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Lore of the Corps

Articles

Book Reviews

Lore of the Corps

From Graduate Class Student to Army Major General to King of Okpe: The Remarkable Career of Felix A. Mujakperuo of Nigeria

Fred L. Borch
Regimental Historian & Archivist

It will come as no surprise to judge advocates that international officers attending the Basic and Graduate Courses often excel as students. Israeli Captain Gal Asael, for example, was the number one student in the 56th Graduate Course. Similarly, the high caliber of these international officers means that they often return to their home countries and go on to have stellar careers. For example, Major Michael D. "Mike" Conway attended the 124th Basic Course; today, he is a major general and the Judge Advocate General of the British Army.

But arguably the most remarkable international officer to have studied here is Felix Mujakperuo of Nigeria. He graduated from the 36th Graduate Course in 1988, returned home, and subsequently retired as a major general in the Nigerian Army. In 2006, Mujakperuo reached even loftier rank when he was crowned Orhue I of the Okpe Kingdom in Nigeria.[1] No one in our Corps history has previously achieved the title of "His Royal Majesty," and this alone makes the story of Felix A. Mujakperuo worth telling.

The Orodje of Okpe Kingdom, His Royal Majesty, Major General Felix A. Mujakeruo (retired)

In July 1987, then Lieutenant Colonel (LTC) Mujakperuo arrived in Charlottesville to attend the 36th Graduate Class. A soft-spoken, distinguished-looking officer, Mujakperuo had been born in 1946 and, after graduating from Urhobo College, had joined the Nigerian Defense Academy as an "Officer Cadet" in October 1968. In March 1971, he graduated as "Best All-Round Cadet" and was commissioned in the Infantry. Mujakperuo subsequently served as a company commander (1971–1973), instructor at the Nigerian Army's Infantry School (1976–1978), and battalion commander (1978–1986). While in this last assignment, he had also been a student at the University of Lagos and the Nigerian Law School, from which he obtained law degrees in 1985 and 1986, respectively. Now that he was a lawyer, it made sense for the Nigerian Army to appoint him as the Director, Army Legal Services. He had served in that assignment for a year when he arrived in Charlottesville in 1987 to attend the year-long Graduate Course.[2]

According to other biographical details that LTC Mujakperuo submitted to The Judge Advocate General's School (TJAGSA), he was married and had five children (three daughters and two sons). Additionally, this was not the first time that he had attended a U.S. Army school; Mujakperuo had previously graduated from Fort McClellan's Military Police Officer Advanced Course in 1986.

If his distinguished educational and military background were not sufficient to set LTC Mujakperuo apart from his classmates, his remarks during the first week of class, when he introduced himself in a five-minute presentation were unforgettable. After talking briefly about his family and his career in the Nigerian Army, LTC Mujakperuo told his classmates that one of the greatest challenges of his career had occurred recently. As he explained, there had been an attempted coup against the government and, after those responsible for the rebellion had been apprehended, tried, and convicted, it had been his responsibility to see that the death sentences imposed against these coup-plotters were carried out. According to Mujakperuo, this assignment had been made even more difficult because some of those who were executed had been his friends. As then–Captain (now Colonel (Retired)) Richard E. "Dick" Gordon remembers, the matter-of-fact manner in which LTC Mujakperuo related this story only made it more shocking to his fellow Graduate Course students.[3]

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[1] *See* OKPENATION, ORHUE1, *available at* www.okpenation.org/doc/ORHUE%I.pdf (last visited Nov. 14, 2014).

[2] THE JUDGE ADVOCATE GENERAL'S SCHOOL, 36TH GRADUATE CLASS DIRECTORY 42 (1987) [hereinafter 36TH GRADUATE COURSE DIRECTORY] (entry for Felix Mujakperuo).

[3] E-mail from Colonel (Retired) Richard E. Gordon, to author (Oct. 1, 2014, 1114 A.M.) (on file with author). In addition to Colonel Gordon, who had a distinguished career as an Army lawyer, another member of the 36th Graduate Class who excelled after graduating was Malinda E. Dunn, who became the first active component female brigadier general in the history of the Corps. Brigadier General Dunn retired in 2009.

When LTC Mujaperuo graduated on May 20, 1988, he received the newly authorized LL.M. in Military Law, setting him apart from all other international student officers who had previously attended the Graduate Class.[4] He then returned to Nigeria, where he resumed his military career.

More than ten years later, in July 1999, now Major General Mujakperuo was in Freetown, Sierra Leone, as part of the United Nations Mission in Sierra Leone (USOMSIL). He was the Commander of the Military Observer Group of the Economic Community (ECOMOG) of West African States. The United Nations Security Council had established the UNOMSIL as a peacekeeping mission in June 1998. A rebellion against the Sierra Leone government had resulted in much bloodshed and damage to civilian property, and the ECOMOG, operating alongside UNOMSIL, was attempting to restore a semblance of order.[5]

UN Secretary-General Kofi Annan (2d from left) visits with Major General Felix A. Mujakperuo (3d from left) in Freetown, Sierra Leone, 8 July 1999. Mujakperuo was the Commander, Military Observer Group, Economic Community of West African States

After retiring from the Army in 1999, Mujakperuo apparently began working as a senior partner in a law firm in Lagos. His life took a new direction in 2008, however, when he was selected by the Orhue Ruling House Chieftaincy Selection Committee to be the next king of the Okpe Kingdom.[6] The previous king, His Royal Majesty Orhoro I, had died in early 2004 and, to avoid any "controversy" about who would be the next king, the Supreme Council of Okpe had "empanelled a committee . . . to examine the issue [of royal succession] and advise accordingly."[7] The end result was that, on July 8, 2008, Felix A. Mujakperuo was elected as Orhue I, the Orodje (King) of the Okpe Kingdom.[8]

He was officially installed on Saturday, July 29, 2006, in Orerokpe, the headquarters of the Okpe Kingdom. To this day, Mujakperuo continues his reign as His Royal Majesty Orhue I.[9]

Certainly no one would have contemplated that when LTC Mujakperuo was studying Government Information Practices, Fiscal Law, and Legal Assistance (among other topics) in the 36th Graduate Class that he would one day be a monarch ruling a kingdom. On the other hand, perhaps the LL.M. he was awarded in 1988 was the key to his future success.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

[4] In addition to LTC Mujakperuo, two other international students were the recipients of the first LL.M.s: Major Sadi Cayci, Turkish Army and Major Seong Jae Lee, Korean Army. 36TH GRADUATE COURSE DIRECTORY, *supra* note 2.

[5] UNITED NATIONS MISSION IN SIERRA LEONE—BACKGROUND, *available at* http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html (last visited Nov. 13, 2014).

[6] The Opke kingdom is located in Delta State, Nigeria. For more on the Okpe kingdom, see ISAAC S. MEBITAGHAN, A BRIEF HISTORY OF OKPE KINGDOM (2001).

[7] OKPENATION, *supra* note 1.

[8] *Id.*

[9] *Id.*

"Where's the Money Lebowski?"[1]—Charging Credit and Debit Card Larcenies Under Article 121, UCMJ

Major Benjamin M. Owens-Filice[*]

This is a very complicated case, Maude. You know, a lotta ins, a lotta outs, a lotta what-have-yous. And, uh, a lotta strands to keep in my head, man. Lotta strands in old Duder's head.[2]

I. Introduction

The facts of the case are these: Chief Warrant Officer Four (CW4) Neil S. Lubasky was detailed as Ms. Mary Shirley's Casualty Assistance Officer following the death of her husband.[3] He quickly gained Ms. Shirley's trust. When his official duties ended, he offered to continue assisting Ms. Shirley with her affairs; she was seventy-seven years old.[4] To facilitate his management of her affairs, CW4 Lubasky added himself to Ms. Shirley's debit account and gained possession of her credit cards.[5] He bought her groceries, brought her cash, and paid her bills.[6]

As they say, the opportunity makes the thief.[7] While Ms. Shirley lay in a nursing home, CW4 Lubasky used her credit and debit cards to steal from her.[8] He used her credit card to buy things for himself. He used her debit card to buy merchandise. He withdrew cash from her debit account and obtained cash advances from her credit card accounts.[9] He took vacations with his family and used her accounts to pay for their incidentals—CW4 Lubasky bilked Ms. Shirley of her savings.

When his villainous conduct was discovered,[10] CW4 Lubasky was charged with and convicted of, among other crimes, fourteen specifications of larceny.[11] He was initially sentenced to confinement, total forfeitures, and dismissal;[12] however, that sentence would later be markedly reduced. In every specification, CW4 Lubasky was charged with stealing *money* that was the property of *Ms. Shirley*.[13] Ms. Shirley died before the case reached the U.S. Court of Appeals for the Armed Forces (CAAF). She would never find out that, according to CAAF, it was not actually her money.[14]

Nine years after the trial, CAAF set aside the findings of seven larceny specifications—half of the specifications of which CW4 Lubasky was convicted.[15] The CAAF held that Ms. Shirley did not "own" the property that CW4 Lubasky stole: the bank did.[16] Consequently, CAAF returned the case for a sentence rehearing on the remaining thefts which only amounted to $2,052, a fraction of the approximately $68,000 he was originally convicted of stealing.[17] Thus,

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[*] Judge Advocate, U.S. Army. Presently assigned as Chief, Federal Litigation Division, Joint Base Lewis-McChord, Washington. J.D., 2005, The University of Michigan Law School; B.A., 2002, University of Portland. This article was submitted in partial completion of the Master of Laws requirements of the 62nd Judge Advocate Officer Graduate Course.

[1] THE BIG LEBOWSKI (Polygram Filmed Entertainment & Working Title Films 1998).

[2] *Id.*

[3] United States v. Lubasky, 68 M.J. 260, 262 (C.A.A.F. 2010).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] BRAINY QUOTE, http://brainquote.com/quotes/quotes/f/franncisbac148956.html (last visited Nov. 12, 2014) (quote attributed to Francis Bacon).

[8] *Lubasky*, 68 M.J. at 262.

[9] *Id.*

[10] A "fraud alert" service contacted Ms. Shirley, alerting her to the unusual purchases being drawn on her bank account. *Id.* at 263.

[11] Chief Warrant Officer Four (CW4) Lubasky was also convicted of a fifteenth specification of larceny, alleging CW4 Lubasky opened a money market account on Ms. Shirley's behalf, and one specification of conduct unbecoming an officer, alleging CW4 Lubasky dishonorably took out life insurance on Ms. Shirley and named himself as the sole beneficiary. United States v. Lubasky, No. 20020924, 2006 WL 6625281, at *1 (A. Ct. Crim. App. Jan. 31, 2006) (mem. op.). Pursuant to its power to review cases for legal and factual sufficiency, the Army Court of Criminal Appeals set aside the findings of guilty for the money-market larceny specification, *id.* at *3 ("Ms. Shirley denied authorizing appellant to open the money market account. She testified that appellant must have duped her into signing the paperwork necessary to establish the account by covering up the entire document except for the space in which she signed. After examining the membership application and signature card pertaining to the money market account, we have misgivings concerning the feasibility of the actions described by Ms. Shirley . . . . As such, we will set aside the finding of guilty as to [that specification]."), and it also set aside the finding for the conduct unbecoming an officer specification, *id.* at *2 ("Mrs. Shirley admitted that around the same time the insurance policy was purchased, she prepared a holographic will wherein she designated appellant as the trustee of her estate and named him as a beneficiary of certain property. Under these circumstances, and 'recognizing that the trial court saw and heard the witnesses,' UCMJ art. 66(c), we are not persuaded beyond a reasonable doubt that appellant 'wrongfully and dishonorably name[d] himself as the sole beneficiary on a certain insurance policy on the life of Mrs. Mary Shirley.'").

[12] *Id.* at 262.

[13] *Lubasky*, 68 M.J. at 263.

[14] *Id.*

[15] *Id.* at 265.

[16] *Id.* at 263.

[17] *Id.* at 265.

after two sentence rehearings, the convening authority approved a sentence that included minimal confinement and forfeitures—CW4 Lubasky was not dismissed from the service.[18]

If nothing else, *United States v. Lubasky* is a cautionary tale about drafting larceny specifications. But more importantly, *Lubasky* illustrates the difficulty of determining the proper owner, property, and means of larceny committed through the wrongful use of credit cards and debit cards. In order to understand CAAF's conclusion that Ms. Shirley was not the owner of the money stolen through the wrongful use of her credit cards, it is necessary to understand not only the various, technical forms of larceny, but also the legal relationship between a cardholder and his or her bank, and the way in which a credit or debit card transaction is executed.

First, this article provides a factual foundation for understanding a credit or debit card transaction. Part II discusses the processing steps that occur in both a point of sale (POS) transaction and an automated teller machine (ATM) transaction. Additionally, a general overview of the emerging area of virtual currency, e.g., Bitcoin, is provided.

Next, in order to provide a legal background, Part III discusses five primary legal principles that are generally applicable in every credit or debit card larceny. This discussion begins with an overview of the primary theories of larceny applicable in a credit or debit card transaction: false pretenses and embezzlement. Next, the discussion highlights that Article 121, Uniform Code of Military Justice (UCMJ),[19] is designed to only proscribe thefts involving tangible property. From there, it is necessary to understand the relationship between an account holder and his and her financial institution, because this creditor–debtor relationship informs the analysis as to who is in possession of the property that is the object of the larceny. Particularly because of the importance in a larceny case of ascertaining "ownership," this is determined in light of the character of the property, the legal relationship of the parties, and the legal theory of larceny. Part III concludes by highlighting problems that may arise due to the existence of an agency relationship between the thief and the account holder.

Finally, this article critically examines the legal theories available pursuant to the UCMJ[20] for prosecuting and defending against a theft accomplished by wrongfully using a credit or debit card. Part IV discusses the available theories of larceny under Article 121, applying the legal principles previously discussed, that may be employed in a credit or debit card larceny. What is essentially one course of conduct, can give rise to numerous charging options pursuant to Article 121, and each option possesses strengths for the government as well as weaknesses that can be exploited by the defense. In deciding on a particular theory of larceny, trial counsel should consider a variety of factors,[21] each of which will illuminate the merits of charging individual theories of larceny available in a given set of circumstances. Although attention will be given to factors that will inform a discretionary decision of which theory *should* be charged, the primary focus of the discussion in this article is on which theories of larceny are currently legally sufficient under the UCMJ, i.e., which theories *could* be charged. This analysis is important for defense counsel as well, as they should seek to preclude consideration of improper theories of the alleged crime.

II. The Anatomy of a Credit or Debit Card Transaction

The swipe is just the beginning. In every case, the processing of a credit or debit card transaction involves numerous parties and can take days before it is ultimately completed. In a POS transaction, the customer runs the card through the merchant's card reader. If it is a debit card transaction, then the customer enters his or her personal identification number. In both credit card and debit card transactions, the card reader then sends data to the merchant's bank which requests approval from the cardholder's bank (the card-issuing bank). The card-issuing bank grants approval, and the merchant's bank sends approval to the card reader. The merchant then approves the sale and delivers the goods to the customer.[22]

In credit card transactions, at some point after the sale, the merchant sends a record of transactions to its bank for processing. The merchant's bank then requests payment from the card-issuing bank. Finally, the card-issuing bank transfers money to the merchant's bank, where it is deposited into the merchant's account, less processing fees. In debit card transactions, regional POS or ATM networks determine the net positions of the participating financial institutions, less processing fees, and settle their positions using the Federal Reserve's Automated Clearing House (ACH) network.[23] That completes the POS transaction.

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[18] *See* United States v. Lubasky, No. 20020924, 2011 WL 4701741, at *1 (A. Ct. Crim. App. Sep. 27, 2011) (summ. disp.) ("The convening authority approved only so much of the sentence as provided for confinement for 22 months, forfeiture of $5,811.00 pay per month for 22 months, followed by a forfeiture of $3,835.00 pay per month for 86 months.").

[19] UCMJ art. 121 (2012).

[20] 10 U.S.C. §§ 801–946 (2012).

[21] Those factors include the availability of witnesses and evidence, the admissibility of evidence, simplicity of proof, providing adequate notice to the accused, accurately describing the criminality of the accused's conduct, sentencing considerations, and factual sufficiency on appeal.

[22] THE FED. FIN. INSTS. EXAMINATION COUNCIL, RETAIL PAYMENT SYSTEMS, IT EXAMINATION HANDBOOK (2010), *available at* http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems.aspx.

[23] *Id.*

In an ATM transaction, the bank offering the ATM services[24] requests approval from the card-issuing bank. Once approval is granted, the ATM provides the currency. Similar to a debit card POS transaction, regional ATM networks later determine the net positions of the participating financial institutions, less processing fees, and settle their positions using the ACH network—which completes the ATM transaction.

