing on the character of the accused may be introduced at both phases of the process, there is not much criticism of the use of such evidence during the sentencing phase. The use of character evidence by a guilty defendant, in order to mitigate the harshness of his punishment dur-

---

6. This is in marked contrast to an affirmative defense, such as self-defense, which allows a defendant to be exonerated even though all the elements of the crime can be proved beyond a reasonable doubt.

7. Military trials place the same burden of proof on the prosecution as do civilian criminal courts in this country. The prosecutor must prove guilt beyond a reasonable doubt.

8. Michelson v. United States, 335 U.S. 469, 476 (1948).

9. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ¶ 7-8-1 (1 Apr. 2001).

10. *See* 3 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 23-11.00 (1999).

11. *See id.*

ing the sentencing phase, is a far less controversial practice and will not be the focus of this article.

Typically, the defense presents character evidence through the live testimony of superior officers of the accused, or from associates of the accused. In *United States v. Vandelinder*,[12] the Court of Military Appeals (COMA) (the predecessor of the Court of Appeals for the Armed Forces (CAAF)) made it clear that in addition to live testimony, enlisted performance reports could be admitted as evidence of good military character. Writing for the *Vandelinder* majority, Chief Judge Everett pointed out that:

> The admissibility of these opinions [about a service member's military character contained in Enlisted Performance Reports] fulfills an important purpose . . . by permitting a service-member to reap the benefits of the "good military character" he has demonstrated in years past, even though because of death, distance, or other reasons, his former superiors and associates may be unavailable to testify for him at his trial.[13]

Specific instances of conduct described on the reports, however, cannot be admitted[14] per MRE 405(a) and (b).[15] Standard military appraisal forms contain five categories: (1) professional performance,[16] (2) military behavior,[17] (3) leadership and supervisory ability,[18] (4) military appearance,[19] and (5) adaptability.[20] All of these categories, however, may not be admissible for good soldier defense purposes. Chief Judge Everett observed: "Admittedly, a diversity of views may exist as to the precise limits of 'good military character.' Perhaps, it does not include all the five 'traits' rated on the Reports of Enlisted Performance; or perhaps it includes

---

12. 20 M.J. 41 (C.M.A. 1985).

13. *Id.* at 46.

14. *See id.*

15. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 405(a) and (b) (2000**)** [hereinafter MCM].

16. *See Vandelinder*, 20 M.J. at 42-43. Professional performance is defined on the form as "skill and efficiency in performing assigned duties." *Id.* at 48.

17. *See id*. at 42-43. Military behavior is defined on the form as "how well the member accepts authority and conforms to the standards of military behavior." *Id*. at 48.

18. *See id.* at 42-43. "Leadership and supervisory ability" is defined on the form as "the ability to plan and assign work to others." *Id*. at 48.

19. *See id.* at 42-43. Military appearance is defined as the "member's military appearance and neatness in dress." *Id.* at 48.

20. *See id.* at 42-43. Adaptability is defined as "how well the member gets along and works with others." *Id.* at 48.

additional 'traits.'"[21] Ultimately, the discretion lies with the military judge in each individual case to discern which categories are relevant to a pertinent trait.

B. When Is the Good Soldier Defense Available?

Military Rule of Evidence 404(a) permits the admissibility of evidence of good military character during the trial phase of a court-martial. To properly comprehend MRE 404, one must have a basic understanding of the history of character evidence in the military justice system. Prior to the enactment of the MRE in 1980, paragraph 138f of the 1969 *Manual for Courts-Martial* addressed the admissibility of character evidence and provided:

> To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen. However, he may not, for this purpose, introduce evidence as to some specific trait of character unless evidence of that trait would have a reasonable tendency to show that it was unlikely that he committed the offense charged. For example, evidence of good character as to peaceableness would be admissible to show the probability of innocence in a prosecution for any offense involving violence, but it would not be admissible for such a purpose in a prosecution for a nonviolent theft.[22]

This paragraph provided defense counsel a great deal of leeway in presenting character evidence. Such a favorable disposition to the admissibility

21. *Id.* at 45.
22. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f (1969).

of character evidence is consistent with the practice and tradition of the military justice system.

The first *Manual for Courts-Martial* (*Manual*) to specifically provide for the introduction of character evidence was the 1928 *Manual*.[23] Paragraph 113b of the 1928 *Manual* stated, "The accused may introduce evidence of his own good character, including evidence of his military record and standing, in order to show the probability of his innocence."[24] The 1949 *Manual* expanded on this provision with language very similar to that quoted from the 1969 *Manual* in the preceding paragraph.[25] The early precedents set by the COMA support the conclusion that courts-martial have traditionally been very receptive to the introduction of character evidence by the accused.[26] Thus, courts-martial historically permitted the accused

---

23. The first *Manual for Courts-Martial* to contain rules of evidence was the 1921 *Manual*. *See* Capofari, *supra* note 5, at 173. Prior to that, the *Manual* simply stated that the rules of evidence at courts-martial would be the same as those used by the federal district courts. The 1921 *Manual* did not specifically address the use of good character evidence by the defense. *See id.*

24. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 113b (1928).

25. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 125b (1949). The 1949 *Manual* provided that:

> In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general reputation as a moral well-conducted person and law abiding citizen. However, if the accused desires to introduce evidence as to some specific trait of character, such evidence must have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of reputation for peacefulness would be admissible in a prosecution involving any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft.

Id. The 1951 *Manual for Courts-Martial* modified this provision slightly by changing the word "reputation" in the first sentence to "character." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f(2) (1951).

26. *See* United States v. Harrell, 26 C.M.R. 59 (C.M.A. 1958); United States v. Presley, 9 C.M.R. 44 (C.M.A. 1953); United States v. Browning, 5 C.M.R. 27 (C.M.A. 1952).

to introduce evidence of specific traits and evidence of general good character as a soldier.[27]

Following this long-standing history of permitting nearly all forms of character evidence to be introduced in courts-martial, MRE 404(a) was enacted. The rule provides:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (1) *Character of the accused*. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.[28]

The basic rule laid out in MRE 404(a) is that evidence of the character of an accused is not admissible to prove that he or she acted in conformance with that trait on a particular occasion. Despite this blanket prohibition on the introduction of character evidence when deciding the merits of a case, the language in MRE 404(a)(1) provides an exception whereby the accused may introduce evidence that relates to a pertinent trait. Military Rule of Evidence 404 provides little guidance as to what constitutes a pertinent trait, which will qualify for admission at trial under MRE 404(a)(1). The drafters of MRE 404, however, provided the following analysis of the new rule:

> (a) *Character evidence generally.* Rule 404(a) replaces 1969 Manual [paragraph] 138f and is taken without substantial change from the Federal Rule. Rule 404(a) provides, subject to three exceptions, that character evidence is not admissible to show that a person acted in conformity therewith. Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from [paragraph] 138f of the 1969 Manual which also allows evidence of "general good character" of the accused to be received in order to demonstrate that the accused is less likely to

---

27. *See* Capofari, *supra* note 5, at 175 ("Courts-martial always have been receptive to character evidence offered by the accused, and the accused always was permitted to offer general character [evidence], not only as to a specific trait, but also as to one's general good character as a soldier.").

28. *See* MCM, *supra* note 15, MIL. R. EVID. 404(a)(1).

> have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. *It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders*.[29]

While the drafters explicitly stated in their analysis that they were significantly changing the law, they also provided that evidence of good military character would be admissible when found to be pertinent. Neither the plain language of the rule, nor the drafters' analysis provides guidance as to when good military character would be a "pertinent trait." It has been left to the military courts to interpret the meaning of this language. Through a series of cases discussed below, the COMA has developed a broad interpretation of "pertinent," such that today evidence of good military character is likely to be found relevant for most courts-martial.

