PROSECUTING INDECENT CONDUCT IN THE MILITARY:
HONEY, SHOULD WE GET A LEGAL REVIEW FIRST?

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> *[V]ague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due process of law."* Connally v. General Construction Co., 269 U.S. 385, 391. *As the Court put the matter in* Lanzetta v. New Jersey, 306 U.S. 451, 453: *"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." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."* United States v. Cerdiff, 344 U.S. 174, 176.[2]

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[2] Parker v. Levy, 417 U.S. 733, 775 (1974) (Stewart, Douglas & Brennan, JJ., dissenting).

I. Introduction

Indecent acts with another[3] and other military crimes involving indecency—indecent acts with a child under sixteen-years old,[4] indecent exposure,[5] indecent language,[6] and sending obscene material in the mails[7]—present an uncertain standard of potentially criminal conduct. They present no clear standard of sexual conduct for Soldiers to adhere to, nor do they present a clear standard of proscribed conduct for military attorneys to prosecute. Further, military cases attempting to define indecency or explain the bounds of proscribed indecent conduct fail to establish either a comprehensible definition of the word indecent, or a consistent framework to apply facts to the elements of these military offenses. Persons subject to the Uniform Code of Military Justice (UCMJ) lack a clear differentiation between permissible adult, consensual, noncommercial, private, sexual conduct, and conduct proscribed by the military indecency offenses. Consequently, they make decisions regarding this kind of sexual conduct uncertain of whether they may later be charged and convicted in a military court of an indecency offense.

For both civilians and the military, the scope of lawfully criminalized sexual conduct changed with the U.S. Supreme Court's landmark decision in *Lawrence v. Texas*.[8] In *Lawrence,* the Court's decision finds what is apparently a fundamental liberty interest in the privacy of adult consensual, noncommercial, private sexual conduct. *Lawrence* calls into question the constitutionality of any criminal code that bans this manner of personal conduct.[9] The *Lawrence* decision likely invalidates the military's criminalization of adult, consensual sodomy[10] on constitutional grounds. Consequentially, indecent-acts convictions that rely on the

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[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 90 (2002) [hereinafter MCM].
[4] *Id.* ¶ 87.
[5] *Id.* ¶ 88.
[6] *Id.* ¶ 89.
[7] *Id.* ¶ 94.
[8] 539 U.S. 558 (2003).
[9] *See generally Id*.
[10] This will apply at least, to cases of adult consensual private *heterosexual* sodomy. One can argue that for purposes of good order and discipline, the military has a special need to regulate *homosexual* sodomy, and that the only effective means of regulating this activity is criminalization; therefore, the military should accordingly receive deference in these determinations. This argument, and the military's regulation of homosexual conduct in general, are both beyond the scope of this article.

illegality of sodomy to meet the elements of indecent acts with another, will also fail. The "separate society" theory articulated in *Parker v. Levy*[11] should not limit *Lawrence's* impact on military cases. It is difficult to conceive of a special military need, or legitimate linkage between adult, consensual, noncommercial, private sexual conduct, and either good order and discipline[12] or service credibility. Accordingly, after *Lawrence,* the military may not impose a different criminal standard for this private sexual conduct than that which applies to other citizens.

Recent cases in the Court of Appeals for the Armed Forces (CAAF) have reduced the scope of conduct proscribed by the indecency offenses[13] and suggest a subtle change in the military law of indecency. These cases demonstrate the CAAF's acceptance that contemporary military standards, and not those of overly strait-laced fact finders must measure the definition of indecency. These CAAF decisions, coupled with the implications of *Lawrence v. Texas*, suggest that the CAAF will exercise even greater scrutiny of indecency cases in the future, and that military prosecutors should exercise caution when charging a minor indecency offense as part of a larger case.

II. Indecency Is Incomprehensively Defined by the Military Courts

A. Do the Array of Terms Used to Define "Indecency" Add Anything to Understanding What Conduct the Indecency Offenses Actually Proscribe?

Perhaps the first problem in prosecuting indecent conduct is establishing a cogent definition of the word "indecent". Military courts attempting to provide clarity to the meaning of the word "indecent" have only a circular definition of indecency that includes few words of common understanding[14] to assist them in their effort. Justice Stewart

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[11] 417 U.S. 733 (1974).

[12] William Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV 3 (1973). The power to court-martial under vague standards tends to encourage an arbitrariness of command, which is undesirable in itself and which can have an adverse effect upon morale. *Id.*

[13] *See generally* States v. Baker, 57 M.J. 330 (2002) (finding the military judge's instructions on indecency inadequate); United States v. Brinson, 49 M.J. 360 (1998) (finding the accused's clearly offensive epithets not indecent under the circumstances).

[14] *See, e.g.*, United States v. Negron, 58 M.J. 834, 841 (N-M. Ct. Crim. App. 2003) (defining "obscene" as synonymous with "indecent," defining "libidinous" as "marked by lustful desires: characterized by lewdness"); United States v. Allison, 56 M.J. 606, 608

may have been correct in describing the task of precisely defining obscenity (a term closely related to indecency) as "trying to define the undefinable."[15] Nevertheless, as the terms indecent and obscene specifically appear in the elements of indecency offenses, the justice system requires cogent definition of these terms.

Military judges define indecent acts as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations."[16] Similarly, indecent language is defined as "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. . . [and] must violate community standards."[17] Military courts have found the test to determine if language is criminally indecent "lies in whether the particular language is calculated to corrupt morals or excite libidinous thoughts."[18] Various court decisions attempting to pin down the meaning of these definitions expose a circularity problem in the list of adjectives used to modify and illuminate the meaning of indecent. One military court, in apparent frustration, found that "[t]he term 'lascivious' is synonymous with 'lewd' or 'indecent' and inclusion of the latter adjectives in addition to the former adds nothing . . . ."[19] The Supreme Court found simply that "[i]ndeed, 'lascivious' has been defined along with obscene and lewd, as signifying that form of immorality which has relation to sexual impurity."[20] From these cases, it is clear that indecency is largely defined not by an explanation, but by a

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(C.G. Ct. Crim. App. 2001) (finding essentially that sodomy is indecent *per se*: "It would indeed be a tortured exercise in semantics to conclude that oral sodomy is not an indecent act" (quoting United States v. Harris 25 M.J. 281, 282 (C.M.A. 1987))); United States v. Gaskin 12 C.M.R. 419, 421 (C.M.A. 1961) (defining "lascivious" as synonymous with "lewd" or "indecent").

[15] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[16] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-90-1 (15 Sept. 2002) [hereinafter BENCHBOOK].

[17] United States v. Negron, 58 M.J. 834, 836-37 (N-M. Ct. Crim. App. 2003), *petition granted*, 59 M.J. 258 (2004).

[18] United States v. French, 31 C.M.R. 57, 60 (C.M.A. 1990) (quoting United States v. Linyear, 3 M.J. 1027, 1030 (N.M.C.M.R. 1977)).

[19] United States v. Gaskin, 12 C.M.R. 419, 421 (C.M.A. 1961) (quoting United States v Hobbs, 23 C.M.R. 157 (C.M.A. 1957)).

[20] Swearingen v. United States, 161 U.S. 446, 448 (1896).

string of synonyms providing little guidance on what specific conduct is meant to be included within the definition.

Military courts have also determined the word "obscene" to be synonymous with indecent.[21] The Supreme Court's test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme . . . taken as a whole appeals to the prurient interest."[22] The military refines the Court's definition of "obscene" explaining that the "applicable and relevant community standards . . . are those of the military community"[23] and are to be judged "according to the average person in the military community as a whole, rather than the most prudish or tolerant."[24]

Military courts are by no means alone in struggling to provide a cogent definition of the conduct or material actually described by the words "indecent" and "obscene." An Ohio municipal court identified that "[u]nder the statute defining lewdness, as including any indecent or obscene act, the words indecent and obscene add nothing to broaden the concept of lewdness, but are simply modifying adjectives."[25] Struggling with this same concept, a Kentucky court found that "the word indecent includes anything which is lewd or lascivious, obscene or grossly vulgar, unbecoming, unseemly, or unfit to be seen or heard."[26] The opinion generally expressed by courts appears to be that the words indecent, obscene, lewd, lascivious, and prurient, all describe the same thing with no meaningful difference between them.

All of these definitions and tests rely on a series of adjectives that are hardly helpful in actually understanding what the principal terms indecent and obscene describe. None of these words—lewd, lascivious, prurient, etc.—provide any clarity to the bounds of the conduct meant to be criminalized by the words indecent and obscene. In defining these words, courts might just as well, and probably to better effect, resort to

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[21] *Negron*, 58 M.J. at 841; *see also French*, 31 C.M.R. at 59 (defining indecent as synonymous with obscene).

[22] Roth v. United States, 354 U.S. 476, 191-95 (1957). The phrase "prurient interest," not helpfully, is defined as "patently offensive representations or descriptions of normal or perverted sexual acts of the description of masturbation, excretory functions, or lewd exhibition of the genitals." Miller v. California, 413 U.S. 15, 25 (1973).

[23] United States v. Hullet, 40 M.J. 189, 191 (C.M.A. 1994).

[24] *Negron*, 58 M.J. at 841.

[25] State v. Davis, 165 N.E. 2d 504 (1959).

[26] King v. Commonwealth, 233 S.W. 2d 522 (1950).

the adjective "dirty." This effort provides precious little guidance on what conduct is actually proscribed by the indecency offenses. One must seriously question what the average military person considers appealing to the "prurient interest," and even this must assume that the average military person has in mind any definition of the word prurient. A further serious question is whether courts-martial panel members, selected because of their, "education, training, experience, length of service, and judicial temperament";[27] or military judges as fact finders, can ever fairly represent the standards of the average person in the military community.[28]

The best to be gleaned from the numerous judicial efforts to define the words indecent and obscene is that they describe some form of sexual behavior of which courts do not approve. Justice Stewart's famous quote—"I know it when I see it"[29]—is probably the best, albeit entirely subjective, description of the gauge used to determine whether a given action is indecent or obscene. Unfortunately, great disparity undoubtedly exists between different individuals, including military prosecutors and judges in how they apply this gauge to the conduct of others. The remainder of Justice Stewart's famous quotation should also be instructive to fact finders who may be tempted to convict any scurrilous conduct charged as indecent, "and the [movie banned by the state as obscene] is *not* that."[30]

B. How Have Courts Actually Illuminated the Difficult Definition of Indecency?

Military courts, attempting to apply the difficult definition of indecency to charged misconduct must determine when sexually related conduct is sufficiently offensive to warrant the label indecent or obscene and, consequently, be worthy of a court-martial conviction. As a starting point, military courts recognize that "[the UCMJ] is not intended to

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[27] UCMJ art. 25 (2002).