From a transactional standpoint, the use of a government card works in the same manner as a credit card.[25] Take the Government Purchase Card (GPC) program for example.[26] The United States Government, through the Government Services Agency, has contracted with several banks to provide banking services.[27] Thus, the government, through its agents, is the account holder in a GPC card purchase, and the card-issuing bank is the GPC program bank. In a GPC card transaction, the GPC card is processed by a merchant or ATM, and undergoes the same transactional process as described above. In other words, approval is requested by intermediate financial institutions and ultimately approved by the GPC program bank. The transaction is completed when the GPC program bank later transfers money to the merchant's account.[28]

When a credit or debit card is used to make a purchase via the internet, the processing may be somewhat different. For example, if an internet merchant employs PayPal, a payment processing website, then the cardholder's credit or debit card information is processed by software developed by PayPal. Using special algorithms, PayPal determines the likelihood of sufficient funds in the cardholder's account. If approved, then PayPal transfers its own money into the merchant's PayPal account. PayPal then seeks reimbursement of the funds from the card-issuing bank, generally through a third-party processor.[29] In this manner, PayPal acts as the merchant bank.

Another method of payment accepted by some merchants is Bitcoin. Bitcoin is virtual currency that "can best be described as digital cash."[30] The most important thing to remember about Bitcoin is that, under the current UCMJ approach, it cannot be the object of a larceny pursuant to Article 121, because it does not exist in a tangible form.[31] "Bitcoin is generated by computers, lives on the internet, and can be used to purchase real and digital goods across the world."[32] Bitcoin is stored by individuals in a virtual "wallet" and is spent without the use of third-party intermediaries, such as banks.[33] Thus, in a Bitcoin transaction, the buyer transfers the virtual currency, using software on his or her computer, from a virtual wallet directly to the virtual wallet of the seller. The transaction is processed with the help of open-source computing: computers on the Bitcoin network verify the authenticity of the Bitcoin being spent.[34] Bitcoin, and virtual currency in general, is still an emerging area that is not yet widely used.

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[24] Although not all ATMs are owned and operated by a bank, for discussion purposes, this article assumes that the entity offering the ATM services is a bank.

[25] *See* Captain David O. Anglin, *Service Discrediting: Misuse, Abuse, and Fraud in the Government Purchase Card Program*, ARMY LAW., Aug. 2004, at 1.

[26] The government has several methods by which it spends its money. At the root level, the government's money is spent through a federal reserve bank. "The biggest customer of the Federal Reserve is one of the largest spenders in the world - the U.S. government. Similar to how you have a checking account at your local bank, the U.S. Treasury has a checking account with the Federal Reserve. All revenue generated by taxes and all outgoing government payments are handled through this account." INVESTOPEDIA, *The Federal Reserve Duties*, http://www.investopedia.com/university/thefed/fed2.asp (last visited Feb. 11, 2014, 11:30 AM). Once this money is distributed or allocated to different agencies, then the actual financial institutions involved in a particular transaction may be different.

[27] Currently, U.S. Bank is contracted to provide account services to the U.S. Army. *See* United States v. Sharpton, 72 M.J. 777 (A.F. Ct. Crim. App. 2013), *aff'd*, 73 M.J. 299 (C.A.A.F. 2014).

[28] Although the card transaction is complete, there are unique contractual provisions in a GPC case that result in a transfer of money following the completion of the card transaction. Specifically, the government is obligated to pay to the GPC program bank the amount charged by its agents regardless of whether the agent's purchase is unauthorized. *See* United States v. Sharpton, 73 M.J. 299, 302 n.2 (C.A.A.F. 2014); U.S. DEP'T OF THE AIR FORCE, INSTR. 64-117, AIR FORCE GOVERNMENT-WIDE PURCHASE CARD (GPC) PROGRAM para. 3.8.5.2 (Sept. 20, 2011).

[29] PAYPAL, http://www.paypal.com/developer (last visited Nov. 27, 2013).

[30] *Beyond Silk Road: Potential Risks, Threats, and Promises of Virtual Currency: Hearing Before the S. Committee on Homeland Sec. and Govt Affairs*, 113th Cong. (Nov. 18, 2013) [hereinafter *Beyond Silk Road*] (statement of Sen. Thomas R. Carper, Chairman, S. Comm. on Homeland Sec. and Gov't Affairs).

[31] *See infra* Part III.C.

[32] *Beyond Silk Road*, *supra* note 30 ("Virtual currencies, perhaps most notably bitcoin, have captured the imagination of some, struck fear among others, and confused the heck out of many of us. Indeed, based on conversations my staff and I have had with dozens of individuals both inside and outside of government, it is clear that the knowledge and expectation gaps are wide. Fundamental questions remain about what a virtual currency actually is, how it should be treated, and what the future holds. Virtual currency can best be described as digital cash. It is generated by computers, lives on the internet, and can be used to purchase real and digital goods across the world. Some proponents believe virtual currencies can prove valuable to those in developing countries without access to stable financial systems. Others believe it could prove to be a next generation payment system for retailers both online and in the real world. At the same time, however, virtual currencies can be an effective tool for those looking to launder money, traffic illegal drugs, and even further the exploitation of children around the world. While virtual currencies have seen increased attention from regulators, law enforcement, investors, and entrepreneurs in recent months, there are still many unanswered questions and unresolved issues.").

[33] BITCOIN, http://www.bitcoin.org (last visited Nov. 27, 2013, 6:15 PM).

[34] Instead of relying on a trusted intermediary, such as a bank or credit-card network, to verify the authenticity of the digital currency being tendered, Bitcoins are embedded with a private key that is checked by the Bitcoin network of unaffiliated "mining" computers to ensure the authenticity and

In sum, when a credit or debit card is used to commit a theft, determining which bank ultimately grants approval of the transaction, and understanding the transactional process itself, is crucial to determining what property was stolen, who is the owner of the stolen property, and consequently, which theory must be proved to establish a larceny under Article 121. As the above descriptions illustrate, a single transaction can involve multiple parties, not the least of which is the account holder, the government, and the relevant financial institution. For that reason, it is also important to understand the legal relationships that may exist in a given case, to include that between the financial institution and the account holder, as well as that between the thief and the account holder (which may be the government).

III. Relevant Legal Principles in a Credit or Debit Card Larceny

What follows is a discussion of the five primary legal issues that inform pleading, proving, and defending against a credit or debit card larceny pursuant to Article 121: (1) the applicable theories of larceny; (2) the requirement of a tangible res; (3) the possessory interests in a creditor–debtor relationship; (4) the importance of "ownership"; and (5) the impact of an agency relationship. Each of these areas, outlined below, impact the legal sufficiency of a larceny charge.

A. The Applicable Theories of Larceny

Article 121, UCMJ, states that a person is guilty of larceny when he or she:

> wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind . . . with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner.[35]

Although a plain reading of the statute may indicate it encompasses many theories of theft, case-precedent has clarified that the perimeter of Article 121 only extends as far as those thefts previously cognizable at common-law or by early statute.[36] In other words, Article 121 only encompasses and consolidates what were previously known as larceny, larceny-by-trick, embezzlement, and false pretenses.[37]

In a larceny committed by use of a credit or debit card, the relevant theories under Article 121 are false pretenses, and embezzlement.[38] The crime of false pretenses occurs when the thief, with the requisite intent, obtains property from the owner through the use of a false representation of a past or existing fact.[39] In a credit or debit card larceny, this occurs through the false representation that the thief is the cardholder[40] or that the thief has the authority to use the credit or debit card in that manner.[41] On the other hand, an

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ownership of the Bitcoin. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM, *available at* http://www.bitcoin.org.

[35] 10 U.S.C. § 921(a)(1) (2012).

[36] United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010); United States v. Antonelli, 35 M.J. 122, 124 (C.M.A. 1992).

[37] *Lubasky*, 68 M.J. at 263; *see* United States v. Aldridge, 8 C.M.R. 130, 131–32 (C.M.A. 1953).

[38] The common-law theories of larceny and larceny by trick are generally not implicated in a credit or debit card larceny. Relevant to this discussion, what separates larceny and larceny by trick from false pretenses and embezzlement is that the latter two crimes result in the thief acquiring title to the stolen property, whereas the first two do not. *See* WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.7(a) (2d ed. 2013). In a credit or debit card larceny, it is difficult to conceive of a situation in which the thief would not acquire title to the stolen property. "Whether title to property delivered to the defendant passes to him usually depends upon whether the victim *intends* to transfer title to him." *Id.* § 19.7(d). In a POS transaction, the merchant transfers title to goods to the thief, and the card-issuing bank transfers title of money to the merchant's bank. In an ATM transaction, the ATM bank transfers title of money to the thief, and the card-issuing bank transfers title of money to the ATM bank. Although there may be an unusual case, in which the merchant somehow failed on his end to transfer title of the property he provides to the thief, the overwhelming majority of cases will result in the transfer of title of the object property in a credit or debit card larceny case. *Cf.* State v. Rhome, 462 S.E.2d 656, 666 (N.C. App. 1995) (holding there was no embezzlement of funds overpaid because title to overpaid sums did not pass to the defendant).

[39] United States v. Bulger, 41 M.J. 194, (C.M.A. 1994); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46.c.(1)(e) (2012) [hereinafter MCM].

[40] *E.g.*, United States v. Sierra, 62 M.J. 539, 542 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006).

[41] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e) ("In addition to other kinds of facts, the fact falsely represented by a person may be that person's . . . authority. . . ."). *Contra* United States v. Sharpton, 72 M.J. 777 (A.F. Ct. Crim. App. 2013), *aff'd on other grounds*, 73 M.J. 299 (C.A.A.F. 2014). In *Sharpton*, Senior Airman Cimball Sharpton used her GPC card to purchase $20,000 in merchandise and gift cards. United States v. Sharpton, 73 M.J. 299, 300 (C.A.A.F. 2014). She was convicted of stealing money from the government. *Id.* At her first level of appeal to the Air Force Court, Senior Airman Sharpton claimed that this theory of larceny was legally insufficient and that she should have been charged with stealing money from the GPC program bank or goods from the merchant. In evaluating these claims, the Air Force Court concluded that neither of these entities was the proper owner of the stolen property because the appellant made no false representations to them due to her apparent authority. *Sharpton*, 72 M.J. at 781. Following the Air Force Court's logic, an agent is unable to make a false representation to a third party if he or she possesses the apparent authority to engage in the actually unauthorized transaction. This holding eviscerates the theory that a thief can make a fraudulent representation about the scope of his or her authority to a third party, and is a marked departure from the current state of the law. *See* MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e) ("In addition to other kinds of facts, the fact falsely represented by a person may be that person's . . . authority. . . ."). This holding was neither affirmed nor discussed by Court

embezzlement occurs when the thief, with the requisite intent, withholds property by failing to "return, account for, or deliver property to its owner when a return, accounting, or delivery is due."[42] In a credit or debit card larceny, this usually occurs where a Servicemember misuses a GPC.

The general distinction between false pretenses and embezzlement is found in the manner in which the thief came into possession of the stolen property. In the case of an embezzlement, there is some form of an agency relationship[43] between the thief and the account holder that allows the thief to lawfully acquire the property.[44] Once the property is lawfully acquired, it is the thief's subsequent withholding or conversion of that property, with the requisite intent, which consummates the crime.[45] In the case of false pretenses, although title to property is obtained, the thief does so through the use of a false representation as opposed to the abuse of an agency relationship.

Although these theories may seem straightforward, their simplicity belies the complex issues that arise in their application when the theft is committed by wrongfully using a credit or debit card. These complexities arise through the determination of what property was stolen and who was the "owner"[46] of the stolen propery, often leading to counter-intuitive results and complicated theories of the crime. Nowhere is this more evident than in the *Lubasky* case, in which Ms. Shirley was found not to be the owner of money expended from her account when CW4 Lubasky wrongfully used her credit cards. Therefore, to properly understand a credit or debit card larceny, it is necessary to examine the relationships between the various parties to the transaction, and then to properly identify both the owner and the property involved in the theft.

of Appeals for the Armed Forces (CAAF) when it affirmed Airman Sharpton's conviction.

[42] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(e).

[43] "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

[44] *See* United States v. McFarland, 23 C.M.R. 266, 269–70 (C.M.A. 1957) ("Generally in embezzlement, the property comes lawfully into the accused's possession by virtue of the existence of a fiduciary relationship with the owner.").

[45] "A typical statute on embezzlement by servants punishes a servant, clerk or agent employed by a person, partnership or corporation who misappropriates his employer's property in his possession. Under such statutes, misappropriating employees who have possession of their employer's property are guilty of embezzlement . . ." WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.6 (2d ed. 2013).

[46] "'Owner' refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case." MCM, *supra* note 39, pt. IV, ¶ 46c.(1)(c)(ii).

B. The Requirement of a Tangible Res

The first important limitation to keep in mind is the legal requirement that the object of any larceny charged under Article 121, must be of tangible personal property. This restricts the cognizable theories available in a credit or debit card larceny in three ways. First, this requirement prevents charging a theft of a debt or a line of credit. Second, it generally prohibits charging a theft of services as a violation of Article 121 (which is instead cognizable under Article 134, UCMJ). And finally, it makes it impossible to charge a theft of virtual currency, such as Bitcoin.

As discussed above, a larceny is the taking, obtaining, or withholding of personal property with the requisite intent.[47] To be cognizable under Article 121, "the object of the larceny [must] be tangible and capable of being possessed."[48] *United States v. Mervine*[49] is illustrative of this point. In *Mervine*, the accused was charged with attempted larceny from the Navy Post Exchange (NEX) when he altered a money order receipt and submitted it to the NEX in an attempt to expunge a previously acquired debt. Thus, the theory of larceny pursued by the government was that the accused attempted to steal the money that he owed to the NEX. In considering the government's theory of larceny, the Mervine Court concluded:

> This theory is flawed in view of the possessory nature of the debtor-creditor relationship recognized for purposes of larceny under Article 121, as explained in the Manual for Courts-Martial. "The taking obtaining, or withholding must be of specific property. *A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.*"[50]

Since the NEX did not have a possessory interest in any specific money belonging to the appellant—money that the appellant could have attempted to steal by submitting the false receipts—the government was left with the theory that the appellant attempted to steal the debt itself. The Mervine Court rejected this theory, holding: "'[P]ossession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of.'. . . Accordingly, we

[47] UCMJ art. 121 (2012). *See supra* Part III.A.

[48] United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988).

[49] *Id.*

[50] *Id.* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 46.c.(1)(b) (1984)) (emphasis in original). Part III.C, *infra*, explores this issue of creditor–debtor relationships in detail.

hold that a debt or the amount thereof is not the proper [object] of a larceny under Article 121."[51]

From this holding, it is obvious that an accused cannot be charged with stealing a debt or a line of credit. This is important to keep in mind in the case of a larceny committed through the use of a credit card specifically. Taking *Lubasky* as an example, CW4 Lubasky could not have been charged with stealing the line of credit extended to Ms. Shirley when he wrongfully used her credit cards. Thus, the allegation and proof of the thefts he committed when he wrongfully used her credit card could not be based upon her diminishing line of credit.[52]

Second, the requirement that the property be tangible prevents prosecution under Article 121 for a theft of services. If the object of the crime is "obtain[ing] services rather than tangible property, the offense is not a larceny, but a theft of services in violation of Article 134, UCMJ."[53] Thus, if a thief wrongfully uses another person's credit or debit card to rent a vehicle, then the thief has obtained services, not tangible goods.[54] Consequently, the thief could not be charged with a theft from the rental car company.[55] In a credit or debit card larceny, this issue can also arise when service fees are charged by a financial institution for the credit or debit card transaction. For example, in an ATM transaction, a fee is generally charged for the use of the ATM terminal. Where a thief is charged with obtaining cash from the ATM bank by false pretenses, the service fee charged by the bank cannot be properly included in the larceny.[56]

Finally, the principles discussed in *Mervine* have enormous ramifications in the area of virtual currency. Applying these principles to a Bitcoin transaction, it is apparent that there is no cognizable theory under Article 121 that could support the theft of a Bitcoin. A Bitcoin transaction is different from a credit or debit card transaction in that there is no tangible property underlying a Bitcoin exchange. Underlying a credit or debit card transaction is actual U.S. dollars stored in vaults. Although the transactions may never physically result in tangible dollars changing hands, instead only resulting in numbers being adjusted in accounts between banks, the simple fact remains that these numbers represent tangible currency that exists, somewhere. This is not the case for a Bitcoin transaction. A Bitcoin is itself a virtual currency that does not exist in tangible form. It is, very literally, only ones and zeros. A Bitcoin only exists in a virtual world of stored electronic information. Accordingly, when a Bitcoin, or a unit of a similar virtual currency, is the object of a theft, there is no tangible res being taken, obtained, or withheld; consequently, there is no legally cognizable theory under Article 121.[57]

C. The Possessory Interests in a Creditor–Debtor Relationship

As alluded to in the *Mervine* discussion and in the *Lubasky* case itself, the relationship between an account holder and the card-issuing bank is fundamental to pleading, proving, and defending against a credit or debit card larceny. The legal framework for understanding the relationship between an account holder and his or her bank is found in commercial law. Therefore, it is necessary to employ the general tenants of commercial law where the means of theft involve the wrongful use of a credit or debit account.[58]

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[51] *Id.* (quoting Harris v. Balk, 198 U.S. 215 (1905)) (first alteration in original).

