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REBALANCING MILITARY SENTENCING: AN ARGUMENT TO RESTORE UTILITARIAN PRINCIPLES WITHIN THE COURTROOM

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I. Introduction

Retribution is an almost instinctual response to injury caused by another. From the earliest times, the law has recognized the retributive concept—perhaps most famously expressed in the Mosaic law as an "eye for eye, tooth for tooth."[1] While the simplicity of retributive justice philosophy is attractive, building a system of justice that relies solely on retribution might miss another important end of sentencing—producing a benefit for society.

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[1] Exodus 21:22 (New International Version).

Utilitarian sentencing principles provide a focus on the future that counterbalances backward-looking retributive theory. These principles focus on a benefit for society, such as reduced crime in the future, the rehabilitation of the offender, or some other positive effect. The promise of utilitarian sentencing is that, unlike retribution, it is theoretically possible to determine through research just how much punishment is necessary to achieve whatever the desired end-state is.[2] Military sentencing expressly recognizes four utilitarian sentencing principles: rehabilitation of the accused, general deterrence of others, specific deterrence of the accused, and the preservation of good order and discipline.[3]

In recent years, an additional utilitarian tool—recidivism risk assessment—has entered the scene as a robust, evidence-based methodology to predict which criminals are likely to offend again. Several military cases, in particular *United States v. Ellis*,[4] have cracked open the sentencing door to recidivism tools, but have fallen short of either embracing recidivism principles or providing the robust procedures necessary to realize fully the potential of recidivism research.

In fact, a close comparative analysis of sentencing principles reveals that the military has not only failed to embrace recidivism principles, but that it is headed in the other direction, and has largely abandoned the utilitarian sentencing principles in favor of retribution. Part of this movement away from utilitarian principles has to do with how easy it is to admit retributive evidence in the military sentencing setting.[5] While the

[2] *See infra* Section II.A. Utilitarian principles seek a 'good' for society. For our purposes, that "good" could be the prevention of future crime by that accused or by others, the rehabilitation of the accused, restoration of good order and discipline, or some other non-punitive end.

[3] *See*, *e.g.*, U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-5-21 (10 Sept. 2014) [hereinafter DA PAM 27-9]. Retribution is the fifth sentencing principle. *Id.* Good order and discipline will not be a focus of this paper. The National Defense Authorization Act for Fiscal Year 2017 made numerous changes to the Uniform Code of Military Justice (UCMJ), including an amendment to Article 56 UCMJ that adds explicit factors for a sentencing authority to consider. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301 [hereinafter FY17 NDAA]. While the amendment explicitly lays out additional sentencing factors, all of the factors still fundamentally relate to the underlying sentencing rationales discussed in this paper. The effective date of the amendments is no later than January 1, 2019, unless earlier specified by the President. *Id.* § 5542(b).

[4] United States v. Ellis, 68 M.J. 341 (C.A.A.F. 2010).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2016) [hereinafter MCM]. *See also* discussion *infra* Section II.B.

sentencing rules—especially those concerning rehabilitative potential[6]—do not wholly abandon utilitarian principles, the rules apply such a stilted and outdated approach that it is nearly impossible to apply them, particularly with the intellectual rigor required to fulfill the promise of utilitarian-based sentencing.

As written, the procedural rules in sentencing largely deny utilitarian sentencing principles the opportunity to deliver on their empirical promise. This article proposes that a new sentencing rule be adopted to give recidivism risk an appropriately calibrated place in military court-martial sentencing.

II. Military Sentencing—A Primer

A. The Role of the Sentencing Authority

In the military, after a finding of guilt, sentencing proceedings begin almost immediately.[7] The sentencing authority can be either the military judge or a military panel,[8] and the Uniform Code of Military Justice (UCMJ) allows the accused an election between them.[9] Even in cases where the accused enters a guilty plea before the military judge, the accused can still request that the case be heard by a military panel for sentencing.[10] However, if the accused enters a not-guilty plea before a panel, that panel sentences the accused.[11]

The military sentencing scheme vests incredible discretion in the sentencing authority. Statutes—or Presidential orders—fix maximum

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[6] *See generally* MCM, *supra* note 5, R.C.M. 1001(b)(5) (2016).
[7] *See generally id.* R.C.M. 1001 (2016).
[8] The fiscal year (FY) 2017 National Defense Authorization Act (NDAA) includes a provision for all sentencing to be conducted by military judge alone, unless elected otherwise by an accused who has been tried before members. *See* FY2017 NDAA, *supra* note 3, § 5182. The changes are significant to the broader military justice practice, and several are directly relevant to the focus of this article.
[9] *See generally* MCM, *supra* note 5, R.C.M. 903 (2016). If the accused is enlisted, he has the further right to elect trial by a military panel composed of at least one third enlisted members. *See* UCMJ art. 25(c)(1)(1983); MCM, *supra* note 5, R.C.M. 503(a)(2) (2016). Ordinarily, the panel consists of members senior in rank to the accused. UCMJ art. 25(d)(1)(1983).
[10] *Id*. The 2017 amendments to the UCMJ no longer allow this option; however, those amendments may not take effect until January 1, 2019. FY17 NDAA, *supra* note 3, § 5236.
[11] *Id*.

sentences, but they are set sufficiently high that they rarely operate as a realistic ceiling.[12] In the sexual assault context, for example, maximum sentences range from one year, for the comparatively trivial crime of indecent exposure, to as much as life without parole, for rape.[13] No military offense has a mandatory minimum term of years.[14] In fact, no punishment is an acceptable sentence for all crimes, save more egregious sex crimes.[15] Even then, however, the mandatory minimum is a punitive discharge that must be part of the sentence.[16]

Other forms of punishment are also possible. Forfeiture of pay and allowances, as well as reduction in rank, are frequently a part of the sentence.[17] A range of other sentencing possibilities like reprimands, fines, restrictions on liberty, and hard labor are also available.[18]

Collateral consequences also form a part of the overall sentencing landscape, and may be imposed by either civil or military authorities. For example, civilian sex offender registration requirements follow military conviction of a sexual assault.[19] Other uniquely military consequences also may follow. For example, the recording of any adjudication of guilt

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[12] *See, e.g.*, Major Jody Russelberg, *Sentencing Arguments: A view from the bench*, ARMY LAW., Mar. 1986, at 50, 51 (stating, "Except in a few cases, neither the maximum punishment nor a sentence to no punishment is an appropriate sentence.").

[13] Coker v. Georgia, 433 U.S. 584 (1977). Notwithstanding *Coker*, death is an available sentence for rape offenses, under certain conditions. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008)(containing a denial of petition for rehearing and modification of the Court's opinion to comment on the availability of the death penalty for rape in the military).

[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. A12 (2012)

[15] *See* 10 U.S.C. § 856 (2013) (UCMJ) (requiring mandatory discharge for those found guilty of penetrative sexual offenses, or rape and sexual assault of a child).

[16] *Id*. Article 60 of the UCMJ allows a convening authority to disapprove a "mandatory" discharge, if it is a part of a pretrial agreement with the accused. 10 U.S.C. § 860 (b)(4)(C)(i)(2013).

[17] *See*, *e.g*., RESULTS OF TRIAL, U.S. NAVY JUDGE ADV. GEN'S CORPS, http://www.jag.navy.mil/news/ROT.htm (last visited Feb. 20, 2017) (reporting results of Navy courts-martial from 2013 to present).

[18] *See*, *e.g*., Major Joseph B. Berger III, *Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor*, ARMY LAW., Dec. 2004, at 1, 1 (discussing hard labor without confinement and proposing a model to make administration of the sentence easier). The 2016 changes to the UCMJ eliminated diminished rations, e.g., bread and water, as an authorized punishment. FY2017 NDAA, *supra* note 3, § 5141.

[19] *See*, *e.g*., U.S. DEP'T. OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 4 (listing offenses requiring sex offender processing and requiring registration with appropriate civilian jurisdictions).

is required administratively.[20] If the individual is not given a punitive discharge as part of the sentence for a crime of sexual assault,[21] regulations require the initiation and processing of an administrative discharge.[22]

Other collateral consequences may flow from the sentence itself. For example, a dishonorable discharge strips the accused of nearly all Department of Veteran Affairs benefits, while a bad conduct discharge precludes many, but not all, such benefits.[23] Another example: by operation of law, a sentence to more than six months in confinement or one that includes a punitive discharge automatically results in forfeiture of pay and allowances.[24]

Recent changes to the UCMJ have restricted some discretion by the sentencing authority. The National Defense Authorization Act for Fiscal Year 2017 includes a provision by which the government could appeal a sentence that violates the law or is "plainly unreasonable."[25] It is unclear what kinds of sentence might be "plainly unreasonable"; however, the provision likely relates to earlier proposals by the Military Justice Review Group which would have established sentencing guidelines and parameters.[26] Despite the changes, discretion in the military sentencing

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[20] *See, e.g.*, Military Personnel Message, 1070-170, U.S. Army Human Res. Command, subject: Documents Filed in the Permanent Personnel Record (22 Aug. 2002) [hereinafter MILPER Message 1070-170] (stating guidelines for the filing of nonjudicial punishment and court-martial conviction records); U.S. ARMY, *iPerms Required Documents*, HUMAN RES. COMM'D (Mar. 30, 2016), https://www.hrc.army.mil/Site/Assets/Directorate/tagd/iPerms_required_documents.pdf (specifying that records of all court-martial convictions and non-judicial punishment are to be filed in the soldier's permanent record).

[21] Dismissal or dishonorable discharge is a mandatory minimum punishment for conviction of certain sex offenses. *See* UCMJ art. 56 (2014).