The COMA first had the opportunity to interpret the new MRE 404 in *United States v. Clemons*.[30] In *Clemons*, the accused was charged with larceny, unlawful entry, and wrongful appropriation in connection with the theft of a cassette player and television set.[31] Clemons admitted taking the property, but claimed he did so as part of his tour of duty as charge of quarters in order to teach a lesson to those who left their valuables unsecured and to secure these items to protect them from theft.[32] To support this defense, he sought to have several noncommissioned officers testify as to his "good military character and his character for lawfulness."[33] The trial court, relying upon MRE 404(a), excluded this evidence that Clemons was a good soldier. The COMA unanimously agreed that this exclusion of character evidence was reversible error and overturned Clemons' conviction.[34]

Writing for the court in *Clemons*, Judge Fletcher focused on the relationship between the character evidence and the nature of the defense raised by Clemons in holding that "it is clear that the traits of good military

---

29. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404 Analysis, apps. 22-32 (1984) (emphasis added).

30. 16 M.J. 44 (C.M.A. 1984).

31. *See id.* at 44.

32. *See id.* at 45.

33. *Id.* at 44.

34. *Id.* at 48.

character and character for lawfulness each evidenced 'a pertinent trait of the character of the accused' in light of the principal theory of the defense case."[35] Chief Judge Everett wrote a concurring opinion, which seemed to foreshadow the court's future treatment of character evidence when he stated:

> it is hard to understand how evidence of a defendant's character as a law-abiding person—or, indeed, his general good character—would not be pertinent in the present case or, indeed, in almost any case that can be imagined. This seems especially true in light of the great weight that for decades has been attributed to character evidence in trials by courts-martial.[36]

The next case to reach the COMA concerning character evidence was *United States v. Piatt*.[37] Sergeant Piatt was a Marine Corps drill instructor who was accused of ordering two trainees to assault a third trainee in order to improve the derelict trainee's behavior.[38] Sergeant Piatt claimed that he did not intend to have the two trainees physically assault the third, but merely intended to have them verbally address the third trainee. In support of this defense, Sergeant Piatt attempted to have witnesses testify as to their "opinions of appellant's character as a drill instructor and his dedication to being a good drill instructor."[39] Relying on MRE 404(a), the trial court denied the admissibility of the character evidence. Again, a unanimous COMA found this to be reversible error after focusing on the nature of the offense and the defense to be raised by the accused.[40] The court found that:

> trial defense counsel correctly pointed out that the charges against appellant arose in the context of the performance of his military duties as a drill instructor. As past character for performing such duties in a proper manner would tend to undermine the implication that he willfully departed from normal standards in training. . . . his character as a good drill instructor was clearly

35. *Id.*
36. *Id.* at 49.
37. 17 M.J. 442 (C.M.A. 1984).
38. *See id.* at 444.
39. *Id.* at 445.
40. *Id.* at 446 ("In this context, a person's military character is properly considered a particular trait of his general character and a fact which may be relevant at a court-martial depending upon the issue for which it is offered.").

> pertinent to the question of his intent to do the charged offenses.[41]

On the same day *Piatt* was decided, the court also decided *United States v. McNeill.*[42] In *McNeill*, the court utilized the same logic found in *Piatt* to hold that a drill instructor accused of sodomizing one of his trainees was entitled to have the benefit of evidence of his character as a drill instructor introduced as part of his general denial of the charges.[43]

Clemons, *Piatt* and *McNeill* all dealt with character evidence in connection with offenses that involved the performance of military duties. In *United States v. Kahakauwila*,[44] the court was faced for the first time with a non-duty offense. Marine Corporal Kahakauwila was convicted of purchasing drugs from an undercover informant in the barracks in violation of Uniform Code of Justice (UCMJ) Article 92. The accused sought to introduce testimony from witnesses who would testify that his work performance was excellent, his military appearance was outstanding, and his conduct as a squad leader was very dependable.[45] The COMA found that the trial court erred in excluding the character evidence on the grounds that "[e]vidence of the accused's performance of military duties and overall military character was admissible to show that he conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations."[46]

In another drug case, *United States v. Vandelinder*,[47] the court recognized that the admissibility of character evidence in a drug case "should not hinge on whether the prosecution is under Article 92 or Article 134; or

---

41. *Id.*

42. 17 M.J. 451 (1984).

43. The procedural history of *McNeill* is somewhat unique in that the trial judge prohibited the admission of the character evidence at trial and a verdict of guilty was returned. At the sentencing phase, the defense was permitted to introduce character evidence to mitigate Sergeant McNeill's sentence. Upon hearing the character evidence, the members of the court-martial inquired of the judge how they could reconsider their findings of guilt. The military judge told the members they could reconsider their findings, but the character evidence could not be considered. *See* Capofari, *supra* note 5, at 180.

44. 19 M.J. 60 (C.M.A. 1984).

45. *See id.* at 61.

46. *Id.* at 62.

47. 20 M.J. 41 (C.M.A. 1985).

under . . . Article 112a."[48] The trial court found that the alleged drug purchases by the accused were not uniquely military misconduct and, thus, good military character was not pertinent. The COMA disagreed, stating that "[t]he Drafters Analysis makes clear that—whatever the term 'trait' means in [MRE] 404(a)(1)—'good military character' is a 'trait.' We can only conclude that this trait was 'pertinent' to the charge against Vandelinder."[49] Thus, *Vandelinder* and *Kahakauwila* firmly established that evidence of good military character is pertinent even when the accused is charged with an offense, such as drug possession, which appears to have only a limited nexus to the accused's military duties.

The COMA continued its expansive reading of "pertinent trait" in *United States v. Court*,[50] where it held that the trial judge improperly excluded evidence of the accused's military proficiency even though the offense did not involve the defendant's military duties and occurred off-base. Captain Court was accused of conduct unbecoming an officer and a gentlemen as a result of his behavior towards a fellow officer's wife while off-base and off-duty. Chief Judge Everett, writing for the court, held:

> We agree with defense counsel's argument at trial that appellant's "integrity both as an officer and as a member of the community are in question here." Therefore, in addition to presenting whatever other evidence was available to show that he did not commit the alleged indecent assault or attempted rape, appellant was entitled to argue—and to present evidence in support of such a position—that he was such an outstanding officer that, by virtue of this fact alone, a factfinder could infer that he would not have engaged in activity unbecoming an officer and a gentleman.[51]

---

48. *Id.* at 44. Article 92 prohibits failing to obey an order or regulation. *See* UCMJ art. 92 (2000). Article 134 is a general article that disciplines "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredits upon the armed forces." *See id.* art. 134. This general article can be used to punish drug offenses, as in *Vandelinder*, where the court stated that the defendant was being prosecuted under this article for the "possession, sale or transfer of a controlled substance." *Vandelinder*, 20 M.J. at 44. Article 112a, however, specifically prohibits the wrongful use or possession of controlled substances. UCMJ art. 112(a).

49. *Vandelinder*, 20 M.J. at 44.

50. 24 M.J. 11 (C.M.A. 1987).

51. *Id.* at 13 (quoting defense counsel).

Judge Cox concurred in part and dissented in part, but agreed with Chief Judge Everett that the character evidence should not have been excluded at trial. Judge Cox espoused an even broader view of the pertinent nature of good military character when he stated:

> I further agree that evidence of appellant's military record and military character should have been admitted. I do so without hesitation because, in my judgment, the fact that a person has given good, honorable, and decent service to his country is always important and relevant evidence for the triers of fact to consider. Commanders consider it not only when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense. The evidence may have little weight; indeed, it may have none. But if an individual has enjoyed a reputation for being a good officer or [service member], that information should be allowed into evidence.[52]

The cumulative effect of this line of cases is to firmly establish that good military character will almost always be found to be a "pertinent trait" as that term is used in MRE 404(a)(1) and therefore admissible when offered by the defense. The court generally requires a nexus between the defendant's good military character and the offense with which he is charged, but it has been quite liberal in finding such a nexus.