[52] Instead, a supportable theory of this theft would be that CW4 Lubasky stole from the bank by inducing it to pay money to various merchants, or from the merchants by inducing them to provide him goods. *See infra* Part IV.

[53] United States v. Sierra, 62 M.J. 539, 542 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006). *See* MCM, *supra* note 39, pt. IV, ¶ 78.b (Obtaining Services under False Pretenses).

[54] *E.g.*, United States v. Abeyta, 12 M.J. 507 (A.C.M.R. 1981) (holding that failing to pay for a taxicab ride is a theft of services).

[55] However, alternative charging options are available under Article 121, UCMJ, for this crime. For example, the thief could be charged with obtaining money from the bank by inducing it to pay money to the rental car company. *Cf.* United States v. Plante, 36 M.J. 626 (A.C.M.R. 1992) (upholding conviction for larceny of money from an insurance company where the insurance company was fraudulently induced to pay money to a rental car agency from which the appellant rented a car after he torched his own car). This type of theory of false pretenses is discussed in detail below. *See infra* Part IV.A.2.

[56] However, alternative charging options that would include service fees in the amount of the larceny may be available under Article 121 so long as the ATM bank is not alleged as the owner of the stolen property. For example, if the thief had used a GPC card, then it may be possible to charge the thief with stealing money, to include the service fees, from the government, because the government paid the full amount to the ATM bank. *See* United States v. Sharpton, 73 M.J. 299, 302 n.2 (C.A.A.F. 2014). *See also infra* Part IV.A.3. The simplest method of charging a theft of services may be to allege a violation of Article 134. However, if an alternate theory of larceny under Article 121 is available, e.g., the theory just discussed, then defense counsel would be wise to argue that the Article 134 offense is preempted. *See, e.g.*, United States v. Erickson, 61 M.J. 230 (C.A.A.F. 2005); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953).

[57] Furthermore, a theft of virtual currency, like a Bitcoin, could not be charged as obtaining services under false pretenses, Article 134, or as bank fraud, 18 U.S.C. § 1341 as applied through Clause 3 of Article 134. Moreover, although the definition of "military property" under Article 108 may be broad enough to encompass virtual currency, the government does not transact in virtual currency; thus, any prosecution under Article 108 would have to involve the thief wrongfully purchasing virtual currency with government money, on the government's behalf, and then withholding it. This unusual circumstance notwithstanding, the only remaining options would be a simple disorder pursuant to Article 134, the wrongful use of an access device under 18 U.S.C. § 1029 as applied through Clause 3 of Article 134, or the assimilation of an applicable state statute.

[58] In fact, the guidance contained in the *Manual for Courts-Martial* for charging "*Credit, Debit, and Electronic Transactions*" is based on this foundational premise. *See* MCM, *supra* note 39, pt. IV, ¶ 46c.(1)(i)(vi). The discussion for the 2002 amendment to Article 121, which added guidance for charging credit card and debit card thefts, cites two service

Ultimately, this analysis is crucial to determining the proper owner of property obtained through the wrongful use of a credit or debit card, which in turn, indicates the theory of larceny that the government must pursue to prosecute a larceny under Article 121.

In the case of a debit card relationship, an account holder has deposited money with the bank against which the POS or ATM transactions are drawn; however, due to the military courts' application of commercial law principles, the account holder is not the "owner" of her deposits within the meaning of Article 121. Absent special arrangements, the title to the money deposited is transferred to the bank when a deposit is made by the account holder into his her account.[59]

This is true because money deposited with a financial institution, absent special arrangements, is considered a general deposit. In the case of general deposits, "[t]he general transaction between the bank and a customer in the way of deposits to a customer's credit, and drawing against the account by the customer, constitute the relation of creditor and debtor."[60] As such, there "is nothing of a trust or fiduciary nature in the transaction, nor anything in the nature of a bailment . . . or in the nature of any right to the specific monies deposited."[61] Thus, the account holder has neither title to nor possession of the money in his or her debit account—only an agreement from the bank "to pay an equivalent consideration when called upon by the depositor in the usual course of business."[62]

The same is true in the case of a credit card agreement. The relationship between the bank and the account holder is one of creditor and debtor—the roles being reversed such that the account holder, not the bank, is the debtor. Just as in a debit card relationship, the credit-card account holder has neither title to nor possession of the line of credit that is extended by the bank.

In a creditor–debtor relationship, an account holder has neither title to nor possession of specific money in his or her account.[63] Furthermore, nowhere in the processing chain does the account holder acquire title to or possession of the money distributed from his or her account.[64] When a credit or debit card is wrongfully used to expend money, the money is not distributed to the account holder. In a POS transaction, the money is transferred to the merchant's bank and, ultimately, to the merchant. In an ATM transaction, the money is transferred to the bank operating the ATM and, ultimately, to the thief. The importance of the preceding is obvious: If an account holder does not have title to or possession of the money stolen, then the account holder cannot be the "owner" in a credit or debit card larceny case.[65]

Accordingly, the limitations of the creditor–debtor relationship must be kept in mind when prosecuting or defending against a larceny charge pursuant to Article 121. That relationship does more than define the legal relationship between the parties to a credit or debit card transaction; it provides the lens through which ownership in a larceny case is viewed. This is especially important when determining the theory by which an accused commits a theft (i.e., false pretenses or embezzlement). Many times, it is the allegation of ownership that drives proof as to the theory of larceny.

D. The Importance of "Ownership"

In a larceny case pursuant to Article 121, it is necessary to allege the "owner"[66] of the stolen property, because it is an element of the offense.[67] It may be counter-intuitive, but

court cases as authority for its guidance: United States v. Duncan, 30 M.J. 1284 (N.M.C.M.R. 1990), *variance analysis abrogated by*, United States v. Lubasky, 68 M.J. 260, 264–65 (C.A.A.F. 2010); and United States v. Jones, 29 C.M.R. 651 (A.B.R. 1960), *variance analysis abrogated by*, *Lubasky*, 68 M.J. at 264–65. 2002 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002). The Duncan Court cites Jones as the persuasive authority for its ruling, and the Jones Court in turn cites *United States v. Soppa* as its authority. 4 C.M.R. 619 (A.F.B.R. 1952). Relying on fundamental principles of banking law, the Soppa Court held that the proper owner of funds contained in a bank account was the bank and not the account holder. *Id.* at 621.

[59] Nat'l Bank of the Republic v. Millard, 77 U.S. 152, 154–55 (1869).

[60] Burton v. United States, 196 U.S. 283, 301 (1905).

[61] *Jones*, 29 C.M.R. at 653.

[62] *Soppa*, 4 C.M.R. at 621 (citing Cragie v. Hadley, 1 N.E. 537, 538 (N.Y. 1885)).

[63] *Id.* at 619.

[64] This statement must be qualified. An account holder can acquire constructive ownership of money received on his or her behalf by an agent. Furthermore, there is case-precedent in other jurisdictions that indicates an account holder gains "possession" of money transmitted to a third party in an embezzlement case, because the money is segregated from his account by the card-issuing bank immediately prior to transmission. There is also authority to the contrary. It is unclear whether this theory is viable in the military. These theories are discussed *infra* at Part IV.B.2.

[65] This statement is true where the focus of the crime is on the property involved in the transactional process, which is generally the case. However, as discussed in Part IV.A.3, there are more complicated theories of false pretenses that may allow charging the account holder as the "owner," and as discussed in Part IV.B, there are embezzlement theories available as well.

[66] A larceny charge requires proof of an owner or "any other person." This does not mean you can allege anyone—it means that the owner can be any person with a superior possessory interest: "'Any other person' means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused." MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(c)(iii).

[67] "The military is a notice pleading jurisdiction." United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)). "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and

it is this allegation of "ownership" that drives the theory of larceny to be proved at court-martial.

In *Lubasky*, CAAF examined the allegation of ownership in the specifications leveled against CW4 Lubasky when it assessed the legal sufficiency of the corresponding theory of the theft.[68] In this manner, the Lubasky Court tested the theory of the crime through the allegation of ownership. In other words, the Lubasky Court implicitly concluded that the allegation of ownership was tied to the theory of larceny itself, and not just to the comparative ownership interest CW4 Lubasky's had vis-à-vis Ms. Shirley. In doing so, the Lubasky Court concluded that the bank was the entity that owned the money used by CW4 Lubasky, not Ms. Shirley. Therefore, it was untenable to charge the theft of Ms. Shirley's money by wrongful use of her credit cards using any available theory.[69] Consequently, it is apparent that, following *Lubasky*, not only must the allegation of ownership jibe with the property alleged to have been stolen, but the property and its owner must also be constituent pieces of a cognizable whole: they must substantiate a legally sufficient theory of larceny, i.e., false pretenses or embezzlement.

Furthermore, the owner of the stolen property is not synonymous with the victim of the crime. However, in its recent case, *United States v. Sharpton*, CAAF made this very mistake—referring to the "victim" of the larceny instead of the "owner" of the stolen money.[70] Nevertheless, the foundational legal principle remains the same: Larceny is a crime against property, not against the person. "Owner" describes the person with the right of ownership superior to that of the thief, in light of the theory of larceny being pursued. That is not necessarily the person who is directly victimized. *Lubasky* is a good example of this concept. In that case, Ms. Shirley was victimized by CW4 Lubasky's crimes, but the various banks were the owners of the money he stole using her credit card.

However, that is not to say that who ultimately bears the loss is irrelevant; unfortunately, the relevance of this is presently uncertain. In *Sharpton*, CAAF looked to after-the-fact payments made by the government to the card-issuing bank for fraudulent purchases made by one of its agents, Senior Airman Cimball Sharpton. However, the Sharpton Court failed to address any particular theory of larceny; consequently, the meaning and importance of this analysis is unclear. It is possible that CAAF meant to extend the processing chain of a credit or debit card transaction to include later payments pursuant to contractual arrangements between creditors and debtors. If *Sharpton* does support this position, then a card-issuing bank would not be the owner of money paid to a merchant for fraudulent purchases by a thief, because the card-issuing bank was later compensated by the account holder.[71] However, practitioners should be aware of the questionable logic presented in this interpretation, as the fact that a bank has later been made whole by a third-party does not change the fact that a theft occurred in the first place.[72] A second interpretation of CAAF's analysis in *Sharpton* is that it adopted the *Ragins* theory of larceny without citation or discussion (this theory is discussed in detail below).[73] This interpretation is supported by the Sharpton Court's use of the term "obtained," signaling that the theory involved was an obtaining by false pretenses as opposed to an embezzlement.[74] In either case, trial counsel should take these interpretations into account when deciding upon a theory of the crime, and defense counsel should be prepared to leverage these competing interpretations against a particular larceny charge.

E. The Impact of an Agency Relationship

The existence of an agency relationship between the thief and the account holder is important to both an embezzlement charge and a false pretenses charge. In the case of an embezzlement, the authority of the agent, which is critical to sustaining an embezzlement theory, may be in factual dispute. And in a false pretenses charge, the

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fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id.* at 229 (quoting Hamling v. United States, 418 U.S. 87, 117 (1974) (internal citations and quotation marks omitted)) (citing United States v. Resendiz–Ponce, 549 U.S. 102, 108 (2007); United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F.2010); United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F.2006); United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)) (alterations in original). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." MCM, *supra* note 39, R.C.M. 307(c)(3).

[68] United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

[69] *Id.*

[70] United States v. Sharpton, 73 M.J. 299, 299 (C.A.A.F. 2014) (holding "the victim of the larceny is the person or entity suffering the financial loss or deprived of the use or benefit of the property at issue").

[71] *See infra* Part IV.A.2 (discussing this theory of false pretenses).

[72] *See, e.g.*, State v. Lomax, 14 S.W.2d 436, 438 (Mo. 1929) ("It is possible that the Brookfield school district was in a position to hold the Linn County Bank on account of the embezzlement of defendant, but this may be based on the ground, among others, that the bank had actual or imputed knowledge that it was crediting defendant with money belonging to the school district. [ ] The responsibility of the Linn County Bank to the Brookfield school district for defendant's acts is aside the question. It is also immaterial that said bank, through defendant's knowledge, knew, at the time the checks were presented and the money appropriated, that defendant intended to convert a portion of the proceeds of the respective checks to his own use." (internal citation omitted)).

[73] *See infra* Part IV.A.2.

[74] *Sharpton*, 73 M.J. at 301 (holding that the appellant "wrongfully obtained property").

existence of an agency relationship may make such a theory legally insufficient. For that reason, it is important to identify the existence of an agency relationship and take into account its scope when pursuing a particular theory of larceny.

The authority granted to the agent is an important issue for all embezzlements. "The 'authority of the agent' is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to the agent. . . . [T]he scope of the agent's authority is limited to what the principal has authorized the agent to do."[75] The scope of an agent's authority is a factual issue that may be difficult to determine in some cases. For example, in *United States v. Willard*, Private First Class (PFC) Clare was slated to deploy and gave a general power of attorney to his roommate, Specialist (SPC) Willard, instructing him to withdraw cash and pay various bills for him while he was away.[76] Specialist Willard instead withdrew cash from PFC Clare's accounts and used it for his own personal expenses.[77] Specialist Willard was convicted of embezzlement for misapplying the cash he withdrew from PFC Clare's bank accounts. On appeal, SPC Willard argued that the general power of attorney gave him authority to use PFC Clare's money in any manner he deemed fit, to include for his own benefit. The CAAF rejected this argument, stating, "The power of attorney may convey apparent authority *vis-[à]-vis* an innocent third party, but it does not empower the grantee to exceed the terms of his or her actual authority."[78] Thus, although SPC Willard held a general power of attorney, the actual scope of his authority was circumscribed pursuant to PFC Clare's instructions that the money be used to pay PFC Clare's bills.

Although a larceny by false pretenses does not require the existence of an agency relationship between the thief and the account holder, the existence of such a relationship may very well frustrate the viability of such a theory. Specifically, if an agency relationship exists and the thief purchases goods or withdraws money within the scope of his authority, then a straight-forward theory of false pretenses is untenable. The reason for this is plain—the thief made no false representation. For example, in *Willard*, SPC Willard was authorized to withdraw cash from PFC Clare's account. Therefore, when SPC Willard withdrew cash from PFC Clare's account, he made no false representations to the bank. Consequently, a charge of obtaining money from the bank by false pretenses would not be legally sufficient.[79] In contrast, if SPC Willard had not been authorized to make cash withdrawals, then a theory of false pretenses against the bank would be legally sufficient. In that situation, SPC Willard would have made false representations to the bank about the scope of his authority.

IV. Application in the Digital Age

Suitably armed with the foregoing principles, it is possible to arrive at several alternative legally sufficient[80] charges under Article 121 where a debit or credit card was used as the means of theft. For credit and debit card larcenies, the legally sufficient alternatives can be categorized based on the theory of larceny upon which they rely. Thus, the first category consists of those alternatives in which the wrongful use of the credit or debit card resulted in an obtaining by false pretenses,[81] and the second consists of those alternatives in which the wrongful use of the credit or debit card resulted in an embezzlement.[82] In both categories, it is important to note the object property, the subject owner, and whether there is an agency relationship between the thief and the account holder.

Presenting charging options for a credit or debit card larceny that are unassailable in every circumstance is difficult, because each case turns on its own facts, and the merits of each alternative theory vary in accordance with those facts. As is the case in many areas of the law, there is no one correct answer, only several wrong answers. For that reason, it is important to understand the rationale underpinning the viable theories in a credit or debit card larceny. Most times, it is the POS-transaction cases that present the most difficult issues; for that reason, Appendix A provides a general reference guide that may be helpful for practitioners.

A. False Pretenses—The Obtaining Theories

For those offenses categorized as larcenies by false pretenses, there are three alternatives to charging and proving a violation of Article 121: The obtaining is either of goods from the merchant,[83] of money from the bank,[84] or of

[75] 3 AM. JUR. 2D *Agency* § 64 (2014).

[76] 48 M.J. 147, 148 (C.A.A.F. 1998).

[77] *Id.*

[78] *Id.*

[79] This scenario instead presents a wrongful withholding of PFC Clare's money, which is an embezzlement theory. *Id.*; *see also* Part IV.B.1, *infra.*

[80] A charge is legally sufficient where, considering the evidence in the light most favorable to the prosecution, a reasonable trier of fact could find all the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In the larceny context, this means that, not only must the evidence establish the offense, but also that the offense itself must constitute a valid theory of larceny encompassed by Article 121, UCMJ. United States v. Lubasky, 68 M.J. 260, 263 (C.A.A.F. 2010).

[81] *See infra* Part IV.A.

[82] *See infra* Part IV.B.

[83] *See infra* Part IV.A.1.

