Flying Without a Net: *United States v. Medina* & Its Implications for Article 134 Practice

Major Howard H. Hoege III
Associate Professor, Criminal Law Department
The Judge Advocate General's Legal Center & School
Charlottesville, Virginia

It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3.[1]

And so it goes . . . Judge Stucky's frustration reflects a broader malaise within the military justice system regarding the scourge of child pornography cases. Judge Stucky's observation highlights the rather ad hoc charging decisions that surface in these types of cases absent a specific, statutory provision in the Uniform Code of Military Justice (UCMJ) to deal with child pornography. Unfortunately, child pornography cases do more than simply demonstrate difficulties with the charging decision. The body of child pornography cases also reveals a troubling trend of Article 134 jurisprudence generally and the disturbing impact of that trend on the military's "offense-relation" doctrines.

The military justice system recognizes several offense-relation doctrines that show how different offenses in the military operate relative to one another. Part I of this article describes the doctrines of multiplicity, lesser-included offenses, preemption, and closely-related offenses, highlighting their similarities and differences. These offenses often intersect in confusing and unpredictable ways. This article will show how changing Article 134 jurisprudence causes a substantial amount of the confusion in these offense-relation doctrines. Part II describes the traditional role of Article 134 in the military justice system, and Part III describes the metamorphosis of that role and the resultant impact on the offense-relation doctrines.

The changing Article 134 jurisprudence and its impact on the offense-relation doctrines provide the context for fully understanding the recent Court of Appeals for the Armed Forces (CAAF) opinion in *United States v. Medina*.[2] Part IV shows how *Medina* revisits the trends detailed in Parts II and III and restores a degree of order to both Article 134 jurisprudence and the offense-relation doctrines. In the end, this article concludes that practitioners should view *Medina* as an opinion in which the CAAF reestablishes itself as a steward of Article 134 jurisprudence.

Part V ultimately explores the implications of this thesis on the offense-relation doctrines. Inevitably, the CAAF's holding in *Medina* will serve to clean-up practice relative to the offense-relation doctrines. To begin, consider these doctrines.

Part I: Multiplicity, Lesser-Included Offenses, Preemption, and Closely-Related Offenses

Military justice practitioners use a variety of doctrines to describe the relationship between the many UCMJ offenses. Both at trial and on appeal, practitioners regularly navigate these related, yet distinct, offense-relation doctrines: multiplicity, lesser-included offenses, preemption, and closely-related offenses.[3] Just as practice relies, to some degree, on some basic grasp of the offense-relation doctrines, assessing *Medina*'s implications requires some background knowledge of these doctrines.

---

[1] United States v. Medina, 66 M.J. 21, 25 n.1 (2008) (Stucky, J., dissenting).

[2] *Medina*, 66 M.J. 21.

[3] Practitioners will note what appears to be a glaring omission from this list: the doctrine of unreasonable multiplication of charges. While regularly discussed in the same breath as the doctrine of multiplicity, the two doctrines are separate. *See* United States v. Quiroz, 55 M.J. 334, 337 (2001). While the CAAF is careful to point out that the doctrine of unreasonable multiplication of charges is not an equitable doctrine, it nonetheless grows out of fairness concerns. *See id*. at 339. So, to the extent that CAAF has established a case-by-case totality of the circumstances test to determine when the government has reached too far in prosecuting a given case, it has certainly not set out a test meant to define offenses relative to one another in every like case. *See id*. at 338–39. Because the four offense-relation doctrines do not employ a case-by-case analysis and instead define offenses relative to one another in a way that has precedential value, this article will only address them and places unreasonable multiplication of charges outside of the scope of this article.

Unfortunately, discussion on the tests and limits of the offense-relation doctrines inevitably devolves into frustration and confusion. Courts and commentators alike lament the disarray of this particular field of jurisprudence. In *United States v. Britton*, a CAAF case looking, in part, at the doctrine of multiplicity as applied to lesser-included offenses, Judge Effron writes in a concurring opinion, "Multiplicity litigation has been marked by instability in doctrine and *ad hoc* resolution of cases . . . ."[4] Colonel James Young, the then-Chief Circuit Military Judge of the European Circuit (Air Force), calls the doctrine of multiplicity a "vexatious problem."[5] Then-Major William Barto likens the intersection of multiplicity and lesser-included offenses to the mythical "Gordian Knot."[6] To avoid this confusion at the outset, this article will initially ignore the nuanced application of each offense-relation doctrine and seek merely to draw rough borders around each doctrine.

The first offense-relation doctrine, multiplicity, protects an accused's Fifth Amendment double jeopardy rights.[7] According to the doctrine of multiplicity, a court may not convict an accused multiple times under different statutes for the same criminal act unless Congress intends it.[8] This protection from double jeopardy applies both across successive trials and within the confines of a single trial.[9]

Defining the relationship between two offenses in the context of the multiplicity doctrine is important, then, as a tool to determine congressional intent. The seminal case on the military doctrine of multiplicity, *United States v. Teters*,[10] establishes three ways to determine congressional intent to permit multiple convictions for a single criminal act. One method of determining congressional intent looks for express intent in the relevant statute or its legislative history.[11] Another method looks to other reliable sources of legislative intent, although the court does not describe these.[12] The third method looks to "the elements of the violated statutes and their relationship to each other."[13]

The *Teters* test defines the extent to which statutory offenses are sufficiently separate to warrant separate convictions arising from a single criminal transaction.[14] The heart of the test is the third method of determining congressional intent: a comparison of the elements of the violated statutes. *Teters* applies the elements test articulated by the Supreme Court in *Blockburger v. United States*:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.[15]

If, by looking to the competing statutes, a practitioner can point to an element in one that is not required by the other and vice versa, then the prohibited offenses are sufficiently distinct that one can infer congressional intent to permit multiple convictions for the same criminal act.[16]

---

[4] United States v. Britton, 47 M.J. 195, 199 (1997) (Effron, J., concurring).