[28] Though beyond the scope of this paper, considering the age of most Soldiers, it is worth pondering whether court-martial panels (typically comprised of commissioned and senior noncommissioned officers), or military judges (typically senior commissioned officers) actually attempt to apply the standards of "the average person in the military" or apply their own standards to define these terms.

[29] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[30] *Id.* (emphasis added).

regulate the wholly private moral conduct of an individual."[31] Accordingly, military courts consistently state, "[p]rivate sexual intercourse between unmarried persons is not punishable."[32] One way the courts find otherwise lawful sexual intercourse to be indecent, and thus criminal, is when the sex act is committed "openly and notoriously."[33] Open and notorious conduct occurs when it is subject to the public view.[34] Courts consider the public nature of such acts an aggravating circumstance that converts an otherwise excusable act into an offense.[35] The issue of whether the act was in fact open and notorious is often litigated. These cases demonstrate the difficulty of determining whether a given sexual act should be defined as a crime.

In *United States v. Berry*, the Court of Military Appeals (COMA) found that the place of occurrence does not always determine the public nature of an act,[36] holding that "[a] private residence in which other persons are gathered may be regarded as a public place for the purpose of [determining whether the act is open and notorious]."[37] In *Berry*, the evidence revealed that Sergeant (SGT) Berry and a co-accused Soldier, engaged in consensual, round-robin sex with two young women in a private hotel room.[38] The court found that despite the privacy of the hotel room, the sexual intercourse took place in a public location and became an indecent act because the participants knew of the "actual presence of a third person."[39] The court found irrelevant the fact that the third persons actually present in this case were unlikely offended as they were themselves participants in the sexual intercourse, holding that "the effect of the act on persons of average sensibilities [not the sensibilities of the actual participants] determines the aggravating circumstances."[40]

Subsequent to *Berry*, military courts continue to revisit the issue of when a sexual act takes on a public nature making it worthy of conviction. In 1989, the Navy-Marine Court of Military Review (NMCMR) overturned the conviction of Lance Corporal Carr for

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[31] United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952).
[32] United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).
[33] *Hickson*, 22 M.J. at 149 (quoting United States v. Berry, 6 C.M.R. 609 (C.M.A.1956)).
[34] *Berry*, 6 C.M.R. at 614.
[35] *Id.*
[36] *Id.* at 609.
[37] *Id.* at 614.
[38] *Id.* at 611.
[39] *Id.* at 614.
[40] *Id.*

indecent acts with another by "fornicating on a public beach."[41] In this case, the court found the facts as follows:

> Carr and P, the 16 year old daughter of an Air Force Technical Sergeant . . . strolled down the beach for about ¼ mile, into a camping area that was officially closed at 1900. They sat down together at a thatch-covered picnic table. On the ground next to the table was a large canvas tent . . . at some point after midnight . . . . [t]hey lay down on the side of the tent and engaged in sexual intercourse.[42] The sex act occurred on a military beach campground, within 50 feet of a tent occupied by an apparently sleeping family.[43]

Carr was originally charged with rape for these acts, but was acquitted of rape and found guilty of the lesser included offense of indecent acts with another.[44] On appeal of the conviction, the Navy-Marine court weighed the issue of "whether an unwitnessed act of sexual intercourse on a public beach late at night is a 'public' [and thus indecent] act within the meaning of Article 134 of the UCMJ."[45] Ultimately, the court expanded on the *Berry* definition by determining that "an act is 'open and notorious' when it is performed in such a place and under such circumstances *that it is reasonably likely to be seen* by others."[46] The court then determined that despite the actual presence of third persons, separated only by the canvas of their tent, the act was "not likely to be seen by others."[47] The court also took specific note of the "intent of the parties not to be seen"[48] when overturning Carr's conviction.

In *United States v. Izquierdo*,[49] the CAAF adopted the Navy-Marine court's definition of indecency provided in *Carr*, though not its application. At trial, Airman (Amn) Izquierdo was acquitted of raping

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[41] United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989).
[42] *Id.* at 662.
[43] *Id.* at 665.
[44] *Id.* at 662.
[45] *Id.*
[46] *Id.* at 665 (emphasis added).
[47] *Id.* at 666.
[48] *Id.*
[49] 51 M.J. 421 (1999).

two young women in his barracks room, but convicted of the lesser included offense of committing indecent acts with both women.[50] The CAAF affirmed one indecent acts conviction, and reversed the other.[51]

In the indecent act with another affirmed by the CAAF, Amn Izquierdo and a young woman had sexual intercourse on his bed in a barracks room while his two roommates were across the room in their beds.[52] A sheet hanging from the ceiling divided the room and blocked the roommates' view of Izquierdo's activities, but the roommates were "quite suspicious of the activity on the other side of the sheet."[53] Using the legal standard provided in *Jackson v. Virginia*,[54] the CAAF held that despite the fact that no one actually saw the intercourse, the members could find the act open and notorious, as it was reasonably likely to be seen by others.[55] Unlike the *Berry* case, the court did not mention the parties' intent not to be seen.

In the indecent acts with another conviction overturned by the CAAF,[56] Izquierdo had sexual intercourse with another young woman on the same bed. This time, no other person was in the room, but one of his roommates, suspecting the sexual activity, opened the unlocked door and actually saw the sexual activity.[57] Even though the sex act was actually witnessed by others, the court found "there was not sufficient evidence, as a matter of law, of the open and notorious nature of the sexual conduct."[58] In his concurring opinion, Judge Sullivan points out that this decision adopts the "reasonably likely to be seen by others"[59] standard of *Carr*, but points out the difficulty in "explaining the difference between a sheet in a room and a closed but unlocked door which was opened by a roommate suspecting sexual conduct."[60] Without saying so, the CAAF in *Izquierdo,* like *Carr*, apparently uses a definition of open and

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[50] *Id.* at 422.
[51] *Id.* at 423.
[52] *Id.*
[53] *Id.*
[54] 443 U.S. 307, 319 (1979) (stating the standard of review for legal sufficiency as "asking whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt").
[55] *Izquierdo*, 51 M.J. at 423.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* (Sullivan, J., concurring).
[60] *Id.*

notorious that looks to the intent of the parties. Apparently, the CAAF was reluctant to sustain a conviction when it believed that despite being actually seen, the parties took reasonable steps (e.g., closing a door) to avoid being seen by others.

Even with the assistance of these cases, it remains difficult to determine when sexual conduct will be considered to occur openly and notoriously. From the decisions in *Izquierdo* and *Carr*, it apears that the dividing line between sexual conduct that is private and sexual conduct that is open and notorious—and thus indecent acts—falls somewhere between the thickness of a cotton sheet and the thickness of a canvas tent wall.

Similar to *Carr* and *Izquierdo*, when the courts considered the couples' intent to keep their sexual acts private,[61] military courts have also considered state of mind to determine if an accused's acts demonstrated indecent intent. An example, *United States v. Proper*[62] is a surprising case in which the Coast Guard Court of Criminal Appeals reversed Chief Petty Officer Proper's conviction for indecent assault.[63] The facts at trial revealed that a female petty officer under Proper's supervision arrived for watch without wearing the required T-shirt under her coveralls, an infraction for which Proper had previously counseled the petty officer. When she appeared on watch a few days later, wearing only a bra beneath the coveralls, Proper hooked a finger in her shirt collar and said "[y]ou're not wearing a T-shirt, if [you're] going to give [me] a free titty shot, then [I'm] going to take it."[64] Reversing the

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[61] United States v. Carr, 28 M.J. 661, 666 (N.M.C.M.R. 1989); *Izquierdo*, 51 M.J. at 421.
[62] 56 M.J. 717 (C.G. Ct. Crim. App. 2002), *petition denied*, 56 M.J. 472 (2002).
[63] *Id.* Chief Petty Officer Proper was convicted of the following: eight specifications of violating a lawful general regulation (six by engaging in sexually intimate behavior with subordinate female crewmembers, one for consuming alcohol in the ship's radio room, and one specification of violating a lawful order of a superior officer), all in violation of Article 92 of the UCMJ; one specification of maltreatment of a female subordinate, in violation of Article 93 of the UCMJ; six specifications of committing sodomy onboard his cutter with a subordinate female member of the ship in violation of Article 125 of the UCMJ; two specifications of assault consummated by a battery upon two female subordinates, in violation of Article 128 of the UCMJ; and seven specifications under the general article of the UCMJ (one for committing an indecent act by engaging in sexual intercourse on a racquetball court in a Navy gymnasium, one for committing an indecent assault on a female subordinate, two for wrongfully impeding an administrative investigation, and three for adultery), all in violation of Article 134 of the UCMJ. Proper was sentenced to a bad conduct discharge, confinement for six months, and reduction to pay grade E-1. *Id*.
[64] *Id.* at 718.

indecent assault conviction, the Coast Guard court essentially relied on the definition of indecent first stated in *United States v. Holland*,[65] that "the word indecently itself is insufficient to show how or in what manner the act charged was indecent . . . [and] excludes any possibility that . . . the conduct charged could reasonably be interpreted as innocent."[66] The court concluded that under the circumstances there was insufficient evidence that Proper's actions were performed with the intent to satisfy his lust, and therefore concluded the assault was not indecent.[67] The court used the intent of the actual parties to determine that despite appearances, and the plain meaning of the spoken words, the act was not sexual, and consequently not indecent.[68]

Very recently, the Navy-Marine court issued an opinion demonstrating the continuing difficulty of pinning down a precise meaning of "obscene" and "indecent," and the humor, if not futility of the various adjectives used to circumscribe them. In *United States v. Negron*, the Navy-Marine court sustained Corporal Negron's conviction of, among other things,[69] depositing obscene materials in the mail.[70] The conviction stemmed from an angry letter Negron mailed to his credit union that closed with the offensive phrase: "[m]aybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking . . . ."[71] The court's opinion scrupulously parsed the meaning of

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[65] 12 C.M.R. 444 (C.M.A. 1961).

[66] *Id.* at 445.

[67] *Proper*, 56 M.J. at 718.