[84] *See infra* Part IV.A.2.

money from the account holder.[85] However, the latter theory should rarely be used and generally only when there is an agency relationship between the thief and the account holder.[86] The facts of any particular case will determine whether a charge is legally sufficient under a particular theory of false pretenses, and that theory will in turn drive the focus of the prosecution's evidence and of the accused's defense. This section discusses these theories, paying particular attention to the property alleged to have been obtained, the owner of that property, and the evidentiary focal point of the crime.

1. Theft of Goods from the Merchant

In cases where a credit or debit card is used by the thief to purchase goods from a merchant (a POS transaction), then the simplest method of charging the crime is by alleging a theft of goods from the merchant. The explanation to Article 121, in the *Manual for Courts-Martial* (*MCM*) specifically endorses this approach:

> *Credit, Debit, and Electronic Transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them.[87]

Following this theory, it is the thief's false representation to the merchant that induces the merchant to provide goods to the thief. As for what is falsely represented to the merchant, it is either the false representation that the thief is the cardholder of the credit or debit account being used to purchase the goods, or that the thief possesses the authority to use the credit or debit card to purchase the goods.[88] In this theory, it is irrelevant whether the card used by the thief is a credit card or a debit card, because the focus is not on the account holder or the bank, but on the merchant and his goods.[89]

In most cases, trial counsel will find that this is the simplest theory for charging a credit or debit card larceny. But even though this is the simplest way to *charge* the larceny, it may not be the simplest way to *prove* the larceny. To prove that the thief obtained goods, it is necessary for the government to produce some evidence of the goods that were obtained. Generally, the primary evidence of a credit or debit card larceny is the statement of purchases issued by the account holder's financial institution and, in most cases, the statement does not list individual items that were acquired, only that a certain amount of money was transferred to a specific merchant. Although it may be legally sufficient to simply rely on the credit or debit card statement itself, failing to provide any evidence of the actual goods obtained may sow seeds of reasonable doubt.[90] Moreover, it may prove difficult to use eye-witness testimony from the merchant to establish which goods were obtained by the thief, as the merchant may not remember the details of a mundane credit or debit card transaction that took place months or years ago.[91]

In defending against this theory of larceny, defense counsel should not only be aware of the proof issues discussed above, but also of the impact of an agency relationship on the theory and the implications of CAAF's recent decision in *Sharpton*. As discussed in Part III.E, if there is an agency relationship between the accused and the account holder, then it may be possible for the defense to argue that the accused did not make any false representations to the merchant when he or she purchased the goods. Defense counsel should also be prepared to argue that, based on the holding in *Sharpton*, the merchant is not the proper owner of the stolen property. As previously discussed, the Sharpton Court took into account who ultimately bore the loss in a credit card larceny when deciding upon the viability of the charged theory. From this analysis, it is possible to argue from the converse proposition that, if the merchant was compensated by the card-issuing bank, the merchant is not the owner of the property that was stolen because he did not bear the loss.

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[85] *See infra* Part IV.A.3.

[86] *E.g.*, United States v. Sharpton, 73 M.J. 299 (C.A.A.F. 2014).

[87] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(i)(vi) (emphasis in original). Although this provision is only persuasive guidance, it has been cited by CAAF as a correct statement of the law. *Sharpton*, 73 M.J. 299; United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010).

[88] *See* authority cited *supra* notes 40, 41, and *infra* note 105.

[89] United States v. Gordon, No. S32008, 2013 WL 3324397 (A.F. Ct. Crim. App. June 26, 2013) (providing an adequate example of this theory of larceny). Airman Basic Gordon stole his roommate's debit card and used it to purchase, among other things, clothes, sneakers, and slippers via the internet. *Id.* at *1. Airman Gordan was charged with and convicted of stealing goods from the merchant that provided him with the clothes, sneakers, and slippers. *Id.* at *2. As this stated a proper theory of larceny by false pretenses, the Air Force Court affirmed without incident. *See also* United States v. Gaskill, 73 M.J. 207 (C.A.A.F. Jan. 27, 2014) (summ. disp.) (holding that "the proper victim in Specifications 2, 3, and 4 of Charge V was the merchant who provided the goods and services upon false pretenses, not the debit cardholder/Soldier").

[90] *Cf.* United States v. Barnes, No. 20110361, 2014 WL 104430, at *3 (A. Ct. Crim. App. Jan. 9, 2014) (mem. op.) (noting that the military judge found the appellant not guilty of the offense of larceny of services, pursuant to Article 134, UCMJ, because of the "government's failure to present any evidence the credit card charges were for services and not for some other purpose, such as the purchase of goods").

[91] For example, consider the case of a thief wrongfully using a credit card to purchase items at a convenience store. The credit card statement will not itemize the hot dogs, candy bars, chips, and coffee that were obtained by the thief, and it is highly unlikely that the convenience store clerk will remember these items.

Ultimately, the factual circumstances of a particular case may make it difficult to prove that a thief obtained goods from a merchant by wrongfully using a credit or debit card. Also, if there is an agency relationship, then the defense may successfully contest that no false representation was made to the merchant. Finally, *Sharpton*'s holding provides a basis for the defense to claim the merchant is not the proper owner because he was compensated by the card-issuing bank. Accordingly, although this charging option may be the simplest in terms of legal theory, it may not be superior to other available options.

2. Theft of Money from the Bank

In both a POS transaction and an ATM transaction, it is easier, from an exigency of proof standpoint, to establish that the wrongful use of a credit or debit card resulted in a theft of money from the bank. Unlike in the case of a theft of goods from a merchant, the statement issued by the cardholder's financial institution entirely substantiates the stolen property where a theft of money from a bank is alleged, listing both the amount of money and the bank that owned the money.

In an ATM transaction, the owner of the money is the bank which owns or operates the ATM.[92] This is a traditional obtaining by false pretenses where the thief falsely represents to the ATM bank that he or she has the authority to use the credit or debit card that is presented, thereby inducing the bank to dispense cash through the ATM terminal.[93] "Wrongfully engaging in a credit, debit, or electronic transaction . . . to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny from the entity presenting the money or [ ] negotiable instrument."[94] To be clear, the simplest theory of false pretenses in an ATM transaction is that the ATM bank—which is not necessarily the card-issuing bank[95]—owned the object money.[96]

In a POS transaction, however, the card-issuing bank is the owner of the object money, a distinction which creates a somewhat more complicated legal theory of false pretenses. For a POS transaction, the legal theory supporting a theft of money from the card-issuing bank originates from *dictum* in the case of *United States v. Ragins*.[97] Chief Ragins was a mess management specialist assigned to the commissary where he was authorized to accept delivery of goods.[98] In partnership with Rose, an employee of a bread company, Chief Ragins stole bread that was delivered to the commissary, and Rose later sold the bread, splitting the proceeds with appellant.[99] When this scheme was discovered, Chief Ragins was court-martialed for larceny; however, Chief Ragins was not charged with stealing the *bread* from the government, he was charged with stealing *money* from the government.[100] Ultimately, the Ragins Court concluded that this theory was legally sufficient as an embezzlement, which is discussed at Part IV.B, but before doing so it also considered whether this allegation could be legally sufficient as an obtaining by false pretenses. It did so by changing the focus of the crime away from the money that was acquired by the thief in his subsequent sale of the bread, and instead focusing on the money transferred by the government to the merchant as payment for the stolen bread:

> Whether the payments by the United States to the baking company could be the basis of a larceny prosecution of appellant for those payments is more doubtful. Of course, appellant used a wrongful means whereby money was obtained from the possession of the Government, and this was done with the intent permanently to deprive and defraud the United States of

[92] *E.g.*, United States v. Duncan, 30 M.J. 1284, 1289 (N.M.C.M.R. 1990), *variance analysis abrogated by*, United States v. Lubasky, 68 M.J. 260, 264–65 (C.A.A.F. 2010) (noting that in a case where the appellant wrongfully uses a debit card to withdraw cash in an ATM transaction, "the currency wrongfully taken or obtained by the appellant was the property, not of the cardholder, but most likely of the financial institution that owned and operated the ATM terminal which dispensed the currency to the appellant").

[93] It is important to keep in mind that the service fees charged by an ATM are not a part of the money stolen by the thief in this theory, because a larceny does not capture a theft of services. *See supra.* Part III.B.

[94] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(i)(vi).

[95] In cases where the ATM bank is not the card-issuing bank, defense counsel should keep in mind CAAF's discussion in *Sharpton*, which focused on the entity ultimately suffering the loss. If the ATM bank was compensated by the card-issuing bank, then defense counsel should argue the ATM bank is not the proper owner.

[96] A second, and overly complex, theory of obtaining by false pretenses in an ATM transaction can involve the card-issuing bank as the owner of the money alleged as the object of the theft. This is the *Ragins* theory that is discussed for POS transactions *infra*, i.e., the thief induces the card-issuing bank to pay money to the ATM bank by representing to the card-issuing bank through the ATM terminal that he has the authority to use the debit or credit card issued by the bank. In this case, the focus is not on the money dispensed by the ATM, but on the money transferred from the card-issuing bank to the ATM bank, for example via the ACH network.

[97] 11 M.J. 42 (C.M.A. 1981).

[98] *Id.* at 46.

[99] *Id.* at 43.

[100] *Id.*

> that money. The fact that the money went from the Government into the hands of the baking company, which had no fraudulent intent, to reimburse it for the bread which appellant and Rose had purloined would not seem to preclude treating this conduct as larceny from the Government committed when the contemplated payments to the baking company were made after it ultimately submitted the false invoices. *False pretenses used by A to induce B to transfer property to C, who is completely innocent, can probably fit within the literal language of Article 121*.[101]

In a POS transaction, this means that a thief's wrongful use of a credit or debit card, where the card-issuing bank is fraudulently induced to transfer money to the merchant, can be charged as a theft of money from the card-issuing bank. To use the hypothetical from *Ragins*, the thief (A) induces the card-issuing bank (B) to transfer money to the merchant (C).[102]

This theory is explicitly applied in two service court cases, and arguably implicitly applied in the CAAF's recent decision in *Sharpton*. In *United States v. Sierra*[103] and *United States v. Christy*,[104] the Army and Navy appellate courts, respectively, approve of the *Ragins dictum* as a valid statement of the law,[105] with both courts explicitly discussing *Ragins*.[106] The CAAF has yet to be so explicit in its acceptance of this theory. Nevertheless, *Sharpton* provides a strong indication that the *Ragins* theory is good law. In *Sharpton*, Senior Airman Sharpton was charged with stealing money from the government for using her GPC card to purchase items for her personal use.[107] In affirming this theory of larceny, the Sharpton Court specifically stated that the money paid by the government (the account holder) to US Bank (the GPC Program bank) was "obtained" by Senior Airman Sharpton.[108] If the CAAF had relied upon an embezzlement theory, then it would have referred to a "withholding" of money from the government. Therefore, the language used in *Sharpton* supports the position that CAAF applied the *Ragins* theory of false pretenses in *Sharpton*.[109]

In the POS transaction context, it is the thief's false representation to the card-issuing bank, through the merchant's card reader and the merchant's bank,[110] that induces the card-issuing bank to provide money to the merchant's bank, and ultimately the merchant. Applying this theory to the facts of *Lubasky*, it is evident that CW4 Lubasky could have been charged with a theft of money from the card-issuing bank when he wrongfully used Ms. Shirley's credit cards. This theory would also have been legally sufficient for CW4 Lubasky's misuse of Ms. Shirley's debit card,[111] provided he was acting outside the scope of his authority.[112]

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[101] *Id.* at 46.

[102] *See also* People v. Cravens, 180 P.2d 453, 456 (Cal. App. 1947) ("We are not satisfied that proof that the wrongdoer afterwards converted the partnership property to his own use while the victim was still subject to the influence of his false pretenses would not constitute the crime of obtaining money or property by false pretenses. . . . [Otherwise] any confidence man could safely operate through the medium of forming a partnership with his victim and then appropriating the assets of the partnership . . . . That the wrongdoer gets the property in two steps rather than one where a partnership with his victim is formed should not absolve him of the crime of obtaining money or property by false pretenses where the false pretenses continued to operate up to the moment of his wrongful appropriation of the partnership assets contributed by his victim."); Urciolo v. State, 325 A.2d 878, 893 (Md. 1974) ("Although the Court did state that the 'bank was made the 'innocent agent' of the traverser to pay to the parties indicated for the traverser's use and benefit the several sums of money agreed to be paid by the bank for the traverser,' it nonetheless pointed out that '(t)he passage of the title, possession, and control of the money from the bank to the indicated third parties at the traverser's request or in accordance with his written order was an obtaining of the money by the traverser as fully and completely as if the physical delivery had been made to the traverser in person.'" (discussing and quoting Simmons v. State, 167 A. 60, 63 (Md. 1933))).

[103] 62 M.J. 539 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006).

[104] 18 M.J. 688 (N.M.C.M.R. 1983).

[105] Both decisions presume that the digital transfer of information through the merchant's card reader, and the merchant's bank, to the card-issuing bank for approval of the sale, constitutes a false representation—a presupposition that has yet to be challenged. However, it is worth noting that in both *Ragins* and *Christy*, the thief did more than just swipe a government credit card to induce the transfer of money. In *Ragins*, the accused submitted false receipts to the government, and in *Christy* the accused submitted false invoices to the government.

[106] *Sierra*, 62 M.J. at 543 ("[U]nder certain circumstances, an accused may alternatively be charged with theft of the money the government pays for the goods or services obtained. As our superior court has stated, 'false pretenses used by A to induce B to transfer property to C, who is completely innocent, can probably fit within the literal language of Article 121.'") *Ragins*, 11 M.J. at 46. Such a situation occurs if the accused fraudulently uses a government credit card to induce the government to pay for property or services he obtains. If the accused intends to deprive the government of that money, he can properly be convicted of larceny of the funds the government actually pays."); *Christy*, 18 M.J. at 690 ("Whether the payments made by the United States to the various oil companies provide the basis for a larceny of those monies by the appellant is more problematic . . . . The fact that the money went to the oil companies to reimburse them for gasoline purchased by the appellant would not seem to preclude treating this conduct as larceny from the Government when the contemplated payments were made after the appellant put the unauthorized credit card invoices into the commercial collection system. *False pretenses used by the appellant to induce another to transfer property to a third party would seem to nicely fit in UCMJ, Article 121*.").

[107] United States v. Sharpton, 73 M.J. 299, 300 (C.A.A.F. 2014).

[108] *Id.* at 301.

[109] *See also supra* Part III.D.

[110] *See supra* notes 40, 41, & 105.

[111] In an unpublished opinion, *United States v. Fields*, No. 201100455, 2012 WL 1229443 (N-M. Ct. Crim. App. Apr. 12, 2012), the Navy Court

Although the *Ragins* theory of false pretenses is not reliant upon the agency relationship, the existence of such a relationship again has the potential to frustrate its applicability. As discussed in Part III.E, *supra*, both trial and defense counsel must be aware of how the scope of the thief's authority limits the applicability of a false pretenses theory. A thief does not commit the crime of false pretenses against the card-issuing bank where the thief uses the debit or credit card to make purchases on the principal's behalf that are within the scope of the thief's authority.[113]

Ultimately, proving a theft of money from the bank may be the simplest theory for the government to pursue. However, in a POS transaction, trial counsel must keep in mind that the focus is on the money paid to the merchant, money that does not reach the thief's pocket. And defense counsel may find it useful to contest the viability of the case-precedent underlying this theory. Finally, both sides of the aisle should be aware of any potential issues created by an agency relationship.

3. Theft of Money from the Account Holder

A third alternative for charging false pretenses involves naming the account holder as the owner of the object money. Where there is no agency relationship, practitioners should rarely, if ever, charge the account holder as the owner of money in a credit or debit card larceny.[114] In fact, this is the primary take-away from the *Lubasky* case. In *Lubasky*, CAAF held that Ms. Shirley, the account holder, was not the owner of the money CW4 Lubasky stole through the misuse of her credit cards.[115]

However, where there is a principal–agent relationship then this theory is on solid ground for a credit card transaction. *Sharpton*, *Sierra*, and *Christy*, discussed above, provide good examples of this theory in action.[116] In all of those cases, the thief induced the government, through an abuse of the agency relationship, to pay money to the card-issuing bank; therefore, a proper theory of the larceny was that the object property—the money paid to the card-issuing bank—was owned by the account holder: the government. Do not confuse this with an embezzlement where the cardholder is also the principal—this is an obtaining-type larceny in which the principal is induced to pay money to the card-issuing bank. Also, it is noteworthy that the focal point of the crime is not on the credit card transaction itself, but upon payments later made by the account holder as a result of that transaction. Finally, this theory does not work for a debit card transaction because the account holder does not make payments to compensate the card-issuing bank (the bank is the debtor in that relationship).[117]

B. Embezzlement—The Withholding Theories

In addition to any available options in the false pretenses context, there are also alternatives to charging and proving an embezzlement provided there is some form of agency relationship. Where there is an agency relationship—for example when a Servicemember uses a GPC card—then at least one of two possible charging theories of embezzlement is available: (1) theft of goods from the principal or (2) theft of money from the principal. Again, the determination of whether the object of the crime is money or goods is fact driven.