There is some evidence to suggest that Judge Susan Crawford, currently Chief Judge of the CAAF, believes that a more restrictive test should be applied to determine the admissibility of good character evidence. In a concurring opinion in *United States v. Brewer*,[53] Chief Judge Crawford disagreed with the rest of the court on the following issue:

> Rather than being based on [MRE] 404(a)(1) and the Analysis, the cases cited by the majority find their genesis in an interpretation of a selected few decisions of federal courts of appeals. *See, e.g.*, United States v. Clemons, 16 M.J. 44, 47 (CMA 1983) . . . . Even under the most expansive reading of [MRE] 404(a)(1), not all the testimony submitted by the defense should have been

52. *See id.*
53. 43 M.J. 43 (1995).

> admitted into evidence. Appellant was charged with conduct unbecoming an officer and making a false statement. To counteract those charges the defense introduced the following evidence: appellant performed his duties in a superb manner; there was no problem concerning his duty performance; he was extremely honest; he was of high moral character; and he was "a fine man."[54]

Judge Crawford seems to be questioning the foundation of the line of cases beginning with *Clemons* discussed above. Since she does not appear to have the support of the other current members of the court on this issue, it seems likely that a broad interpretation of the admissibility of evidence of good military character will continue to be used by the CAAF.

Before completing this overview of the operation of the good soldier defense, it must be pointed out that the good soldier defense is not without peril to the accused. An accused service member who introduces evidence of good military character must be aware that this defense can also serve as an avenue for the prosecution to introduce negative character evidence that might not otherwise have been admissible at trial.[55] The Supreme Court has identified this trade-off by stating that "the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."[56]

In the 1995 case of *United States v. Brewer*,[57] the CAAF laid down two principles that may allow damaging cross-examination of character witnesses even though the defense has attempted to carefully limit the scope of the questioning of such witnesses on direct examination.[58] First, the trial counsel may inquire as to the basis of good character testimony by asking whether the witness is aware of uncharged misconduct committed by the accused after the period during which the witness formed his opin-

---

54. *Id.* at 49 (Crawford, J., concurring).

55. *See* Majors Long & Henley, Note, *Testing the Foundation of Character Testimony on Cross Examination*, ARMY LAW., Oct. 1996, at 17, 25. Majors Long and Henley note that: "The defense may pay a high price for testimony regarding the accused's duty performance and other evidence of good character. Such evidence may open the door to damaging cross-examination despite a careful attempt to limit the scope of the questions on direct examination." *Id.*

56. Michelson v. United States, 335 U.S. 469, 479 (1948).

57. 43 M.J. 43.

58. *See id.* at 46.

ion.[59] Second, if the defense counsel elicits testimony from a character witness regarding the accused's duty performance, this opens the door to cross-examination regarding the accused's good military character and overall officership.[60] Defense counsel must carefully consider the potential ramifications of introducing evidence of good military character before he does so.[61] The accused must ensure that he has consistently displayed good military character before he can safely introduce into evidence select examples of such.

C. What Constitutes a Good Soldier?

There is no precise definition of what, exactly, a "good soldier" entails for purposes of presenting good soldier defense evidence. General categories of qualities that constitute a good soldier can be discerned, however, from evidence defendants have presented at courts-martial. These categories, examined in more detail below, include soldier character in time of war and soldier competency, including dependability, leadership and initiative, performance and proficiency, and promptness.[62]

1. Character in Times of War

This is perhaps the quintessential definition of a good soldier: a soldier that can be counted on by others in times of war and conflict. Courts-martial regularly admit evidence of battlefield performance.[63] *United States v. Crum* is illustrative: "The defense counsel also was able to minimize the appellant's culpability and to highlight his good record of wartime service in Panama and Kuwait."[64] Another defendant presented the following character evidence when charged with shooting two Vietnamese civilians in a U.S. base camp during the Vietnam War: "The accused in the past had been a good soldier and had served in combat many times during

59. *See id.*

60. *See id.*

61. For a more complete discussion of this subject matter and the *Brewer* case, see Majors Long & Henley, *supra* note 55, at 17.

62. *See* Elizabeth Lutes Hillman, Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L. J. 879, 894-900 (1999).

63. *See* United States v. Crum, 38 M.J. 663, 665 (A.M.C.R. 1993); United States v. Condron, 37 C.M.R. 688, 690 (A.B.R. 1967); *see also* Hillman, *supra* note 62, at 895-96.

64. *See Crum*, 38 M.J. at 665.

his Vietnam tour and had been wounded some weeks before the day of the tragic incident."[65]

A related use of the good soldier defense involves presenting evidence that the compatriots of the accused would want to go to war with him and would trust him on the battlefield.[66] One commentator, in discussing the importance of war-time character, noted that "most service members would agree that describing a fellow soldier as someone with whom they would want to go to war with is a powerful statement of good military character . . . ."[67] Defendants have presented evidence stating "that if . . . (the witness) had to go to war, he would want to be deployed with appellant"[68] and "if we were to go to war, PFC Hallum is the type of soldier medic I would want by my side."[69]

2. The Competent Soldier

The concept of the competent soldier is quite broad, encompassing, but not limited to, a soldier's dependability, leadership and initiative, performance and proficiency, and promptness.[70] Good soldier evidence has been presented in all of the above categories.

The dependable nature of the soldier is often presented as part of the defense case-in-chief. Witnesses have testified that the "appellant performed his job well, was dependable, reliable,"[71] "[the defendant] 'was the only man I could depend on,'"[72] the defendant "was very dependable,"[73] and "he's a professional NCO and that if he comes back . . . he's going to fall back into place and we're going to continue where we left off."[74]

---

65. *See Condron*, 37 C.M.R. at 690.

66. *See* United States v. True, 41 M.J. 424, 427 (1995); United States v. Hallum, 31 M.J. 254, 255 (C.M.A. 1990).

67. *See* Hillman, *supra* note 62, at 895.

68. *See True*, 41 M.J. at 427.

69. *See Hallum*, 31 M.J. at 255.

70. *See* Hillman, *supra* note 62, at 895.

71. *See True*, 41 M.J. at 427.

72. *See* United States v. Craddolph, 36 C.M.R. 688, 689-90 (A.B.R. 1966).

73. *See* United States v. White, 36 M.J. 306, 307 (C.M.A. 1993).

74. *See* United States v. Brown, 41 M.J. 1, 7 (C.M.A. 1994) (Crawford, J., dissenting).

Soldiers also present evidence of leadership and initiative as part of their good soldier defense. In *United States v. Brown*, the accused, who was defending against a positive drug urinalysis, had his chaplain supervisor testify that Brown had "lots of initiative, no problems with supervision. Never had a problem with him at all. In fact . . . accountability was the thing that impressed me about him."[75] Similar character evidence was offered in *United States v. Hallum*: "[H]e has always had a take charge and accomplish the mission attitude. . . . [T]o me he has the knowledge and what it takes to be a very effective Combat Medic."[76]

A typical good soldier character defense may include evidence of a soldier's promptness and readiness for duty. The following is an example of an exchange at trial:

> Supervisor: He was much more accountable than [sic] normally you would see an NCO do. He always was—always making me aware of what he had to do, where he was going to be at certain times, when he would be back. That sort of thing . . . .
>
> Q. When he showed up at these times, was he always in a condition that he could perform his mission?
>
> A. I'd never seen anything that I would consider any kind of impairment.
>
> Q. And this was throughout the entire time?
>
> A. The entire time.[77]

Testimony of soldier proficiency and performance has also been considered "good soldier" evidence. The case of *United States v. White*[78] provides an example of proficiency. As part of his defense to wrongful use of cocaine, Medic White presented good soldier evidence from his commanding officer that White "was clinically very proficient" and was "a very determined individual. If he wanted something, he would go after it."[79]

---

75. *See id.*
76. 31 M.J. 254, 255 (C.M.A. 1990).
77. *See Brown*, 41 M.J. at 7.
78. *See* 36 M.J. at 307.
79. *See id.*

Although there is no specific iteration of what, exactly, constitutes a good soldier for purposes of the good soldier defense, the aforementioned guidelines provided by case law, common practice and common sense can guide decisions of good soldier evidence admissibility.