[22] *See, e.g.*, U.S. DEP'T. OF DEF., DIR. 2013-21, INITIATING SEPARATION PROCEEDINGS AND PROHIBITING OVERSEAS ASSIGNMENT FOR SOLDIERS CONVICTED OF SEX OFFENSES (7 Nov. 2013); MILPERSMAN Message, 1910-142, 31 May 2013, Dep't of Navy, Subject: Separation by Reason of Misconduct–Commission of a Serious Offense; MILPERSMAN Message, 1910-233, 11 July 2013, Dep't of Navy, Mandatory Separation Processing (requiring discharge processing for certain kinds of sexual and other offenses).

[23] *See Applying for Benefits and Your Characterization of Discharge*, VET'S ADMIN., http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Feb. 7, 2017).

[24] *See* UCMJ art. 58(a) (1960), UCMJ art. 58(b)(1996). The operation of these statutes has been greatly simplified here. For purposes of this article, it is enough to understand that statutorily imposed collateral consequences form an important—though not dominant—part of the sentencing landscape.

[25] *See* FY17 NDAA, *supra* note 3, § 5301.

[26] *See* Military Justice Review Group, *A Bill*, DEP'T OF DEF. (2016), http://www.dod.gov/dodgc/images/military_justice2016.pdf [hereinafter MJRG] (containing the Military Justice Act's proposed amendment to Article 56 of the UCMJ, which included "sentencing

proceeding still remains largely unconstrained.[27]

B. The Role of the Procedural Rules

Superimposed over this structural framework is a procedural one that effectively limits sentencing evidence to one of several well-defined categories. These categories can be loosely grouped into one of three categories: (1) evidence admitted during the merits portion of trial; (2) evidence presented by the prosecution during sentencing; and (3) evidence presented by the victim or defense during sentencing.[28]

1. Sentencing Evidence Introduced During the Merits

The first significant subset of evidence considered during the sentencing portion is that admitted during trial on the merits. An adept counsel will "start presenting [the] sentencing evidence during the findings portion of the case."[29] Under Rule for Courts-Martial (RCM) 1001(f)(2), evidence that is properly admitted during the merits can be considered during sentencing, even if the purpose for which it was admitted was a limited one.[30] Because of this rule, much useful sentencing evidence actually comes in during the trial on the merits. The evidentiary rules during trial allow almost any evidence to come in if it is relevant to an element of an offense charged. For example, the state of mind of the accused is usually relevant to findings, whether intent is a formal element or not. Evidence concerning the accused's state of mind is also highly relevant evidence for the sentencing authority.

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parameters and sentencing criteria" that were to be developed by a statutorily created "Military Sentencing Parameters and Criteria Board"). In addition to the appeal provisions included in the FY2017 NDAA, the Military Justice Review Group proposed an amendment to Article 56 that would have allowed for government appeal where the sentence reflected an improper application of a sentencing factor. *Id*.

[27] The Federal Sentencing Guidelines—even after *United States v. Booker* relaxed the mandatory application—seem highly structured by comparison the military system. United States v. Booker, 543 U.S. 220 (2005); *see generally* U.S. SENTENCING GUIDELINES MANUAL (2016). Whether such flexibility in military sentencing is a good thing is beyond the scope of this article.

[28] Evidence presented by the victim and the accused fall under separate procedures. *Compare* MCM, *supra* note 5, R.C.M. 1001(c) (2016) *with id.* R.C.M. 1001A (2016). However, for the purposes of this article, they will be analyzed together.

[29] Colonel Michael J. Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, ARMY LAW., Mar. 2010, at 91, 91.

[30] MCM, *supra* note 5, R.C.M. 1001(f)(2) (2016).

Three different types of merits evidence relevant to sentencing are worthy of more detailed consideration. Those types of evidence are uncharged misconduct, character evidence, and propensity evidence. Additionally, this article will briefly consider evidence admitted in the context of a guilty plea.

Evidence admitted during the findings can include uncharged misconduct.[31] Military Rule of Evidence (MRE) 404(b) provides for the admissibility of "other crimes, wrongs, or acts . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[32] The rule provides that this is a non-exhaustive list: so long as the evidence has some non-character purpose, then the evidence is admissible.[33]

Because of the breadth of the rule, a clever prosecutor can frequently admit evidence of uncharged crimes for non-character purposes. While the value of the evidence hinges on a limited "non-character" purpose on the merits, at sentencing, RCM 1001(f) allows the sentencing authority to consider the evidence for any relevant purpose, only loosely cabined by the sentencing principles.[34] For obvious reasons, character evidence is highly relevant at sentencing.[35]

So-called propensity evidence is another form of evidence offered on the merits that has potential use during sentencing proceedings.[36] Military Rules of Evidence 413 and 414 allow evidence of similar crimes in sexual assault and child molestation cases to be admitted against an accused for "consider[ation] for its bearing on any matter to which it is relevant."[37]

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[31] *Id.* M.R.E. 404(a)(1) (2016) (allowing the prosecution to introduce evidence of "pertinent" character traits of the accused under certain limited circumstances).

[32] *Id.* M.R.E. 404(b) (2016).

[33] *Id.* M.R.E. 404(b)(2) (2016) ("This evidence may be admissible for another [noncharacter] purpose."); United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989). *See also* Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV., 271, 314-15 (1995).

[34] MCM, *supra* note 5, R.C.M. 1001(f)(2)(A) (2016).

[35] Lieutenant Colonel Tiernan P. Dolan, *A View from the Bench: Sentencing: Focusing on the Content of the Accused's Character*, ARMY LAW., Aug. 2012, at 34.

[36] *But see* United States v. Hills, 75 MJ 350, 356 (C.A.A.F. 2016) (limiting the use of propensity evidence where the evidence sought to be admitted for propensity purposes is charged misconduct). Trailer cases have continued to refine the meaning of *Hills* for military practice. *See, e.g.*, United States v. Guardado, 75 M.J. 889 (A.C.C.A. 2016).

[37] MCM, *supra* note 5, M.R.E. 413(a), 414(a) (2016); *but see* United States v. Dacosta, 63 M.J. 575 (A. Ct. Crim. App. 2006) (imposing duty to instruct panel members on purposes for which such evidence may be considered).

Thus, if the accused has previously committed similar crimes, evidence of those crimes can be presented during the prosecution case in chief. Importantly, the rule does not place any limits on the prosecution as to means of proof.[38] Even a prior acquittal of the alleged offense does not absolutely bar presentation of the evidence, though the evidence is subject to preliminary ruling by the military judge.[39] In some cases, the evidence may present a trail of damning evidence that significantly alters both the merits and sentencing landscape. For example, the government might bring in a string of witnesses to testify to uncharged but credible accusations that supplement a current strong case. In other cases, the government may be using the rules tactically.[40]

Propensity evidence may have a significant impact on the sentence, depending on how the sentencing authority views it. Perhaps because of that, the military judge has the special role of limiting the impact of the evidence—while such evidence is admissible, the government may not unnecessarily highlight it.[41]

Finally, it is worthwhile considering how evidence comes before the sentencing authority in the context of a guilty plea. While the sentencing

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[38] *Compare* MCM, *supra* note 5, M.R.E. 413(a) (2016) ("[T]he military judge may admit evidence that the accused committed any other sexual offense), *with* MCM, *supra* note 5, M.R.E. 405 (limiting the types of evidence that may be used to prove character generally).

[39] *See, e.g.*, United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2012). In light of *Hills*, practitioners may wish to avoid using evidence of misconduct which has previously been prosecuted to an acquittal. *Hills*, 75 MJ at 356. Part of the reasoning in *Hill* found that charged propensity was problematic because it could confuse the fact finder and result in a reducing the burden of proof as to either (or all) charged offenses being used for propensity purposes. *Id.* ("[Military Rule of Evidence] 413 'would be fundamentally unfair if it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt.'") (quoting United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000). Note however, *Hills* did not call into question the fundamental constitutionality of the MRE 413. *Hills*, 75 MJ at 357-58. More importantly for purposes of this article, *Hills* did not restrict the use of propensity evidence on sentencing. *Id.*

[40] For example, the government might try to use the rules to blunt the spillover instruction in a child molestation case with two victims; however, this type of tactical use is very risky. While the explicit language of Rule for Courts-Martial (RCM) 413 and RCM 414 appears to authorize such use, recent cases have clamped down on the use of propensity evidence, particularly where the propensity evidence is also charged misconduct. *See, e.g.*, United States v. Hills, 75 MJ 350, 356 (C.A.A.F. 2016). *See also* DA PAM 27-9, *supra* note 3, para. 7-17 (requiring a panel instruction that "[t]he burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt" and that "[p]roof of one offense carries with it no inference that the accused is guilty of any other offense," even where the propensity evidence offered is uncharged).

[41] *See id.* at 7-13-1, n.5.1.

phase of trial is the same regardless of whether there is a guilty plea or a contest on the merits, there are significant differences in how evidence comes to the judge during a guilty plea. In general, the accused can mitigate much of what comes before the sentencing authority through a negotiated guilty plea. Unlike most civilian jurisdictions, which require only minimal inquiry into the "factual basis" for the crime, the military requires an extremely comprehensive plea inquiry to ensure that the accused actually committed the crime and believes he committed the crime.[42] Depending on the crimes alleged, this inquiry can take many hours. During this inquiry, the accused must provide sufficient facts detailing why he believes he is guilty of the crime—including every element of the offense—and why he is in fact guilty. While the plea inquiry may be quite searching, the accused still has an incentive to minimize the impact of the plea inquiry on the sentencing proceedings. Of course, if the accused makes exculpatory statements, then the judge cannot accept the plea.[43] The defense and government may seek to limit the risk of a failed providence inquiry by entering a stipulation of fact.[44]

A stipulation introduces new sentencing issues. While a plea inquiry is limited only to the offenses alleged, and the judge will not generally inquire as to other, uncharged misconduct unless it is directly relevant to an element of the offense,[45] a stipulation may contain aggravating facts, including uncharged misconduct. Because of this, government and defense counsel often vigorously negotiate over what—and how—uncharged misconduct will be included as a part of the stipulation.