An important distinction between the embezzlement theories and the false pretenses theories is that the "owner" under an embezzlement theory is always the account holder, i.e., the principal; whereas, this is not always the case under a false pretenses theory. Furthermore, the particular embezzlement theory available depends upon whether the transaction was authorized by the principal and upon what the thief acquired during the transaction, i.e., goods or money. The purpose of identifying the scope of the authority granted to the thief is not necessarily to rule out the applicability of embezzlement as a theory in total, but to determine what property was stolen. In this manner, it overlaps with the second variable, that of what was acquired by the thief, goods or money.

affirmed a case in which the wrongful use of a debit card was charged in this manner. In *Fields*, the appellant wrongfully used a Soldier's debit card in POS transactions and was subsequently charged with stealing money from the card-issuing financial institution (which in this case was a credit union). *Id.* at *1. After citing *Lubasky* and noting the military judge's decision at court-martial that the financial institution was the owner of the money, the Navy Court affirmed the appellant's conviction without discussion or controversy. *Id.* at *2, *5.

[112] *See supra* Part III.E.

[113] *See supra* Part III.E.

[114] Where there is no agency relationship, it is theoretically possible, though very risky, to charge a thief with falsely inducing the owner of a credit card to make payments to his or her financial institution in order to satisfy the debts falsely incurred by the thief. In this situation, the focus is on the money paid by the account holder to the card-issuing bank. Of course, for this theory to work, the thief must be wrongfully using a credit card, not a debit card, because the payments by the account holder must be induced by the fraudulent use of the card. However, defense counsel should vigorously contest the viability of this charge, as it is unlikely the thief made any representations to the card holder. *See* United States v. Lubasky, 68 M.J. 260 (C.A.A.F. 2010). *See also* discussion, *infra*, note 117.

[115] *Lubasky*, 68 M.J. at 263.

[116] *See supra* Part IV.A.2.

[117] Although the Lubasky Court affirmed a theft of money from the account holder, Ms. Shirley, for CW4 Lubasky's misuse of her debit card, that holding was based on a unique situation—CW4 Lubasky fraudulently induced Ms. Shirley to make him a joint owner of her debit account. Therefore, the false pretenses enabled him to gain ownership in her account, and the crime was completed upon the use of the money via a debit card transaction. That unique situation notwithstanding, the charging theory discussed above is not viable for a debit card transaction.

The scope of the agent's authority is of primary importance to the embezzlement theories. Part III.E provides an introduction to the issue of agency, and Part IV.A discusses how the agent's authority can prevent an obtaining by false pretenses. In this subpart, the existence of an agency relationship is presupposed—it is *sine qua non* to the withholding theories. For that reason, practitioners must pay particular attention to the facts establishing the agency relationship, to include the scope of the thief's authority to act on behalf of the principal. Where a thief's use of a credit or debit card is authorized by the principal, then the thief's misuse can result in embezzlement. But where a thief uses a credit or debit card outside the scope of his authority, the law is unclear as to whether embezzlement has occurred.

1. Theft of Goods from the Principal

In a POS transaction where the principal's credit or debit card is used by the thief to purchase goods, the thief may be properly charged with embezzling those goods from the principal. If the thief acted within the scope of his authority in purchasing the goods, then his or her later withholding of those goods from the principal, with the requisite intent, completes a classic embezzlement:

> A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully.[118]

For example, if a Servicemember uses a GPC card to purchase authorized equipment, but then keeps that equipment, then the Servicemember commits embezzlement by withholding goods from his or her principal, the government. This theory is not available in an ATM transaction because it is money not goods that is acquired.

If a thief acts outside of his authority in using a credit or debit card, then the thief has not acquired the purchased goods lawfully and, therefore, embezzlement has not occurred.[119] However, the *MCM*, in the passage quoted above, expresses the view that embezzlement can also occur when the thief acquires goods unlawfully. This statement is dubious, and such a theory is risky at best. The early embezzlement statutes were designed to punish only the unlawful withholding of goods that came lawfully into the possession of a thief.[120] Furthermore, Article 121 only captures those offenses recognized at common-law or early statute.[121] Therefore, defense counsel should be prepared to argue the *MCM*'s suggestion that a thief can be prosecuted for embezzling goods that did not come into his or her lawful possession is incorrect.

This provides a good segue to the next section, as there may be an alternative embezzlement theory available where a thief acts outside the scope of his or her authority when using the principal's credit or debit account—withholding money as opposed to goods. However, there is significant uncertainty surrounding this theory as well.

2. Theft of Money from the Principal

A second option in an embezzlement case is to allege a withholding of money, as opposed to goods, from the principal (the account holder). There are several factual situations that may support this theory of embezzlement.

Automated teller machine transactions are the simplest factual scenario to which this theory is applicable. The *Willard* case, discussed in Part III.E, is a good example of this.[122] Specialist Willard was authorized by PFC Clare to withdraw cash from his account. When SPC Willard used this cash for his personal expenses, he was convicted of withholding money from PFC Clare, his principal. Thus, the proper embezzlement theory was a theft of money from the principal. In a GPC card context, a Servicemember who is authorized to withdraw money from an ATM, to use for an authorized purpose, but who later converts that money to his or her own personal use, may be charged with embezzlement of that money from the government, the principal.

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[118] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(b).

[119] Instead, the thief has committed a larceny by false pretenses. *See* Part IV.A., *supra*.

[120] *E.g.*, Moore v. United States, 160 U.S. 268, 269 (1895) (defining embezzlement as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come"); United States v. Sayklay, 542 F.2d 942 (5th Cir. 1976); State v. Gillespie, 705 P.2d 808 (Wash. App. 1985) ("Embezzlement occurs where property that comes lawfully into the taker's possession is fraudulently or unlawfully appropriated by him"). *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 562–63 (2001) ("Because of the statutory nature of the offense, and the piecemeal manner in which embezzlement laws were enacted, no single definition of the crime exists. At a minimum, however, embezzlement involves two basic ingredients: (1) that *D* came into possession of the personal property of another in a lawful manner; and (2) that *D* thereafter fraudulently converted the property . . . . Most embezzlement statutes include a third element: that *D* came into possession of the property as the result of entrustment by or for the owner of the property.").

[121] *See* authority cited *supra* note 36.

[122] United States v. Willard, 48 M.J. 147, 148 (C.A.A.F. 1998).

In the case of a POS transaction, the simplest permutation of this theory occurs where the thief subsequently sells property that he or she has lawfully acquired and then retains the proceeds. The *Ragins* case is a good example of this theory of embezzlement. As discussed in Part IV.A.2, Chief Ragins worked in concert with a bread delivery man to steal from the commissary. The Ragins Court summarized the government's theory of the crime as follows:

> [U]nder the government's theory, appellant received the bread for the government's benefit and held it in trust for the Government. [ ] When the bread was sold, the proceeds in turn were held in trust. [ ] Then, in turn, when he and Rose split up these proceeds, there was a "withholding" of money which belonged to the Government, this money being the amount of the proceeds from the private bread sales. Thus, appellant is ultimately responsible for an embezzlement of these proceeds.[123]

Thus, a thief's later sale of goods purchased using his or her principal's credit or debit card may be properly charged as an embezzlement of the proceeds gained from the sale, i.e., a withholding of money from the principal.

The final, and potentially most complex and precarious variation of this embezzlement theory, also occurs in the POS transaction context. In the case of a POS transaction, an embezzlement of the principal's money occurs when the thief devotes "property to a use not authorized by its owner."[124] Therefore, in general, a thief may be charged with embezzlement by misapplying the principal's money when using that money for the thief's own benefit, for example by purchasing goods. What is noteworthy in this situation, is that the thief is acting outside the scope of his or her authorization. Unlike the previous embezzlement situations, where the thief acquired property lawfully by acting within the scope of his or her authorization, in this situation the thief is acquiring a benefit by depriving the principal of the possession of the money by devoting it to an unauthorized use. However, due to the creditor–debtor relationship, the viability of this theory is uncertain in a credit or debit card case.

When a thief uses the principal's credit or debit card, the money that is misapplied originates from the card-issuing bank. It is that money which is being misapplied, and due to the creditor–debtor relationship, the account holder is not the owner of that money.[125] Moreover, in *Lubasky*, CAAF rejected a theory of larceny where the account holder, Ms. Shirley, was the owner of the money misapplied by her agent, CW4 Lubasky. Civilian jurisdictions that have considered this issue are split, and those that find an embezzlement in this situation, do so using a constrained theory of segregation: The principal becomes the owner of money paid by the bank because that money is segregated from the bank's general account seconds before payment to the merchant.[126] However, in its recent decision, *Sharpton*, CAAF held that the account holder, the government, was the owner of money stolen by its agent. As discussed above, in Parts III.E and IV.A, this holding can be interpreted as authority that the processing chain of a credit card transaction reaches back to include payments contractually required to be made by the account holder. If that is true, then trial counsel may be able to sustain a prosecution for this type of embezzlement theory. But defense counsel would be well-advised to contest this interpretation of *Sharpton* based on CAAF's use of the term of art "obtaining," and its holding in *Lubasky*.

In any event, it is currently unclear whether an embezzlement of money from the principal is supportable in a POS transaction where there is a creditor–debtor relationship between the principal and the card-issuing bank. This uncertainty should be taken into account when pursuing this specific theory.

V. Conclusion

United States v. Lubasky provides an important lesson for the military practitioner because it illustrates the difficulty of determining the proper owner, property, and means of larceny committed through the wrongful use of credit card and debit card transactions. When a credit or debit card is used by a thief, his or her conduct implicates not only the various, technical forms of larceny, but also the legal relationship between a cardholder and his or her bank, all of which takes place against the backdrop of a complex financial processing framework. When prosecuting a credit or debit card larceny it is important to take into account the

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[123] United States v. Ragins, 11 M.J. 42, 47 (C.M.A. 1981).

[124] MCM, *supra* note 39, pt. IV, ¶ 46.c.(1)(b).

[125] *See supra* Part III.C.

[126] E.g., People v. Keller, 250 P. 585, 585–86 (Cal. App. 1926) ("It, of course, is conceded by the Attorney General, as indeed it must be, that the money of the Finance Corporation, which appellant placed on general deposit with the Santa Ana Bank, was, while on deposit, the property of that bank, and that during its deposit the relation between the bank and the depositor, appellant's principal, was that of debtor and creditor. When, however, the money was paid on the check to the forwarding bank, it became, for an instant of time at least, however short, the property of the depositor—the Finance Corporation."). *Contra* State v. Tauscher, 360 P.2d 764, 770–771 (Or. 1961) ("Even if we were to accept (which we do not) the fiction that the bank segregates a part of its funds upon the presentment of a check, and further accepting (as we do not) the fiction that the possession constructively vests in the depositor, we cannot bring ourselves to take the next step and, by fiction, put the defendant in possession of the money. Under our embezzlement statute the defendant must have possession of the property embezzled.").

creditor-debtor relationship in order to avoid the result in *Lubasky*. And it is also important to consider whether there is an agency relationship that somehow affects the theory of the crime. In most cases, there are a variety of factors to consider, and several theories of larceny available.

Practitioners who approach these cases with diligent forethought in their pretrial preparation have the best chance of success when the case ultimately reaches trial. "Dude."[127]

[127] THE BIG LEBOWSKI, *supra* note 1.

Appendix

Point-of-Sale (POS) Transaction Figure

			Owner and Property					
			Merchant		Card-Issuing Bank		Principal	
			Goods	Money	Goods	Money	Goods	Money
Agency Relationship and Larceny Theory	No Agency	False Pretenses	YES (Part IV.A.1)	NO	NO	YES (Part IV.A.2)	NO	NO
		Embezzle-ment	NO	NO	NO	NO	NO	NO
	Agency But No Authority	False Pretenses	YES (Part IV.A.1)	NO	NO	YES (Part IV.A.2)	NO	YES (Part IV.A.3)
		Embezzle-ment	NO	NO	NO	NO	NO	YES (Part IV.B.2)
	Actual Authority	False Pretenses	NO	NO	NO	NO	NO	NO
		Embezzle-ment	NO	NO	NO	NO	YES (Part IV.B.1)	YES (Part IV.B.2)

This figure is a general reference guide for determining a viable theory of larceny under Article 121, UCMJ, in a POS transaction. To use this Figure:

1. Locate the two rows that describe the agency relationship of the case;
   a. "No Agency" refers to a case where there is no agency relationship between the thief and the account holder.
   b. "Agency But No Authority" refers to a case where there is an agency relationship between the thief and the account holder, but the thief acted outside the scope of his authority when engaging in the POS transaction.
   c. "Actual Authority" refers to a case where there is an agency relationship between the thief and the account holder, and the thief possessed the authority to engage in the POS transaction.
2. Next, locate the "YES" blocks within these set of rows;
   a. Shaded "YES" blocks indicate theories with significant uncertainty.
   b. Cross-references for discussions of the theory are also indicated.
3. The row in which the "YES" block is located will indicate the theory of larceny; and
4. The column in which the "YES" block is located will indicate both the character of the property, and the owner of that property that should be alleged. A shaded "YES" block means that there is some uncertainty about the viability of the indicated theory.

In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families

Major Melvin L. Williams[*]

I. Introduction

It looked like an open-and-shut case: two U.S. servicemembers found dead in Ghana, each lying unresponsive in their hotel room after a night of partying to bring in the New Year, with heroin, cocaine, and alcohol detected in their bodies. The Ghanaian authorities ruled that the deaths were caused by abuse of drugs and alcohol without involvement of any external factors indicating foul play. Even so, the command investigation that followed determined that both servicemembers died in the line of duty as opposed to as a result of their own misconduct. The rationale was simple—how much did their families stand to lose?[1]

Despite commanders' best efforts to safeguard their troops with weekly unit safety briefings and extensive training, Soldiers are not immune from death, injury, or disease. It can occur during hostile engagements, during garrison physical training, while on leave overseas for New Year's Eve, or even when a Soldier is absent without leave (AWOL). Anytime a Soldier suffers injury or death, a line of duty (LD) investigation is initiated to determine entitlements to certain benefits.[2]

Although the mantra, "I am a Soldier every day, all day—24/7,"[3] is ubiquitous in the Army, the reality is that an individual's conduct and duty status control who is eligible to receive certain benefits, to include family members in death cases.[4] As a consequence, leaders are often concerned with the prospective loss of substantial benefits for an injured Soldier and his Family. This typically creates a tension between protecting the interest of the individual concerned and the readiness of the Army where service is interrupted by death, injury, or disease.

Army regulations provide detailed guidance regarding LD investigations as well as specific rules governing LD and misconduct determinations.[5] Yet, existing guidance on the full implications of receiving a "not in line of duty" (NLD) determination is scattered, incomplete, and often fraught with misconceptions.[6] For example, many leaders may be surprised to learn that numerous benefits are not lost (e.g., the death gratuity[7]) even when a Soldier's injury or death is determined to be NLD.

The potential loss of benefits in a LD investigation should neither outweigh nor overcome prescribed regulatory procedures, although it is a common tendency for leaders to make a LD determination based precisely on that consideration.[8] This primer informs judge advocates and

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[1] This example is loosely based on real events involving Navy Petty Officer 1st Class Patrick Brendan Mack and Navy Seaman Lonnie Davis, Jr. *See* Lisa M. Novak, *Misconduct Rarely Found in Servicemember Deaths*, STARS & STRIPES, Mar. 10, 2010, *available at* http://www.stripes.com/news/misconduct-rarely-found-in-servicemember-deaths-1.100000. *See, e.g.*, Matthew M. Burke, *Report: Sailor Left His Friend to Die After Fall from Train in Japan*, STARS & STRIPES, Oct. 20, 2013, *available at* http://www.stripes.com/news/report-sailor-left-his-friend-to-die-after-fall-from-train-in-japan-1.247908 (reporting that the approval authority reversed the investigating officer's opinion that the subject servicemember did not die in the line of duty when he climbed aboard a train after drinking several Japanese cocktails and subsequently falling on the train platform).

[2] *See* U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-3 (4 Sept. 2008) [hereinafter AR 600-8-4] (outlining requirements of line of duty (LD) investigations). Among the various benefits available, some examples include Dependent and Indemnity Compensation (DIC), Survivor Benefit Plan (SBP), accrual of creditable service and leave, receipt of pay and allowances as well as severance or physical disability pay, and free hospitalization.

[3] U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER'S GUIDE para. 7-6 (Feb. 2004) [hereinafter FM 7-21.13].

[4] AR 600-8-4, *supra* note 2, para. 2-2. *See also* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7a, ch. 01 (Apr. 2013) [hereinafter DoD FMR].

[5] *See generally* AR 600-8-4, *supra* note 2. Appendix B, Army Regulation (AR) 600-8-4, provides several basic rules when making LD and misconduct determinations. The purpose of the rules is to find out whether there is evidence of intentional misconduct or willful negligence. These rules are also listed in Appendix B of this article.