[5] Colonel James A. Young, *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159, 159 (1996).

[6] Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 2 (1996).

[7] *See* United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993).

[8] *See id*. The *Teters* court explains, "[A] constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *Id*. (citing Ball v. United States, 470 U.S. 856, 861 (1985)).

[9] *See id.* at 373.

[10] *Teters*, 37 M.J. 370.

[11] *See id*. at 376.

[12] *See id.* at 377.

[13] *Id*. at 376–77.

[14] *Id*. at 376.

[15] *Id*. at 377 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[16] This statement represents an instance where this article ignores the nuanced application of the multiplicity doctrine. In fact, the CAAF has expanded the *Teters* test to include a comparison of not only the statutory elements, but the elements alleged in the pleadings. *See generally* United States v. Weymouth, 43 M.J. 329 (1995). In practice, *Weymouth* has not been used to set aside convictions on multiplicity grounds, as courts tend to rely on the doctrine of

The second offense-relation doctrine, lesser-included offenses, performs at least two functions. First, the doctrine provides the accused with the benefit of giving the fact-finders in his case an option for a conviction that is less egregious than the greater offense with which he is charged.[17] Second, the doctrine allows the government the flexibility to convict on a less-serious offense when its proof fails on the greater offense.[18] Through operation of the doctrine in both contexts, the military justice system presumes that the accused is on notice of uncharged lesser-included offenses.[19]

Defining the relationship between offenses in the lesser-included offense context, then, is important as a tool to determine whether or not a fall-back position is available at trial to either the government or the defense. Unlike the doctrine of multiplicity, the doctrine of lesser-included offenses is codified in the UCMJ at Article 79.[20] Importantly, Article 79 defines lesser-included offenses as those "necessarily included" in the charged offense.[21] The seminal case on the military doctrine of lesser-included offenses, *United States v. Foster*, adopts the *Teters* elements test to determine whether an offense is necessarily included in a charged offense.[22]

While practitioners use the *Teters* elements test to determine if two offenses are sufficiently distinct from one another, they use the *Foster* elements test to determine if two offenses are sufficiently similar to one another. The Court of Military Appeals (CMA) uses different language to articulate the *Foster* elements test to reflect the different goals of the otherwise similar tests. *Foster* applies the elements test for lesser-included offenses established by the Supreme Court in *Schmuck v. United States*:

> One offense is not "necessarily included" in another unless the *elements* of the lesser offense *are a subset* of the elements of the charged offense.[23]

If, by looking at the two statutes, a practitioner can see that the greater offense accounts for all of the elements of the lesser offense, then the lesser offense is necessarily included within the greater offense. Military law on the doctrine of lesser-included offenses recognizes that by charging *only* the greater offense, the government places the accused on notice of *both* the greater and lesser offenses.[24] As a result, military law strongly discourages charging both the greater and lesser-included offenses.[25]

The third offense-relation doctrine, preemption, prevents the government from dropping essential elements from the common-law crimes Congress codified in the UCMJ and prosecuting the remaining elements as an Article 134 offense.[26] The *Manual for Courts-Martial* (*MCM*) uses the example of a larceny-type offense under Article 121 to illustrate the preemption doctrine.[27] According to the *MCM*, practitioners cannot drop the specific intent element required for an Article 121 larceny and charge a larceny-type offense under Article 134.[28]

---

unreasonable multiplication of charges to set aside convictions in cases where two offenses are statutorily distinct. *See, e.g.*, United States v. Quiroz, 55 M.J. 334 (2001).

[17] *See* United States v. Foster (*Foster II*), 40 M.J. 140, 143 (C.M.A. 1994). The military judge has a sua sponte duty to instruct on lesser-included offenses in issue at trial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 920(e)(2) (2008) [hereinafter MCM].

[18] *See* UCMJ art. 79 (2008).

[19] *See* MCM, *supra* note 17, Pt. IV, ¶ 3b(1).

[20] *See* UCMJ art. 79.

[21] *Id*.

[22] *See Foster II*, 40 M.J. at 142.

[23] *Id*. (quoting Schmuck v. United States, 489 U.S. 705, 716 (1989)).

[24] *See* MCM, *supra* note 17, Pt. IV, ¶ 3b(1).

[25] *See id.* R.C.M. 307(c)(4) discussion ("In no case should both an offense and a lesser included offense thereof be separately charged.").

[26] *See* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953).

[27] *See* MCM, *supra* note 17, Pt. IV, ¶ 60c(5)(a).

[28] *See id.*

Defining the relationship between two offenses in the context of the preemption doctrine is important as a tool to determine whether Congress intended to foreclose an Article 134 prosecution in a specific case by its proscription of specific misconduct in Articles 80–132. The seminal case on the military doctrine of preemption, *United States v. Wright*,[29] establishes a two-part test to determine congressional intent. If Congress intended to foreclose an Article 134 prosecution for specific misconduct through its enactment of one of the enumerated offenses in Articles 80–132, then the Article 134 charge is preempted.

Like the *Foster* test, the *Wright* test defines the extent to which two offenses are sufficiently similar to one another. Because the military preemption doctrine is unique to the military justice system,[30] the CMA test does not draw on Supreme Court precedent for authority. *Wright* states:

> [T]he applicability of the preemption doctrine requires an affirmative answer to two questions. The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of . . . Article . . . 134 . . . .[31]

Since Congress seldom communicates an express intent to preempt Article 134 prosecutions,[32] practitioners will inevitably consume themselves with the second *Wright* question. Notably, the second question that practitioners must answer in the *Wright* test appears very similar to the *Foster* elements test.