2. Evidence Presented by the Prosecution During the Sentencing Phase

During the sentencing phase, evidence offered by the prosecution is much more closely controlled. Sentencing evidence must fit within one of

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42 *See*, *e.g.*, United States v. Care, 40 C.M.R. 247 (C.M.A. 1967).
43 MCM, *supra* note 5, R.C.M. 910(e) Discussion (2016) (requiring the military judge to inquire into and resolve "any potential defense . . . raised by the accused's account" before accepting the plea).
44 *See*, *e.g.*, Colonel Thomas S. Berg, *A View from the Bench: A Military Judge's Perspective on Providency*, ARMY LAW., Feb. 2007, at 35, 36.
45 For example, the military judge may ask how an accused knew that he was ingesting an illegal drug, which inquiry could result in a brief discussion of prior unlawful (and uncharged) use. Note, however, that such an inquiry would also conform to the evidentiary rules regarding uncharged misconduct. *See* MCM, *supra* note 5, M.R.E. 404 (2016).

five "pigeon holes."[46] These pigeon holes are: (1) service data of the accused on the charging document; (2) properly filed service records of the accused; (3) evidence of prior convictions; (4) evidence in aggravation; and (5) evidence of rehabilitative potential.[47] In practice, these pigeon holes can be quite narrow.

The first pigeon hole is service data of the accused, and consists of data such as name, rank, service number, unit, date of entry for current term of service, pay data, and pretrial confinement information. This information is basic and arguably adds very little to the sentencing calculus, except for perhaps information concerning any pretrial confinement and current pay data.

The second pigeon hole—service records of the accused—contains training records, awards, schooling, and other administrative information.[48] The records may also contain officially filed reprimands or records of non-judicial punishment.[49] The records may enable both the prosecution and defense to argue the accused's rehabilitative potential, though frequently the accused's records only contain evidence typical of any soldier with similar rank and specialty.[50] A service record containing negative information is valuable to a prosecutor, but in many cases, the

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[46] This term is common Army parlance for the sentencing categories. *See*, *e.g.*, Colonel Michael J. Hargis, *A View from the Bench: Military Rule of Evidence (MRE) 412 and Sentencing*, ARMY LAW., Mar. 2007, at 36, 36 (discussing different categories of sentencing evidence as "pigeon holes").

[47] *See* MCM, *supra* note 5, R.C.M. 1001 (2016).

[48] The key inquiry is that the record must relate to the manner of military service performed by the accused—not records predating her service. *Id.* R.C.M. 1001 (2016). A recent case found that a service record referring to misconduct committed by the accused before his entry into the military was not admissible under this rule. United States v. Ponce, 75 M.J. 630 (A. Ct. Crim. App. 2016).

[49] Training records and test scores can sometimes be relevant to the question of whether the accused had the capability to commit the crime. *See, e.g.*, Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (finding that provisions of the UCMJ regarding mental responsibility extended beyond the question of mental disease or defect to the question of whether the accused had the capability of forming the requisite intent); *see also* DA PAM 27-9, *supra* note 3, para. 5-17 (providing panel instructions on same).

[50] Administrative records are usually a significant part of the so-called Good Soldier Book defense counsel frequently admit as mitigation evidence. *See*, *e.g.*, Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier," supra* note 29, at 93 ("[T]he Soldier's Medal citation, . . . the APFT score, the weapons qualification scores, and the accused's noncommissioned officer evaluation reports are all admissible and are commonly submitted in the form of a "Good Soldier Book."). Note, however, that in this context, the records are being admitted under the broader evidentiary rules available to the defense. MCM, *supra* note 5, R.C.M. 1001(c) (2016).

accused may have no prior negative administrative or non-judicial record.[51]

The third pigeon hole—evidence of prior convictions—would indeed be helpful evidence in aggravation. However, this evidence rarely exists and is generally not a significant source of evidence in the sentencing context.[52]

Evidence in aggravation is the fourth pigeon hole. Under this category, evidence "directly relating to or resulting from the offenses of which the accused has been found guilty" may be admitted at trial.[53] This includes "evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of any offense committed by the accused."[54] Aggravation evidence also includes impact to a military unit, and can also include the fact that the accused intentionally selected the victim on the basis of "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation."[55]

Although who qualifies as a victim under the rule is more broadly defined, to include both institutions and individuals, the requirement that the aggravating evidence have a "direct" link between the victim and the crime serves as a check on what is admissible.[56] This requirement has

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[51] Soldiers who commit minor offenses may be discharged administratively, eliminating many would-be recidivists from the pool of potential criminal soldiers. *See e.g.,* DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 14-12(a), (b) (6 June 2005) (Rapid Action Revision 6 Sept. 2011) Additionally, some offenses require the initiation and processing of a proceeding leading to discharge (whether the proceeding is criminal or administrative does not matter). *See, e.g.*, DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-6 (28 Dec. 2012) (mandating discharge for soldiers with drug related misconduct).

[52] This is true for reasons highlighted in the preceding footnote. Criminological studies have also empirically demonstrated this proposition. *See, e.g*., A.J. Rosellini et. al., *Predicting non-familial major physical violent crime perpetration in the U.S. Army from Administrative data*, PSYCHOL. MED., JAN. 2016, at 3 (noting that the vast majority of Army personnel do not have prior criminal records).

[53] MCM, *supra* note 5, R.C.M. 1001(b)(4) (2016).

[54] *Id*.

[55] *Id*.

[56] The limitation here may roughly approximate the tort concept of proximate cause. The further removed the evidence sought to be admitted, the less likely the evidence is "directly related" to the alleged offense. *See* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 48-50 (Robert G. Street ed., 6th ed.) (1913). Additionally, similar to the tort concept of an intervening cause, the introduction of an intervening event is not ordinarily evidence "directly related" to the offense. *See generally*

been interpreted to allow so-called "syndrome" evidence,[57] as well as evidence of the initial victimization in cases involving revictimization.[58] Additionally, evidence in aggravation is not admissible simply because it is relevant: "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[59] This balancing test is not a difficult hurdle to overcome, but it must be overcome.[60]

The fifth and final prosecution pigeon-hole is evidence of rehabilitative potential. Rehabilitative potential is the "accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[61] Evidence of rehabilitative potential is admitted in the form of opinion evidence, which must be offered through a witness after establishing a foundation for that opinion.[62] The foundational requirements for an opinion contemplate both lay and expert witness testimony,[63] though the "relevant information" listed in the rule tends to skew more toward the kind of information that a lay witness would possess: "information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses."[64] Finally, the rule limits the scope of the opinion solely to "whether the accused has rehabilitative potential and to the magnitude or quality of any such potential."[65] According to the non-

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U.S. v. Rust, 41 M.J. 472 (C.A.A.F. 1995) (finding that a suicide note was admitted inappropriately in the sentencing case of an obstetrician whose criminal dereliction resulted in the death of an unborn child but caused neither the mother's murder nor the suicide of the child's father thereafter); U.S. v. Stapp, 60 M.J. 795 (Army Ct. Crim. App. 2004).

[57] U.S. v. Hammer, 60 M.J. 810 (A.F. Ct. Crim. App. 2004).

[58] This occurs in child pornography cases, where, though the identity of the victim may not be known, the government may seek to admit evidence of Senate findings of the negative victim impact of child pornography production and trafficking. U.S. v. Anderson, 60 M.J. 548 (A.F. Ct. Crim. App. 2004).

[59] United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2008).

[60] In *United States v. Ashby*, the accused concealed a videotape of an accident in which a Navy airplane severed the cable supporting a gondola, sending the occupants to their deaths. *Ashby*, 68 M.J. at 108, 108. The family members testified at the trial of the officer who concealed the tapes as to the effect that it had on their ability to have closure. *Id.* On appeal, the court found that the judge's decision to allow the testimony of the family members in a case involving a conviction for conduct unbecoming an officer was not an abuse of discretion under the circumstances. *Id.*

[61] MCM, *supra* note 5, R.C.M. 1001(b)(5) (2016)..

[62] *Id*.

[63] MCM, *supra* note 5, R.C.M. 1001(b)(5)(B) discussion (2016).

[64] *Id.* 1001(b)(5)(B).

[65] *Id.* 1001(b)(5)(D).

binding discussion[66] to the rule, the witness may not "generally" elaborate on that conclusion.[67]

The value of rehabilitative evidence is minimal, particularly when the prosecution overreaches by eliciting opinions of "no rehabilitative potential." The problem may become even more acute when a lay witness has a poor foundation for their opinion, or in cases involving lesser or military-specific crimes where at least some rehabilitative potential may be presupposed.[68]

3. Evidence Presented by the Victim or the Accused During the Sentencing Phase

Evidence presented by the victim is new to the world of military justice.[69] It remains to be seen how or whether courts will limit the form or content of the testimony sought to be admitted by a victim. Under the rule, evidence can take the form of a sworn or unsworn statement to the court.[70] The victim can present matters either in mitigation or in aggravation, and has the aid of a Special Victim Counsel for doing so.[71] The definition of aggravation appears substantially similar to the rule governing the prosecution, and the definition of mitigation is parallel to

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[66] *Id.* preamble discussion para. 4. The supplementary materials in the *Manual for Courts-Martial*, to include discussion of the Rules for Courts-Martial, are not "binding on any person, party, or other entity." *Id.*

[67] MCM, *supra* note 5, R.C.M. 1001(b)(5)(D) discussion (2016).