[6] In the author's professional experience, one reason for confusion by Soldiers and commanders alike on the various benefits available is the breadth of pertinent information being spread across a number of federal statutes and regulations, rather than provided for in one repository.

[7] Payment of the death gratuity has not depended on the outcome of a LD investigation since 1959. 10 U.S.C. §§ 1475-1480, *amended* by Act of Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1452.

[8] Anecdotal evidence suggests that impacted benefits ultimately become the crux of each investigation, often with the belief that a NLD determination will deprive the Soldier of *all* benefits. Although limited to LD investigations involving suicides, see Major Marcus Misinec, *Get Back in Line: How Minor Revisions to AR 600-8-4 Could Bring Major Rejuvenation to Suicide Line of Duty Investigations*, 221 MIL. L. REV. 183 (Fall 2014). "In a survey conducted by [Major Misinec], 12 out of 17 (70.6%) current suicide [LD] appointing authorities (future approval

leaders of the LD investigation process and, more importantly, the LD investigation effect on benefits so they can make informed LD determinations, protect the integrity of the LD system, and not be distracted by false beliefs about impacted benefits.

This primer examines the reasons for conducting LD investigations and the benefits at stake after final approval authority decision, with emphasis on the effects of being found NLD-Due to Own Misconduct (DOM). Part II of this article previews the LD process while Part III considers the possible outcomes of a LD investigation. Part IV analyzes the impact of a LD determination; in particular, it focuses on the provision of benefits administered by the Department of the Army (DA), Department of Veterans Affairs (DVA), and other federal agencies. Finally, Part V addresses special considerations and other matters that may affect LD investigations.

II. Line of Duty Investigation Overview

A. Background

1. Purpose and Function

At its core, a LD investigation is predicated on the simple proposition that "every [S]oldier whose service is interrupted by injury, disease, or death while conducting himself properly in the Army is entitled to certain benefits."[9] The operative language hones in on two issues: proper conduct and duty status. Specifically, a LD determination is required whenever a Soldier cannot perform his duties due to incapacitation from injury or disease.[10] Any Soldier can become the subject of a LD investigation, so naturally leaders want to ensure their Soldiers receive the various benefits that accrue when death or injury transpires.[11]

Army Regulation 600-8-4, *Line of Duty Policy, Procedures, and Investigations*, promulgates the policies and procedures for investigating the circumstances surrounding a Soldier's death, disease, or injury and prescribes the standards used in determining LD status. The purpose of making LD determinations is to protect the interests of the individual, the individual's family, and the United States, because significant benefits are at stake depending upon whether the death, injury, or illness occurred "in line of duty" (ILD).[12] Unlike worker's compensation, which requires that a worker be performing job related duties in order to qualify for benefits/compensation, a LD determination is not dependent on a Soldier actually performing military duties at the time of impairment or, more broadly, that any resulting disability is job-related.[13] Rather, LD determinations are based on a Soldier's duty status, coupled with the question of whether he committed any misconduct that precipitated the injury or death.[14]

It is important to remember that LD investigations not only apply to the Active Army, the Army National Guard, and the U.S. Army Reserve, they also apply to cadets at the U.S. Military Academy and those enrolled in the Senior Reserve Officers' Training Corps (ROTC);[15] moreover, they encompass applicants for enrollment in the military while performing authorized travel to or from or while attending training.[16] Three procedures can be used to make a LD determination: a presumptive finding, an informal investigation, and a formal investigation.[17]

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authorities) stated that making sure the surviving family is taken care of was the most important thing to them when one of their Soldiers committed suicide. Only one was most concerned with determining the Soldier's line of duty status." *Id.* at n.41. Further, the opening scenario in Ghana illustrates this point by illuminating the apparent friction for a commander to do all that he can to assist the Soldier and Family, while adhering to regulation. Recognizing the disconnect between rule and application, albeit without the benefit of large scale empirical data across the Army, see *infra* Parts IV and V for a non-exhaustive list and discussion of the most applicable source documents for the reader's awareness and use.

[9] OFFICE OF THE STAFF JUDGE ADVOCATE, U.S. ARMY NORTH AND FORT SAM HOUSTON, GUIDE FOR THE LINE OF DUTY INVESTIGATING OFFICER (ARMY REGULATION 600-8-4) (Feb. 2012) [hereinafter ARNORTH LD GUIDE], *available at* http://www.samhouston.army.mil/sja/pdf_files/2012/Line%20of%20Duty%20Investigating%20Officer%20Guide.pdf. Many installation legal offices have created similar guides to assist investigating officers (IO) conduct LD investigations. This guide can be a valuable resource for any appointed LD IO. It is complete with a sample notification letter and evidence checklist. For another excellent guide, see OFFICE OF THE STAFF JUDGE ADVOCATE, CIVIL AND ADMIN. LAW DIV., 101ST AIRBORNE DIV. (AIR ASSAULT), LINE OF DUTY INVESTIGATOR'S GUIDE (Apr. 2005) [hereinafter 101ST ABN LD GUIDE], *available at* http://www.campbell.army.mil/campbell/SJA/Documents/LOD_Investigating_Officers_Guide.pdf.

[10] AR 600-8-4, *supra* note 2, para. 2-3.

[11] *See* Lieutenant E. J. Harrington, *Eligibility for Death or Injury Benefits*, JAG J., Oct. 1951, at 17, 17. Lieutenant Harrington stresses the significance of LD investigations by portending the situations where any servicemember, whether he or she is in the Reserve component or active component, may become the subject of a LD investigation because any servicemember can fall prey to death or injury during military service.

[12] AR 600-8-4, *supra* note 2, para. 2-1.

[13] Worker's compensation is a form of insurance providing wage replacement and medical benefits to employees injured in the course of employment in exchange for mandatory relinquishment of the employee's right to sue his employer for the tort of negligence. *See* BLACK'S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2d ed. 1910), http://thelawdictionary.org/no-fault-compensation (last visited Mar. 20, 2014) ("Without having to prove any other party was at fault in an accident, an aggrieved party is awarded compensation. Workmen's compensation is no-fault compensation.").

[14] For further discussion, see *infra* Part II.B.

[15] AR 600-8-4, *supra* note 2, at i.

[16] *Id.*; *accord* 10 U.S.C.A. § 2109 (West 2014). *See also id.* § 2110. Line of duty investigations extend to applicants for enrollment while engaged in flight or flight instruction. *Id.*

[17] AR 600-8-4, *supra* note 2, paras. 2-3 to 2-5. For further discussion, see *infra* Part II.A.2.

2. Types of Investigation

a. Presumptive Finding of In Line of Duty—A Determination Without an Investigation

Line of duty investigations are not always necessary, even when a determination is required because a Soldier has died or was injured—of course if willful negligence is involved, then one is required. The LD determination is presumed to be ILD when no investigation is completed.[18] For instance, a person will be automatically presumed ILD when he incurs injuries from a terrorist attack or enemy action, dies from natural causes or while a passenger on civilian or military aircraft, or, barring the presence of any circumstances that necessitate a formal investigation, in the case of disease.[19] When appropriate, a commander will determine a Soldier is ILD merely by filling out and signing a Department of the Army (DA) Form 2173, *Statement of Medical Examination and Duty Status*.[20] In all other cases, a LD investigation must be conducted.

b. Informal Investigation

An investigation can be conducted informally by the chain of command, unless misconduct or negligence is suspected and a formal investigation is required.[21] The special court-martial convening authority (SPCMCA) is the appointing and approval authority for informal LD investigations.[22] At a minimum, documentation for an informal investigation typically consists of a DA Form 2173, which is completed by the Military Treatment Facility (MTF) and the unit commander.[23] In contrast to a formal LD investigation, an informal investigation's determination may only result ILD.[24] Before the commander finds a Soldier NLD, a formal LD investigation must be conducted.[25]

c. Formal Investigation

Formal LD investigations are detailed investigations that are much more comprehensive than the two procedures explained above. A Soldier subject to a formal investigation enjoys certain protections, such as the right to counsel, notification of any contemplated adverse action, and an opportunity to respond before a final determination is made.[26] A formal LD investigation must be conducted when certain factors are present, including such circumstances as death or injury involving abuse of drugs or alcohol, possible suicide, or injury incurred while AWOL, among others.[27] Once the appointing authority—the SPCMCA—receives the DA Form 2173, he will appoint an investigating officer (IO) to complete Department of Defense (DD) Form 261, *Report of Investigation--Line of Duty and Misconduct Status*.[28] After the IO completes the report, the SPCMCA will ensure the IO's report complies with his instructions, refer the report for legal review, and approve or disapprove the IO's findings before forwarding it to the approval authority.[29] The final approval authority for a formal LD investigation is

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[18] AR 600-8-4, *supra* note 2, para. 2-3a. *But see, e.g.*, Major Gregory Block, *Line of Duty—How Strong is the Presumption of "In Line of Duty?,"* ARMY LAW., May 1995, at 66, 66. Major Block cautions practitioners to not become blindly obedient when using LD presumptions, given differing affected interests between the individual and the government: "[p]resumptions in favor of ILD status may give some deference to the individual, but should not be used to unduly prejudice the agency." *Id.*

[19] AR 600-8-4, *supra* note 2, para. 2-3.

[20] *Id.* para. 3-2.

[21] *Id.* para. 2-3c.

[22] *Id.* para. 3-6. The special court-martial convening authority is normally in the grade of O-6 and commands a brigade-size organization. For the Army National Guard, the appointing authority must be a commander of at least a battalion- or squadron-size organization, and the approval authority is the respective state Adjutant General. *Id.*

[23] *Id.* para. 3-2.

[24] *Id.* para. 3-4a. An exception to the rule is in the case where the MTF finds that a condition existed prior to service (EPTS), and in that event the LD status would be NLD-Not Due to Own Misconduct (NDOM). *Id.* para. 4-8e.

[25] *Id.* para. 3-4c to d.

[26] *Id.* para. 3-8.

[27] *Id.* para. 2-3c. The following enumerated list contains the circumstances that mandate a formal LD investigation.

> (1) Injury, disease, death, or medical condition that occurs under strange or doubtful circumstances or is apparently due to misconduct or willful negligence.
> (2) Injury or death involving the abuse of alcohol or other drugs.
> (3) Self-inflicted injuries or possible suicide.
> (4) Injury or death incurred while AWOL.
> (5) Injury or death that occurs while an individual was en route to final acceptance in the Army.
> (6) Death of a USAR or ARNG soldier while participating in authorized training or duty.
> (7) Injury or death of a USAR or ARNG soldier while traveling to or from authorized training or duty.
> (8) When a USAR or ARNG soldier serving on an AD tour of 30 days or less is disabled due to disease.
> (9) In connection with an appeal of an unfavorable determination of abuse of alcohol or other drugs (para 4–10*a*).
> (10) When requested or directed for other cases.

Id.

[28] *Id.* para. 2-5. An IO must be appointed in writing and the IO may be a commissioned officer, warrant officer, or commissioned officer of another U.S. military service in joint activities where the Army has been designated as the executive agent. *Id.* para. 3-7. Moreover, the IO must be senior in grade to the individual being investigated. *Id. See generally* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6]. The IO inquiring into the matter will use the general guidance contained in AR 15-6, chapter 5, unless AR 600-8-4 provides more specific or different guidance.

[29] AR 600-8-4, *supra* note 2, para. 3-9.

the general court-martial convening authority (GCMCA), a distinction from the informal investigation process.[30] In summary, there are essentially three separate and independent reviews by the IO, SPCMCA, and GCMCA during the formal LD investigative process.

3. Standards and Timeline

The evidentiary standard for LD investigations is preponderance of the evidence standard.[31] That is, the findings or determinations must be supported by "a greater weight of evidence than supports any different conclusion."[32] Investigated Soldiers are given the benefit of the doubt from the outset of each case and are presumed ILD unless there is substantial evidence that rebuts this presumption.[33]

Investigating officers should fully consider and apply, where appropriate, the rules in Appendix B of AR 600-8-4 throughout the LD investigation. The Appendix B rules provide detailed guidance for analyzing various types of cases and injuries.[34] They assist the IO in assessing how misconduct plays a role in making such findings and recommendations.[35] The prescribed completion time for an informal investigation is forty days.[36] Formal investigations must be completed within seventy-five days of the incident.[37]

B. Conduct and Status Interface

In order to make a LD determination, two questions must be answered. The first question is whether the Soldier's intentional misconduct or willful negligence proximately caused the injury, illness, or death. The second question determines the Soldier's duty status at the time of injury, illness, or death.[38]

1. Intentional Misconduct or Willful Negligence

A Soldier's conduct is characterized by his behavior at the time of injury or death.[39] A person can never be found ILD if his own misconduct or willful negligence causes some degree of incapacitation that interferes with carrying out one's duties, regardless if that person was in an authorized duty status.[40] Also, violating an Army regulation by itself is not misconduct—it is simple negligence, but regulatory violations should still be considered and weighed by investigating officers and approval authorities.[41] If misconduct or willful negligence was not the proximate cause of any resulting death, injury, or illness, then the Soldier's status comes into question.

2. Soldier's Status

The duty status inquiry is related to an individual's duty status as a functioning member of the Army.[42] Duty status is a term of art that involves more than direct performance of military duties and does not necessarily mean conduct within the scope of employment. It refers to whether a Soldier was in an authorized status at the time of injury or death, such as being present for duty, on leave, or on pass, or in unauthorized status, such as AWOL, deserter, or dropped from rolls.[43] For example, a person injured while on

[30] *Id.* para. 2-5. The general court-martial convening authority is normally in the grade of O-7 or higher. *See id.* para. 3-11 (for actions by the final approval authority).

[31] *Compare id.* para. 2-6c (the Army uses a preponderance of evidence standard when making LD determinations), *with* U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0212 (26 June 2012) (prescribing a clear and convincing standard for evidence, which is a higher bar than preponderance of the evidence but lower than beyond a reasonable found at court-martial, that supports a finding of misconduct).

[32] AR 600-8-4, *supra* note 2, para. 2-6c.

[33] *Id.* para. 2-6b.

[34] *See id.* app. B.

[35] *Id.* para. 2-6e.

[36] *Id.* tbl.3-1.

[37] *Id.* tbl.3-2.

[38] *Id.* paras. 2-6a; 3-4(b). Determining if misconduct occurred in a LD investigation is considered the threshold or crucial question because that finding is irrespective of the Soldier's duty status. Once it is determined that misconduct or willful negligence did not take place, then and only then would the investigating officer or commander have to answer the second question of the two-step analysis in formal LD investigations.

[39] *See* ARNORTH LD GUIDE, *supra* note 9, at 1. "'Conduct' is a characterization of a [S]oldier's behavior based on tort principles. These principles are summarized for guidance in 12 rules governing line of duty and misconduct determinations which are set forth in Appendix B of AR 600-8-4." *Id.*

[40] AR 600-8-4, *supra* note 2. para. B-1. Intentional misconduct is defined as "any wrongful or improper conduct which is intended or deliberate," but does not necessarily involve committing an offense under the Uniform Code of Military Justice (UCMJ) or local law. *Id.* at 27. Willful negligence is defined as "a conscious and intentional omission of the proper degree of care that a reasonably careful person would exercise under the same or similar circumstances." *Id.*

[41] *Id.* para. B-2. As an example, a Soldier illegally parks his car in a loading dock on Fort Irwin, California when an incoming semi-truck trying to unload freight strikes his vehicle. Consequently, the Soldier is injured in the accident. So long as the Soldier was not willfully negligent or the cause of his injury was not his illegal parking, he would still likely be considered to be ILD. A mere technical violation of an installation's parking policy would not constitute deliberate wrongdoing. *See, e.g.*, Policy Memorandum 7, Headquarters, U.S. Army Garrison, Fort Irwin, subject: Parking Policy on Fort Irwin (24 May 2012).

[42] ARNORTH LD GUIDE, *supra* note 9.

authorized pass or leave is as much ILD as a Soldier injured while at his military post. However, the mere fact that a Soldier is in an authorized status does not by itself always support an ILD determination.[44] Moreover, a Soldier in an unauthorized status can never be injured ILD unless mentally unsound.[45]

The conduct-status equation is critical to the LD determination calculus because each possible outcome has a differing impact for the Soldier being investigated. Once an IO has completed gathering all available evidence related to the Soldier's conduct and status, he may find the Soldier ILD, NLD-Not Due to Own Misconduct (NLD-NDOM), or NLD-Due to Own Misconduct (NLD-DOM).