D. Comparison to Civilian Treatment: Federal Rule of Evidence 404(a)(1)

The Military Rules of Evidence are explicitly based upon the Federal Rules of Evidence. In fact, MRE 404(a) and FRE 404(a) are almost identical.[80] Although the rules are textually similar, civilian courts do not typically allow evidence of a defendant's general character to be admitted, subject to certain limited exceptions under FRE 404.[81] The civilian rationale for this exclusion is that people do not always act in accordance with their character propensities.

> [Federal Rule of Evidence] 404(a) might seem to establish a rule of exclusion that is not only counterintuitive[,] but also contrary to the usual practice and social and business relationships of judging persons by their past behavior. Past conduct or performance is usually thought to be one of the best predictors of future behavior. But while a person's propensities are a useful gauge of likely behavior patterns over a period of time, they are less accurate when used to decide what happened on one particular occasion because people do not always act in accordance with their propensities.[82]

---

80. *Compare* FED. R. EVID. 401(a)(1) *with* MCM, *supra* note 15, MIL. R. EVID. 401(a)(1).

81. These limited exceptions include:

> (1) FRE 404(a)(1) allows a criminal defendant to put on evidence of a "pertinent" trait of character, such as his disposition to be honest or peaceable as proof that he was unlikely to have committed the crime charged. For example, [if] the defendant was charged with assault, he can show peacefulness; and (2) FRE 404(a)(2) authorizes a criminal defendant to introduce evidence of a "pertinent" character trait of a crime victim, such as evidence that an alleged assault victim was inclined toward violence.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 204 (2d ed. 1999).

82. *See id.* at 203; *see also* Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987) ("Moral conduct in one situation is not highly correlated with moral conduct in another.").

Military courts, however, interpret MRE 401(a)(1) more broadly than civilian courts interpret FRE 401(a)(1). The differentiation lies in the military's interpretation of the Drafters' Analysis of MRE 404(a)(1) and the special context of military justice and military society. While military and civilian courts have some similar purposes, such as imposing punitive justice and deterring future transgressions, there are additional considerations, not present in civilian courts, which military judges must take into account:

> Courts-martial are part of a disciplinary scheme relied upon to maintain good order among troops, to preserve the obedience and conformity deemed necessary to successful military action, and to eliminate from the military those individuals who pose a risk to other [service members] or to national security itself . . . . [A] broader variety of acts are deemed criminal under military law than under civilian criminal codes. . . . The good soldier defense takes advantage of this special military context by emphasizing an accused's loyalty to the armed forces and military performance. The defense counters wrongdoing with proof that an accused has been a "good soldier" during her military career.[83]

It is because of these differing demands in the court-martial setting that the military and civilian interpretations of a similarly worded rule of evidence have diverged. The arguments in favor of the good soldier defense, including the one above that alludes to the special context and separateness of military society, are discussed in the next section.

III. The Debate

The good soldier defense has been used in the military justice system for almost seventy-five years. During this time, there have been those who have criticized the admissibility of character evidence, but it generally has been accepted as firmly imbedded in the military justice system. Recently, however, there has been an increasing amount of attention focused upon the good soldier defense, and consequently, a greater number of observers

83. *See* Hillman, *supra* note 62, at 886.

have questioned its utility. This recent attention to the military justice system in general,[84] and the good soldier defense in particular, has come about as the result of a number of high profile courts-martial which have garnered significant main-stream, civilian press coverage. The court-martial of Sergeant Major of the Army Gene McKinney for sexual harassment and that of Marine E-6B pilot Richard Ashby brought the U.S. military justice system onto the front pages of newspapers around the world. This public attention caused greater numbers of people outside the military justice system to become aware of some of its unique features, including the good soldier defense.

While there are valid arguments that can be made for both retaining and prohibiting the good soldier defense, the authors of this article believe that the good soldier defense serves a valid purpose and should be preserved. This section begins by advancing four arguments that weigh strongly in favor of maintaining the good soldier defense. The section then identifies and rebuts the primary arguments raised by critics of the good soldier defense. When viewed in their totality, the costs of the good soldier defense are outweighed by the benefits it provides.

A. The Case for the Good Soldier Defense

There are four primary arguments that support the admissibility of evidence of good military character. This section parses out the logic behind them. It begins by laying out the separate society argument, which points to the separate nature of military life as a justification for a system of military justice that differs from its civilian counterpart. It then turns to

---

84. *See* Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Military Criminal Cases*, 163 MIL. L. REV. 1, 2 (2000). Lind explains:

> This information explosion is coupled with an increased interest by the media in criminal trials. Military criminal trials are no exception. Military cases are attracting local and national media interest. As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public. Public interest in military justice not only involves individual cases being investigated or prosecuted, but also, the rules and policies unique to military life.

Id.

a discussion of the unique nature of certain military offenses that make character evidence especially relevant to their adjudication. The third argument is based on the concept of the soldier under surveillance; because service members are constantly observed by their peers and superiors, there is a strong foundation on which these people can base testimony regarding the military character of the accused. The final argument highlights the long-standing tradition of allowing service members to introduce evidence of their good character, and it counsels against breaking that tradition. Each of these will be addressed in turn.

1. Separate Society

The military is a different society from civilian society. Different norms, rules of conduct, and legal precedents apply. Independent, appointed Article III judges do not preside over courts-martial; rather, active duty military officers serve as judges. Acts not punishable as crimes in civilian society are deemed criminal under military law, such as absence without leave,[85] disobedience of orders,[86] dereliction of duty,[87] disrespect,[88] desertion,[89] mutiny,[90] and conduct unbecoming an officer and a gentleman.[91] There is no random jury selection in the military,[92] and service members' rights are limited by their status as soldiers.[93] As such, sol-

85. *See* UCMJ art. 86 (2000) (criminalizing the offense of being absent without leave (AWOL)); *see also* Major General William A. Moorman, *Fifty Years of Military Justice, Does the Uniform Code of Military Justice Need to Be Changed,* 48 A.F. L. REV. 185, 189 (listing offenses cited herein).

86. *See* UCMJ arts. 90 (criminalizing disobedience of superior commissioned officer); 91 (criminalizing willful disobedience of lawful order of a warrant officer, noncommissioned officer, or petty officer); 92 (criminalizing disobedience of lawful order issued by a member of the armed forces).

87. *See id.* art. 92(3) (criminalizing dereliction in the performance of duties).

88. *See id.* arts. 89 (criminalizing disrespect toward superior commissioned officer); 91 (criminalizing treating with contempt or disrespectfulness in language or deportment toward a warrant officer, noncommissioned officer or petty officer while that officer is in the execution of office).

89. *Id.* art. 85 (criminalizing desertion).

90. *Id.* art. 94 (criminalizing the acts of mutiny or sedition).

91. *Id.* art. 133 (criminalizing conduct unbecoming an officer and a gentleman).

92. *See id.* art. 25; *see also* Hillman, *supra* note 62, at 886.