The final offense-relation doctrine, closely-related offenses, permits appellate courts to affirm an accused's conviction for a technically different offense than the offense alleged and found at trial. According to the closely-related offense doctrine, an accused's plea of guilty to an alleged offense and his admissions during his plea colloquy taken together may permit a slight "technical variance" between the offense alleged and the offense ultimately affirmed on appeal.[33] The closely-related offense doctrine has only been applied in appellate practice.[34]

Defining the relationship between two offenses in the context of the closely-related offense doctrine is important as a tool to determine whether or not the accused was on notice of the offense ultimately affirmed on appeal.[35] The case establishing the closely-related offense doctrine, *United States v. Felty*, employs a totality of the circumstances test to determine whether or not two offenses are closely-related.[36] To that end, *Felty* and cases since have considered whether the two offenses are charged under the same Article, share the same maximum punishment, reflect a similar gravamen of each offense, and are proved by the accused's admissions during the providence inquiry.[37]

Like the *Foster* and *Wright* tests, the closely-related offense doctrine's totality of the circumstances test defines the extent to which two offenses are sufficiently similar to one another. Despite the similar function of these three doctrines, the discussion above shows that each doctrine employs a different test for determining when two offenses are similar to one

---

[29] United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[30] Federal criminal law employs a similar, but distinct preemption doctrine relative to the federal Assimilative Crimes Act. *See* Lewis v. United States, 523 U.S. 155, 164–65 (1998). The federal Assimilative Crimes Act permits federal prosecutors to try state crimes in federal courts given certain statutory conditions. *Id*. at 158. The federal preemption doctrine is used to determine whether federal law preempts the use of a given state statute in federal court. *Id*. at 164–65. *Medina* arguably does not have implications for the application of the federal preemption doctrine, rendering any further discussion of the federal preemption doctrine irrelevant.

[31] *Wright*, 5 M.J. at 110–11.

[32] *See, e.g.*, *id*. at 111.

[33] *See* United States v. Felty, 12 M.J. 438, 442 (C.M.A. 1982).

[34] *See generally* United States v. Bivins, 49 M.J. 328 (1998) (affirming a conviction for dereliction of duty as a "closely-related" offense to the alleged violation of a lawful general order); United States v. Epps, 25 M.J. 319 (C.M.A. 1987) (describing the application of the closely-related offense doctrine on appeal).

[35] *See Felty*, 12 M.J. at 442.

[36] *See id*.

[37] *See id*. at 441–42.

another. The *Teters* multiplicity test adds a fourth method for defining the extent to which two offenses are related to one another.

While the discussion to this point in the article has attempted to cleanly distinguish between the military's four offense-relation doctrines, the full jurisprudence across these four doctrines seldom treats them cleanly. Instead, courts have consistently twisted and stretched the doctrines to a point where the doctrines are often conflated and lack internal consistency. Part III of this article will demonstrate how Article 134 jurisprudence is largely responsible for the morass of offense-relation doctrines.

Part II: An Original Understanding of Article 134's Role in Military Justice Practice

To fully understand the state of Article 134 jurisprudence today and its impact on the offense-relation doctrines, it is necessary first to understand where Article 134 has been. For starters, the UCMJ labels Article 134 the "General Article" because of its broad and vague language meant to capture misconduct "not specifically mentioned" elsewhere in the UCMJ.[38] The three clauses of Article 134 criminalize conduct that is prejudicial to the good order and discipline of the armed forces, is service-discrediting, or is in violation of a federal, non-capital crime.[39] The *MCM* acknowledges the potential for virtually limitless application of the General Article in its explanation of clause one: "Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense . . . ."[40]

Despite its broad and vague language, Article 134 has withstood constitutional challenge at the Supreme Court. In *Parker v. Levy*, the Supreme Court considered Dr. Howard Levy's First Amendment overbreadth and Fifth Amendment vagueness challenges to the General Article.[41] Captain (CPT) Levy, an Army physician stationed at Fort Jackson, South Carolina, was convicted at a court-martial of, among other things, violating Article 134.[42] Charged and tried during the Vietnam War, the Article 134 specification alleged that CPT Levy made several comments to enlisted personnel designed to "promote disloyalty and disaffection" among them.[43] Captain Levy's comments condemned Special Forces Soldiers, criticized U.S. war policy in Vietnam, and encouraged African-American Soldiers both to refuse deployment to Vietnam and to refuse to fight if sent.[44]

The Supreme Court handled the Fifth Amendment and First Amendment challenges in turn. Vagueness under the Fifth Amendment is concerning, said the Supreme Court, because every accused should enjoy fair notice of the offense charged and protection from arbitrary enforcement.[45] In holding that the General Article is not void for vagueness, the Supreme Court relied on three characteristics of the military justice system that both provide a military accused fair notice of the nature of

---

[38] UCMJ art. 134 (2008).

[39] *Id.*

[40] MCM, *supra* note 17, Pt. IV, ¶ 60c(2)(a).

[41] *See generally* Parker v. Levy, 417 U.S. 733 (1974).

[42] *See id*. at 735.

[43] *See id*. at 738.

[44] *See id*. at 739. The full Article 134 specification read:

> In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statement to divers enlisted personnel at divers times: 'The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

Id. at 739 n.5.

[45] *See id*. at 752.