[68] Email from a former military judge (name withheld), to author (Mar. 10, 2016 4:20 PM) (on file with author). ("I listen to rehab potential evidence, as I am required to do. And I "considered" it, as I was required to do. But that is an area that I gave very miniscule weight. For the Government, it's one of those things that often backfires on them when a witness says the accused has no rehab potential. Really? They lose []some credibility when they say that. Everyone has rehab potential—just varying degrees of it . . . .").

[69] *See generally* Exec. Order. No. 13696 80 Fed. Reg. 35783 (June 17, 2015) (amending Rules for Court-Martial to include certain victim rights). This article is focused primarily on how sentencing rules impact the prosecution, because that is where the procedural rules have the most limiting impact on the full expression of the sentencing principles. It will briefly cover evidence admissible by the victim and the accused. It does not focus extensively on the victim or accused here because: (1) evidence offered by the victim is a new and untested area of the law; while (2) evidence offered by the accused is more broadly admissible and subject only to a few caveats. For example, while the rules of evidence apply on sentencing, the accused can request that the judge relax them. MCM, *supra* note 5, R.C.M. 1001(c)(3) (2016).

[70] MCM, *supra* note 5, R.C.M. 1001A(a) (2016).

[71] *Compare* 10 U.S.C. §1044e (2013), *with* MCM, *supra* note 5, R.C.M. 1001(b)(4), *with* MCM, *supra* note 5, 1001(c)(1)(B) (2016).

the defense definition.[72] Presumably, a victim will seek only to relate his personal experience of victimization, and thus, taken together, these definitions should pose little in the way of limitation on what a victim may seek to admit.[73] Finally, according to the rule, the right to be heard exists whether or not the victim was previously called as a witness for the prosecution.

The defense has much broader latitude to present evidence to the court-martial at the end of the sentencing phase.[74] Three categories—evidence in rebuttal, evidence in extenuation or evidence in mitigation—form the basis for potential defense submissions.[75] Rebuttal evidence is fairly straightforward in that it must relate to evidence presented by the prosecution or the victim.[76] Extenuation evidence is anything that "serves to explain the circumstances surrounding the commission of an offense, including the reasons for committing the offense which do not constitute a legal justification or excuse."[77] Mitigation evidence is evidence that is "introduced to lessen the punishment to be adjudged . . . or to furnish grounds for a recommendation of clemency."[78] Mitigation evidence includes evidence of prior punishment for the same offense, such as non-judicial punishment under Article 15, UCMJ, and the potential loss of retirement pay.[79] Significantly, case law has limited the admissibility of sex offender registration requirements.[80]

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[72] A victim may not offer extenuation evidence, presumably because it is less clear where or how a victim might seek to offer evidence that "serves to explain the circumstances surrounding the commission of an offense, including the reasons for committing the offense which do not constitute a legal justification or excuse . . . ." MCM, *supra* note 5, R.C.M. 1001(C)(1)(A). However, given the non-exclusive wording of the rule, a victim could conceivably offer "extenuation" evidence as to other circumstances, such as uncharged misconduct by the accused, which "serves to explain the circumstances surrounding" the offense, that would not be aggravating under the technical definition, but could be highly relevant to a sentencing rationale such as retribution. *Id*. It remains to be seen whether this limitation will be significant.

[73] It remains to be seen whether courts will apply any balancing test to the victim's right to be heard. *See generally* MCM, *supra* note 5, M.R.E. 403 (2016).

[74] *See* MCM, *supra* note 5, R.C.M. 1001(c) (2016).

[75] *Id*.

[76] *Id*. R.C.M. 1001(c)(1) (2016).

[77] *Id*. R.C.M. 1001(c)(1)(A) (2016).

[78] *Id.* 1001(C)(1)(B) (2016).

[79] *See, e.g*., United States v. Washington, 55 M.J. 441 (C.A.A.F. 2001) (finding error when the military judge excluded defense evidence of loss of retirement pay which would result from an adjudged punitive discharge).

[80] United States v. Talkington, 73 M.J. 212 (C.A.A.F. 2013).

The accused may also present an unsworn or sworn statement, or a combination of both.[81] An unsworn statement may be given orally, in writing, or as a combination of the two.[82] The accused may be permitted wide latitude to say nearly anything; however, the military judge also can instruct the panel "essentially to disregard" problematic portions of the unsworn statement.[83] Additionally, the accused may not present evidence that impeaches or contradicts the verdict.[84]

III. Retributive Tendencies: A Theoretical Breakdown of Military Sentencing Principles

Now that we have an overview of the mechanics of the military sentencing procedure, we return to the more basic question of what purposes sentencing should seek to accomplish.

Military sentencing serves five principle purposes: rehabilitation of the accused, general deterrence of others, specific deterrence of the accused, retribution, and preservation of good order and discipline.[85] Using a specific focus on aggravation evidence and evidence of rehabilitative potential, this section will demonstrate that these principles intersect with the sentencing procedural rules in a way that favors the retributive principle disproportionately over the utilitarian[86] principles.

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[81] MCM, *supra* note 5, R.C.M. 1001(c)(2)(A) ("The accused may testify, make an unsworn statement, or both . . . .").

[82] *Id.* 1001(c)(2)(C) (2016)..

[83] *Talkington*, 73 M.J. at 212. A recent unpublished Army case suggests that a military judge could prohibit an accused from discussing sex offender registration; however, this rationale has not been treated by the Court of Appeals for the Armed Forces. *See* United States v. Feliciano, No. 20140766, slip op. (A. Ct. Crim. App.) (Aug. 22, 2016).

[84] United States v. Johnson, 62 M.J. 31 (C.A.A.F. 2005). In the case of a guilty plea, defense evidence that casts doubt on the providence of the guilty plea will result in the reopening of the plea and may result in the military judge rejecting the plea. *See* United States v. Phillippe, 63 M.J. 307 (C.A.A.F. 2006) (finding "if an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea").

[85] DA PAM 27-9, *supra* note 3, para. 8-3-21 (the five recognized principles of sentencing are "[r]ehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his. . .crimes and his sentence . . . .")

[86] This article uses the terms utilitarian and instrumental interchangeably throughout to denote punishment theories that seek to maximize societal benefit in the present and future. Utility is "[t]he quality of serving some function that benefits society. *Utility*, BLACK'S LAW DICTIONARY (9th ed. 2009). An instrumentality is "a thing used to achieve an end or purpose." *Id. Instrumental*.

The effect is to pay lip service to utilitarian sentencing principles, while simultaneously limiting their impact. This section will briefly discuss the theoretical basis for the military's sentencing principles before demonstrating how procedural rules skew toward the retributive sentencing rationale and away from utilitarian principles.

A. Moral-Theoretical Underpinnings of the Sentencing Principles

The five sentencing principles group into one of two moral-theoretical camps: the deontological camp and the utilitarian/instrumentalist camp. When applied to sentencing, deontological thinking looks at rewarding the actor his just deserts.[87] Retribution fits cleanly in the deontological camp because of its backward-looking focus.[88] The goal of the sentence is to punish the offender for what he has done. This view of sentencing relies on an understanding of the offender's moral agency and the offender's capacity to understand society's censure of his behavior, though punishment does not necessarily need to be harsh to be effective.[89] In many ways, retributive theory is the easiest to understand because it relies on instinctive revulsion to fix moral blame.[90] "Eye for eye, tooth for tooth"[91] expresses the sense of moral balance retributive theory appeals to. However, there is a difference between understanding moral opprobrium and applying it in a criminal sentencing proceeding. That is because different individuals will value crimes differently.[92] For example, although most would agree that murder is worse than robbery, and that both are worse than double parking, there is likely to be wider divergence between individuals when it comes to fixing an appropriate sentence for a

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[87] *See*, *e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).
[88] *See, e.g.*, Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful*, *Deontological, and Empirical*, 67 CAMBRIDGE L. J. 145 (2008) (describing three distinct rationales for retributive theory—all of which focus on desert).
[89] *See generally* Andrew von Hirsh, *Proportionate Sentences: A Desert Perspective*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Ashworth & Von Hirsch eds., 2000).
[90] *See*, *e.g.*, Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831 (Apr. 2007) (discussing different ways to affix retributive blameworthiness and suggesting that blameworthiness could be fixed through empirical research of the community punitive norms).
[91] Exodus 21:22 (New International Version).
[92] *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (1973) (proposing sentencing commissions which have the authority to set sentencing ranges as a way to overcome this problem).

given crime of which the accused has been convicted.[93]

Compared to retributivism, the attraction of utilitarian sentencing is that, at least in theory, the sentencing authority can determine with some specificity the type and amount of punishment necessary to accomplish the utilitarian goal.[94] Instrumental theories do not assign blame in the traditional sense. Instead, the focus is on producing a positive externality in the present or future.[95] Most commonly, the positive externality sought is the prevention of future crime.

A utilitarian might see the commission of a crime as a doorway that allows society to lawfully separate out those most at-risk for future crime,[96] and provides a utilitarian baseline against which to measure efforts to reduce crime.

Rehabilitation of the accused, general deterrence, specific deterrence,

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[93] This divergence seems to be a key argument for why the military justice system should make the judge the sole sentencing authority, as has been proposed in recent statutory amendments. *See, e.g*, MJRG, *supra* note 26 (containing a proposed amendment to Article 53, UCMJ which would have provided for "judicial sentencing for all non-capital offenses"). The argument is that judges are more capable, through repetition, to understand what a crime is worth than are military jurors who may sit on only one panel during the entirety of their career. *See, e.g*., Paul Larkin & Charles "Cully" Stimson, *The 2015 Report of the Military Justice Review Group: Reasonable Next Steps in the Ongoing Professionalization of the Military Justice System*, HERITAGE (Apr. 2016), http://www.heritage.org/research/reports/2016/04/the-2015-report-of-the-military-justice-review-group-reasonable-next-steps-in-the-ongoing-professionalization-of-the-military-justice-system. While it is a fact that judges may be more internally consistent in sentencing, sentencing guidelines—that were also proposed (though not adopted) in the amendments—may be necessary to ensure a degree of cross-jurisdictional normalization.