93. *See* Hillman, *supra* note 62, at 886.

diers' rights, for example in regards to the First Amendment, are narrower than civilians' rights.[94]

The Supreme Court has adopted a standard of deference towards the military justice system that is not applied to civilian federal courts.[95] The Court specifically recognized the military as a separate society when it stated that "the military constitutes a *specialized community* governed by a *separate* discipline from that of the civilian."[96] The Court extends great deference to the military because it is

> difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[97]

The Court's decision in *Rostker v. Goldberg*[98] exemplifies this deference to the military's separate society:

> In *Parker*, the Court rejected both vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society, and that "[while] the members of the military are not excluded from the protection granted by the First Amendment, the *different character of the military community and of the military mission requires a different application of those protections*."[99]

---

94. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (upholding regulations imposing a prior restraint on the right to petition of military personnel).

95. *See* Rostker v. Goldberg, 453 U.S. 57, 64-72 (1981).

96. Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (emphasis added).

97. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

98. 453 U.S. 57 (1981).

99. *Id.* at 66 (quoting Parker v. Levy, 417 U.S. 733, 756, 758 (1974)) (emphasis added). The *Rostker* court stated:

> The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court . . . . In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Court

In a recent article discussing the fiftieth anniversary of the UCMJ, Major General William A. Moorman expanded on the integral importance of the "separate society" concept to the military justice system:

> The primary purpose of the military justice system is to maintain good order and discipline by holding military offenders accountable for their misconduct. Discipline is vital to the effectiveness of every military unit. As George Washington noted in 1759, "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." Commanders must be able to ensure their personnel will perform their duties and follow orders, often in situations involving life and death. No civilian parallel can be drawn. Civilian employers can't compel subordinates to perform tasks resulting in substantial likelihood of death, much less come to work on time.[100]

The military is a separate society because it has special needs and considerations not present in civilian society: the military must maintain good order among its troops, preserve the obedience and conformity necessary to engage in successful military action, and eliminate those individuals who pose a risk to national security.[101] These special needs, in turn, require different rules and procedures. Since the military is a separate society, different rules can and should apply.

One such rule is the good soldier defense: allowing soldiers to present evidence of good military character as a defense in military courts-martial. The COMA asserted a separate society justification for the good soldier

---

99. (continued)

> noted that in considering due process claims in the context of a summary court-martial it "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8," concerning what rights were available. *Id.* at 43. Deference to the judgment of other branches in the area of military affairs also played a major role in *Greer v. Spock*, 424 U.S. 828, 837-38 (1976), where the Court upheld a ban on political speeches by civilians on a military base, and *Brown v. Glines*, 444 U.S. 348 (1980), where the Court upheld regulations imposing a prior restraint on the right to petition of military personnel.

Id. at 66-67.

100. *See* Moorman, *supra* note 85, at 187-88 (emphasis added).

101. *See* Hillman, *supra* note 62, at 886.

defense in *United States v. Kahakuawila*: "The *peculiar nature of the military community* makes similar interpretation [of MRE 404(a)(1)] inappropriate."[102] The distinct nature of military society, and its substantive differences from civilian society, serve as a basis for the existence of an evidentiary rule allowing for the "good soldier" to introduce character evidence in his defense.

2. Unique Nature of Military Offenses

Another factor that weighs in favor of maintaining the availability of the good soldier defense is the unique nature of the crimes punishable by the military justice system. Military law penalizes a number of crimes that relate directly to the character of the accused. These are offenses that have no counterpart in the civilian criminal justice system. Article 133 of the UCMJ, which punishes conduct unbecoming an officer and a gentleman, is one such charge.[103] The CAAF has held that in order to convict a service member under Article 133, "the [offending] conduct must . . . be shown to dishonor the individual" and to "seriously compromise his standing as an officer."[104] Such a showing of dishonor calls the character of the accused into question. Since the character of the accused is at issue with charges such as conduct unbecoming, he should be permitted to introduce evidence concerning that subject.

Even one of the most outspoken critics of the good soldier defense has stated, "Courts-martial for offenses defined as 'military' present the strongest case for admitting evidence of good military character."[105] She continues by conceding that "[a]dmitting generic good military character evidence in courts-martial for military-specific offenses seems consistent with the intent and meaning of MRE 404(a)(1); surely 'military character' is a pertinent trait when a service member is accused of being disrespectful, disloyal, sloppy, or otherwise unsoldierly."[106] This particular critic believes the good soldier defense should be available only to service members charged with offenses defined as "military." The difficulty with this

102. *See* 19 M.J. 60, 61 (C.M.A. 1984) (emphasis added); *see also* Hillman, *supra* note 62, at 890 n.59.

103. *See* UCMJ art. 133 (2000) (criminalizing conduct unbecoming an officer and a gentleman).

104. United States v. Timberlake, 18 M.J. 371, 375 (C.M.A. 1984).

105. Hillman, *supra* note 62, at 900.

106. *Id.*

view is that it becomes nearly impossible to draw a meaningful line between "military" and "non-military" offenses.

The Supreme Court was faced with this difficulty when attempting to distinguish "service connected" from "non-service connected" offenses for determining the jurisdiction of the military justice system.[107] Faced with this challenge in *Solorio v. United States*,[108] the Supreme Court opted to avoid the quagmire of drawing artificial lines between "service connected" and "non-service connected" offenses and instead expanded military courts-martial jurisdiction to include nearly all offenses committed by a member of the armed services.[109] In an analogous manner, it is only practical to avoid attempting to divide the punitive articles of the UCMJ into "military" and "non-military" offenses, and instead allow evidence of good military character to be introduced at all courts-martial.

Because courts-martial often carry greater penalties and can have a greater impact on the career of the accused than a conviction for the same offense in a civilian court, the military justice system should retain the good soldier defense. Unlike defendants in civilian criminal tribunals, those court-martialed for even relatively minor offenses may find that it costs them their careers.[110] Civilians on trial for misdemeanors, such as low-level drug possession, are often found guilty and sentenced to probation, with no adverse effect on their current employment. A service member charged with the same offense may be able to similarly avoid serving time in prison, but is likely to be discharged from the armed forces and thereby deprived of his livelihood. The increased consequences of courts-martial when compared to comparable civilian offenses, weighs in favor of permitting the accused to introduce potentially exculpatory evidence of his good military character. Thus, the unique nature of certain military offenses and the potential for increased consequences for their violation

---

107. *See* Solorio v. United States, 483 U.S. 435 (1987).

108. *Id*.

109. *See id.* at 439 (eliminating the requirement that offenses subject to prosecution at court-martial be "service connected," thereby greatly increasing the jurisdiction of the military justice system).

110. *See* Hillman, *supra* note 62, at 907 ("[C]ourts-martial are often charged with determining whether a service member should be retained in the military, in addition to imposing traditional criminal sanctions. This aspect of a sentencing decision is not required in civilian trials.").

justify permitting the accused to introduce evidence of his good military character.

3. Soldier Under Surveillance

A third reason the good soldier defense should be maintained is that evidence of character can be especially valuable when examined in the military context. The nature of military service and the lifestyle inherent in that service create a situation where the supervisors and peers of a service member are well placed to evaluate the service member's character. The heart of this argument is the concept of the "soldier under surveillance." This concept was eloquently described by Dean John Wigmore,[111] a legal scholar specializing in evidence who also served as a major in the Army's Judge Advocate General's Corps during World War I. Dean Wigmore wrote:

> The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his 'service record,' which follows him throughout his army career and serves as the basis for the terms of his final discharge. The certificate of discharge, therefore, is virtually a summary of his entire service conduct, both as a man and as a soldier.[112]

In *United States v. Kahakauwila*,[113] the COMA recognized the principle outlined by Dean Wigmore when it asserted:

> The military rule is taken from the Federal Rules of Evidence. However, the peculiar nature of the military community makes similar interpretation inappropriate. Unlike his civilian counterpart, the conduct of a military person is closely observed both on

111. In his civilian life, John Wigmore was Dean of Northwestern Law School. *See* Capofari, *supra* note 5, at 173 n.8 (1990). While in the military during World War I, Major Wigmore wrote Chapter XI of the 1921 *Manual for Courts-Martial*. He is the only individual with a by-line in the *Manual for Courts-Martial*. *See id.*

112. John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 59, at 462-63 (3d ed. 1940).

113. 19 M.J. 60 (C.M.A. 1984).