Article 134 misconduct and protect the military accused against arbitrary enforcement of Article 134. First, the Supreme Court noted that the *MCM* places limits on the scope of Article 134 through both the *MCM*'s explanation section and the more than sixty enumerated Article 134 offenses promulgated by the President.[46] Second, the Supreme Court relied on the history and custom of military law, tracing the roots of the General Article through the old British Articles of War and explaining that the values of good order and discipline captured in the General Article are integral in the military's "specialized society."[47] Third, the Supreme Court highlighted the body of military appellate authority that has interpreted and "narrowed the very broad reach" of Article 134.[48]

The Supreme Court likewise held that Article 134 is not overbroad under the First Amendment. In a First Amendment expression context, the Court asks whether a more narrowly-drawn statute could have reached the accused's impermissible speech.[49] In CPT Levy's case, the Supreme Court answered with an emphatic "no."[50] Because of the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline" residing in the military, the General Article's admittedly broad language appropriately reaches speech that might otherwise be permitted in the civilian community.[51] The Court declined to strike down Article 134 when it could conceive of "a substantial number of situations to which it might be validly applied" in order to support the unique command structure of the U.S. military.[52]

Two valuable points from the Supreme Court's holding in *Parker v. Levy* set the starting point for an analysis of the metamorphosis of Article 134's role in military jurisprudence. First, the Supreme Court clearly perceived military appellate courts as stewards of Article 134 and as checks against its potentially over-expansive use. The Court expressly relied on the military courts performing these functions in its vagueness holding and invoked the limiting role of military courts in its overbreadth analysis.[53] Whether or not military appellate courts have continued to fulfill that stewardship role will figure prominently in this article's subsequent analysis.

Second, the Supreme Court's holding in *Parker v. Levy* deals entirely with clause 1 of the General Article: conduct that prejudices good order and discipline in the armed forces. Especially in the context of the Supreme Court's First Amendment analysis, the Court casts Article 134 as essentially a commander's tool to impose punishment for offenses that he could not have anticipated, but that nonetheless impact the good order and discipline of his unit. The Supreme Court's conception of Article 134 as the commander's tool to address indiscipline in his unit stands in stark contrast to the role Article 134 plays in modern military jurisprudence.

Part III: The Metamorphosis of Article 134's Role in Military Justice Practice

While commanders admittedly continue to use Article 134 as a tool to enforce discipline in the armed forces, the past fifteen years of military jurisprudence has defined a new role for Article 134: the catch-all lesser-included offense. As trial practitioners and military appellate courts look to Article 134 as a lesser-included offense more and more frequently, they have placed tremendous strain on the offense-relation doctrines outlined in Part I. As the following analysis will show, the evolution of Article 134 jurisprudence set the stage for *Medina* and foreshadows the implications of *Medina*.

Surprisingly, *Foster*, the seminal case on the military's modern doctrine of lesser-included offenses, launches the liberalization of Article 134 jurisprudence that has left the offense-relation doctrines in their current, confusing state. The government charged Technical Sergeant (TSgt) Foster, in relevant part, with a violation of Article 125, forcible sodomy of a female airman.[54] A general court-martial convicted TSgt Foster, inter alia, of a violation of Article 134, indecent assault,

---

[46] *See id*. at 753.

[47] *See id*. at 743–47.

[48] *See id*. at 754.

[49] *See id*. at 758–59.

[50] *See id*. at 757.

[51] *See id*. at 758.

[52] *See id*. at 759–61.

[53] *See id*. at 760–61.

[54] *See* United States v. Foster (*Foster II*), 40 M.J. 140, 141 (C.M.A. 1994).

following instructions from the military judge that the indecent assault offense was a lesser-included offense of the sodomy offense.[55] On appeal, the Air Force Court of Military Review (AFCMR) held that indecent assault was not a lesser-included offense of sodomy because indecent assault included an additional element not fairly embraced by sodomy: that the victim is not the wife of the accused.[56] The AFCMR instead affirmed TSgt Foster's conviction as an indecent act, in violation of Article 134, holding that the elements of an indecent act are a subset of sodomy's elements.[57] The AFCMR did not discuss nor even mention prejudice to good order and discipline or service-discrediting as elements to either indecent assault or indecent act.

As discussed above, the CMA opens its *Foster* opinion by declaring that it adopts the *Teters* elements test for multiplicity and the Supreme Court's elements test for lesser-included offenses set out in *Schmuck v. United States*.[58] By adopting these similar elements tests, the CMA seems to predetermine its course. *Teters* expressly considered whether a court could rely on the pleadings or the facts proved at trial to conduct the elements test and rejected both in favor of a pure *statutory* elements test.[59] Likewise, the Supreme Court in *Schmuck* expressly rejected using evidence adduced at trial to guide the application of its elements test, opting instead for a pure *statutory* test.[60] When it considered whether the statutory elements of indecent acts are a subset of the elements of sodomy,[61] the CMA concluded in *Foster* that, "charges prosecuted under Article 134 require proof of at least one element not required for proof of offenses arising under Articles 80 through 132 of the Uniform Code."[62] The additional element, of course, is prejudice to good order and discipline or service-discrediting. *Teters* and *Schmuck* would seem to mandate setting aside TSgt Foster's conviction because the elements of the Article 134 indecent acts offense, by virtue of its additional element, is not a subset of the elements defining Article 125.

The *Foster* court did not set aside the conviction, though—it affirmed. By straining to affirm the use of Article 134 as a lesser-included offense, the *Foster* court condemned the offense-relation doctrines to more than a decade of confusion. To start, immediately after acknowledging that clauses 1 and 2 of Article 134 are not elements of Article 80 through 132 offenses, the CMA laments the fact that "the opportunity for instructions on lesser-included offenses" would be lost to the accused if clause 1 and 2 of Article 134 were not considered lesser-included offenses of the enumerated Articles.[63] Leaving aside the questionable "favor" the court provided Foster in this case,[64] the CMA declares without analysis, "To avoid these incongruous results, we hold simply that, in military jurisprudence, the term 'necessarily included' in Article 79 encompasses derivative offenses under Article 134."[65]

---

[55] *See id*. at 145.

[56] *See* United States v. Foster (*Foster I*), 34 M.J. 1264, 1267 (A.F.C.M.R. 1992).

[57] *See id*.

[58] *See Foster II*, 40 M.J. at 142.