[68] *Id.* The indecent assault charge was reduced to the lesser included offense of assault consummated by a battery. In accordance with Chief Petty Officer Proper's concession, the court agreed that the sentence adjudged would not have been reduced had the trial court reached the same result. *Id.*

[69] 58 M.J. 834 (N-M. Ct. Crim. App.2003), *petition granted*, 59 M.J. 258 (2004). Negron was also convicted of wrongful appropriation, making and uttering a worthless check. *Id.* at 835.

[70] *Id.* at 836; *see also* MCM, *supra* note 3, pt. IV, ¶ 94 (2002).

[71] *Negron*, 58 M.J. at 836. Negron's letter was in response to the credit union denying his loan request. His complete closing remarks in the letter were the following:

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?

Id.

Negron's written words and curiously speculated as to their impact on the reader to uphold Negron's obscenity conviction.[72]

During Negron's providence inquiry, the military judge used the *Benchbook's* definition for indecent acts with another to define "obscene" rather than the *Benchbook's* obscenity definition.[73] The Navy-Marine court found no error in this inconsistency by concluding that the word obscene is synonymous with indecent, and that "[t]he matter must violate community standards of decency or obscenity and must go beyond customary limits of expression."[74] The Navy-Marine court explained that for its own decision, it would use neither the trial court's definition nor the *Benchbook's* obscenity definition, finding the most appropriate definition to be "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite libidinous thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts."[75]

Having selected this third definition, the Navy-Marine court engaged in a curious analysis of the meaning of the words "morals," "libidinous," and "incite" to determine whether the language written by Negron was actually obscene.[76] The court supplied the definition of libidinous as, "having or marked by lustful desires; characterized by lewdness."[77] It defined morals as "rules or habits of conduct, especially sexual conduct,

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[72] *Id.*

[73] *Id.* at 841. The trial judge used the language from MCM, *supra* note 3, pt. IV, ¶ 90c:

> That form of immorality relating to sexual impurity which is not only grossly vulgar and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to human relations . . . The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. The community standards of decency or obscenity are to be judged according to the average person in the military community as a whole rather than the most prudish or tolerant.

Id. (quoting MCM, *supra* note 3, pt. IV ¶ 90c).

[74] *Id.* (quoting United States v. Hullet, 40 M.J. 189, 191 (C.M.A. 1994)).

[75] *Id.* at 836-37 (quoting MCM, *supra* note 3, pt. IV, ¶ 89c).

[76] *Id.* at 841-45.

[77] *Id.* at 837 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1304 (16th ed. 1971)).

with reference to standards of right and wrong."[78] The court defined incite as to "stir up."[79] Surprisingly, the court relied on two different dictionaries, the most current of which was twenty-seven years old, to provide these three definitions. The court's reliance on two different obsolete dictionaries to supply the definitions to support the conviction is troubling as the accused was unlikely born when either was printed,[80] and because current dictionaries no longer provide a sexual connotation to the definition of morals.[81] It is questionable whether an obsolete dictionary definition can fairly assist in determining the contemporary community standard or supply the basis for a criminal conviction.

Using the antiquated definitions as guidance, the Navy-Marine court found that "for most individuals, the very descriptive nature of [Negron's] operative words and phrases upon reading—even if totally involuntary and only fleetingly—will incite libidinous thoughts, in that the mental image of the described act will flash through one's mind."[82] The court specifically declined to view Negron's conduct as a coarse expression of anger—"cursing like a sailor."[83] Instead, it focused on the sexual content of his words, and the visual impact the court imagined they have on a reader.[84] Unfortunately, the court's analysis provided no

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[78] *Id.* at 844 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 852 (1976)).

[79] *Id.* at 843 n.19 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 665 (1976)).

[80] Although Negron's age at the time of conviction is unavailable, considering his rank was Lance Corporal (E-3) at the time of trial, it is unlikely he was twenty-seven or more years old.

[81] *See, e.g.*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998) (defining morals as principles or habits with respect to right or wrong conduct).

[82] *Negron*, 58 M.J. at 843.

[83] *Id.* at 853-54.

[84] *Id.* The court found the following:

> As sad and as unwelcome as it may be, as a culture we have become somewhat desensitized to the "F" word, and, regrettably, it seems to be on the fringe of the older, long-established group of recognized and perhaps somewhat more "acceptable" commonly-used expletives, such as "hell," Damn," and "s___". . . applying the appropriate military community standard," we do not find that Appellant's words of choice have reached the same commonly-used-as-an-expletive status as the "F" word. How often, when hitting a thumb with a hammer or upon spilling hot, greasy gravy on a new shirt or skirt, is one heard to blurt" "Oh, [the "B" word]!"? Appellant's explicit and descriptive words invoke the image of the sexual act itself.

explanation to support their assertion that someone who read Negron's insulting words would involuntarily form a mental image of a bank employee performing fellatio on a customer.

In *Negron*, the Navy-Marine court's analysis is nearly the complete opposite of the Coast Guard court's in *Proper*. Faced with a question of intent similar to that in *Proper*, the *Negron* court decided to focus on the appearance of sexuality in the words, and not the likely intent of the party who wrote them.

III. The Elements of Indecency Offenses Are Loosely Applied by Military Courts

A. Does Indecent Acts With *Another* Actually Require Another Person?

The elements of the offense of indecent acts with another are listed in the *Manual for Courts-Martial* (*MCM*) as:

> (1) the accused committed a certain wrongful act with a certain person; (2) the act was indecent; and (3) under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces . . . .[85]

In analyzing indecent acts convictions, military courts demonstrate a surprising willingness to disregard the specificity of these elements. The result of this curious analytical technique tends to affirm convictions of appellants who legitimately challenge the sufficiency of the evidence presented on one or more of the elements.

An opening question regarding the specificity of the elements in indecency crimes is whether the UCMJ with the specified offenses of: indecent acts or liberties with a child;[86] indecent exposure;[87] indecent

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Id. It may say a great deal about the court's perspective and their ability to relate to the contemporary community standard of the military when the example they provide for cursing is "spilling hot greasy gravy on one's shirt or skirt." *Id*.

[85] MCM, *supra* note 3, pt. IV, ¶ 90b (2002) ("Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.").

[86] *Id.* ¶ 87.

language;[88] indecent acts with another;[89] and depositing obscene matters in the mails[90] specifies all forms of indecent sexual conduct meriting proscription. The COMA, in sustaining the conviction in *United States v. Sanchez*[91] answered the question in the negative. At trial, Private Ricardo Sanchez was convicted of violating Article 134 by "wrongfully and unlawfully commit[ing] an indecent act with a chicken by penetrating the chicken's rectum with his penis with intent to gratify his [Private Sanchez's—not the chicken's] lust."[92] On appeal, the defense argued to overturn the conviction as the facts met neither the elements of sodomy nor of indecent acts with another.[93] The court disagreed, finding that although "[a]rticle 134 did not intend to regulate the wholly private moral conduct of an individual . . . [i]t would be an affront to ordinary decency to hold that an act such as the one here committed was not criminal *per se* and would not dishonor the service . . . ."[94]

Although one expects the incidence of human-chicken copulation to be rare, this case has precedential value as the *Sanchez* court affirmed an Article 134 conviction for conduct that did not meet the elements of any other offense, but that the court found Sanchez's conduct to be indecent *per se*, and service discrediting. The *Sanchez* case remains viable to prosecute sexually related conduct that offends the government, but is not specifically proscribed by the *MCM*.

The case of *United States v. Allison*[95] demonstrates a military court's willingness to sustain a conviction for indecent acts with another when the indecent act was not performed "with" another person. In this case, Allison, a Coast Guard specialist first class,[96] pled guilty to two specifications of consensual heterosexual sodomy, and one specification of indecent acts with another by videotaping his acts of sexual intercourse and sodomy.[97] Allison's co-actor in the sexual activity was

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[87] *Id.* ¶ 88.
[88] *Id.* ¶ 89.
[89] *Id.* ¶ 90.
[90] *Id.* ¶ 94.
[91] 11 C.M.R. 216 (C.M.A. 1960).
[92] *Id.* at 217.
[93] *Id.*
[94] *Id.* at 218 (quoting United States v. Snyder, 4 C.M.R. 15 (C.M.A. 1952)).
[95] 56 M.J. 606 (C.G. Ct. Crim. App. 2001), *petition denied*, 57 M.J. 104 (2002).
[96] *Id.* In the Coast Guard, the rank of specialist first class is a pay grade E-6 service member, equivalent to an Army staff sergeant.
[97] *Id.* Allison also pled guilty to, and was convicted of, two specifications of violating a lawful order, and one specification of attempting to destroy evidence. Allison received a

his future wife.[98] Though the record fails to explain how these acts came to be charged, the facts of the case were undisputed. Allison and his future wife engaged in acts of sexual intercourse and oral sodomy in the privacy of Allison's home. They both participated in videotaping these actions. The tape never left the home, and there was no evidence that the tape was ever shown to anyone.[99]

Beginning its analysis, the Coast Guard court acknowledged that unless otherwise in violation of the law, consensual acts of sexual intercourse between unmarried participants are not indecent if conducted in private.[100] The court determined though, that because sodomy is an offense under Article 125, UCMJ, whether heterosexual, consensual, private or not, videotaping such acts is "a different matter."[101] The court followed this finding with the conclusion that "[i]t would indeed be a tortured exercise in semantics to conclude that oral sodomy is not an indecent act,"[102] and sustained Allison's convictions for both sodomy and indecent acts with another by videotaping the acts.

Whether oral sodomy was itself an indecent act *per se* did not ultimately drive the Coast Guard court's decision regarding the indecent acts with another offense. For engaging in oral sex, Allison was charged and convicted of sodomy.[103] The act of videotaping the sexual activities served as the basis for Allison's indecent acts with another conviction.[104] The court's analysis based the conviction on Allison's acts with a video camera, not his acts with his future wife. After restating the definition of indecency provided in the *MCM*,[105] the court inferred from the facts that either "the making of the tape itself, [Allison's] knowledge that his acts of sodomy were being videotaped, or the anticipation of later viewing,

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sentence that included eighteen months confinement and reduction to the lowest enlisted grade. *Id.*

[98] *Id.* at 607.

[99] *Id.*

[100] *Id.* at 608 (quoting United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989)).

[101] *Id.*

[102] *Id.* (quoting United States v. Harris, 25 M.J. 281, 282 (C.M.A. 1987)).