> and off duty, and such observation provides the material upon which performance reports and other evaluations are based.[114]

Members of the armed services are formally reviewed throughout their career through periodic fitness reports. This creates a situation where there is a detailed written record of a service member's conduct and where a service member's superiors are forced to continually evaluate that individual. This leaves supervisors well qualified to testify about a subordinate's character.

It is not solely superior officers who are in a position to provide meaningful character evidence. A service member's peers are also uniquely positioned to observe the accused's character. Members of the military are frequently stationed in, or deployed to, remote areas where they are forced to live in difficult conditions in close proximity to their peers. Such deployments can often be physically and mentally demanding and, therefore, create a situation where a service member's true character will reveal itself to his peers. As one commentator has observed, "in the close and disciplined environment of the military community it requires far more effort for a person to be known as a good soldier than it does to be known as a good person in a civilian neighborhood."[115] An accused's peers and superiors are thus both uniquely positioned to provide relevant and credible evidence of his good military character.

4. Tradition

As discussed above, the military justice system has a long-standing tradition of allowing the defendant to introduce character evidence.[116] Given the strong respect for tradition in the armed forces, the tradition of permitting accused service members to introduce evidence of good military character that may serve to exonerate them should not be lightly discarded. Outside of the courts-martial setting, the military places a heavy emphasis on character and expects service members to conduct themselves in an honorable manner. The soldier who is diligent in acting in a manner consistent with good character throughout his career should be permitted to use that behavior in his defense. It would send a mixed signal for the

---

114. *Id.* at 61.

115. Smith, *supra* note 4, at 429.

116. The admissibility of good military character evidence was first explicitly provided for in the 1928 *Manual for Courts-Martial*. *See supra* note 24 and accompanying text.

military to demand that a soldier comport himself in a manner consistent with good character and then turn around and inform him that evidence of such behavior is not significant should he find himself subject to a court-martial. We should maintain the tradition of allowing those who have made the sacrifices inherent in serving this country the opportunity to have that service considered by the court-martial panel.

B. Case Against the Good Soldier Defense & Rebuttal

In opposition to the four primary arguments supporting the good soldier defense, there are four adverse arguments advanced in favor of abolishing or limiting the defense. This section presents and then rebuts these four arguments. The discussion begins by presenting the argument that a good character defense is not available under civilian society's evidentiary rules, and thus, should not be available in the military. The second argument is that the good soldier defense, as applied, creates unique gender discrimination problems in sex-offense cases. Next, the third argument asserts that the good soldier defense should be abolished because there is no specific, uniform standard of what constitutes a good soldier. Finally, the section concludes by examining the argument that the good soldier defense only benefits higher ranking officers and creates unfair advantages based on race, gender, and status. A detailed rebuttal follows each argument.

1. Not Available in Civilian Society

The first criticism lodged against the good soldier defense is that it is not available in civilian society.[117] The evidentiary rationale for the good soldier defense, the argument reasons, completely disregards civilian justifications for not allowing such evidence.[118] Civilian courts reason, as did Supreme Court Justice Jackson, that "the overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice."[119] Proponents of this argument assert that there is no proper justification for the good soldier defense because "even conceding the unique nature of military discipline and the need for a sep-

117. *See* Hillman, *supra* note 62, at 890.

118. *See id.*

119. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948).

arate legal system, no compelling rationale exists for a judicial interpretation of character admissibility so at odds with federal rules and civilian evidentiary procedure."[120]

Some commentators do not even concede the separate society issue, and have stressed that the military is not a separate society: "Although some service members . . . live and work in environments isolated from civilian life, casting the entire American military, a postmodern force of scattered troops, complex missions, and gender and racial diversity, as wholly 'separate' from civilian communities overstates the case."[121] If a separate military society still exists, its critics add, "its circumstances and the [service members] who are subject to its constraints are not so remote from modern civil society as to justify such a dramatically different rule."[122] Thus, because there is no compelling rationale for the good soldier defense and because the separate society argument does not justify a wholly different rule, the good soldier defense should be eliminated, and the military should conform to the civilian interpretation of FRE 401(a)(1).

The problem with this argument is that it implicitly assumes that civilian society's evidentiary rulings and practices are always superior to those of the military. This assumption, however, cannot be validly asserted for two reasons: first, military practices are sometimes more advanced than those used in civilian courts and, second, the military is, as aforementioned, a wholly separate society.

Scholars, military justice practitioners, and commentators consider some protections afforded by the military justice system more advanced than those used in civilian courts.[123] Military members enjoy a more generous right to counsel than their civilian counterparts. Every accused service member is entitled to free military defense counsel and, unlike civilian practice, entitlement to free counsel is not based upon economic status.[124] Article 31 warnings against self-incrimination are also more extensive than civilian *Miranda* warnings because they are mandated when a service member is suspected of an offense, not just when the accused is in custody.[125] The Article 32 investigation is also considered more advanced

120. Hillman, *supra* note 62, at 890.
121. *Id.*
122. *Id.*
123. *See e.g.*, Moorman, *supra* note 85, at 189.
124. *See id.*
125. *See id.*

than civilian grand jury practice.[126] An Article 32 investigation has been described as

> more protective of the accused in many respects than federal grand jury proceedings. In the military, an independent investigating officer is appointed to conduct the inquiry to determine if sufficient evidence exists to support a prosecution unlike the civilian sector in which a federal prosecutor controls the proceeding. And a military accused, unlike his civilian counterpart, is entitled to be present throughout the proceeding with legal representation, is entitled to present evidence on his own behalf, and may subject prosecution witnesses to cross-examination.[127]

Thus, the assumption that the civilian justice system is always superior to the military justice system is unfounded and unduly conclusive. The impression that justice is either lacking or diminished in the military has no foundation in fact.[128] The aforementioned examples demonstrate that military procedures are not inferior simply because they do not follow the law and letter of the civilian system.

Military defendants should be able to use the good soldier defense because the military is a distinct society, and different rules and norms apply.[129] As argued above, the Supreme Court provides substantial deference to military jurisprudence because it specifically recognized that "the military constitutes a *specialized community* governed by a *separate* discipline from that of the civilian."[130] The separate discipline and specialized community of the military, not present in civilian society, justify some differing evidentiary rules and procedures, including the good soldier defense.

The argument that the military is not a separate society is at odds with Supreme Court precedent and common sense. Military members lead very different lives than their civilian counterparts. As one commentator wittingly stated: "No civilian parallel can be drawn. Civilian employers can't compel subordinates to perform tasks resulting in substantial likelihood of

126. *See id.*
127. *Id.*
128. *See id.*
129. *See supra* Part III(A)(1).
130. Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (emphasis added).

death, much less come to work on time."[131] Moreover, service members are subject to direct orders, stricter discipline, regimented schedules, restricted living conditions, dress codes, and are constantly on-call in case of national emergency or other important duties that need to be performed. These are just a few of the many differences that make the military a separate society. These differences, and the different needs of military society, allow character evidence to be more trustworthy in the military setting because the accused is in a regimented atmosphere where his character is under constant surveillance.