[59] *See* United States v. Teters, 37 M.J. 370, 377–78 (C.M.A. 1993).

[60] *See* Schmuck v. United States, 489 U.S. 705, 716–17 (1989). The Supreme Court explains:

> Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly.

Id. at 720.

[61] Recall that this is the *Schmuck* test for whether or not an offense is "necessarily included" in another offense, making it a lesser-included offense. *See id.* at 716.

[62] *See Foster II*, 40 M.J. at 143.

[63] *See id*.

[64] The government elected to prosecute TSgt Foster with a forcible sodomy in this case, requiring that the government prove "unnatural carnal copulation." *See* UCMJ art. 125 (2008). The Air Force court speculated, "Based on the testimony of Amn KLT and the questions of the court members, it appears they were not convinced beyond a reasonable doubt that appellant had 'physically penetrated the sexual organs of Amn KLT with his mouth' and, therefore, they could not find him guilty of sodomy." *See Foster I*, 34 M.J. 1264, 1265 (A.F.C.M.R. 1992). So, the opportunity for a lesser-included offense in *Foster* did not belong to the accused at all, but to the government when it apparently failed in its proof. Indeed, the CMA in *Foster* acknowledges "the Government's sloppy handling of the case." *Foster II*, 40 M.J. at 145 n.5.

[65] *Foster II*, 40 M.J. at 143.

This conclusory holding seems to implicitly reject the *Schmuck* elements test as applied in the specific field of Article 134 jurisprudence. Indeed, the *Foster* court's explanation cements this observation: "Thus we hold that an offense arising under the general article may, *depending on the facts of the case*, stand either as a greater or lesser offense of an offense arising under an enumerated article."[66] The practitioner should understand that the *Foster* opinion, while claiming to follow *Teters* and *Schmuck*, in fact rejects the statutory elements test of both in the case of Article 134 lesser-included offenses, and applies the same old case-by-case, factual analysis the court purports to reject.

The *Foster* court compounds its nonsensical approach with a virtual concession that it has unfaithfully applied a statutory elements test. *Foster* recommends as "sound practice" that the government alternatively plead both the greater offense and the lesser offense.[67] The CMA presumably recommends the practice of pleading both the greater and lesser offenses on the charge sheet out of notice concerns. Recall that as a matter of practice, the Rules for Courts-Martial (RCM) direct military justice practitioners to avoid pleading both the greater and lesser offenses.[68] Recall also that Article 79, because of the statutory elements test and the rationale in *Schmuck*, presumes that the accused is on notice of lesser-included offenses.[69] Again, *Foster* offers lesser-included offense language that runs directly counter to lesser-included offense doctrine.

Two other notes about the *Foster* opinion raise equally vexing questions about the CMA's abrogation of its stewardship role vis-à-vis Article 134 and obfuscation relative to the offense-relation doctrines. First, it bears repeating that *Foster*, like *Schmuck*, was not simply establishing some elements test anew. Instead, both opinions were rejecting lines of precedent that employed ad hoc and indeterminate "inherent relationship"[70] and "fairly embraced" tests.[71] The *Foster* court nonetheless cites a concurring opinion in a case decided under the old fairly embraced test as its authority to declare Article 134 a lesser-included offense of all enumerated offenses.[72]

Second, as it unleashed Article 134 as the lesser-included offense of last resort, the CMA did not account for the preemption doctrine. The CMA expressly invoked the history and relationship between Article 134 and the enumerated Articles in support of its position, but mischaracterized both. The CMA points to the Winthrop hornbook for the proposition that all common-law felonies were, under the Articles of War, prosecuted under the general article.[73] The CMA irresponsibly relies on Winthrop in this case because it implies that using the general article as a lesser-included offense is permissible because "we've always done it that way."

In truth, the legislative history of the UCMJ supports the exact opposite conclusion. In his testimony before Congress on the UCMJ, Professor Morgan, one of the drafters of the UCMJ, explained that the general article was "too vague and indefinite" to continue to use for common law crimes.[74] One of the goals of the UCMJ was to define common law crimes in the enumerated offenses, "leaving the general article pretty much only for military offenses."[75] The case that essentially memorialized the preemption doctrine, *United States v. Norris*, cites this legislative history in setting aside a conviction under Article 134 for a wrongful taking instead of prosecuting a larceny under Article 121.[76] The *Norris* court explained, "We

---

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

[67] *See id*.

[68] *See* MCM, *supra* note 17, R.C.M. 307(c)(4) discussion.

[69] *See id.* Pt. IV, ¶ 3b(1).

[70] *See* Schmuck v. United States, 489 U.S. 705, 708–09 (1989) (explaining, then rejecting the "inherent relationship" test for lesser-included offenses).

[71] *See* United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983) (explaining the "fairly embraced" test, which relied, in part, on the "factual allegations of the . . . offense and established by evidence introduced at trial."). The Air Force Court of Military Review relied, in part, on the holding of United States v. Duggan, 15 C.M.R. 396, 399–400 (C.M.A. 1954), *Baker*'s precedent for the "fairly-embraced" test. *See generally Foster I*, 34 M.J. 1264, 1267 (A.F.C.M.R. 1992) (citing *Duggan*); *see also* Lieutenant Colonel Michael J. Breslin & Lieutenant Colonel LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99 (1998) (charting the history of the development of the doctrine of multiplicity in the military).

[72] *See Foster II*, 40 M.J. at 143 (citing United States v. Doss, 15 M.J. 409, 415 (C.M.A. 1983) (Cook, J., concurring)).

[73] *See id.* (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 720–21 (2d ed. 1920 Reprint)).

[74] *See Hearings Before S. Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong. 37, 47 (1949) (statement of Prof. Morgan).

[75] *See id*.