[103] *Id*. at 606.

[104] *Id*.

[105] *Id.* at 608 (citing MCM, *supra* note 3, pt. IV, ¶ 90c (2000)). The court explained that "'indecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id.*

somehow excited his lust to a greater extent or degree than that engendered by the sexual acts alone."[106]

The "excited lust" reasoning of *Allison* is troubling when carefully scrutinized. The court's reasoning suggests that a sexual act becomes criminal when at the time of the sex act, the presence of some other object excites extra lustfulness in the actor's mind. By this logic, there is no reason to confine offending (extra-lustful thought exciting) objects to video cameras. As precedent, this case predicts the possible successful prosecution of adult, consensual sex performed in a private bedroom occupied only by the couple performing the sex act and an "extra-lustful thought exciting" television playing a pornographic program. By extension of the very same logic, a prosecution could be successful if the extra-lustful thought- exciting object is a bouquet of flowers, a scented candle, or bottle of Viagra.[107]

Perhaps realizing the frailty of the "excited lust" analysis standing alone, the *Allison* court ultimately sustained the indecent acts conviction for a more conventional, but factually unsupported reason, concluding that the sex act performed by the couple alone in a private bedroom was nevertheless performed in public view. To reach this conclusion, the Coast Guard court reasoned that the presence of a video camera created public view, finding:

> By capturing the transient acts of sodomy on tape, a degree of permanence was created which enabled later viewing of these acts at any time by anyone. Appellant argues that these tape images were for private use only, but we know that he kept the tape for over seven months, during which time it was possible that someone else could have viewed the tape, with or without Appellant's permission. In fact the police viewed it after its seizure . . . Thus, despite Appellant's argument that the tape was not for others to see, the private quality of the sexual acts was compromised as a result of the videotape. The potential for viewing by others, that taping affords, prompts us to equate videotaping with placing a third-

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[106] *Id.*

[107] Viagra is a pharmaceutical prescribed and marketed to enhance libido and correct erectile dysfunction. Pfizer Pharmaceuticals Viagra official information web site, *available at* http://www. viagra.com (last visited Mar. 15, 2004).

> person observer in the room, and causes the enterprise to take on a public character.[108]

The fact Allison and his future wife kept the recorded images private indicates that the court, without explicitly saying so, reasoned that activities performed in front of a video camera are in the public view *per se*.[109] In this decision, the Coast Guard court created an entirely new definition of public view, and applied it in a manner inconsistent with both the "actual presence of a third person" standard of *Berry*[110] and the "reasonably likely to be seen by others" expansion of *Berry* established in *Carr*.[111] The *Allison* court accepted as fact that the participants performed the activity in private, intended to keep the tape private, and that the tape never left the home. *Allison* establishes a "potential for viewing by others"[112]—at any time now or in the future—standard. The *Allison* court provided no guidance as to how low the actual potential may be for an act to become criminal.

As precedent, the reasoning in *Allison* potentially criminalizes many more sexual activities than just those performed by Allison and his future wife. Under *Allison,* the intent of the parties to keep sexual activity private is irrelevant. Accordingly, the *Allison* "potential for viewing" standard by logical extension could be applied to criminalize unwitnessed sex acts performed behind closed but unlocked doors, as there is certainly at least the potential for viewing by others. Logically, this could be applied not only to couples in barracks rooms, where the presence of other Soldiers in the building creates at least the potential for viewing, but also to parents in their own bedrooms when their own children are in the house.

Careful scrutiny of either of the Coast Guard court's rationales ("excited lust" or "potential for viewing") for upholding Allison's conviction shows them to be fundamentally flawed. Applying the logic of the *Allison* court to consider whether apparently innocent acts of

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[108] *Allison*, 56 M.J. at 609.

[109] *Id.* Though entirely beyond the scope of this paper, *Allison*'s reasoning that anything videotaped, even in a private bedroom, should be considered in the public view fails when analyzed in any other context. It is unlikely courts would ever accept this reasoning to suggest that a crime victim's videotaped statement to either hospital or law enforcement personnel is in the public view.

[110] United States v. Berry, 6 C.M.R. 609, 614 (C.M.A. 1956).

[111] United States v. Carr, 28 M.J. 661, 665 (N.M.C.M.R. 1989).

[112] *Allison*, 56 M.J. at 609.

sexual intercourse would fall within either of the rationales, demonstrates the flaw. Both rationales encompass, and therefore potentially criminalize far too broad a range of sexual conduct. *Allison* fails to provide a cogent standard to guide either prosecutors or participants in cases of adult consensual sexual activity with the intent to maintain privacy.

B. Does Indecent Acts *With* Another Actually Require That Another Person Participate?

Military courts reviewing court-martial convictions for the offense of indecent acts with another[113] frequently analyze whether the first element of the offense: "[t]hat the accused committed a certain wrongful act with a certain person"[114] is met. One part of this analysis is determining whether presumably indecent conduct was actually performed *with* another person. The results in these cases are often surprising, and demonstrate military courts' willingness to twist the plain language of the elements to avoid overturning a conviction. As the "definitions" cases like *Negron* demonstrate the practice of functionally defining "indecent" as sex-related acts of which the court does not approve, these "elements" cases demonstrate a similar willingness to sustain convictions for sex-related activities of which the court does not approve, regardless of whether the facts meet the actual elements of the offense.

In *United States v. Thomas*,[115] the COMA established a rather straightforward test to determine whether an accused's act fits the elements of the indecent acts with another offense, or whether the act fits into the more generally described offense of indecent exposure.[116] At

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[113] MCM, *supra* note 3, pt. IV, ¶ 90 (2002). The specific elements for this offense are:

> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id. ¶ 90b.

[114] *Id.*

[115] 25 M.J. 75 (C.M.A. 1987).

[116] MCM, *supra* note 3, pt. IV, ¶ 88 (2002). The elements of indecent exposure are:

trial, Thomas was convicted of indecent acts with another for playing games and dancing with nude children, and persuading the children to let him pose them as nude models.[117] The COMA affirmed the conviction, finding,

> The offense of committing indecent acts with another requires that the acts be done in *conjunction or participation with* another person . . . . It is the *participation* of [the accused] with the children in the performance of the indecent acts which distinguishes it from indecent exposure . . . . It was much more than merely exposing himself to an unwilling nonparticipant.[118]

This straightforward "in conjunction or participation with" requirement was almost immediately contorted by the service courts to support indecent acts convictions when the facts provided no evidence of actual participation by anyone other than the accused. As the examples below demonstrate, the service courts have been willing to eliminate virtually any distinction between a co-actor and an unwilling nonparticipant when finding that a sex act was performed "with" another.

The first sign of the courts' willingness to stretch the concept of participation came in the Army court's decision of *United States v. Murray-Cotto*.[119] At trial, SGT Murray-Cotto was convicted of committing indecent acts with a fifteen-year-old German bicyclist.[120] The facts of this case showed that Murray-Cotto, with his penis exposed, drove his car up from behind the bicyclist, shouted obscenities at her, and forced her off the road.[121] Affirming the conviction, the Army court

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> (1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
> (2) That the exposure was willful and wrongful; and
> (3) That under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[117] *Thomas*, 25 M.J. at 76.

[118] *Id.* at 76-77.

[119] 25 M.J. 784 (A.C.M.R. 1987), *petition denied*, 26 M.J. 322 (C.M.A. 1988) (emphasis in original).

[120] *Id.* at 784-85.

[121] *Id.*

found that the bicyclist was more than a mere unwilling participant as mentioned in *Thomas*. The court reasoned that forcing the cyclist off the road and shouting obscenities at her created "participation" between Murry-Cotto and the bicyclist sufficient to affirm the indecent acts with another conviction.[122] The Army court did not explain the distinction between the bicyclist's level of participation in this case and that of the "unwilling nonparticipant" mentioned in *Thomas*.

A series of Air Force cases that tracked this precise issue, and in which the court ultimately reversed its reasoning on the subject of participation, best demonstrate the process by which military courts evaporated the participation of another requirement for the offense of indecent acts with another.

The first of these cases was the 1990 case of *United States v. Jackson*.[123] The trial court convicted Amn Jackson of indecent acts with another for masturbating in the stacks of the base library while keeping a particular young woman in view by following her between rows of bookshelves.[124] The Air Force court reversed the conviction, finding that the young woman was not a participant,[125] and accordingly, that indecent exposure was the proper charge. The court noted straightforwardly "the requirement that an indecent act must be done 'with another.'"[126] The court reasoned that "[t]he appellant hardly masturbated 'with' [the young woman]; she was not his co-actor, principal, or co-conspirator.[127] At best, she became the 'inspiration' for Jackson's self-abuse."[128] Besides applying the element to the most straightforward interpretation of the facts, the *Jackson* court attempted to maintain the distinction between the offenses of indecent acts with another and indecent exposure. The court explained this distinction by noting that they "view[ed] the framers of the [*MCM*] as artful drafters,"[129] pointing out that in the *MCM's* Article 134 offense of indecent acts or liberties with a child, "physical contact is not

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[122] *Id.* at 785.
[123] 30 M.J. 1203 (A.F.C.M.R. 1990), *petition denied*, 32 M.J. 378 (C.M.A. 1991).
[124] *Id.*
[125] *Id.* at 1204.
[126] *Id.* (citing MCM, *supra* note 3, pt. IV, ¶ 90b (1988)).
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1205.

required."[130] Under "the logic of *exclusio unis*, physical contact still must be necessary for the offense of indecent acts with an adult."[131]

In 1992, the Air Force court revisited the participation issue and reached a different conclusion.[132] In *United States v. Hansen*, the trial court convicted Master Sergeant (Msgt) Hansen, among more egregious offenses,[133] of indecent acts with another for having his daughter watch him masturbate.[134] This particular act was only a minor part in the torturous history of Msgt Hansen's sexual abuse of his daughter.[135] The Air Force court considered whether the elements of indecent acts with another were met for this specified act, as there was no physical contact between Msgt Hansen and his daughter. In affirming the conviction, the court narrowed its previous decision in *Jackson*[136] by reconsidering the definition of the phrase "with another."[137] The court found "[t]he elements of indecent acts with another do not require a touching. Accordingly, we hold that an indecent act with another may be committed without touching. To the extent *Jackson* states touching is essential to prove an indecent act with another, that portion should be viewed as dicta."[138] Considering the substantial interaction between Msgt Hansen and his daughter necessary for the other offenses, the duration, and the egregiousness of the abuse, the court's reasoning suggests they believed Msgt Hansen made his daughter a co-actor in his indecent acts even though there was no actual touching.[139]