2. Inequality in Sex Offense Cases

The second argument against the good soldier defense concerns sex offenses and gender issues. It is asserted that in courts-martial for sex offenses, good soldier evidence may confuse issues and make a conviction more difficult to obtain. This, in turn, may lead to a prejudice against females in the military and dissuade them from bringing charges.[132] This is especially significant, according to proponents, because of the high number of sex crimes and offenses reported to, and tried by, the military.[133]

Since sex offense cases, such as rape, involve "battles of credibility between the accused and the prosecution's witnesses,"[134] good soldier evidence may mislead the jury, confuse the issues, and complicate the trial. Supporters of this argument point to the fact that "military judges admit evidence of good military character without any empirical data that 'good soldiers' rape, or commit other sex crimes, with any less frequency than 'bad' soldiers or 'good civilians.'"[135] Furthermore, proponents take issue with the fact that only "bad soldiers" can be found capable of rape. "Given the number of alleged rapes that are prosecuted under both civilian and military law in which the men implicated would otherwise appear to be 'good' persons, this evidentiary doctrine allows irrelevant evidence . . . to taint the judgment of a court-martial."[136]

---

131. *See* Moorman, *supra* note 85, at 187-88.
132. *See* Hillman, *supra* note 62, at 904-05.
133. *See id.* at 904.
134. *Id*.
135. *See id.* at 905.
136. *See id.*

Using a high-profile example in her criticism of the good soldier defense, Elizabeth Hillman points to the recent sexual harassment case against Sergeant Major of the Army Gene McKinney.[137] In 1998, McKinney was tried on charges of sexual misconduct.[138] Six service women provided "damning" testimony against him.[139] McKinney presented good soldier evidence and former superiors and subordinates testified in his favor. McKinney was acquitted on all counts except one charge of obstruction of justice, and he was sentenced to a minor reduction in rank.[140]

Hillman concluded, and some commentators asserted, that "McKinney . . . was seen as benefiting from military law that allowed the jury to consider his character and military record as the grounds for finding reasonable doubt as to his guilt"[141] and that "defense lawyers relied on McKinney's testimony and service record by invoking military rules that allowed the jury to use his outstanding military reputation as grounds for reasonable doubt that he might have committed any of the crimes."[142] Those arguing against the good soldier defense conclude from the McKinney court-martial experience that McKinney took "full advantage" of the good soldier doctrine and that the good soldier "defense worked so well for McKinney [that] it has disturbing implications for the roles of rank, gender and race in military justice."[143] These disturbing implications, it is argued, should lead to the elimination of the good soldier character defense.

Hillman's argument can be criticized on the ground that there is no causal link between the introduction of character evidence and the accused's acquittal. In other words, it is wholly unfair to criticize the McKinney decision because we do not know the actual cause of, or reason for, the acquittal. Here, Hillman makes an unfounded assumption that McKinney was acquitted only because he presented good soldier defense evidence. Hillman seems to ignore the possibility that McKinney may actually have been innocent of the charges leveled against him, or that the

---

137. *See id.* at 879-81.

138. *See id.*; *see also* Bill McAllister, *McKinney Not Guilty on Sexual Misconduct: Sergeant Major Convicted of Obstruction*, WASH. POST, Mar. 14, 1998 at A1.

139. *See* Hillman, *supra* note 62, at 880.

140. *See id.*

141. *Id. See also* Bob Hohler, *Some Say McKinney Verdict Could Have Chilling Effect*, BOSTON GLOBE, Mar. 15, 1998 at A9.

142. McAllister, *supra* note 138, at A1.

143. Hillman, *supra* note 62, at 881.

prosecution simply failed to present sufficient evidence to meet its burden of proof.

The good soldier defense is not a one-way street: the prosecution can rebut good soldier evidence and minimize its effect. Rebutting the evidence allows prosecutors to discredit, in effect, the good soldier evidence, making the defendant's case more difficult for the defense. This may be especially damaging for the defense in sexual-assault cases. Once the defendant opens the door and introduces "good character" evidence, the prosecution has the opportunity to rebut character evidence the defendant puts into issue. "[T]he prosecution may rebut the defense's good character evidence—and that rebuttal can be in the form of general testimony or of specific instances of misconduct [under MRE 405(a)]."[144] The prosecution can rebut in two ways: through cross-examination or by calling the prosecution's own opinion and character witnesses.[145]

This allows the panel members the opportunity to hear both sides of the character issue and come to a more informed conclusion. Military prosecutors assert that it is not difficult to overcome the good soldier defense:

> [Trial counsel should] scour the accused's past for evidence of misconduct and to conduct extensive interviews at the current and most recent duty stations. Some good character evidence is "an inch deep" and, on probing, witnesses will withdraw their endorsements or moderate their vouching for the accused. *Not only is the good soldier defense beatable—it most often is*—but counsel should be armed to defeat it, even when it seems to the trial counsel that it is not logical for the defense to present in the first place.[146]

Thus, trial counsel may use good, old-fashioned investigative work and cross-examination of character witnesses to defeat the presumptions that good soldier character evidence raises, especially in sexual assault cases. By taking the time to rebut the defense, good soldier evidence may actually work to the advantage of the prosecution by making the prosecution's case

144. Smith, *supra* note 4, at 429.

145. *See* Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1, 8.

146. Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 22.

more damaging through rebuttal character evidence. The Supreme Court reiterated this point by stating that "the price a defendant must pay for attempting to prove his good character is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."[147]

3. The Need for Uniformity

Criticism has been lodged against the good soldier defense primarily because it remains unclear precisely what characteristics make for a good soldier. "[V]agueness is a troubling feature of military law in general, and the evidentiary doctrine that allows admission of general good character is no exception."[148] One critic has specifically asserted, "Opinions of military courts, treatises, and military evaluations describe military character in disparate ways. These descriptions draw attention to the contradictions contained within the concept as well as the absence of definable, military specific aspects of military character."[149]

As the discussion in Part II[150] indicated, there are a wide variety of character traits used in courts-martial to demonstrate the good character of the accused. While there are common themes, there is nothing close to a uniform standard of what type of evidence may be offered to show good military character. This can be attributed to the large variety of occupations fulfilled by members of the armed forces:

> No single description can encompass the variety of personalities and "characters" that make up a successful modern fighting force. The intrepid captain of a nuclear submarine, the cerebral code-breaker, the ace fighter pilot, the meticulous supply sergeant, the reckless paratrooper, the selfless medic—although each is a key part of the armed forces, they share few essential character traits as a group.[151]

Critics of the good soldier defense believe that because there are a multitude of traits presented as evidence of good military character at courts-

147. Michelson v. United States, 335 U.S. 469, 492 (1948).
148. Hillman, *supra* note 62, at 899.
149. *Id.* at 894.
150. *See supra* Part II(C).
151. Hillman, *supra* note 62, at 896.

martial, the assertion of the good soldier defense is "inevitably incoherent."[152]

It cannot be disputed that there is no uniform standard for what constitutes a good soldier, but this should not be used to invalidate the entire concept. Quite to the contrary, it would seem that the wide diversity of occupations available in today's modern military would necessitate numerous iterations of the good soldier defense. Today's service member is as likely to be an expert with a computer as he is an expert with a rifle. While there may be some overlap, the characteristics which make one a good Navy SEAL (Sea, Air, Land) are different from the characteristics which make one a good network administrator. The military justice system must remain flexible enough to account for these differences. There should not be a specific, complete, single list of good soldier traits—every case has individualized circumstances, and military judges must use their discretion to decide whether or not to admit evidence. The notion that there must be a single uniform standard of what constitutes a good soldier should be resisted.

At the same time, however, there is a general conception of what traits constitute a good soldier to guide the decision maker.[153] Although today's armed forces are more diverse, varied and complex than ever, the aforementioned general essential traits of a good soldier can be used as a guide. For example, the captain of a nuclear submarine and a military cook have very different duties, but each may be regarded as a "good soldier" in their own way. They could both be loyal to the United States, maintain grace under pressure, assist when called upon, supervise subordinates well, and be dependable and highly adaptable to adverse circumstances.