[76] *See* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953) (citing *Hearings Before S. Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong. 37, 47 (statement of Prof. Morgan)).

cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."[77] The legislative history of the UCMJ and the preemption doctrine—both ignored by *Foster*—would seem to mandate a different conclusion in *Foster*.

The CAAF took another dramatic step toward liberalizing the use of Article 134 as a lesser-included offense nearly six years later in *United States v. Sapp*. Senior Airman (SrA) Sapp pled guilty to, and a general court-martial convicted him of, possessing child pornography in violation of Article 134, clause 3.[78] During the providence inquiry, the military judge inquired as to the service-discrediting nature of possessing child pornography and SrA Sapp admitted that possessing child pornography was service-discrediting.[79] The military judge accepted the accused's plea to the clause 3 offense.

On appeal, the Air Force Court of Criminal Appeals determined that the military judge did not adequately establish that SrA Sapp's child pornography appeared in three "matters" as required by the statute.[80] The court set aside SrA Sapp's clause 3 conviction, but affirmed a clause 2 conviction as a lesser-included offense of the failed clause 3 offense.[81] The CAAF affirmed the Air Force court because the military judge inquired about and SrA Sapp admitted the service-discrediting element during the providence inquiry.[82]

Again in the *Sapp* opinion, the CAAF makes a mess of offense-relation doctrines by forcing the expansive use of Article 134. In affirming the clause 2 conviction as a lesser-included offense of the failed clause 3 conviction,[83] the CAAF curiously asserts that neither is really a separate offense, but merely "alternative ways of proving the criminal nature of the charged misconduct."[84] According to the CAAF, these alternative ways of proving criminality are nonetheless composed of distinct elements,[85] leading to the question: what is an alternative way of proving criminality, if not an offense? Elements define offenses and the CAAF cites no authority for creating the alternative way to defining criminal misconduct.

Additionally, the CAAF expands the use of Article 134, clauses 1 and 2 as lesser-included offenses to Articles 80 through 132 to include Article 134, clause 3 without explanation. The CAAF concedes that the clause 3 specification did not require the government to prove the service-discrediting nature of the conduct.[86] The CAAF nonetheless relies on *Foster* for the proposition that clauses 1 and 2 are implicit in a clause 3 offense, explaining, "we noted that the elements of prejudice to good order and discipline and discredit to the armed forces are implicit in every enumerated offense under the Uniform Code of Military Justice."[87] Again, the CAAF merely concludes and does not explain what makes federal crimes charged under clause 3 so similar to the enumerated offenses charged under Articles 80 through 132 that the elements of prejudice and discredit are implicit in the entirety of Title 18.

Like the *Foster* court, the *Sapp* court appears to sense it has overreached and piles on more analysis attempting to explain the expansion of Article 134 jurisprudence. Like *Foster*, *Sapp*'s attempt to clarify only obfuscates further. Rather than explaining and applying the *Foster* elements test to determine a lesser-included offense, the *Sapp* court cites *United States v. Bivins*, a "closely-related offense" doctrine case, to support its conclusion that clause 2 is a lesser-included offense

---

[77] *Id.*

[78] *See* United States v. Sapp, 53 M.J. 90, 90 (2000). The government relied on the Federal Child Pornography Prevention Act, 18 U.S.C. § 2252 (2000). *Id.*

[79] *See Sapp*, 53 M.J. at 91.

[80] *See id.*

[81] *See id.*

[82] *See id.* at 92.

[83] *See id.* at 92 n.2.

[84] *See id.* at 92.

[85] *See generally Sapp*, 53 M.J. 90 (describing the "elements" as they appear in the federal statute for clause 3 and the "elements" of service-discrediting and prejudice to good order and discipline).

[86] *See id.* at 92.

[87] *See id.*

of clause 3.[88] So, instead of laying the statutory elements of the clause 3 offense—specifically, the elements of the Federal Child Pornography Prevention Act (CPPA)—next to the statutory elements of Article 134, clause 2, the CAAF applies the closely-related offense doctrine's totality of the circumstances test.[89] Again, the confusion that results from conflating the two doctrines grows from stretching the use of Article 134 as a lesser-included offense where errors at trial cause the greater offense to fail.

Part IV: *United States v. Medina*: The Liberalization of Article 134's Role Revisited

Following *Foster* and *Sapp*, a sizable line of cases has developed where the CAAF has remedied problems at trial by affirming convictions on the lesser-included offenses of Article 134, clause 1 or 2.[90] The practice of using Article 134 as the lesser-included offense of last resort has infested trial practice, as well. The case of *United States v. Mason* illustrates just how much the conception of Article 134's role in the military justice system has changed since the Supreme Court considered it in *Parker v. Levy*.

In *Mason*, like *Sapp*, the military judge led the accused through a providence inquiry on an Article 134, clause 3 child pornography offense.[91] After advising the accused of the elements of the Federal Child Pornography Prevention Act, the military judge added an element:

> Fourth—and I instruct on this only in this case if it is determined that your plea is improvident on the charged offense, since the crime has been charged as an other crime or offense not capital—such conduct was of a nature to bring discredit upon the armed forces or was to the conduct [sic] of good order and discipline in the armed forces.
>
> . . . .
>
> Now, it's my position with the charged offense as it is charged in Charge III, that is not an element of the charged offense. However, in the abundance of caution, I add that as an element in case for some reason the appellate courts, if this case goes to the appeals system, determines your plea to the . . . [CPPA] charge is improvident, it would find that it was service discrediting or armed forces discrediting. That is why I have added that element.[92]

Gone from the military judge's explanation are the ideas supporting the constitutionality of Article 134 in *Parker v. Levy*. In *Mason*, the prohibition against conduct that is prejudicial to good order and discipline does not operate as the commander's flexible tool to discipline misconduct he could not anticipate but nonetheless impacts his unit. Instead, the military judge sua sponte adds an element not found in the statute or pleadings of the charged offense for the express purpose of saving the case on appeal should something go wrong.