[94] *See*, *e.g*., John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, *in* ANNU. REV. CLIN. PSYCH. (2016) ("Without at least some ability to validly estimate an offender's risk of recidivism[,] e.g., through the use of actuarial assessment instruments[,] and hopefully to reduce that level of risk[,] e.g., through the use of evidence-based psychological interventions, there would be few positive 'consequences' flowing from consequential theories of sentencing.").

[95] *See, e.g.*, PLATO, PROTAGORAS 139 (trans. W.R.M. Lamb 1952) ("No one punishes the evil doer under the notion . . . that he has done wrong, only the unreasonable fury of a beast acts in that way. But he who undertakes to punish with reason does not avenge himself for past offense, . . . he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again.").

[96] Some utilitarian thinkers might even take the concept a step further, envisioning a *minority report*-like program that uses biological techniques to forecast and control criminal behaviors before they occur. *Compare* ADRIAN RAINE, THE ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME (2013), *with* MINORITY REPORT (Dreamworks Pictures 2002).

and the maintenance of good order and discipline are utilitarian concepts that focus on future externalities, though in slightly different ways. Rehabilitation seeks to accomplish future crime prevention through reformation of the accused.[97] The hope is that the sentencing authority can determine the rehabilitative potential of the accused, and mete out punishment in the degree necessary to achieve rehabilitation. Specific deterrence seeks to preclude future crime by incapacitating the criminal for the future commission of crime.[98] General deterrence is less concerned with the individual criminal, and instead hopes to dissuade others from the commission of future crime through the punishment imposed in the current case.[99] Good order and discipline does not directly seek future crime reduction; rather, it seeks to produce a disciplined unit, with crime reduction being one of the many positive externalities.[100]

B. The Ascendancy of Retribution

Instrumental sentencing factors are four of the five recognized military sentencing principles. The recognition of a range of different instrumental sentencing theories at least suggests a heavier emphasis on forward looking sentencing principles. However, these principles intersect with the procedural rules in a way that actually emphasizes retribution over the utilitarian principles. This article focuses on a comparative analysis of rehabilitation and retribution both because they are the most frequently seen in sentencing,[101] and because none of the other principles have any supporting rule of evidence directly tied to them.

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[97] *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF THE LAW 25-27 (2d ed. 2008).

[98] *See, e.g.*, Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 542 (2006) ("At the most basic level . . . those in prison don't commit any new crimes . . .and so by extending the periods of imprisonment . . .we extend the period where the inmate cannot re-offend.")

[99] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 ("The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses.").

[100] *See generally* Lieutenant Colonel Dru Brennerbeck, *Assessing Guidelines and Disparity in Military Sentencing: Vive La Difference*, 27 FED. SENT. R., 108 (2014) (discussing how the concept of good order and discipline sets apart military practice from federal practice).

[101] *See, e.g.*, Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29, at 92 ("[T]he two most frequently cited rules [are the rules admitting aggravation evidence and rehabilitative potential evidence]").

1. Trial Evidence Supporting the Retribution Principle

From a retributive perspective, the most inflammatory and damning sentencing evidence is likely to have been admitted during the trial on the merits. Evidence admitted for its relevance to an element of the offense, i.e., the crime, and evidence of other bad acts that were admitted at trial for a non-character purpose are highly relevant to the question of punishment. Not insignificantly, some of that evidence, e.g., propensity evidence, may have had peripheral relevance to the merits, but will be particularly probative for sentencing under a retributive theory.[102] The simple evidence of the offense is bound to be the most damning evidence there is, because it establishes the gravamen of the offense—i.e., the core conduct upon which society has focused moral opprobrium.[103] Considering that such evidence is bound to the offense *itself*, it is by definition backward looking, and thus most closely tied to retributive philosophy.

The evidentiary aperture mildly opens once a trial moves into sentencing, but the focus remains aggravation evidence. Although there is bound to be some variance in judicial thought about the importance of aggravation evidence in sentencing, the military judges discussed below who have written on the sentencing proceeding have expressed a preference for retributive philosophy. One judge comments on the effectiveness of sentencing argument, observing that "[a]n argument which merely states that what the accused did is bad, without any emphasis on why it was bad, does nothing more than state the obvious."[104] While the article does not discuss any of the principles underlying sentencing, the judge argues that a strong sentencing argument should leave the fact finder with an emotional reaction of some kind.[105] Sentencing on the basis of an emotional reaction approximates most closely a retributive sentencing rationale—the focus is on the crime itself, rather than on the more cerebral and less emotional goal of prospectively eliminating crime.

Another judge notes that while counsel "should focus their sentencing

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[102] Character evidence could also have rehabilitative connotations; however, the evidence only develops its full instrumental value if attached to a predictive tool. Otherwise, the value of the evidence has purely arbitrary sentencing value.
[103] This point is particularly true for traditional common law crimes because they are generally thought to be morally wrong in and of themselves.
[104] Russelberg, *supra* note 12, at 51.
[105] *Id.*

cases on the accused's character,"[106] the sentence ultimately must only be for "the offenses of which he has been convicted."[107] Although the message is more subtle here, the backward-looking focus effectively rips what would be rehabilitative evidence, i.e., the accused's character, out of the utilitarian construct and attempts to shoehorn it into a retributive theoretical framework. Even though the article champions the admission and use of character evidence to determine the rehabilitative potential of an accused, the entirety of this argument is couched in language ultimately mooring the sentence back to retributive theory—sentencing for acts done.[108] The net effect is to conjoin rehabilitative evidence with aggravation evidence. In essence, the focus is not on what kind of sentence the accused needs to rehabilitate himself and live a life free from crime, but rather on whether any aspects of his character aggravate or mitigate the criminal enterprise of which he was convicted.

A third judge observes more explicitly, "[a] trial counsel who fails to present cogent, material aggravation evidence usually presents a skeletal sentencing case, starkly devoid of the facts necessary to support a fair and appropriate sentence."[109] Further, "Military trial practitioners who understand the purpose and scope of aggravation evidence will help ensure that the fact finder gets not only the bones of the case, but also the flesh."[110] At least for this judge, no sentencing proceeding can result in a fair sentence unless the trial counsel has brought forth the available aggravation evidence. The message could hardly be any clearer: evidence in aggravation is the *sine qua non* of military sentencing.

2. Trial Evidence Supporting the Rehabilitation Principle

Despite the foregoing argument, it would not be accurate to claim retribution completely overcomes all other principles of sentencing. Notwithstanding the judicial interpretive lenses above, when viewed from the standpoint of support in the procedural rules, the next strongest sentencing principle is still rehabilitation.[111] After all, a whole pigeon hole

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[106] Dolan, *supra* note 35, at 34.
[107] *Id*. at 35 n.13.
[108] *Id*.
[109] Lieutenant Colonel Edye U. Moran, *A View from the Bench, Aggravation Evidence—Adding Flesh to the Bones of a Sentencing Case*, ARMY LAW., Dec. 2006, at 48, 48.
[110] *Id*. at 50.
[111] For the moment, this article sets aside the question of whether we may admit recidivism evidence under RCM 1001(b)(5) as "rehabilitation" evidence.

is devoted to the principle, providing very detailed procedural rules to shepherd admissible evidence before the sentencing authority.[112] And yet, if the value of a utilitarian theory is its ability to help a sentencing authority fix a more exact punishment, these very rules almost wholly gut rehabilitative evidence of that value.

The entire foundation laid prior to admitting evidence of rehabilitative potential results in a largely unhelpful ultimate opinion: high, medium, or low rehabilitative potential. As Judge Dolan, a former military judge, has argued, a trial counsel seeking to provide useful evidence in the rehabilitative context is better off trying to probe relevant questions while laying the foundation for the evidence than she is in asking the ultimate question.[113] The case must be rare indeed where laying the foundation for evidentiary admissibility is more probative of the ultimate fact than is the actual evidence itself. Of course, this suggested method is also fraught with error, for a discerning opposing counsel who sees that foundational questions are straying into substantive territory[114] will have a valid objection. Particularly in this context, the foundation should consist of evidence of *how* the witness knows the accused and not evidence of *what* the witness knows *about* the accused.[115]

The generally unhelpful nature of rehabilitation-focused evidence—at least as conceived in the rules—is ironic, given that utilitarian principles, if they are to be useful at all, should tell the court something about the future behavior of the accused.[116]

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[112] *See supra* part III.B.2.

[113] Dolan, *supra* note 35, at 35 (encouraging counsel to focus on foundational elements "even if these questions do not lead to an "ultimate issue" question").

[114] In this context, substantive evidence could include an opinion on a related rehabilitative potential question, such as an opinion as to the moral fiber of the accused. Note that this is substantively different from a question as to whether the witness has known the accused long enough or in enough contexts to have formed an opinion as to his moral fiber. In any event, evidence that is relevant to the sentence rather than the admissibility of the ultimate opinion is only masquerading as foundational evidence and should be excluded.

[115] *See, e.g.*, MCM, *supra* note 5, R.C.M. 1001(b)(5)(C) (2016). *See also* Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29, at 92-93 (observing that the foundational requirement requires the trial counsel to demonstrate "sufficient knowledge" of the accused).