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[130] MCM, *supra* note 3, pt. IV, ¶ 87c(2) (2002).
[131] *Jackson*, 30 M.J. at 1205.
[132] United States v. Hansen, 36 M.J. 599 (A.F.C.M.R. 1992), *petition denied*, 38 M.J. 229 (C.M.A. 1993).
[133] *Id.* at 602. Master Sergeant Hansen was convicted of rape, forcible sodomy, indecent acts upon the body of a minor female on divers occasions, and committing indecent acts with another, all involving his natural daughter, T. He also was convicted of committing an indecent act upon the body of his other minor daughter, L. His sentence included a dishonorable discharge and twenty-years confinement and reduction to E-3. *Id.*
[134] *Id.*
[135] *Id.* The appellant began a course of sexual conduct with T when she was eight or nine-years old. Besides having T watch him masturbate, Msgt Hansen also attempted to have sexual intercourse with T, but was unsuccessful at first in achieving full penetration due to her small size and age. He even used a vibrator on the outside of her vaginal area to stimulate her, as well as providing her a rubber hot dog to insert into her vagina to also stimulate her and aid in eventual penetration. Master Sergeant Hansen eventually began having sexual intercourse with his daughter. This abusive relationship terminated only when the daughter turned eighteen-years old, left home, and joined the armed forces. *Id.*
[136] *Jackson*, 30 M.J. at 1203.
[137] *Hansen*, 36 M.J. at 608-09.
[138] *Id.* at. 604.
[139] *Id*. at 608-09.

A year later, the Air Force court again addressed the participation issue in *United States v. Daye*.[140] On appeal by the government, the court reversed the trial court's dismissal of a charge and two specifications of indecent acts with another against Technical Sergeant (Tsgt) Daye for videotaping his acts of sexual intercourse without the knowledge or consent of the other participant.[141] The defense argued that the act of videotaping was not, in and of itself, indecent and that the act of videotaping did not occur "with another."[142] The court instead accepted the government's position that the indecent act was neither the sex, nor the videotaping itself, but the videotaping without the female's knowledge.[143]

The court held that a touching is not required to commit an indecent act with another[144] and that "[t]he absence of a touching will not, alone preclude a finding of guilty, regardless of the age of the other party involved with the perpetrator."[145] The court asked and answered the obvious question raised by the reasoning of its decision: "If no physical contact is required for commission of an indecent act with another, then what precludes every indecent exposure from being charged as the greater offense of indecent act? It is the requirement that the act be 'with another.' There must be active participation by another person."[146] The implication of this decision is that the other "active participant" need not perform any indecent act, but must in some way actually participate in the accused's indecent act. The court limited the scope of this decision by explaining that "[a]lthough we do not subscribe to the implication in *Jackson* that the other person essentially must be an accomplice or co-

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[140] 37 M.J. 714 (A.F.C.M.R. 1993), *petition denied*, 39 M.J. 5 (C.M.A. 1993).

[141] *Id.* Tech Sgt. Daye was charged separately of committing indecent acts with another and of adultery, both in violation of Article 134 UCMJ,

> by videotaping and/or knowingly participating in a videotaping of various sexual intercourse positions between himself and Sgt LMG and another unnamed partner on another occasion, and videotaping and/or knowingly participating in a videotaping of the sexual partners performing oral sex on him, both without the knowledge or consent of the partners.

Id.

[142] *Id.*

[143] *Id.* at 715.

[144] *Id.* at 717.

[145] *Id.*

[146] *Id.* at 717 n.3.

actor, neither do we accept the other extreme represented by *Murray-Cotto*, which views involuntary observation as participation."[147]

The *Daye* court specifically challenged the persuasiveness of *Jackson*'s determination that the indecent acts with another offense requires a touching between actors. Referring to *Jackson*'s touching requirement,[148] the *Daye* court found *Jackson*'s rationale of using the elements of indecent acts with a child to explain the elements of indecent acts with another unpersuasive.[149] Not surprisingly, the *Daye* court did not mention whether it also found unpersuasive the *Jackson* court's assertion that the framers of the *MCM* were artful drafters.

To reach its decision, the *Daye* court specifically analyzed the elements of indecent acts with another: "(1) the accused committed a certain wrongful act with a certain person, (2) the act was indecent, and (3) under the circumstances . . . ."[150] The court reasoned that the word "with" "includes situations without actual physical contact as well as those involving contact or touching."[151] The court did not explain how the word "with" relates to the element requiring that the accused perform a certain wrongful act "with" another.[152] One can certainly imagine an indecent wrongful act done with another that does not require touching, (e.g. simulated sex performed between two nude adults on an elementary school playground—during recess) but it is difficult to understand indecent acts "with" another, when only one person performs a wrongful act.

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[147] *Id.*

[148] *Id.* at 716 (quoting United States v. Jackson, 30 M.J. 1203, 1205 (A.F.C.M.R. 1990)).

> We view the framers of the Manual for Courts-Martial as artful drafters. A page or two earlier in the Manual, they addressed the Article 134 offense of indecent acts/liberties with a child. They provided that "physical contact is not required." MCM Part IV, ¶ 87c(2). By the logic of *exclusio unis*, physical contact still must be necessary for the offense of indecent acts with an adult. Had the drafters intended something different, they clearly knew how to say so.

Id.

[149] *Id.*

[150] *Id.* (quoting the MCM, *supra* note 3, pt. IV, ¶ 90b (1984)). This paragraph remains unchanged in the 2002 edition of the *MCM*.

[151] *Id.*

[152] MCM, *supra* note 3, pt. IV, ¶ 90b (2002).

In reaching its decision, the *Daye* court ignored the government's alleged wrongful act. The government alleged that videotaping without knowledge was the indecent act. The government argued specifically that "[i]t's not the sexual intercourse that is the basis of the indecent acts, it's the sexual intercourse that was videotaped without the females' knowledge and consent."[153] The sexual intercourse was performed "with" another person, but the government specified this was not the indecent act, nor was it, in and of itself, wrongful. As the charges specified the videotaping was done without the womens' knowledge, Daye's videotaping was not done "with" anyone. By disregarding the "wrongful act with another"[154] language of the element, the court apparently separates the element into two components, satisfied by two different acts. First, the accused does something sexual with another person, and second, the accused does something indecent. The court left unresolved which of the acts must also be wrongful. The Air Force court's faulty logic in *Daye* is particularly glaring since the court was not acting to affirm a conviction already tried below, but to overturn a judge's ruling on a motion.

The Air Force court made another attempt to clarify the meaning of "with another" in the 1995 case of *United States v. Eberle*.[155] The relevant facts in this case were that on two occasions Airman First Class (A1C) Eberle entered a public women's restroom and masturbated in the presence of different women.[156] In his providence inquiry, Eberle admitted trying to block the women's exit from the restroom until he finished abusing himself.[157] On appeal of his indecent acts conviction, the court once again confronted how much participation "with another" is necessary to support a conviction for indecent acts with another, rather than mere indecent exposure.[158]

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[153] *Daye*, 37 M.J. at 715.
[154] MCM, *supra* note 3, pt. IV, ¶ 90b (2002).
[155] 41 M.J. 862 (A.F. Ct. Crim. App. 1995), *reh'g granted*, 43 M.J. 231 (1995), *aff'd*, 44 M.J. 374 (1996).
[156] *Id.*
[157] *Id.*
[158] *Id.* At trial, A1C Eberle plead guilty to two specifications of indecent acts and one specification of disorderly conduct. The panel sentenced him to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Although the court found these facts unnecessary to reach their decision, Eberle not only tried to block the women's exit from the restroom, but grabbed the breast of one, and struggled with another who broke her finger trying to exit. *Id.*

In affirming Eberle's conviction, the court discussed the rationale behind the decisions in *Jackson*, *Hansen*, and *Daye*.[159] Considering the *Daye* decision, the *Eberle* court expressed approvingly that "we put to rest any lingering notions about the continued vitality of *Jackson*'s analysis and expressly harmonized the law of indecent acts with another with that for indecent acts with a child."[160] This also put to rest the Air Force court's previous supposition that the *MCM* had careful drafters and that the logic of *exclusio unis*[161] should control military courts when interpreting the *MCM*.

The *Eberle* court held that "to be an indecent act 'with' another person, regardless of age, there must be active participation by that other person. Such active participation need not involve physical touching, but it must be more than just involuntary observation."[162] With this interpretation, the court then applied the elements to the facts, and found that "[Eberle's] attempt to obstruct his victim's exit until he finished his performance satisfied the requirement for 'active participation.'"[163] The logic of this finding is nearly incomprehensible. After stating the indecent act with another offense requires the other person to actively participate in a manner that need not amount to touching,[164] the Air Force court considered only Eberle's conduct (blocking the exit) to find active participation. The court found active participation when the women attempted to leave, and thus remain non-participants. Applying *Eberle's* reasoning, an indecent exposure remains a mere exposure so long as the "victim" continues to look, but becomes an indecent act when the victim "actively participates" by averting their eyes.

Any respect for the elements of indecent acts with another and any distinction between it and indecent exposure the Air Force court hoped to maintain in *Jackson* was completely rubbed out in the very recent decision of *United States v. Proctor*.[165] The facts at trial showed that A1C Proctor walked into the dorm room of a female Airman, and while her back was turned, he removed his penis from his pants and began rubbing it.[166] When the female Airman turned around, Proctor asked her

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[159] *Id.* at 864.
[160] *Id.*
[161] United States v. Jackson, 30 M.J. 1203, 1205 (A.F.C.M.R. 1990).
[162] *Eberle*, 41 M.J. at 865.
[163] *Id.*
[164] *Id.*
[165] 58 M.J. 792 (A.F. Ct. Crim. App. 2003).
[166] *Id.*

to rub his penis.[167] The female Airman demanded that Proctor leave, and she threatened to scream if he did not depart immediately.[168] Proctor pulled his pants up and left the room, later to plead guilty to the offense of indecent acts with another for these actions.[169] To sustain Proctor's indecent acts with another conviction, the Air Force court's analysis reversed the meaning of "with another." The court acknowledged the previous statement of the law that "[t]he offense of committing indecent acts with another requires that the acts be done in conjunction or participation with another person . . . . However, there is no requirement that an indecent act involve a physical touching."[170] The court then disposed of any requirement to find "active participation" on the part of anyone other than the accused by finding, "[i]t is the affirmative interaction of *an accused* with another person, voluntarily or involuntarily that makes what would otherwise be an indecent exposure an indecent act."[171] The court's holding apparently disregards the element of the offense that states, "the accused committed a certain wrongful act with a certain person."[172] Now the offense of indecent exposure becomes indecent acts with another solely based on the conduct of the accused.