With the state of Article 134 jurisprudence essentially captured in *Mason*, this term the CAAF considered *United States v. Medina*.[93] A general court-martial convicted Staff Sergeant Medina, like Sapp and Mason, of a clause 3 child pornography offense.[94] Like Sapp and Mason, Medina admitted all elements of the CPPA violation during a providence inquiry pursuant to his guilty plea.[95] Like the military judges in *Sapp* and *Mason*, the military judge in *Medina* "gratuitously added" an additional element of service-discrediting conduct to the providence inquiry.[96] The Army Court of Criminal Appeals set

---

[88] *See id.*

[89] *See id.*

[90] *See, e.g.*, United States v. Martinelli, 62 M.J. 52 (2005); United States v. Reeves, 62 M.J. 88 (2005); United States v. Mason, 60 M.J. 15 (2004).

[91] *Mason*, 60 M.J. at 16.

[92] *Id.* at 17–18.

[93] United States v. Medina, 66 M.J. 21 (2008).

[94] *Id.* at 22.

[95] *See id.* at 23.

[96] *See id.*

aside Medina's clause 3 conviction but, following *Sapp* and *Mason*, nonetheless affirmed a clause 2 conviction as a lesser-included offense to clause 3.[97] The CAAF's subsequent grant on *Medina* seemed unremarkable given the familiar procedural history of the case.

The CAAF made *Medina* remarkable, however, when it set aside Medina's conviction of the Article 134, clause 2 lesser-included offense. *Medina* represents the first check on the expansive field of Article 134 jurisprudence in recent memory. Flowing from this more conservative approach to Article 134's role in the military justice system, the *Medina* court's analysis does much to restore clarity to the offense-relation doctrines.

To start, the CAAF's certified question in *Medina* asks whether or not the Army Court of Criminal Appeals, when it changed Medina's clause 3 conviction into a clause 2 conviction, added an element to the greater clause 3 offense in contravention of *Schmuck*.[98] The question focuses exclusively on the doctrine of lesser-included offenses and the *Medina* court handles its analysis accordingly. *Medina* applies a pure, statutory elements test, expressly invoking *Schmuck*'s language that rejects a case-by-case, evidence-adduced-at-trial approach.[99] The *Medina* court holds that the elements of Article 134, clauses 1 and 2 are not "textually contained" in the CPPA.[100]

The CAAF confronts its demons when it completes the application of its elements test by asking whether any offense arising under clause 3 implicitly includes the elements of Article 134, clauses 1 and 2.[101] The *Medina* court acknowledges that *Sapp* "suggested" prejudice to good order and discipline and service-discrediting were implicit in clause 3 offenses.[102] The *Medina* court quickly distances itself from *Sapp*, however, acknowledging *Sapp*'s conflated analysis of the doctrine of lesser-included offenses and the closely-related offenses doctrine (discussed above).[103]

After distancing itself from *Sapp*'s conclusion that the elements of clauses 1 and 2 are implicit in clause 3 offenses, *Medina* considers arguments strongly against the *Sapp* holding. For example, a related line of CAAF cases holds that violations of state law, assimilated through clause 3, are not *per se* service-discrediting.[104] Additionally, the CAAF finds, "there is no indication that Congress codified any of the numerous offenses contained in the United States Code with the concepts of service discrediting conduct or good order in the military in mind."[105] These two arguments, taken with *Medina*'s textual analysis, allow the *Medina* court ultimately to hold that clauses 1 and 2 are not necessarily lesser-included offenses of clause 3.[106]

Through this holding, *Medina* accomplishes two important bits of house-cleaning within the military justice system. The CAAF, for the first time in over a decade, constrains the role of Article 134 in the military justice system. For the first time since Article 134's transition from commander's tool to safety net, the CAAF considers the very real ramifications for fair notice in the field of Article 134 jurisprudence, as the doctrine of lesser-included offenses dictates.[107] The *Medina* court casts its opinion not as one dealing with the factual sufficiency of Medina's plea, but as one considering the knowing and voluntary nature of the plea.[108] As such, the *Medina* court expresses concern about whether Medina understood that he did not have to admit service discrediting as an element of the clause 3 offense of which the court-martial convicted him.[109]

---

[97] *See* United States v. Medina, No. 20040327 (Army Ct. Crim. App. Aug. 31, 2006).

[98] *See Medina*, 66 M.J. at 22.

[99] *See id*. at 24–25.

[100] *See id*. at 25.

[101] *See id*.

[102] *See id*.

[103] *See id*.

[104] *See id*. at 26.

[105] *See id*.

[106] *See id*.

[107] *See id*.

[108] *See id*. at 27.

[109] *See id*.

Likewise, the record did not demonstrate that the accused understood the implications of pleading the additional element on appeal[110]—namely, that he, himself, was securing the clause 2 safety net underneath the government's clause 3 case.

The other direct consequence of *Medina* pertains to the offense-relation doctrines. By discontinuing the strained analysis in cases like *Foster* and *Sapp* that allowed Article 134 to become the lesser-included offense of last resort, the CAAF restores some clarity to offense-relations doctrines. The *Medina* opinion suggests that CAAF determined, as a threshold matter, that the same concerns about fair notice that informed the Supreme Court's decision in *Parker v. Levy* would feature predominately in *Medina*. As a result, the *Medina* court was free to apply a true elements test and signal to the field that it would no longer "conflate" the doctrine of lesser-included offenses with other offense-relation doctrines like the closely-related offenses doctrine.[111]