[116] Ignoring for the moment the possibility of recidivism risk, perhaps the most useful rehabilitative sentencing evidence is opinion evidence as to whether the accused should be discharged from the military. The rules tightly control the admissibility of this evidence, with the accused himself holding the key. When the accused is seeking retention on active duty, the defense may offer evidence in the form of testimony that the witness would "serve with the accused again." *Id*. Once offered, this evidence opens the door for the prosecution

3. United States v. Ellis*: Recidivism Risk as Rehabilitation Evidence?*

The recent case of *United States v. Ellis*[117] involves recidivism evidence that purports to blow wide-open the rehabilitative potential pigeon hole, though as this section will discuss, this has not been the result. *Ellis* involved an airman who committed a number of sex crimes against a thirteen-year-old girl whom he met in an internet chat room.

During the sentencing proceedings, the prosecution sought to admit the testimony of an expert in recidivism as evidence of lack of rehabilitation potential.[118] At trial, the defense objected to the testimony, arguing that the expert "did not have sufficient factual basis to make a relevant opinion[, that] . . . the methodology from which [the expert based] his opinion . . . [did] not bear sufficient reliability to be admissible in this case[, and] that risk of recidivism was not proper testimony as to rehabilitation potential."[119] The military judge did not make a ruling on the admissibility of the evidence, but did allow the trial counsel to continue laying a foundation for the evidence.[120] The trial counsel then elicited testimony that "Ellis fell into the moderate high category for risk of recidivism [on the Static-99 assessment[121]], which reflected a thirty-eight percent chance of recidivism over a fifteen-year window of time."[122] The expert also explained how he scored each of the factors on the assessment.[123]

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to rebut with witnesses who can testify that this is not the consensus view of the command. *Id*. Such rebuttal evidence can be disastrous to an unwitting accused and his defense counsel. Considering that the command is responsible for reviewing, recommending, and forwarding the charges in the first place rebuttal evidence will usually be damning. *See generally* MCM, *supra* note 5, R.C.M. 306, 401. Moreover, the relevance of such testimony is also self-limiting. Because the intent of this testimony is to allow the defense to argue that the sentence should not include a punitive discharge, such evidence is most effective only in those borderline cases where the question of a punitive discharge is at issue.

[117] United States v. Ellis, 68 M.J. 341 (C.A.A.F. 2010).

[118] *Id.* at 343-44.

[119] *Id*. at 344.

[120] *Id.*

[121] The Static-99 "is a ten-item actuarial assessment instrument . . . for use with adult male sexual offenders who are at least [eighteen] year[s] of age at time of release to the community." *Static 99/Static 99R*, STATIC 99 CLEARINGHOUSE, www.static99.org (last visited Feb. 19, 2017). The instrument predicts recidivism risk.

[122] *Ellis*, 68 M.J. at 346.

[123] *Id.* at 344.

The Court of Appeals for the Armed Forces addressed the defense objections under a Military Rule of Evidence 702 framework: essentially examining the reliability of the data and its application in the case at hand.[124] The court found the military judge did not abuse his discretion in considering evidence of rehabilitation potential.[125]

While *Ellis* initially seems to cast wide-open the sentencing doors to evidence involving recidivism risk, a closer look at the opinion reveals the appeals court never decided the evidence was admissible under the sentencing procedural rules. Instead, the opinion focused on whether Static 99 was a valid scientific tool from a reliability perspective.[126]

According to the facts in the appellate court opinion, the trial court also never made any ruling on the ultimate admissibility of the expert's opinion.[127] Instead, the expert opinion apparently entered evidence as "foundational" evidence—i.e., as evidence providing the court with sufficient information to rule on whether the ultimate opinion would be admissible.[128]

Under standard evidentiary practice, a foundation must be laid for counsel to tender a witness as an expert.[129] Although this much is clear, *Ellis* is disturbing because it focused so much on whether there was an adequate evidentiary foundation laid for the witness to give an expert opinion,[130] that it never decided the related—and important—procedural question of whether the expert opinion sought to be offered fit under RCM 1001(b)(5).[131]

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[124] *Id.* at 344-45.
[125] *Id.* at 347.
[126] *Id.*
[127] *Id.* at 344.
[128] *Id.*
[129] MCM, *supra* note 5, M.R.E. 702 (2016).
[130] The analysis encompassed both the basis of the opinion—i.e., whether an interview of the accused was necessary to the opinion—as well as the scientific reliability of the opinion. *See* M.C.M., *supra* note 5, MIL. R. EVID. 702 (2016).
[131] In an interesting concurrence, Judge Baker stated that he would limit the holding narrowly to the facts of the case. A concern was that a military panel might be improperly swayed by the rehabilitation evidence, a risk that was attenuated in this case by the fact that a military judge sat as the court-martial. Judge Baker's major concern, however, was with the role of recidivism evidence in sentencing proceedings in general. After echoing Judge Posner's concerns that recidivism tools may under-report the risk of recidivism, Judge Baker then went on to criticize the usefulness of over-inclusive recidivism assessments in the individualized setting of military sentencing. *Ellis*, 68 M.J. at 347-48.

A plain reading of the procedural rule clearly shows that the expert opinion was not admissible. The rule holds that the scope of the opinion "is limited to whether the accused *has* rehabilitative potential and to the magnitude or quality of any such potential."[132] The discussion to the rule provides that the question of whether the accused has rehabilitative potential is a simple binary response, while the question of magnitude or quality of the potential must be met with a "succinct" opinion of "great" or "little," with no further elaboration.[133] Thus, the *Ellis* expert's opinion that an accused who falls into a certain risk recidivism group would have a certain likelihood of recidivating was far too specific to be admissible.

In some ways, *Ellis* was decided correctly—if the relevant question is only whether the expert opinion had an adequate basis. However, *Ellis* provides less than fulfilling guidance on how to admit a more precise evaluation of recidivism risk. Perhaps because it is a comparatively recent case, neither the facts nor the opinion in *Ellis* has been duplicated in other cases. Indeed, if a case's true holding can be measured by a review of its progeny, *Ellis* is not a sentencing case at all; rather, it is a case about laying an evidentiary foundation for expert witness testimony.[134] The clearest precedential value of *Ellis* appears to be only that vague but succinct expert opinions will be upheld.[135] Perhaps for that reason, one military

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[132] MCM, *supra* note 5, R.C.M. 1001(b)(5)(D) (2016) (emphasis added).

[133] *Id*., R.C.M. 1001(b)(5)(D) discussion. *See also* Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29 (offering a recommended foundational colloquoy).

[134] The majority of the cases citing *Ellis* do so for its holding concerning MRE 702, and not for its value in interpreting RCM 1001(b)(5). For a non-exhaustive list of cases citing *Ellis* for the former proposition, see, for example*, United States v. Henning*, 75 M.J. 187 (C.A.A.F. 2016) (citing Ellis in the context of admissibility of expert testimony under M.R.E. 702); *United States v. Bell*, 72 M.J. 543 (A. Ct. Crim. App. 2013) (same); *United States v. Walls*, 2013 WL 3972283 (A.F. Ct. Crim. App. 2013) (same); *United States v. Cannon*, 74 M.J. 746 (A. Ct. Crim. App. 2015) (same); *United States v. D.W.B.*, 74 M.J. 630 (N-M. Ct. Crim. App. 2015) (same); *United States v. Palma*, 2015 WL 6657365 (A.F. Ct. Crim. App. 2015) (same); *United States v. Stevenson*, 2015 WL 5737171 (A. F. Ct. Crim. App. 2015) (same); *United States v. Walters*, 2015 WL 4624880 (A. F. Ct. Crim. App. 2015) (same); *United States v. Bondo*, 2015 WL 1518987 (A.F. Ct. Crim. App. 2015) (same); and *United States v. Wright*, 75 M.J. 501 (A. F. Ct. Crim. App. 2015) (same). *United States v. Merritt*, 2015 WL 5737152 (A. F. Ct. Crim. App. 2015), is among the few that cites *Ellis* for its holding as to the admissibility of recidivism evidence.

[135] *See, e.g*., United States v. Scott, 51 M.J. 326 (C.A.A.F. 1999) (expert opinion that the accused was at "high risk for re-offense."); United States v. Merritt, 2015 WL 5737152 (A.F. Ct. Crim. App. 2016) (finding the trial judge did not abuse his discretion when he admitted as evidence of rehabilitative potential an expert's opinion that the accused's likely recidivism risk was "in his opinion, high." The court also upheld the trial judge's further

judge has recommended caution when relying on *Ellis*, warning of the related evidentiary pitfalls "of presenting profile evidence, and of presenting evidence that is merely generic and not necessarily applicable to the accused."[136]

IV. Moving Toward Balance: Fulfilling the Utilitarian Promise in Sentencing

Despite the obvious problems with *Ellis*, this article does not argue that it got the law wrong. Instead, *Ellis* simply did not get the law wrong enough to get it right. *Ellis* had the opportunity to say something about the law that would have been at once revolutionary and reconciliatory. By expressly delimiting the language of RCM 1001(b)(5), it could have simultaneously upended common military practice in sentencing while also reaffirming the utilitarian sentencing principles that the military has held dear for decades.[137] Instead, *Ellis* leaves the law a bit conflicted as to the admissibility of recidivism evidence.

Of course, given the limited language of RCM 1001(b)(5), it went about as far as it could. A new paradigm is necessary to enable consideration of utilitarian principles on equal footing with retribution principles.

A. A Modest Proposal

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finding that any questioning regarding the significance of paraphilia evidence was admissible as aggravating evidence, and not evidence of rehabilitative potential); United States v. McDowell 2002 WL 341268 (A.F. Ct. Crim. App. 2002) (holding admissible evidence general that certain categories of offenders have a "higher rate of recidivism."), set aside and remanded for further proceedings on a separate issue by U.S. v. McDowell, 57 M.J. 471 (C.A.A.F. 2002).