Here, the accused's actions transformed an indecent exposure to indecent acts with another when he "singled out [the female Airman] and specifically targeted her as an involuntary participant in his deviant act . . . ."[173] Of course, the female's only participation was demanding that the accused leave. From this analysis, a charging official may use the offense of indecent acts with another rather than indecent exposure whenever the accused knows someone will see their exposed parts. Only rare circumstances will present a case when indecent acts with another cannot supplant an indecent exposure charge. This case has serious implications for the military accused, as the maximum punishment for indecent acts with another includes a dishonorable discharge and confinement for five years,[174] while the maximum punishment for

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[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 795.
[171] *Id*. (emphasis added).
[172] MCM, *supra* note 3, pt. IV, ¶ 90b(1) (2002).
[173] *Proctor*, 58 M.J. at 795.
[174] MCM, *supra* note 3, pt. IV, ¶ 90e (2002).

indecent exposure includes only a bad conduct discharge and confinement for six months.[175]

IV. *Lawrence v. Texas* Significantly Undermines the Support of Many Indecent Acts Convictions

A. *Lawrence v. Texas* Essentially Finds a Fundamental Right in the Privacy of Noncommercial, Adult Consensual Sexual Activity

In 2003, the Supreme Court announced its decision in *Lawrence v. Texas*.[176] In this decision, the Court invalidated a Texas statute that criminalized sodomy[177] on the grounds that such statutes violate individuals' exercise of liberty under the Due Process Clause of the Fourteenth Amendment.[178] The holding in *Lawrence* came in complete contradiction to, and explicitly reversed the Court's 1986 decision in *Bowers v. Hardwick*.[179] The *Lawrence* Court found that an individual's fundamental right to privacy includes protection from government interference with acts of adult consensual, noncommercial, private sexual activity.[180]

The outcome of *Lawrence,* though perhaps surprising to many, was the latest in a series of Supreme Court cases recognizing a protected liberty interest in matters of sexual intimacy.[181] The Court drew on its decision in *Griswold*, in which it overturned a Connecticut law prohibiting the use of drugs or devices of contraception, and counseling

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[175] *Id.* ¶ 88e.
[176] 539 U.S. 558 (2003).
[177] TEX. PENAL CODE ANN. § 21.06(a) (2003). This code section stated as follows:

> A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. Deviate sexual intercourse was defined in the statute as any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object.

Id.
[178] *Lawrence*, 539 U.S. at 561.
[179] 478 U.S. 186 (1986).
[180] *Lawrence*, 539 U.S. at 567.
[181] *See generally* Maggie Kaminer, *How Broad Is the Fundamental Right to Privacy and Personal Autonomy?*, 9 AM. U.J. GENDER SOC. POL'Y & L. 395 (2001).

or aiding and abetting the use of contraceptives.[182] This law applied to all use of contraceptives, including those used by married couples.[183] In *Griswold*, the Court found the Due Process Clause protected individuals' right to privacy in the marital bedroom.[184] Later, when the Court overturned a Massachusetts statute designed to comply with *Griswold* by prohibiting only the distribution of contraceptives to unmarried persons, the Court extended this privacy protection to cover the activities of unmarried persons.[185] The Court extended this same protection farther still, when it invalidated a New York statute that prohibited distributing contraceptives to persons under the age of sixteen.[186] The explicit proposition of these three cases is best summed-up in the *Griswold* opinion in which the court found "[i]f the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to beget a child."[187] As each of these cases invalidated state statutes intended to prevent the use of contraceptives, the Court's language striking them down expanded the privacy right from married persons to all people, but always described the protected interest as one related to decisions regarding procreation, not decisions regarding sexual relations. Resolution of whether this protection extended to other sex-related decisions remained undetermined.

In the 1986 case of *Bowers v. Hardwick*,[188] the Court declined to invalidate a Georgia statute criminalizing sodomy.[189] The Georgia statute was similar to the Texas statute later struck down in *Lawrence*.[190] Unlike the Texas statute in *Lawrence*, the Georgia statute prohibited both heterosexual and homosexual sodomy regardless of the relationship between the partners.[191] Sustaining the validity of the Georgia statute, the Court read the rulings in *Griswold*, *Eisenstadt*, and *Carey* as dealing

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[182] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
[183] *Id*.
[184] *Id*.
[185] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[186] Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977).
[187] Lawrence v. Texas, 539 U.S. 558, 565 (2003) (quoting *Griswold*, 381 U.S. at 453) (emphasis in original).
[188] 478 U.S. 186 (1986).
[189] *Id*. at 188; GA. CODE ANN. § 16-6-2 (1984). The sodomy statute stated that, "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." *Id.*
[190] *Compare id.*, *with* TEX. PENAL CODE ANN. § 21.06A (2003).
[191] GA. CODE ANN. § 16-6-2.

only with the right to decide whether to have children.[192] The Court found it "evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[193] Interestingly, despite the broad language of the Georgia statute, the Court limited its analysis of the statute only as applied to acts of homosexual sodomy, specifically stating "[w]e express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."[194] Thus, to reach its conclusion, the Court narrowed both the related precedent to that protecting the privacy of decisions regarding procreation, and the facts at issue to acts of homosexual sodomy. Accordingly, the majority in *Bowers* found it "obvious" that no fundamental right protected a homosexual's decision to engage in consensual sodomy.[195]

Rejecting both the *Bowers* Court's analysis, and narrow construction of the issue, the *Lawrence* Court held that *Bowers* was "not correct when it was decided, and it is not correct today."[196] Instead of framing the issue as one specifically limited to homosexual sodomy, the *Lawrence* Court found the issue to be "[w]hether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment[.]"[197] The Court specifically found the case did not involve "minors, . . . persons who might be injured or coerced or who are situated in relationships where consent might not be refused, [or] public conduct, or prostitution."[198] The Court held that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[199] The *Lawrence* Court drew its rationale directly from Justice Stevens' dissent in *Bowers*, in which he concluded,

> (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the

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[192] 478 U.S. 186, 190-91 (1986).
[193] *Id.*
[194] *Id.* at 188 n.2.
[195] *Id.* at 192.
[196] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[197] *Id.* at 564.
[198] *Id.* at 578.
[199] *Id.*

> intimacies of physical relationships, even when not intended to produce offspring, are a form of liberty protected by due process.[200]

That *Lawrence* invalidates laws banning conduct traditionally thought of as immoral is consistent with the Court's interpretation of the Fourteenth Amendment that "[t]he zone of privacy found in the due process clause . . . cannot be determined by any formula or code; instead it is something that changes over time in response to changes in values and mores."[201] Further, the analysis of *Lawrence v. Texas*, indicates that the Court may strike down any law proscribing adult, consensual, noncommercial, private sexual activity as unconstitutionally violating the individual's protected zone of privacy.

B. *Lawrence v. Texas* Holds That Traditional Views of Morality Are Insufficient Grounds to Criminalize Certain Sexual Activity.

By way of explaining the explicit reversal of *Bowers v. Hardwick*,[202] the *Lawrence* Court asserted that simply because a governing majority has traditionally viewed a particular practice as immoral does not create a sufficient reason to uphold a law prohibiting the practice.[203] The Court specifically found no legitimate state interest justifying this form of intrusion into the private lives of individuals.[204]

At least one military case reached a similar conclusion regarding the criminalization of private, adult, consensual, noncommercial, sexual activity, though not on constitutional grounds. In *United States v. Stocks*,[205] the COMA reviewed the appellant's convictions of adultery and of committing indecent acts with another by performing oral sex on the vaginal area of a female Soldier before engaging in intercourse.[206]

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[200] *Id.* at 561 (quoting Bowers v. Hardwick, 478 U.S. at 217-18 (Stevens, J., dissenting)).
[201] Poe v. Ullman, 367 U.S. 497 (1961).
[202] 478 U.S. 186 (1986).
[203] *Lawrence*, 539 U.S. at 561.
[204] *Id*. at 578.
[205] 35 M.J. 366 (C.M.A. 1992).
[206] *Id.* Stocks and the female Soldier were in the rocky ending of a six-to-nine month adulterous relationship. On the night in question, they engaged in sex, followed by a physical altercation. Stocks was originally charged with, and pleaded not guilty to: assault consummated by a battery, forcible sodomy, rape and adultery. The members convicted him of committing an indecent act with another, assault consummated by a battery, and adultery. *Id.*

The court affirmed the adultery conviction, but reversed the conviction for indecent acts with another.[207] The issue decided was "whether private, heterosexual, oral foreplay not amounting to sodomy between two consenting adults is an 'indecent act' and whether such a sexual act under the circumstances is within the constitutionally protected zone of privacy and, thus, not criminally punishable."[208] Instead of reaching the constitutional issue, the COMA accepted Stocks's assertion that during the oral sex, his tongue did not actually penetrate the woman's vagina, and therefore did not amount to the separate offense of sodomy.[209]

As the court determined, the oral sex was "consensual sexual touching that amount[s] to mere foreplay"[210] to the adulterous sexual intercourse, and not sodomy,[211] the "*sine qua non* of . . . this case, if it was any crime at all, was the adulterous behavior, not its indecency."[212] The court asserted its decision was "logically and legally distinguishable from a situation in which two independent offenses are completed and in which one was not a mere prelude to the other, e.g., sodomy and adultery."[213] The *Stocks* court rationale relies on a fine distinction indeed. To reach its decision that "mere foreplay" could not justify a separate conviction, the court essentially found the specific act performed by Stocks was not "unnatural carnal copulation"[214] and consequentially, that whatever it was, it could not be criminally indecent.