III. Possible Outcomes (and Consequences)

A. In Line of Duty

An ILD determination means that a Soldier was in an authorized status at the time of the injury and his injury was not proximately caused by intentional misconduct or willful negligence of the Soldier.[46] Though most cases result in a determination of ILD, the language "in line of duty" can seem misleading. Often, this phrase connotes carrying out one's work duties, as intended by the idiom, "killed in the line of duty," with law enforcement personnel. However, for the military, the language does not hinge on whether the Soldier was actually performing military duties, but rather on the two-step analysis concerning conduct and status discussed in Part II.B. As the most favorable determination, it qualifies the Soldier involved for all available benefits.[47] Naturally, the desire to reach an ILD determination can permeate the LD process where the commander's final decision justifies the means, even for laudable reasons.[48] The other two possible determinations, both coming under the NLD subheading, are considered adverse and result in diminished entitlements.[49]

B. Not in Line of Duty

1. Not Due to Own Misconduct

A NLD-NDOM determination means that a Soldier is in an unauthorized status, usually AWOL, but any resulting injury is not caused by intentional misconduct or willful negligence of the Soldier.[50] For example, a Soldier is AWOL, but is injured in a car accident where the Soldier is not at fault. Accordingly, the Soldier is considered to be NLD, but not due to any volitional act that is deemed to be misconduct or negligence. This determination may also be based on a medical condition that "existed prior to service" (EPTS), which was not aggravated by military service.[51] Of the three possible outcomes of a LD investigation, a NLD-NDOM determination materializes least frequently.[52]

2. Due to Own Misconduct

A NLD-DOM determination means that a Soldier's intentional misconduct or willful negligence proximately caused injury or death, regardless of duty status.[53] To illustrate this point, imagine that a Soldier gets intoxicated at a party and attempts to drive home. The Soldier then becomes involved in an accident as a result of his intoxication. In this scenario, the Soldier would be found NLD-DOM because his own personal misconduct caused his injuries.

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[43] *See generally* U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVE AND PASSES (15 Feb. 2006) (RAR 4 Aug. 2011) [hereinafter AR 600-8-10].

[44] AR 600-8-4, *supra* note 2, para. 3-4b.

[45] *Id.* para. 4-7 ("Any injury or diseases incurred while the [S]oldier is AWOL is handled as "not in line of duty" unless the [S]oldier was mentally unsound at the inception of the unauthorized absences.").

[46] *Id.* para. 2-1.

[47] A Soldier found ILD would be analogous to separating from military service with an Honorable conditions discharge in terms of eligibility for the receipt of statutory benefits and entitlements.

[48] *See* Novak, *supra* note 1; *see also* Burke, *supra* note 1. Both articles call attention to commanders finding each servicemember's death to be ILD even when evidence to the contrary existed, and that the appropriate determination in each case likely should have been NLD. Take the events in Ghana, for instance, where both servicemembers were found ILD. Autopsies revealed that the mixed use of drugs and alcohol led to their deaths. However, the final approval authority appeared to primarily base his LD determination on efforts to get the families all financial benefits, which would run counter to the intent and textual application of LD rules. In the sailor's death in Japan, he was found to be ILD even though the IO originally concluded he was NLD-DOM. The final approval authority disapproved the findings and substituted ILD for the sake of benefits to the deceased's son. This consideration, while commendable, runs afoul of what is contemplated by statute and regulation.

[49] For further discussion, see *infra* Part IV.

[50] AR 600-8-4, *supra* note 2, para. 2-2. *See also id.* para. 4-7c ("If the driver of a Government vehicle on an unauthorized trip is injured during an unjustified deviation from his or her assigned route, the driver should be considered AWOL for LD purposes.").

[51] AR 600-8-4, *supra* note 2, para. 4-8e.

[52] To the author's knowledge, the difference between NLD-NDOM and NLD-DOM determinations has not shown any salient distinction when it comes to impacted benefits, regardless of the agency administering the provision of benefits. Simply, the gravamen in determining eligibility for benefits lies in the binary choice of ILD or NLD only.

[53] AR 600-8-4, *supra* note 2, para. 2-6a. For background on basic concepts of misconduct as it relates to LD investigations and areas of misconduct, such as malingering, intoxication, or assaults, see Lieutenant Grant Cole, *Misconduct and Line of Duty*, JAG J., May–June 1953, at 3, 3. Of course, many relevant statutes have been enacted and regulations promulgated since the publication date. Therefore, the article is referred in order to provide a basic overview of various types of misconduct.

Each possible outcome of a LD investigation correlates with specific benefits, whether total or partial. Therefore, the impact of LD determinations is paramount to Soldiers and Families, and the commanders who attempt to get them benefits.

IV. Impact of Line of Duty Determination[54]

Commodum Ex Injuria Sua Nemo Habere Debet[55]

For Soldiers and leaders, the impact of LD determinations begins and ends with entitlements. Entitlements have the greatest effect and impact on that individual's life, outside of the triggering incident itself. Again, eligibility for these entitlements is based on an administrative determination in cases involving death, disease, or disability, which controls the benefits available to the Soldier and his Family.

For instance, as discussed further below, an injury that is incurred ILD entitles a Soldier to Army disability retirement or separation compensation, Department of Veterans Affairs compensation, and hospitalization benefits. Conversely, a NLD-DOM determination may result in the loss of pay as well as the loss of creditable days for pay and allowances for as long as the Soldier is unable to perform his duties. Because creditable days are lost, they are then added to the Solder's active duty service obligation (ADSO) to fulfill any contractual terms of service. In the event a servicemember is found NLD-NDOM, he may be denied civil service preference, disability retirement or separation compensation, and DVA disability or hospitalization benefits.

As Parts II and III set up the regulatory framework for LD investigations, this Part—and to a lesser extent, Part V—explores the wide array of benefits across the military. The taxonomy of benefits should be viewed against the backdrop of four categories: immediate income assistance, transition assistance, income replacement, and unpaid compensation.[56] Attendant to this approach, this section comments on the effect of LD determinations for each topic, whether it is ILD or NLD.

A. Benefits Administered by the Department of the Army[57]

Recalling the Ghana case from the introduction, imagine that the servicemembers were found NLD-DOM instead of ILD and consider the benefits the servicemembers stood to lose. Should a commander's altruistic motive trump the intended purpose of LD determinations? Or is a simple misunderstanding of the law the contributing factor for the incongruent nature of LD investigations?

Soldiers who are on active duty (AD) for more than 30 days will not lose their entitlement to medical and dental care, even if the injury or disease is found to have incurred NLD.[58] Likewise, reserve or guard Soldiers under similar circumstances are eligible to receive medical and dental care if their duty extends beyond 30 days.[59]

Soldiers who are absent from their regular duties as a result of injuries or disease caused by misconduct, generally still receive pay during that absence.[60] However, if the disease or injury is directly caused by or immediately follows an intemperate use of drugs or alcohol, a Soldier is not entitled to pay for any continuous absence of more than one day.[61] Further, an enlisted Soldier who is unable to perform duties for more than one day because of an intemperate use of drugs or alcohol or disease or injury caused by misconduct or willful negligence will have to make up the lost time at the end of his initial service obligation.[62]

Soldiers will not accrue creditable service for longevity and retirement purposes, if they are absent due to injury or disease determined to be NLD-DOM.[63] In contrast, Soldiers are still eligible to receive allowances even if found NLD-DOM.[64] Yet, Soldiers will not accrue leave for injury or

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[54] *See infra* Appendix A.

[55] F.J. STIMSON, GLOSSARY OF TECHNICAL TERMS, PHRASES, AND MAXIMS OF THE COMMON LAW (1881). Roughly translated, the maxim means that a wrongdoer should not be enabled by law to take any advantage from his actions. In simpler terms, one should not be able to profit from one's wrongdoing. Although ordinarily used in the context of tort law, this phrase highlights the delicate balance in LD investigations between social responsibility for the Soldier who has been disabled and social protection from the Soldier who irresponsibly has brought disability upon himself.

[56] *See* Patrick Mackin et al., *Review of Survivor Benefits*, THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION ch. 12 (June 2012). The authors employ this functional categorization to evaluate military survivor benefits and compare it with civilian occupations.

[57] See *infra* Part V.C for additional benefits not covered in Parts IV.A thru IV.C; namely, it contains survivor benefits in death cases, such as the Survivor Benefit Plan, life insurance, and death gratuity.

[58] 10 U.S.C.A. § 1074 (West 2014).

[59] *Id.* § 1074a. For Reserve component members on AD for a period of thirty days or less, see U.S. DEP'T OF DEF. DIR., 1241.1, RESERVE COMPONENT MEDICAL CARE AND INCAPACITATION PAY FOR LINE OF DUTY CONDITIONS (28 Feb. 2004) [hereinafter DoDD 1241.1].

[60] AR 600-8-4, *supra* note 2, para. 2-2c. In other words, self-indulgent or excessive drug or alcohol use is grounds to deny pay for those days a Soldier does not work if it is more than one duty day. Seemingly, it appears that drug or alcohol abuse is the only basis to deny pay in this context.

[61] *Id.* The DoD FMR defines pay to include the following: basic pay, special pays, and incentive pay for hazardous duty. DoD FMR, *supra* note 4, para. 010301.C.2.

[62] 10 U.S.C.A. § 972 (West 2014).

[63] DoD FMR, *supra* note 4, para. 010102.B.1.d & tbl.1-2, r. 6.

[64] *Id.* tbl.1-12, r. 3. The DoD FMR defines allowances to include the following: basic allowance for subsistence (enlisted leave rations), basic allowance for housing, personal money allowances, clothing maintenance

disease caused by alcohol or drug abuse or disease caused by other misconduct.[65] Also, Soldiers can have their reenlistment bonuses, or at least a pro rata share, recouped due to misconduct.[66] Additionally, Soldiers found NLD-DOM will not receive severance or physical disability pay.[67]

Under limited circumstances, there are statutory provisions for the award of posthumous warrants by the Secretary of the Army and posthumous commissions by the President in the name of the members of the Army who die after September 8, 1939. These warrants and commissions are only awarded for deaths occurring ILD.[68]

In summary, the primary consequences of NLD-DOM determinations in non-death case are loss of creditable time in service and loss of retirement or disability separation. In the event of permanent disability, the loss of creditable time becomes less important. Generally an adverse determination does not cause a loss of medical benefits or deny eligibility for pay and allowances, unless it involves alcohol or drugs. However, if a servicemember is no longer connected with the Army, then the benefits offered by the DVA become of paramount importance.

B. Benefits Administered by the Department of Veterans Affairs

The DVA makes a separate determination for "service-connected" injuries and is not bound by the Army's conclusion.[69] Notwithstanding, the DVA will use the Army's (or sister service's) investigation to make its own finding.[70]

Payments to veterans for service-connected disabilities are called compensation.[71] A veteran who becomes disabled by incurring an injury or a disease, or by aggravating a pre-existing disease or injury while on active service during a period other than war, is entitled to receive peacetime disability compensation if the veteran was discharged or released under conditions other than dishonorable.[72] As one example, a Soldier who exacerbates a pre-existing rotator cuff injury, say, from his high school football glory days, during training at the National Training Center in Fort Irwin would be eligible for compensation. However, the veteran is not eligible to receive this compensation if the disability is a result of willful misconduct or abuse of alcohol or drugs.[73] Hence, the two servicemembers in the Ghana scenario would not be able to receive compensation if they were found NLD due to drugs or alcohol.

A veteran disabled by an injury or disease incurred during a period of active service in wartime, or by an aggravation of a pre-existing injury or disease during such service, is entitled to wartime disability compensation. This is the case if the veteran was separated from the service under honorable or general conditions. The veteran is not eligible to receive it if the disability is a result of willful misconduct or abuse of alcohol or drugs.[74]

The DVA may furnish hospital or domiciliary care to a veteran who has a service-connected disability, or who was released from military service for a disability incurred or aggravated ILD, or who is receiving disability compensation.[75] However, if the veteran's disability was incurred NLD or was nonservice-connected, or if the disabled veteran is not receiving disability compensation for a reason other than the receipt of retirement pay, the veteran is not entitled to hospital care unless it is necessary and he is unable to defray the expense personally.[76]

Statute provides that surviving widows and children and dependent parents of veterans shall be entitled to death compensation, but only if the death was ILD and resulted from injury or disease incurred in or aggravated by active

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allowances, family separation allowances, and station allowances as outlined in JFTR, vol. 1, ch. 9 (C 310, Oct. 1, 2012). *Id.* para. 010301.C.2.

[65] AR 600-8-4, *supra* note 2, para. 2-2c; AR 600-8-10, *supra* note 43, para. 2-3a(7). This provision is one of seven enumerated exclusions for purposes of leave accrual.

[66] U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 5-10a (31 Jan. 2006) (RAR 15 Sept. 2011) [hereinafter AR 601-280].

[67] 10 U.S.C.A. § 1207.

[68] *Id.* §§ 1521–1522. If a Soldier was "officially recommended for appointment or promotion to a grade other than a commissioned grade but was unable to accept the appointment or promotion because of death[,]" then the Secretary of the Army may issue a posthumous warrant in the name of the Soldier. *Id.*

[69] 38 U.S.C.A. § 105 (West 2014); 38 C.F.R. § 3.301 (2014). "The term 'service-connected' means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service." 38 U.S.C.A. § 101(16). In other words, service-connected means ILD.

[70] *See* AR 600-8-4, *supra* note 2, para. 2-2f.

> In determining whether a veteran or his survivors or family members are eligible for certain benefits, the DVA makes it own determinations with respect to LD. These determinations rest upon the evidence available. Usually this consists of those facts that have been officially recorded and are on file within DA, including reports and LD investigations submitted in accordance with the provisions of this regulation.

Id.

[71] 38 U.S.C.A. § 101(13) (West 2014).

[72] *Id.* § 1131.

[73] *Id.*

[74] *Id.* § 1110.

[75] *Id.* § 1710.

[76] *Id.* § 1722.

service.[77] For service-connected deaths and deaths occurring after 31 December 1956 that resulted from disability incurred in active service (provided the veteran was released under conditions other than dishonorable), the DVA will pay dependency and indemnity compensation[78] to the widow,[79] children,[80] and parents.[81] A widow or child eligible for death compensation may elect to take dependency and indemnity compensation in lieu thereof.[82]

For purposes of disability or death compensation and dependency and indemnity compensation, a veteran's death or disability is treated as though it were service-connected if the injury or an aggravation of the injury is a caused by hospitalization, medical, or surgical treatment.[83] The injury cannot be as a result of willful misconduct or abuse of alcohol or drugs by the Soldier. Similarly, the DVA will treat a veteran's injury as if it were ILD if the individual was pursuing a course of vocation rehabilitation awarded by the DVA or submitting to an examination required by any of the laws administered by the DVA.[84]

A veteran discharged or released from AD by reason of a service-connected disability may be entitled to have the DVA guarantee or insure a loan issued to the veteran for farm, home, and business purposes.[85] A member of the armed forces serving on active duty who is suffering from a disability is eligible for specially adapted housing if the disability is incurred or aggravated ILD during the active military service.[86]

In the case of a deceased veteran who incurred an injury or disease ILD, the DVA may pay a sum not exceeding $300 for funeral expenses if there is no next of kin or there are not sufficient resources to cover funeral and burial expenses.[87] When a veteran dies as the result of a service-connected disability, the DVA shall pay up to $2,000 in burial and funeral expenses.[88] Lastly, the DVA will furnish a flag for the casket of each person who was a veteran of any war if he had served at least one enlistment or was released from AD for a disability incurred or aggravated ILD.[89]

C. Benefits Administered by Other Federal Agencies

Clearly, the most consequential results of a NLD-DOM determination are those effectuated by the Army and DVA; however, other agencies of the federal government administer considerable privileges and benefits to veterans, particularly to disabled veterans. These agencies rely on the DVA determination of whether the injury of the Soldier (veteran) was ILD, NLD-NDOM, or NLD-DOM.

Disabled veterans are given preference in employment in all federal agencies and in the civil service of the District of Columbia. This preference is contingent upon having served on AD, having been separated under honorable conditions, and either (1) having established the present existence of a service-connected disability, or (2) being in receipt of compensation, disability retirement benefits, or a pension from the DVA.[90] Thus, a NLD-DOM determination by the DVA may jeopardize this preference for disabled veterans.

V. Special Considerations and Other Matters

A. How Strong is the "In Line of Duty" Presumption?

Army regulation has promulgated certain presumptions governing LD determinations.[91] Judge advocates and leaders "wrestle with the strength of our regulatory presumption in favor of in line of duty (ILD) determinations,"[92] especially in cases without direct evidence to corroborate a claim. Therein lies the rub for the commander who wants to help out his Soldier and the Family, but not contradict the ancient principle that one should not profit by one's wrongdoing.[93]

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[77] *Id.* §§ 1121, 1141.

[78] *Id.* § 1310. Dependency and Indemnity Compensation (DIC) is a tax free monetary benefit paid to eligible survivors of military Servicemembers who died in the line of duty or eligible survivors of Veterans whose death resulted from a service-related injury or disease. DEP'T OF VETERANS AFFAIRS, DEPENDENCY AND INDEMNITY COMPENSATION, http://benefits.va.gov/compensation/types-dependency_and_indemnity.asp (last visited Nov. 18, 2014). Possible beneficiaries include a spouse who is not currently remarried or children, or parent dependents. One caveat with the DIC is that a surviving spouse who remarries on or after 16 December 2003, and on or after attaining age fifty-seven, is entitled to continue to receive DIC. *Id.*

[79] 38 U.S.C.A. § 1311.