[136] Lieutenant Colonel Tiernan P. Dolan, *A View from the Bench: Sentencing: Focusing on the Content of the Accused's Character*, ARMY LAW., Aug. 2012, at 34, 35 (citations omitted).

[137] *See, e.g.*, MCM para. 88b (1984); MCM para. 88b (1969 Revised edition) (discussing rehabilitation of the accused and deterrence as factors to be considered in approving a sentence); MCM para. 88b (1951) (discussing rehabilitation of the accused and deterrence as factors to be considered in approving a sentence). *See also* Major Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011) (arguing that rehabilitation has been a staple of the military justice system since before World War II).

This article proposes that a new pigeon hole be added to the procedural sentencing rules—RCM 1001(b)(6)—which would govern admissibility and procedures when offering recidivism evidence. The addition of the new rule would not supplant any of the other rules, but rather supplement them. This article proposes that the government should be required to introduce an actuarial risk assessment into evidence where an actuarial tool exists, and seek to develop risk tools where none exist. Thus, for example, in the *Ellis* case, the government would have offered the expert opinion on the Static-99 assessment under RCM 1001(b)(6). Following the introduction of such evidence, the defense should then be given an opportunity to introduce clinical studies specific to the accused which might tend to refute the government's evidence. This article will now lay out how the proposed rule would work.

First, the proposed rule should require the government to introduce actuarial recidivism evidence in every case for which a scientifically validated assessment tool exists. Similar to authorities governing the appointment of a sanity board,[138] the convening authority or military judge will order a qualified psychologist to review the case file and provide a sentencing report which scores the offender according to validated actuarial risk models.[139] The intent of obtaining a report in as many cases as possible is consistent with balancing utilitarian and retributive concerns, and also consistent with the obligation to provide maximum information to the sentencing authority.

Although several statistically validated risk models exist, they currently do not cover a sufficiently broad range of offenses to encompass the spectrum of military offenses. However, the Static-99 is a statistically validated instrument that might be used in certain sexual assault cases.[140] This is an actuarial risk assessment that uses ten different variables to rate the risk of re-offense for an individual convicted of a sexual assault.[141] This was also the same actuarial model used in *Ellis* and is generally accepted in the scientific community.[142]

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[138] *See*, *e.g.*, MCM, *supra* note 5, R.C.M. 706 *and* id., R.C.M. 909 (2016).

[139] This could be ordered under the power of the court-martial to gather evidence, *see id.* R.C.M. 801(c) (2016) however, it would be better for the rule to specify procedures.

[140] *See*, *e.g.*, A. Harris, A. Phenix, R. Hanson & D. Thornton, *Static-99 Coding Rules Revised*, STATIC 99 CLEARINGHOUSE, http://www.static99.org/pdfdocs/static-99-coding -rules_e.pdf (2003).

[141] *Id.* at 13.

[142] *See, e.g.*, *United States v. Shields*, No. CIV.A.07-12056-PBS, 2008 WL 544940, at *1 (D. Mass. Feb. 26, 2008) ("The actuarial risk assessments (RRASOR, STATIC-99, and

Second, the military should authorize, encourage, and fund—if necessary—criminogenic research to develop new actuarial models for use in the military. New computer modeling techniques have produced significant advancement in actuarial modeling that would help identify which risk factors are most relevant to a specific population. For example, Philadelphia has employed random forest modeling to predict two-year recidivism rates among its parolee population.[143] The model has been in development since 2001, and is capable of sifting through hundreds of variables to make a prediction as to low, medium, or high risk of recidivism.[144] The model has sufficient flexibility that researchers can even account for input variables that have political significance, for example, to weight the relative societal costs of false negatives with respect to false positives.[145] The model produces a known error rate of 66%, even when accounting for artificially inserted political variables.[146] Because such a model is transparent about both its strengths a weakness, there is little risk of unfair application by a sentencing authority.

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any adjusted actuarial approach, including the "guided clinical method" and the "adjusted actuarial method") are reliable under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. Among other things, these assessments are generally accepted as a reliable methodology within the relevant scientific community and they have been subject to peer review.") (citations omitted). *Cf. United States v. Carta*, No. CIV. 07-12064-PBS, 2011 WL 2680734, at *14 (D. Mass. July 7, 2011), *aff'd*, 690 F.3d 1 (1st Cir. 2012) (finding that while "[t]he Static–99R is peer-reviewed actuarial instrument," the court would consider it as one of several factors in determining a sentence).

[143] Nancy Ritter, *Predicting Recidivism Risk: New Tool in Philadelphia Shows Great Promise*, 271 NAT'L INST. OF JUST. J. 4 (Feb. 2013), https://www.ncjrs.gov/pdffiles1/nij/240695.pdf. Random forest modeling is a relatively recent algorithmic model for relating large numbers of input and output variables. *See generally* Leo Breiman, *Statistical Modeling: The Two Cultures*, 16 STAT. SCI. 1, 199 (2001). Random forest modeling is among the most accurate of a number of algorithmic methods. *See* Rich Caruana & Alexandru Niculescu-Mizil, *An Empirical Comparison of Supervised Learning Algorithms*, in PROCEEDINGS OF THE 23D INTERNATIONAL CONFERENCE ON MACHINE LEARNING 161 (2006).

[144] *Id.*

[145] Political factors may decrease the reliability of a recidivism instrument. For example, an instrument might demonstrate a high correlation between race or gender and recidivism risk. However, it may not be politically—or perhaps constitutionally—tenable to use such factors in determining recidivism risk. An ideal model must still have strong predictive value even if it excludes problematic classifications.

[146] Ritter, *supra* note 143. In other words, the model gets it right 66% of the time--better than chance. In any event, the mere fact that a model can produce a known error rate helps the fact finder calibrate the appropriate weight to be given the model.

The development of new actuarial models should not be difficult. Research on the military population is relatively easy, given the extensive nature of military databases.[147] In fact, two recent studies have used Army administrative databases to perform comprehensive analyses of criminal perpetration and victimization in the Army. The first study, published in late 2015, studied 975,057 soldiers in the active Army between 2004 and 2009.[148] The study used a comprehensive database created as part of the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS) to build an actuarial model predicting non-familial major physical violent crime. The second study looked at victimization of Army soldiers to determine risk factors leading to victimization of sexual assault.[149] The same database is currently being used to present reports predicting familial violence, and also to predict sexual assault.[150]

Clearly, there may be challenges with validating recidivism risk tools because most military offenders are discharged upon completion of their sentence. Nevertheless, given the depth and breadth of DoD data, to include VA data, and the nationalization of criminal records,[151] identifying relevant risk factors and keeping track of later offenses should not prove too difficult. Additionally, the military's records of administrative and non-judicial punishment imposed could also enlarge the population pool

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[147] *See, e.g.*, Amy E. Street et. al., *Developing a Risk Model to Target High-risk Preventive Interventions for Sexual Assault Victimization among Female U.S. Army Soldiers*, 4 CLINICAL PSYCHOL. SCI. 939, 940 (2016) (discussing the "extensive series of administrative databases available" that were used to complete the study).

[148] A.J. Roselini et. al., *Predicting non-familial major physical violent crime perpetration in the US Army from administrative data*, 46 PSYCHOL. MED. 303 (2015).

[149] Amy E. Street et. al., *supra* note 147.

[150] A.J. Roselini et. al., *supra* note 148 (discussing follow-on studies to be conducted with the same databases).

[151] The National Crime Information Center contains centralized data maintained by the FBI in twenty-one different files.

> [S]even property files containing records of stolen articles, boats, guns, license plates, parts, securities, and vehicles. There are 14 persons files, including: Supervised Release; National Sex Offender Registry; Foreign Fugitive; Immigration Violator; Missing Person; Protection Order; Unidentified Person; Protective Interest; Gang; Known or Appropriately Suspected Terrorist; Wanted Person; Identity Theft; Violent Person; and National Instant Criminal Background Check System (NICS) Denied Transaction.

See National Crime Information Center, FED. BUR. OF INVEST., https://www.fbi.gov/services/cjis/ncic (last visited Apr. 20, 2017).

and improve the actuarial model.[152] For many offenses that are more frequently disposed of through non-judicial punishment than through trial, e.g., low-level drug offenses, such records could help create a statistically validated model, even without a large number of court-martial convictions.

The DoD presents a treasure-trove of information that would have value not only to military sentencing, but more broadly to the criminological research community. To the extent that military research funding is unavailable, the value of these databases could be leveraged as an inducement for private institutions to provide much of the research in exchange for access to the informational databases.

Third, regardless of which actuarial models are used, the defense must have the opportunity to rebut the risk assessment. Thus, the rule should provide an opportunity for the defense to submit a clinical assessment, if doing so would benefit the accused.[153] Studies have shown that actuarial assessments are highly accurate;[154] however, as a matter of fairness, the accused should have the opportunity to rebut them. Under current rules governing the employment of experts, the defense could request and receive approval for a recidivism expert who may then conduct a clinical evaluation of the accused.[155]

Fourth, the sentencing proceeding is not subject to the same confrontation rules as the merits, but both government and defense counsel should still receive prior notice of any expert opinion evidence to be entered, and also have the opportunity to challenge the facts behind the opinion together with the manner in which it was made. Telephonic

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[152] *See, e.g.*, Barun Kumar Nayak, *Understanding the Relevance of Sample Size Calculation*, 58 INDIAN J. OPTHALMOL. 469 (2010) (discussing the importance of sample size in scientific research and stating the ideal—and usually unattainable—research situation is one in which the entire population can be studied).