After *Lawrence v. Texas*, the outcome of *Stocks* is possible without the CAAF splitting hairs as to whether Stocks' "mere foreplay" amounted to sodomy, as a conviction for that act falls within *Lawrence's*

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[207] *Id*. at 367.
[208] *Id.* at 366.
[209] *Id.* at 367.
[210] *Id.*
[211] MCM, *supra* note 3, pt. IV, ¶ 51b (2002). The sole element for the offense of sodomy is that the accused engaged in unnatural carnal copulation with a certain other person or an animal. Unnatural carnal copulation is explained as the following:

> a person taking into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

Id.
[212] *Stocks*, 35 M.J. at 367.
[213] *Id.*
[214] MCM, *supra* note 3, pt. IV, ¶ 51b (2002).

zone of protected privacy. The court could focus entirely on the *sine qua non* of Stocks' misconduct[215]—the adultery—and not the acts leading up to it.

V. The Military Is Not a Separate Indecent Society

Although *Lawrence v. Texas* was a civilian case, its holding will apply to military cases as well. Many activities formerly criminalized by the UCMJ as indecent are now protected as a liberty interest under the Due Process Clause of the Fourteenth Amendment.[216] The Supreme Court does not always apply constitutional protections to members of the military in the same manner as civilians, leading some commentators to state that the military is a "different constitutional animal, an institution that, by necessity, requires a generous deference to discretionary choice."[217] This deference to military decisions should not be applied to the protections described in *Lawrence v. Texas* as the military has no unique need to regulate the kinds of adult, consensual, noncommercial, private sexual activity conducted by its members.

In the past, the Court has granted constitutional deference to discretionary military decisions when the military seeks to punish its members for otherwise constitutionally protected conduct.[218] The Court justifies this deference stating "the military is, by necessity, a specialized society separate from civilian society,"[219] and that "[it] depend[s] on a command structure that . . . must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."[220] The cases granting deference to military decisions never contemplated a general military necessity of regulating "individual decisions concerning the intimacies of physical relationships."[221] Considering the rationale applied in cases granting this deference, it is unlikely the Court will find that national security requires the military to

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[215] *Stocks*, 35 M.J. at 367.
[216] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[217] Diane Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 702 (2002).
[218] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974), Goldman v. Weinberger, 475 U.S. 503 (1986).
[219] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).
[220] *Parker*, 417 U.S. at 759 (quoting United States v Gray, 20 C.M.R. 63, 67 (C.M.A. 1957)).
[221] *Lawrence*, 539 U.S. at 561.

impose its definition of decency on the adult, consensual, noncommercial, private sexual activities of its members.

The Court's rationale for deferring to military decisions punishing service members for otherwise constitutionally protected acts is best demonstrated in the case of *Parker v. Levy*.[222] In this case, Captain Howard Levy, an Army doctor, was convicted of conduct unbecoming an officer and a gentleman, and conduct prejudicial to good order and discipline in the armed forces.[223] He was charged for making repeated derogatory comments to enlisted subordinates regarding the then-ongoing Viet Nam war with the purpose of discouraging them from participating in the war effort.[224] Levy challenged his conviction on the grounds that the relevant punitive articles were constitutionally overbroad, and that his conviction violated the free speech protections of the First Amendment.[225] The Court agreed that Levy's comments would ordinarily be protected by the First Amendment, but found that "[w]hile members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community."[226] The Court affirmed Levy's convictions, expressing that:

> In the armed forces, some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness

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[222] 417 U.S. 733 (1974).
[223] UCMJ arts. 133, 134 (2002).
[224] *Parker*, 417 U.S. at 739 nn.5-6.
[225] *Id.* at 752.
[226] *Id.* at 751.

> of response to command. If it does, it is constitutionally unprotected.[227]

In granting deference to the military's decision to punish Levy's speech as unbecoming and prejudicial to good order and discipline, the Court endorsed the reasoning that the military's need to criminalize this conduct was "beyond the bounds of ordinary judicial judgment, for [it is] not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."[228] Even in upholding Levy's conviction, the Court acknowledged that entering military service does not equate to the surrender of all constitutional protections. The Court stated, "While military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline may render permissible within the military that which would be constitutionally impermissible outside it."[229]

The Court's rationale for granting deference to the military in *Parker v. Levy* is limited to the First Amendment protections of service members.[230] The Court permits the military to prohibit otherwise protected speech because of the military's unique need to regulate the speech activities of its members to preserve good order and discipline, including preserving respect for the chain of command. The facts of the *Levy* case—a commissioned officer encouraging enlisted Soldiers to resist participating in an ongoing war effort, brought this military need into stark relief. The Court will unlikely extend its deference to defining criminal indecency. Though the court is reluctant to interfere in certain types of military decisions, it is unlikely to find "beyond the bounds of ordinary judicial judgment . . . [and] not measurable by our innate sense of right and wrong"[231] the "individual decisions concerning the intimacies of physical relationships" [232] implicated in many military indecency offenses. Justice Stewart's dissent in *Parker v. Levy* underscores this point by making the textualist argument that "the only express exemption of a person in the Armed Services from the protection

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[227] *Id.* (citing Brandenburg v. Ohio, 359 U.S. 444 (1969); United States v Priest, 45 C.M.R. 338 (C.M.A. 1972); United States v. Gray, 20 C.M.R. 331 (C.M.A. 1956)).
[228] *Id*. at 748-49 (citing Swaim v. United States, 28 S. Ct. 172, 228 (1893)).
[229] *Id.* at 758.
[230] *Id*. at 772.
[231] *Id.* at 748-49 (citing *Swaim*, 28 S. Ct. at 228).
[232] Lawrence v. Texas, 539 U.S. 558, 561 (2003).

of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for 'a presentment or indictment of a grand jury' in cases arising in the land or naval forces . . . .'"[233]

It is difficult to form a convincing argument that like the military's need to regulate speech activities to fill its role in the defense of the Nation, the military, as a specialized society, has a particular need to regulate the adult, consensual, noncommercial, private sex-related decisions of its members. Absent a specialized necessity to regulate these kinds of decisions, the Court has stated the Due Process Clause of the Fourteenth Amendment prevents the government from invading a fundamental interest unless the interest is narrowly tailored to serve a compelling state interest.[234]

VI. The CAAF Has Identified That Times and Mores Do Change

A trend in recent CAAF decisions involving indecency finds the court carefully scrutinizing whether the underlying conduct was actually indecent.[235] This trend shows a renewed interest at the CAAF in actually testing indecency convictions to determine whether the conduct charged met the military definition of indecency.[236] These cases signal the court's acceptance that contemporary community standards, even in the military, change over time—and that sustaining any conviction for sexually related activity of which the fact finder simply did not approve, creates no judicial standard at all.

United States v. Brinson is an indecent language case demonstrating the scrutiny with which the CAAF will review cases in which the military criminalizes activity that would otherwise protected by the Constitution.[237] Sergeant Brinson was convicted, among other things, of communicating indecent language[238] for repeatedly calling an Air Force

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[233] *Parker*, 417 U.S. at 766 (Stewart, J., dissenting).
[234] Reno v. Flores, 507 U.S. 292, 302 (1993).
[235] *See* U.S. v. Baker, 57 M.J. 330 (2002); U.S. v. Brinson, 49 M.J. 360 (1998).
[236] BENCHBOOK, *supra* note 16, at 3-90-1 (defining indecency in indecent acts, as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations").
[237] United States v. Brinson, 49 M.J. 360 (1998).
[238] *Id.* at 361. At trial, SGT Brinson was convicted of assault upon a security police officer (two specifications), communicating a threat (two specifications), communicating indecent language, and failure to go to his appointed place of duty, in violation of

security policeman a "son of a bitch" and a "white mother-fucker"[239] while he arrested Brinson. As the charged misconduct was speech otherwise protected by the First Amendment, the CAAF observed, "When the Government makes speech a crime, the judges on appeal must use an exacting ruler."[240] Here, the court recognized Brinson's scurrilous behavior and the offensive nature of the epithets.[241] The court analyzed the *MCM*'s explanation of the offense[242] and the test that indecent language must be "calculated to corrupt morals or excite libidinous thoughts."[243] Reviewing the facts, and despite the court-martial's findings, the CAAF determined that Brinson's clear intention was "calculated to express his rage, not any sexual desire or moral dissolution."[244]

Unlike the Navy-Marine court's later decision in *Negron*,[245] the CAAF in *Brinson* did not find that Brinson's words "white mother-fucker"[246] "even if totally involuntary and only fleetingly . . . incite[d] libidinous thoughts, in that the mental image of the described act will flash through [the court's] mind."[247] In *Brinson*, the court clearly recognized Brinson's inartful use of language for what it was—an angry rant.[248] This decision presaged the CAAF's later articulation that both contemporary standards and the surrounding circumstances must be considered when examining service members' speech activities:

Articles 128, 134, and 86, respectively, of the UCMJ. *Id.*; *see* UCMJ arts. 86, 128, 134 (2002).

239 *Brinson*, 49 M.J. at 362.

240 *Id.* at 361.

241 *Id*. at 364. The court ultimately concluded that "a conviction for the lesser-included offense of disorderly conduct was not only authorized but required." *Id.*

242 *Id.* (citing the MCM, *supra* note 3, pt. IV, ¶ 89b (2002)). The *MCM* defines indecent language as the following:

> that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

MCM, *supra* note 3, pt. IV, ¶ 89b (2002).

243 *Brinson*, 49 M.J. at 364 (quoting United States v. French, 31 M.J. 57, 60 (C.M.A. 1990)).

244 *Id.*

245 United States v. Negron, 58 M.J. 834 (N-M. Ct. Crim. App. 2003).

246 *Brinson*, 49 M.J. at 362.

247 *Negron*, 58 M.J. at 834.

248 *Brinson*, 49 M.J. at 362.