Chief Judge Everett, in a case involving a service member accused of wrongfully possessing, transferring and selling controlled substances, opined:

> Testimony about someone's "good military character" almost inevitably is somewhat imprecise—just as is lay opinion testimony that a car was being operated at a high speed or that "a person was drunk" . . . . Nevertheless, a court-martial member or

152. *Id.* ("Because the good soldier defense admits evidence of so many different traits, assertions of 'good military character' are inevitably incoherent.").

153. *See supra* Part II(C).

> military judge . . . will be aided by such testimony in deciding whether an accused is a person who would be unlikely to engage in drug transactions.[154]

The lack of specificity in determining what constitutes a good soldier is not a weakness of the defense. Rather, it is a strength. It not only allows individualized determinations and judicial discretion in deciding whether to admit good soldier evidence, but it also sends a message of fairness—that the defense is available to all in the armed forces, both the cook and captain, regardless of rank or status.

4. The Defense Benefits Only Higher Ranking Officers

Another charge leveled against the good soldier defense is that it unfairly benefits those of higher rank. Hillman asserts that "the primary beneficiaries of the good soldier defense are soldiers whose long and impressive military records can overwhelm the testimony [of their accusers]."[155] There is both a quantitative and a qualitative element to this alleged disparity in the utility of the good soldier defense for low and high ranking service members. The quantitative element arises from the fact that

> [t]he longer a soldier's length of service, the more assignments, commanders' affidavits, evaluations, and awards that can be admitted as evidence of good military character. This accumulation of evidence of good military character is more likely to sway a court-martial than the evidence available to a service member with low rank and little military experience.[156]

The qualitative element of the disparity is attributable to the fact that "evidence of good military character is qualitatively better for more senior accused service members, since they have the benefit of contact with higher ranking superiors, whose evaluations carry greater weight with a military fact-finder."[157] All of this leads critics of the good soldier defense

154. *See* United States v. Vandelinder, 20 M.J. 41, 45 (C.M.A. 1985).
155. *See* Hillman, *supra* note 62, at 907.
156. *Id.*
157. *Id.*

to assert that it provides senior officers with a privilege that is not afforded to other service members facing courts-martial.

A corollary to the argument that the good soldier defense unfairly benefits high-ranking officers also suggests that it unfairly benefits white males. Currently, there are relatively few women[158] and minorities[159] who occupy senior positions in the military. Because the good soldier defense unfairly privileges those of higher rank, and because those of higher rank are primarily white males, it is asserted that the good soldier defense is biased against women and minorities. Hillman asserts that such a disparity creates the impression that "rank and gender carry guarantees of immunity from criminal conviction" that is "corrosive" both to "good order and high morale among troops" and to the concept that "the perception of equal justice under the law is as important as its reality."[160]

Assertions that the good soldier defense is unfair because it only benefits higher ranking officers are unfounded. Military Rule of Evidence 404(a) makes no reference to the rank of the accused.[161] Similarly, judicial interpretation of MRE 404(a) has not in any way limited the availability of the good soldier defense to those of high rank. Quite to the contrary, the majority of the test cases described in Part II(A), which served to elucidate the Military Court of Appeals' interpretation of the new MRE 404(a), involved accused service members of lower rank.[162] *Clemons, Piatt* and *McNeil* all concerned sergeants, and *Kahakauwila* concerned a private. This is certainly not a precise evaluation, but it is convincing anecdotal evidence to suggest that even those of lower rank are able to utilize good character evidence. The authors are not aware of any empirical data on the use of the good soldier defense, but given the large number of lower ranking service members relative to the number of higher ranking members, it

158. *See* OFFICE OF THE SECRETARY OF DEFENSE, POPULATION REPRESENTATION IN THE MILITARY SERVICES B-38 (1997) (reporting that in 1996 there were only seventeen female general officers, two of which were above the one-star rank, out of 855 total general officers).

159. *See id.* at B-39 (reporting that in 1996 there were forty-three black, eight Hispanic, and eight "other" general officers out of a total of 855 general officers).

160. Hillman, *supra* note 62, at 907.

161. *See* MCM, *supra* note 15, MIL. R. EVID. 404(a).

162. *See* United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984); United States v. McNeil, 17 M.J. 451 (C.M.A. 1984); United States v. Piatt, 17 M.J. 442 (C.M.A. 1984); United States v. Clemons, 16 M.J. 44 (C.M.A. 1983).

seems likely that lower ranking individuals are using the defense more frequently than those of higher rank.

While the good soldier defense is equally available to all members of the armed forces, it must be conceded that it will inevitably be a more effective tool for some service members. Those who have distinguished themselves over long careers and those who have served in combat will have a greater quality and quantity of character evidence to introduce in their defense and will thus have a greater opportunity to convince the members of the panel of their good character. While critics of the good soldier defense consider this to be inequitable, it is an entirely appropriate result.

The lieutenant colonel who has provided a lifetime of honorable service is entitled to present stronger evidence of good character than that which would be available to a first lieutenant charged with the same offense. Certainly, those who point to the inequitable nature of the character evidence available to service members of different rank do not believe that it is unjust that those who cannot muster any evidence of good character are unable to use the good soldier defense. This would seem to be the next logical step in the reasoning employed by these critics. Just as it is perfectly fair that the person who cannot provide evidence of their good character is prevented from using the good soldier defense, it is equally just that a soldier who has distinguished himself over a long career or in combat will be able to present a more effective good soldier defense. It is perfectly acceptable that certain service members will be better positioned to use certain tools in their defense more effectively than others.

The concern expressed that the good soldier defense is more effective for higher ranking officers who tend to be white males, and that this will create a perception that rank, gender, and race provide greater protection from court-martial, is misplaced. The relative lack of minority and female representation in the higher ranks is certainly an area of concern for the armed forces, but one that is beyond the scope of this discussion. Suffice it to say that this is a problem that is currently being addressed, and certainly the demographic of the higher ranks will more closely resemble that of the military as a whole in the coming decades. This should serve to mitigate future accusations that the good soldier defense is perceived as being biased based on race or gender.

Even if this perception does exist, the authors disagree with the emphasis Hillman places on this perception when she states that “the per-

ception of equal justice under the law is as important as its reality."[163] Certainly the perception of the military justice system held by its constituents and outside observers is important, but it cannot take precedence over the ultimate goal of producing justice. It is unjust to deny good soldiers the opportunity to have their honor and service considered at courts-martial simply out of fear that this could create what might be a negative perception of the military justice system.

V. Conclusion

In the summation of her article criticizing the good soldier defense, Elizabeth Hillman states: "Senior [service members] accused of misconduct are allowed to place their thumbs on the scales of justice through the good soldier defense. Military judges should right the balance."[164] Hillman touches on perhaps the ultimate justification for the good soldier defense: viewed on the scales of justice, the benefits of the defense certainly outweigh the arguments presented against it.

The good soldier defense is both a powerful sword and a shield. As a sword, it allows defendants to introduce evidence to assert their good character; as a shield, it protects the accused against inferences and evidence that they committed the charged offenses. As such, the good soldier defense plays an important role in the military justice system. As outlined above, accused service members should continue to be allowed to present good soldier evidence because the military is a separate society, military offenses are unique, soldiers' character can be measured more reliably under the surveillance of the military, and accused soldiers have historically been allowed to present good soldier character evidence.

Criticisms presented against the good soldier defense—that it is not available in civilian society and may be inequitable in sex-offense cases, for example—are unconvincing when thoroughly examined. The importance of the good soldier defense necessitates that it be preserved. On balance, the scales of justice are tilted on the side of fairness when the good soldier defense is available to the dedicated men and women who serve this country in uniform.

---

163. Hillman, *supra* note 62, at 910.

164. *See id.* at 911.