Finally, while *Medina* expressly upholds the *Sapp* line of cases,[112] the CAAF intimates that, in the future, it will only recognize clauses 1 and 2 as lesser-included offenses of clause 3 if the government puts the clause 1 or 2 language in the pleadings.[113] Of course, adding the clause 1 and 2 language to a clause 3 specification arguably converts the specification into a clause 1 or 2 offense and moots the whole lesser-included offense question. Regardless, where trial counsel fear a failure of proof on a clause 3 offense, the *Medina* opinion offers a "best practice" to remove a given specification from litigation over lesser-included offenses.[114]

Part V: Implications of *United States v. Medina* for Military Justice Practice

Medina is more than a "put it in the pleadings" case. The analysis and holding, taken together, raise an interesting question for defense counsel and military judges as well. If the government fails to allege clause 1 or 2 language in a clause 3 specification, it seems that *Medina* militates against permitting a military judge to "gratuitously" add the clause 1 or 2 language during a providence inquiry. If clauses 1 or 2 are "not inherently a lesser-included offense," as *Medina* holds, then seemingly a defense counsel would properly object to the military judge adding the clause 1 or 2 language to a providence inquiry. Strategically, this approach raises other concerns—such as the government simply withdrawing and re-preferring the questionable specification—but *Medina* seems to support the defense counsel's objection. Likewise, evidence or argument at a contested court-martial that goes to the elements of prejudice to good order and discipline or the service-discrediting nature of misconduct should receive objections if the government fails to plead clause 1 or 2 language.

The *Medina* opinion expressly limits itself to the relationship between clauses 1 and 2 to clause 3, entirely internal to Article 134.[115] The holding and analysis clearly has implications both for the relationship between Article 134, clauses 1 and 2, and the enumerated offenses and for other offense-relation doctrines. First, consider what the *Medina* opinion forecasts for the future viability of *Foster* and its holding that Articles 80 through 132 are per se prejudicial to good order and discipline or service-discrediting. If the CAAF grants review on a case similar to *Foster* and applies the same, rigorous analysis of *Medina*, one might predict that the court will walk away from *Foster* just as it walked away from *Sapp* in *Medina*. Specifically, when the CAAF conducts its textual analysis of Articles 80 through 132, it will obviously conclude that

---

[110] *See id*.

[111] *See id*. at 26.

[112] *See id*. at 27.

[113] *See id*. at 26. The CAAF explains, "[W]e conclude that clauses 1 and 2 are not necessarily lesser included offenses of offenses alleged under clause 3, although they may be, *depending on the drafting of the specification*." *Id*. (emphasis added). The CAAF, in three decisions without published opinions, has set aside three convictions based on its rationale in *Medina* and the absence of clause 1 or 2 language in the pleadings. *See* United States v. Donnelly, No. 07-0148/AR, 2008 CAAF LEXIS 460 (Apr. 16, 2008); United States v. Frank, No. 07-0363/NA, 2008 CAAF LEXIS 475 (Apr. 16, 2008); United States v. Bolsins, No. 07-0553/NA, 2008 CAAF LEXIS 476 (Apr. 16, 2008). In a fourth case, the CAAF analyzed an Article 134 clause 1 and 2 specification as a lesser-included offense to an Article 134 clause 3 offense because, in part, the specification had been pled by incorporating the clause 1 and 2 language. *See* United States v. Navrestad, 66 M.J. 262 (2008).

[114] Counsel should note that MCM states, "A specification alleging a violation of Article 134 need not expressly allege that the conduct was a 'disorder or neglect," [or] that it was 'of a nature to bring discredit upon the armed forces . . . .'" *See* MCM, *supra* note 17, Pt. IV, ¶ 60c(6)(a). Given that the clause 1 or 2 language establishes the criminality of the conduct in a clause 1 or 2 offense, however, the *Medina* best practice of alleging the clause 1 or 2 element should be followed. *See generally* United States v. Sell, 11 C.M.R. 202 (C.M.A. 1953) (holding that a legally sufficient specification must: (1) allege all elements of the offense, (2) provide notice, and (3) give sufficient facts to prevent re-prosecution).

[115] *See Medina*, 66 M.J. at 25.

prejudice to good order and discipline and service-discrediting are not textually included in the enumerated offenses.[116] Continuing, *Medina* considered whether or not the clause 1 and 2 elements were implicitly included in clause 3. The *Foster* court essentially held that Article 134 clauses 1 and 2 were implicit in Articles 80 through 132, but on this point, *Medina* again signals a shift.

Recall in the discussion above that the preemption doctrine prohibits the use of Article 134 to prosecute offenses already made criminal by Articles 80 through 132. It is difficult to reconcile the preemption doctrine with the holding in *Foster* that Article 134 is a lesser-included offense to all Article 80 through 132 misconduct. The *Medina* court's willingness to cast doubt on the rationale of *Sapp* and its conflation of the doctrine of lesser-included offenses and the closely related offenses doctrine signals a potential shift in the context of *Foster* as well. Specifically, post-*Medina*, one might anticipate a CAAF court more receptive to an argument that the *Norris* court's holding—and not the *Foster* holding—should govern any future cases on point. In other words, the CAAF should not grant the government authority to eliminate elements from Article 80 through 132 offenses and try the remaining elements as an Article 134 offense.

In the end, *Medina* represents precisely the type of stewardship the CAAF can and should provide in the field of Article 134 jurisprudence. Allowing Article 134 to previously devolve into the ultimate safety net for the government—to the point where military judges explain to the accused that the only reason they include a clause 1 or 2 element is to gird the accused's conviction from a successful appeal—gives life to the accusation that Article 134 is "the Devil's Article."[117] The good news from *Medina* is that military justice practitioners may look forward to much cleaner practice both in the realm of article 134 and the breadth of offense-relation doctrines.

[116] Indeed, the *Foster* court conceded this point. *See Foster II*, 40 M.J. 140, 143 (C.M.A. 1994).

[117] Major General Kenneth J. Hodson, *The Manual for Courts-Martial*, 57 MIL. L. REV. 1, 12 (1972).