> What is condoned in a professional athletes' locker room may well be highly offensive in a house of worship. A certain amount of banter and even profanity in a military office is normally acceptable and, even when done in poor taste, will only rarely rise to the level of criminal misconduct.[249]

Along the line of applying contemporary community standards, the CAAF issued a perhaps more surprising reversal in *United States v. Baker*.[250] At trial, Amn Baker was convicted, among other things, of committing indecent acts with a female under the age of sixteen.[251] The facts showed that one day short of turning eighteen-years old, Amn Baker dated the then, not quite sixteen-year old daughter of an Air Force noncommissioned officer.[252] During the young couple's romantic encounters, "[Baker] touched the girl's bare breasts and kissed them. He also gave her hickies on her stomach, upper chest, and back. There was no evidence that any activity, beyond mere hugging and kissing, took place in public."[253]

During deliberations at trial, the panel asked the military judge whether they should consider the victim's "age, education, experience, prior contact with [Baker] . . . or proximity of age to seventeen years 364 days when determining whether the acts with [Baker] were indecent."[254] The judge provided only the general advice that the panel should consider all the evidence, and the *Benchbook* definition[255] to determine whether the acts were indecent.[256] The CAAF found this instruction "clearly inadequate guidance for the members to decide the issue of the indecency of appellant's conduct."[257] The court held "that the military judge committed plain error when she failed to provide adequately

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[249] United States v. Carson, 57 M.J. 410, 413 (2002).
[250] 57 M.J. 330 (2002).
[251] *Id.* Airman Baker was convicted at trial of two specifications of failing to obey the order of a superior officer, larceny from the base exchange, sodomy, and committing indecent acts with a female under age of sixteen. *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* (citing the BENCHBOOK, *supra* note 16, at 3-90-1, defining indecency in indecent acts, "as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations").
[256] *Id.*
[257] *Id.*

tailored instructions on the issue of indecency."[258] Reversing Baker's conviction, the CAAF focused on the fact the victim testified that "she did not find the activity offensive *because it comported with her ideas of normal activities* within a boyfriend/girlfriend dating relationship."[259] The CAAF's reliance on the opinion of a sixteen-year-old girl to help determine what actions amount to indecent acts in a dating relationship is an abundantly clear sign of an attempt to use actual contemporary community standards of the relevant population to decide cases involving actions charged as indecent.

VII. Conclusion—The Present State of Prosecuting Indecent Conduct in the Military

A. The Definitions In Indecency Offenses Remain Uncertain

Despite many cases attempting to pin down a precise legal explanation of indecency, a cogent definition remains elusive. Military personnel can hardly rely on the various adjectives used to describe the word indecent such as lewd, lascivious, obscene, and prurient, or various phrases such as, patently offensive, or grossly offensive to modesty, decency, or propriety, to provide any guidance, as each of these words and phrases is at least as amorphous as the basic word indecent. It appears true that this amounts to "trying to define the undefinable."[260]

Even though a comprehensible definition of indecency is unavailable, military personnel cannot simply make decisions regarding indecency crimes relying on Justice Stewart's often quoted definition of obscenity, that "I know it when I see it, and the motion picture involved in this case is not that."[261] If nothing else, this quote demonstrates that courts of appellate jurisdiction can and do apply their own definitions of words, like obscene and indecent, and are willing to disagree with the prosecutor's application of the definition to the facts. This lesson suggests caution in charging indecency offenses when the indecency offense makes up only a minor portion of the overall prosecution. *United States v. Negron*[262] is a prime example of this sort of case.

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[258] *Id*.
[259] *Id*. (emphasis added).
[260] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[261] *Id.*
[262] 58 M.J. 834 (N-M. Ct. Crim. App. 2003).

Negron was convicted of wrongful appropriation, and making and uttering a worthless check without controversy.[263] Charging the additional offense of depositing obscene materials in the mails because of the angry words in Negron's letter to his bank, likely added little to the success of the prosecution, but complicated the case considerably when the Navy-Marine court reviewed it. More importantly, the Navy-Marine court's *Negron* decision appears inconsistent with the CAAF's 2002 decision in *Brinson*,[264] leading to the possibility the CAAF could overturn *Negron*'s mails conviction and remand the case for still more proceedings.

Prosecutions for open and notorious indecency will continue to create challenges for military personnel when the alleged misconduct does not fit easily into ordinary definitions of the relevant phrases open and notorious and public view.[265] The *Allison*[266] decision demonstrates the military courts' struggle to comport their understanding of public view to the capabilities of modern technology (video cameras).[267] This struggle to redefine public view may continue as video technology continues to advance (e.g., cell phones with digital camera capability) and become more prevalent in daily life. Despite the Coast Guard court's holding in *Allison*, it is unlikely that the mere potential for viewing by others[268] will be reliable authority to convert otherwise private sexual activity into an offense that requires public view as an element.

B. Meeting the Elements of Indecency Offenses Creates Challenges in Charging Decisions

In charging public view indecency offenses, a troubling problem is determining the definition is that of "with another," as this determines whether clearly indecent conduct is properly charged as indecent exposure,[269] or indecent acts with another.[270] An issue of frequent appellate litigation is whether the facts presented at trial for indecent acts

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[263] *Id.* at 835.
[264] United States v. Brinson, 49 M.J. 360 (1998).
[265] United States v. Berry, 6 C.M.R. 609, 614 (A.C.M.R. 1956).
[266] United States v. Allison, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).
[267] *Id.* at 608.
[268] *Id.* at 609.
[269] MCM, *supra* note 3, pt. IV, ¶ 88 (2002).
[270] *Id.* ¶ 90.

with another meet the element that the wrongful act was performed "with another person."[271] The pertinent question is how much actual interaction with another person is required to convert an indecent exposure to the more serious offense of indecent acts with another.[272] In this area, the service courts appear willing to sustain indecent acts with another convictions when only the slightest interaction between the offender and another creates sufficient participation for the courts to find the accused performed a wrongful act with another.[273] The service courts' apparent willingness to consider virtually any witnessed indecent exposure an indecent act with another necessitates consideration of fairness to the accused when deciding which charge to allege.

The AF court's very recent decision in *United States v. Proctor* apparently goes so far as to hold that if a totally unwilling "victim" of indecent exposure demands the offender depart or "get-out," this creates enough participation to convert the offense to indecent acts with another.[274] It is unlikely that this case will serve as a reliable authority for determining the level of participation required for the offense of indecent acts with another. In light of the CAAFs willingness to overturn both the trial and AF courts' explanation of the term indecent in *United States v. Baker*,[275] the definition supplied in *Proctor* may be unreliable for future indecency decisions. The potential for future litigation on this issue suggests charging the offense of indecent exposure when there is an issue of actual participation. This is particularly true if the facts suggest the appropriate sentence will fall within the authorized maximum punishment for indecent exposure.

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[271] *Id.* ¶ 90b. The element for this offense are the following:

> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[272] *Id.* app. 12. The maximum punishment for indecent acts with another includes a dishonorable discharge and five years confinement, while the maximum punishment for indecent exposure includes only a bad conduct discharge and six months confinement. *Id.*

[273] *See* United States v. Murray-Cotto, 25 M.J. 784 (Army Ct. Crim. App. 1998); United States v. Eberle, 41 M.J. 862 (A.F. Ct. Crim. App. 1995).

[274] 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003).

[275] 57 M.J. 330 (2002).

C. Some Formerly Successful Indecent Acts Prosecutions Are Now Legally Invalidated

Military prosecutors will have to consider the impact of *Lawrence v. Texas*[276] when charging service members for indecent conduct. Although the facts of *Lawrence* were limited to acts of homosexual sodomy, the Court's holding deliberately reached a far wider application. The court held that by interfering with "matters of adult consensual sexual intimacy in the home,"[277] Texas law violated individuals' "vital interests in liberty and privacy protected by the Due Process Clause."[278] Following this holding, any prosecution for adult, consensual, noncommercial, private, sexual activity is likely to face intense scrutiny by the courts.

Some of the military convictions discussed in this paper would likely be reversed if tried after *Lawrence v. Texas*. In *United States v. Allision*,[279] the conviction for indecent acts with another rested on the fact that Allison and his fiancée privately video taped themselves engaged in an act of sodomy,[280] which the court found to be indecent.[281] Both the act of sodomy and the videotaping (as the tape was never shown to anyone)[282] are matters of adult consensual sexual intimacy in the home, and now apparently outside the reach of the criminal law.

The trial conviction in *United States v. Stocks*[283] would also run afoul of *Lawrence v. Texas* as the acts of private adult sexual foreplay could not be criminalized, regardless of whether the court believed the oral sex performed by Stocks amounted to sodomy.[284] The *Stocks* case demonstrates a virtue in the *Lawrence v. Texas* decision. Without *Lawrence*, *Stocks* stands for the proposition that a service member may legally perform oral sex on a woman so long as his tongue does not actually enter her vaginal tunnel, and he follows up this foreplay with more conventional intercourse.[285] Regardless of the moral implications of decriminalizing noncommercial, adult, private, consensual oral sex

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[276] 539 U.S. 558 (2003).
[277] *Id*. at 564.
[278] *Id*.
[279] 56 M.J. 606 (C.G. Ct. Crim. App. 2001).
[280] *Id.* at 606 n.1.
[281] *Id.* at 608.
[282] *Id.*
[283] 35 M.J. 366 (C.M.A. 1992).
[284] *Id.* at 367.
[285] *Id.*

altogether, *Lawrence v. Texas* at least obviates the need for opposing counsel to interrogate adult witnesses on the precise techniques and anatomical geography of their consensual sexual encounters.

D. The CAAF Has Recently Demonstrated a Willingness to Review Indecency Convictions

The CAAF's decisions in *Brinson*[286]and *Baker*[287] demonstrate the court's willingness to reverse decisions of trial and appellate judges on matters of indecency. Both of these cases arguably represent aggressive prosecution of scurrilous behavior of only minor criminal importance.[288] More importantly, these cases demonstrate the CAAF reviews indecency convictions in light of *contemporary* community standards of behavior in the military, not permitting the imposition of a higher standard. The CAAF appears to agree that "[s]uch words as these [indecency, obscenity] do not embalm the precise morals of an age or place . . . the vague subject-matter is left to the gradual development of general notions about what is decent . . . ."[289] These cases show an interest at the CAAF to protect service members from unjust criminal convictions for indecency offenses predating the arguably sweeping Court decision in *Lawrence v. Texas*. Military justice practitioners can expect the CAAF's willingness to examine and reverse convictions for scurrilous but not clearly indecent conduct to increase in the future.

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[286] United States v. Brinson, 49 M.J. 360 (1998).
[287] United States v. Baker, 57 M.J. 330 (2002).
[288] Brinson was prosecuted for calling an arresting military police officer names. Baker was prosecuted for touching and kissing (never amounting to sex or involving the sex organs) his nearly sixteen-year-old girlfriend in ways she considered normal for a dating relationship. *See supra* section VI, for a full discussion.
[289] U.S. v. Kennerley, 209 F. 119, 121 (D.C.S.D.N.Y. 1913) (containing Judge Learned Hand's explanation of the changing notion of contemporary community standards).