[153] *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1148-49 (2011) (proposing a "subject first" rule for the introduction of the less reliable clinical recidivism assessment).

[154] *See, e.g.*, Monahan & Skeem, *supra* note 94 ("[G]roup data theoretically can be, and in many areas empirically are, highly informative when making decisions about individual cases, including decisions about sentencing.").

[155] *See* MCM, *supra* note 5, R.C.M. 703(d) (2016).

testimony is routinely allowed during sentencing proceedings, and may suffice depending on the individual case.[156]

B. Dealing with The Drawbacks of Recidivism Evidence During Sentencing

While the above provisions would go a long way toward formally rectifying the current imbalance in sentencing proceedings, care must be taken to avoid several potential sticking points.

The first potential issue concerns developing statistically significant models that comport with notions of fairness and equal protection. For example, although certain studies have shown that young African American males are over nine-times more likely to be incarcerated than are young white males,[157] using factors such as race or gender to determine recidivism risk may not comport with contemporary notions of fairness, and may violate constitutional equal protection principles.[158] Policy makers might weigh the predictive value, if any, of the variable to make a judgment call as to whether it should be included. It is also possible that over time, causal relationships could be explored to determine whether a specific objectionable factor may be highly correlated, but mask more probative factors that are unobjectionable.[159] Another possible issue is determining which factors might be proxies for problematic classifications. For example, some view criminal history as a proxy for race.[160] The general concept is: because there is a high correlation between criminal history and race, using criminal history instead of race as a predictive factor merely cloaks the problematic classification in legitimacy.

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[156] *Id.* R.C.M. 1001(e) (2016) (detailing procedures for the production of sentencing witnesses).

[157] E. Ann Carson, *Bureau of Justice Statistics, Prisoners in 2013*, BUR. OF JUST. STAT'S BULL. 8 (Sept. 2014), https://www.bjs.gov/content/pub/pdf/p13.pdf.

[158] Inclusion of such factors may be less problematic than many might assume. *Compare* Sassman v. Brown, 99 F. Supp. 3d 1223 (2015) (finding an equal protection violation when gender was used inappropriately to determine eligibility for California's Alternative Diversion Program), *with* Michael Tonry, *Legal and Ethical Issues in Prediction of Recidivism*, 26 FED. SENTENCING R. 3, 167, 169 (finding few jurisprudence constraints on recidivism evidence).

[159] A causal risk factors is one that, by definition, may be changed through intervention. *See, e.g.*, Monahan & Skeem, *supra* note 94.

[160] *Id.*

Whether any of these factors are problematic within the context of the specific model constructed would need to be considered. Additionally, any negative impact to predictive value that removing specific factors might have would need to be captured for policy makers.

A second possible sticking point is philosophical discomfort some may have with using recidivism tools as a front-end sentencing tool. In essence, the issue is whether a recidivism tool is well-suited to capture recidivist risk before the accused has gone through the rehabilitative aspects of punishment. Front-end assessments are more controversial in sentencing than are recidivism tools used to determine early release in a parole or indeterminate sentencing context, or even in the front-end civil commitment context.

[161] Nevertheless, several states have incorporated front-end criminal assessments in other contexts. For example, Virginia uses such assessments to determine which criminals will be allowed to participate in pre-trial diversion programs.[162]

There are ways to mitigate issues with front-end assessments. The first way to mitigate the issue is to rely on fixed factor tools. For example, age at the time of the crime or prior criminal convictions, is fixed in that it does not change based on later developments.[163] Risk tools, such as the

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[161] *See, e.g.*, VA. CODE ANN. § 37.2-900 *passim* (2013) (Virginia Sexually Violent Predators Act). Similar statutes have been challenged but ultimately upheld in the Supreme Court. *See, e.g*., Kansas v. Hendricks, 521 U.S. 346 (1997).

[162] *See, e.g.*, *2014 Annual Report*, VIRG. CRIM. SENT'G COMM'N (2014), http://www.vcsc.virginia.gov/2014AnnualReport.pdf; *2014 Annual Report*, UTAH SENT'G COMM'N (2014), http://justice.utah.gov/Sentencing/AnnualReports/Sentencing2014.pdf; *Justice Reinvestment Initiative in Kansas*, KAN. SENT'G COMM'N (2015), http://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/ksc_jri_report.pdf?sfvrsn=2.

[163] *See, e.g.*, Monahan & Skeem, *supra* note 94

> A fixed marker is a risk factor that cannot be changed (e.g., early onset of antisocial behavior). In contrast, both variable markers and variable risk factors can be shown to change of time. Change can be rapid (e.g., substance abuse can change daily), or slow (e.g., criminal behavior and antisocial traits change over years). Variable markers (like age) cannot be changed through intervention, unlike variable risk factors (like employment problems). Causal risk factors are variable risk factors that, when changed through intervention, can be shown to change the risk of recidivism.

Id.

Static-99, rely on markers which are fixed at the time of conviction. Fixed factor tools do not necessarily yield inaccuracy—the Static-99 remains among the most accurate risk tools in common use.[164] Given that the assessment would yield the same calculations at the time of conviction as it would at the time of release, there seems to be little reason to foreclose its front-end use.[165] Certainly, a similar static factor tool could be developed using military databases.

Moreover, just because the evaluation is on the "front end" does not mean that the sentence recommendation will result in the sentence proposed. As proposed in this paper, the risk tool produces only one component of the whole sentencing case. Evidence in aggravation, mitigation, and extenuation will still be available to the sentencing authority. The risk tool is simply a way to capture and quantify the sentencing information in a way that comports with utilitarian sentencing goals. If the sentencing authority is ultimately persuaded more by retributive principles in the given case, the sentencing authority is still free to sentence according to those principles—without regard to whether such principles would yield a greater or a lesser sentence than the utilitarian model.

Changes to the UCMJ recently proposed by the Military Justice Review Group (MJRG)[166] would have enabled the military to embrace utilitarian sentencing within the context of "limited retributivism."[167] Under this theory, society should fix a sentencing range which accurately depicts the moral opprobrium of the offense (as opposed to driving political factors),[168] and that thereafter utilitarian concerns should prevail

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164 *See* R. Karl Hanson & Kelly Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1 (2009) (concluding that actuarial risk assessments—including the Static-99—are the most reliable predictors of recidivism).

165 Even assuming the convict commits new offenses while in confinement, those would go to a new risk assessment that could be performed at the time of sentencing for the new offense.

166 The proposals, which were not adopted by the FY 2017 NDAA, would have resulted in the creation of a sentencing panel that would have determined guideline sentences. *See supra* note 26 and accompanying sources.

167 *See, e.g.*, MODEL PENAL CODE § 305.7. The Model Penal Code is produced by the American Law Institute.

168 One of the criticisms of the sentencing disparity between crack and cocaine offenses in the Federal Sentencing Guidelines has been that it was motivated by political considerations, and not criminological, or even moral ones. *Cf.* Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass*

when determining where a particular criminal sits within that range. Although the proposed amendments to the UCMJ dealing with sentencing were not adopted, the proposal does hold merit in that it provides for a "range" within which the sentence will ordinarily fall.[169] The sentencing authority can then adjust the sentence based on relevant justice factors, including utilitarian principles. The recommended revisions, if they were to be adopted, would largely render moot any objections to the "front end" use of recidivism tools, because they are all couched within a limiting context.

The final method for dealing with any "front end" sentencing risks remains the parole and clemency process. If changed factors later counsel re-calibrating of the utility of continued confinement, then that process can occur through ordinary parole or clemency channels.

A third possible sticking point is the argument that the use of a recidivism tool based on "average" criminal behavior does not produce individual justice. There are two responses to this criticism. First, as Monahan and Skeem have argued, actuarial models are used in nearly every context where accuracy matters.[170] Why should sentencing be any different, particularly if we know that the most accurate possible prediction of future behavior is the actuarial model? A second response comes from this article's proposal: specifically, the accused would have the opportunity to rebut the actuarial prediction with a clinical assessment of his own. In that manner, both assessments would be subject to the crucible of cross examination and refinement where the individual case warrants.

It is also worthwhile considering that even if there are drawbacks or limitations on inherent in recidivism evidence, if we are truly serious about enabling the fullest expression of truth through an adversarial process, then it is better to enable the prosecution and the defense to give the sentencing authority the best available information upon which to decide the sentence.

Incarceration, 13 CRIM. & PUB. POL'Y, 8, 14-15 (noting the "ham fisted" nature of many mandatory minimum laws passed in the 1980s and 1990s).

[169] *See* MJRG, *supra* note 26, § 801(c)(2) ("[I]n a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter . . . the military judge shall sentence the accused for that offense within the applicable parameter.").

[170] These contexts include weather forecasting, insurance, and even medical diagnosis and treatment. John Monahan & Jennifer L. Skeem, *supra* note 94.

V. Conclusion

Military sentencing, at least in theory, attempts to balance retributive and utilitarian philosophies to give the sentencing authority ample evidence upon which to base a sentence. However, unduly narrow procedural rules have largely minimized the potential impact of utilitarian principles and skewed sentencing toward retribution. At sentencing, the procedures nearly foreclose the possibility of admitting an evidence-based recommendation of what is necessary to accomplish utilitarian aims in a given case. As a result, military sentencing is largely a retributive affair, with sentencing authorities guided mostly by gut instinct.

Military sentencing needs a more fundamental overhaul to draw its procedural rules more closely into alignment with the competing theories of justice that the system purports to uphold. Sentencing will always remain "far more difficult than determining the finding of guilty or not guilty,"[171] but restoring equity between the principles will promote a fair and healthy court-room interchange to the benefit of the accused and society alike.

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[171] Russelberg, *supra* note 12, at 50.