[80] *Id.* § 1313.

[81] *Id.* § 1315.

[82] *Id.* § 1317.

[83] *Id.* § 1151.

[84] *Id.*

[85] *Id.* § 3702.

[86] *Id.* § 2101A.

[87] *Id.* § 2302.

[88] *Id.* § 2307. The request is made by the survivors of the veteran.

[89] *Id.* § 2301.

[90] 5 U.S.C.A. § 2108 (West 2014).

[91] The key for an IO is to use the rules in AR 600-8-4, *supra* note 2, app. B; *see also infra* Appendix B.

[92] The question of whether the injury is incident to service becomes more difficult based on this rationale. *See* Block, *supra* note 18, at 67.

[93] *E.g.*, STIMSON, *supra* note 55.

B. Suicide and Suicide Attempts[94]

All suicides and attempted suicides require a formal LD investigation appointed by the GCMCA.[95] Soldiers may not be held responsible for acts of conduct when they are unable to comprehend or appreciate the nature of the conduct in question if those acts are the result of mental defect, disease, or derangement. Such disorders are presumed ILD unless they existed prior to service (EPTS). It is important to remember that personality disorders, by their nature, are considered to have EPTS.[96]

Suicide and suicide attempt LD investigations must determine whether the subject Soldier was mentally sound,[97] which means that an inquiry is necessary into the subject's background. If the Soldier was mentally unsound at the time of the incident, a medical officer must determine if the condition EPTS.[98] Self-inflicted injuries by a mentally sound Soldier are considered misconduct.[99] To be clear, there are two legal presumptions in play for suicide-related LD investigations: (1) presumption of mental unsoundness—a mentally sound person would not attempt to or commit suicide,[100] and (2) presumption of death to be ILD unless refuted by available evidence.[101]

C. Death Cases and Survivor Benefits

Before 10 September 2001, deaths did not require a LD determination; however, all active duty deaths on or after 10 September 2001 require a LD determination.[102] Qualified survivors[103] of Soldiers who die on AD before becoming eligible to receive retirement pay, may appeal an adverse LD determination in a death case.[104] The appeal must be submitted within six years of the date of the LD determination.[105] An investigation is required for all deaths except death by natural causes, when death occurs while a passenger on a common commercial carrier or military aircraft, death as the result of combat, attack by terrorists, or other forces antagonistic to the interests of the United States, in friendly-fire incidents, or while a prisoner of war. These instances are presumed to be ILD and do not require an investigation.[106]

Significantly, LD determinations affect a Soldier's Survivor Benefit Plan (SBP), but not his Servicemembers' Group Life Insurance (SGLI) or death gratuity. A NLD finding is costly for a deceased Soldier's Family members because they are not authorized to receive the SBP payment, a monthly annuity paid to the surviving spouse or children.[107] On the other hand, a deceased Soldier's named beneficiaries, say, his Family members, will still receive the SGLI benefits—a contractual obligation up to $400,000 depending on the amount of coverage the servicemember elected—regardless of the outcome of any LD investigation.[108]

The death gratuity payment of $100,000 will still be disbursed to the Family irrespective of LD determinations.[109] Concomitant to the SGLI and death gratuity, unpaid pay and allowances[110] and social security benefits[111] are provided to the Family, again, irrespective of any LD determination decision. So in contrast to some people's beliefs, the panoply of benefits is not all lost from the foreboding NLD finding. In fact many benefits are still available to the Soldier's Family.

VI. Conclusion

In light of the number of statutory benefits contingent upon an injury or death having been incurred ILD, the

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[94] For an excellent overview of suicide LD investigations, including suggested revisions to AR 600-8-4 on suicide-related LD determinations, see generally Misinec, *supra* note 8.

[95] U.S. DEP'T OF ARMY, DIR. 2010-01, CONDUCT OF AR 15-6 INVESTIGATIONS INTO SUSPECTED SUICIDES AND REQUIREMENTS FOR SUICIDE INCIDENT FAMILY BRIEFS (26 Mar. 2010) [hereinafter ARMY DIR. 2010-01].

[96] AR 600-8-4, *supra* note 2, para. 4-11a.

[97] *See id.* para. 4-11b.

[98] *Id.* para. 4-11c.

[99] *Id.* paras. 4-11e & B-10.

[100] *Id.* para. B-10. Interestingly, the regulation lays out the legal presumption of mental unsoundness in the negative. For a more in-depth discussion on the evolution of the mentally unsound presumption from its progeny to present day, see Misinec, *supra* note 8, pt. IV.

[101] AR 600-8-4, *supra* note 2, para. 2-6b.

[102] *Id.* paras. 4-13a(1)-(2).

[103] 10 U.S.C.A. § 1448 (West 2014).

[104] AR 600-8-4, *supra* note 2, para. 4-17. The appeal is sent to HQDA (AHRC-PED-S), Alexandria, Virginia 22332. According to Army regulation, the Soldier's surviving Family members may seek assistance with the appeal from the supporting legal assistance office.

[105] *Id.*

[106] *Id.* para. 4-13a(2).

[107] 10 U.S.C.A. § 1448(d). The initial payment is calculated to be fifty-five percent of the projected retirement pay had the servicemember "retired" on the date of his death, which also takes into account the Soldier's time in service. Moreover, the amount lowers to 35 percent upon the surviving spouse attaining the age of sixty-two. *Id.*

[108] 38 U.S.C.A. § 1967 (West 2014).

[109] *See supra* note 7 and accompanying text. The payment is made as one lump sum payment.

[110] 37 U.S.C.A. § 501 (West 2014).

[111] 42 U.S.C.A. § 402 (West 2014).

importance of a LD determination to an injured Soldier or the next of kin in cases of death cannot be overstated. Understandably, leaders never want to put Family members in a position where they may be penalized for the Soldier's conduct. Despite the best of intentions, however, commanders should not view the potential loss of benefits as the overarching factor in LD investigations.

The fact remains that a NLD determination does not automatically equate to a loss of all or even most benefits for the Soldier and Family. This is a common area of confusion for many involved. This primer, in laying out the impacted benefits and availability of each benefit, can help ease the difficulty in the commander's mind when reaching a decision in LD cases because he will know all of the relevant facts. As such, the role of judge advocates in this process is significant—not just staying engaged to ensure a thorough investigation, but also advising leaders of the various benefits at stake to prevent distractions from interfering with the integrity of the process.

The ramifications of LD determinations extend not only to the military service, but well beyond to other federal agencies. Although the DVA renders its own LD determination on each case, which is then relied upon by other government agencies, the DVA uses evidence from the unit's LD investigation in reaching its own LD determination. Confronting misconceptions about impacted entitlements now will, in turn, permit careful consideration of relevant LD factors that will not only benefit the Soldier, but the Army as well.

Appendix A

Active Duty Deaths Benefits Summary

In Line of Duty OR Over 20 Years Time in Service	**Not in Line of Duty AND Less than 20 Years Time in Service**
Servicemembers' Group Life Insurance	Servicemembers' Group Life Insurance
Death Gratuity	Death Gratuity
Social Security[112]	Social Security
Unpaid Pay and Allowances[113]	Unpaid Pay and Allowances
Survivor Benefit Plan[114]	
Dependent and Indemnity Compensation[115]	

[112] A lump sum Social Security benefit of $255 is provided to the surviving spouse or children, along with monthly survivor benefits based on work history (work quarters). *See* U.S. SOC. SECURITY ADMIN., http://www.ssa.gov (last visited Nov. 18, 2014).

[113] Survivors receive all pay owed to the servicemember at the time of death. *See supra* note 60 and accompanying text. To apply to receive the remaining money in the deceased servicemember's account, see U.S. Gov't Accountability Office, SF 1174, Claim for Unpaid Compensation of Deceased Member of the Uniformed Services (Sept. 1992).

[114] Survivor Benefit Plan disbursement is automatic upon the servicemember's death. *See* 10 U.S.C.A. § 1448(d)(1)(B) (West 2014).

[115] Dependent and Indemnity Compensation is only available if the servicemember's death was service-connected. Additionally, surviving spouses or former spouses are eligible to receive the Special Survivor Indemnity Allowance (SSIA) if they are eligible to receive or already receiving the SBP and DIC. The amount of payment increases gradually from $150 for the months during fiscal year 2014 to $310 for the months during fiscal year 2017. Like the SBP, SSIA is taxable. *Id.* § 1450(m).

Appendix B

Rules Governing Line of Duty and Misconduct Determinations[116]

Rule 1. Injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in line of duty. It is due to misconduct. This is a general rule and must be considered in every case where there might have been misconduct or willful negligence. Generally, two issues must be resolved when a soldier is injured, becomes ill, contracts a disease, or dies – (1) whether the injury, disease, or death was incurred or aggravated in the line of duty; and (2) whether it was due to misconduct.

Rule 2. Mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is not enough to determine that the injury, disease, or death resulted from misconduct. However, the violation is one circumstance to be examined and weighed with the other circumstances.

Rule 3. Injury, disease, or death that results in incapacitation because of the abuse of alcohol and other drugs is not in line of duty. It is due to misconduct. This rule applies to the effect of the drug on the Soldier's conduct, as well as to the physical effect on the soldier's body. Any wrongfully drug-induced actions that cause injury, disease, or death are misconduct. That the Soldier may have had a pre-existing physical condition that caused increased susceptibility to the effects of the drug does not excuse the misconduct.

Rule 4. Injury, disease, or death that results in incapacitation because of the abuse of intoxicating liquor is not in line of duty. It is due to misconduct. The principles in Rule 3 apply here. While merely drinking alcoholic beverages is not misconduct, one who voluntarily becomes intoxicated is held to the same standards of conduct as one who is sober. Intoxication does not excuse misconduct. While normally there are behavior patterns common to persons who are intoxicated, some, if not all, of these characteristics may be caused by other conditions. For example, an apparent drunken stupor might have been caused by a blow to the head. Consequently, when the fact of intoxication is not clearly fixed, care should be taken to determine the actual cause of any irrational behavior.

Rule 5. Injury or death incurred while knowingly resisting a lawful arrest, or while attempting to escape from a guard or other lawful custody, is incurred not in line of duty. It is due to misconduct. One who resists arrest, or who attempts to escape from custody, can reasonably expect that necessary force, even that which may be excessive under the circumstances, will be used to restrain him and, is acting with willful negligence.

Rule 6. Injury or death incurred while tampering with, attempting to ignite, or otherwise handling an explosive, firearm, or highly flammable liquid in disregard of its dangerous qualities is incurred not in line of duty. It is due to misconduct. Unexploded ammunition, highly flammable liquids, and firearms are inherently dangerous. Their handling and use require a high degree of care. A Soldier who knows the nature of such an object or substance and who voluntarily or willfully handles or tampers with these materials without authority or in disregard of their dangerous qualities is willfully negligent. This rule does not apply when a Soldier is required by assigned duties or authorized by appropriate authority to handle the explosive, firearm, or liquid, and reasonable precautions have been taken. The fact that the Soldier has been trained or worked with the use or employment of such objects or substances will have an important bearing on whether reasonable precautions were observed.

Rule 7. Injury or death caused by wrongful aggression or voluntarily taking part in a fight or similar conflict in which one is equally at fault in starting or continuing the conflict, when one could have withdrawn or fled, is not in line of duty. It is due to misconduct. An injury received or death suffered by a Soldier in an affray in which he is the aggressor is caused by his own misconduct. This rule does not apply when a Soldier is the victim of an unprovoked assault and sustains injuries or dies while acting in self-defense. The Soldier's provocative actions or language, for which a reasonable person would expect retaliation, is a willful disregard for personal safety, and injuries or death directly resulting from them are due to misconduct. When an adversary uses excessive force or means that could not have been reasonably foreseen in the incident, the resulting

[116] *See* AR 600-8-4, *supra* note 2, app. B (the specific rules are restated here for the reader's convenience). These rules are to be considered fully in every formal investigation in deciding LD determinations, and they elaborate upon, but do not modify, the basis for LD determinations. *Id.* para. 2-6e. Often overlooked or even unheeded, these basic rules apply to various situations that IOs may encounter in their investigations. The rules help inform the IO to arrive at decisions of "whether there is evidence of intentional misconduct or willful negligence that is substantial and of a greater weight than the presumption of 'in the line of duty.'" *Id.* app. B.

injury or death is not considered to have been caused by misconduct. Except for self-defense, a Soldier who persists in a fight or similar conflict after an adversary produces a dangerous weapon is acting in willful disregard for safety and is therefore willfully negligent.

Rule 8. Injury or death caused by a Soldier driving a vehicle when in an unfit condition of which the Soldier was, or should have been aware, is not in line of duty. It is due to misconduct. A Soldier involved in an automobile accident caused by falling asleep while driving is not guilty of willful negligence solely because of falling asleep. The test is whether a reasonable person, under the same circumstances, would have undertaken the trip without expecting to fall asleep while driving. Unfitness to drive may have been caused by voluntary intoxication or use of drugs.

Rule 9. Injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others. "Thrill" or "dare-devil" type activities are also examples of when this rule may be applied.

Rule 10. A wound or other injury deliberately self-inflicted by a Soldier who is mentally sound is not in line of duty. It is due to misconduct. Suicide is the deliberate and intentional destruction of one's own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion. Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

Rule 11. Misconduct or willful negligence of another person is attributed to the Soldier if the Soldier has control over and is responsible for the other person's conduct, or if the misconduct or neglect shows enough planned action to establish a joint venture. The mere presence of the Soldier is not a basis for charging the Soldier with the misconduct or willful negligence of another, even though the Soldier may have had some influence over the circumstances or encouraged it. If the Soldier, however, has substantially participated with others in the venture, then that is misconduct.

Rule 12. The line of duty and misconduct status of a Soldier injured or incurring disease or death while taking part in outside activities, such as business ventures, hobbies, contests, or professional or amateur athletic activities, is determined under the same rules as other situations. To determine whether an injury or death is due to willful negligence, the nature of the outside activity should be considered, along with the training and experience of the Soldier.

Tribal Leadership: Leveraging Natural Groups to Build a Thriving Organization[1]

Reviewed by *Major Joshua Wolff* [*]

I. Introduction

Virtually every Soldier aspires to be a great leader. After all, according to the Army Chief of Staff, "[l]eadership is paramount to our profession."[2] Countless books and essays propose hundreds, if not thousands, of theories and "rules" of leadership.[3] No single text can contain all one needs to know to become a good leader, but those worth reading provide tools or guiding principles to apply when leadership opportunities and challenges arise. *Tribal Leadership* is a worthwhile read for the Army leader because it provides a thought-provoking framework to assess the culture of a unit and, most importantly, practical and specific guides to help improve it.

Tribal Leadership—like all other leadership books—does not provide a magic formula so that anyone can turn a poorly performing unit into a great one overnight. The book is imperfect. The research behind the theory may not be as conclusive as the authors purport. As a model derived largely from research of corporate organizations, the book's template simply will not fit very well within any given Army organization. The book is nonetheless valuable to the Army leader because it provides an informative supplement to current Army leadership doctrine. While Army leadership literature tends to focus *inward*—on what leaders should be and how they need to act, *Tribal Leadership* provides tools for the leader to look *outward* at her organization's culture. The result is fun-to-read, interesting material, which is valuable to anyone desiring to serve in leadership positions.

II. Questionable Research

Tribal Leadership is co-authored by Dave Logan, a business professor; John King, a consultant and "nationally recognized . . . senior teacher, coach, and program leader"; and Halee Fischer-Wright, a physician.[4] The book's central theme is that each organization has a dominant culture, which defines the organization's success and productivity.[5] The leader's responsibility is to assess and "upgrade" the organizational ("tribal") culture by using "leverage points" appropriate for the organization's stage of development.[6] The authors conclude there are five discernible "stages," each with its own rhetoric and types of relationships, which they helpfully summarize in Appendix A.[7]

The trio bases "each concept, tip, and principle" in *Tribal Leadership* on their own organizational study covering twenty-four organizations over an eight-year period, with more than 24,000 people.[8] The research is somewhat explained in an appendix, but the authors deliberately omit statistics and methodology from the main text in favor of various anecdotes and individual profiles to describe their theories.[9] This approach yields an interesting and easily digestible book consisting mostly of theory and real-life examples.

The authors began collecting data by issuing members of an organization a pretest designed to measure language themes and organizational relationships because the authors' early research indicated these were critical indicators of organizational culture.[10] The respondents then received training on ways to improve the functionality of their culture using "upgraded" language and relationship structures.[11] Following the training, the authors allowed a period of nine to sixteen months to pass before re-evaluating the same organization.[12] This approach seems straightforward, but a closer look at the research raises some questions regarding the methodology and conclusions.

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[1] DAVE LOGAN, JOHN KING, & HALEE FISCHER-WRIGHT, TRIBAL LEADERSHIP: LEVERAGING NATURAL GROUPS TO BUILD A THRIVING ORGANIZATION (2008).

[2] GENERAL RAYMOND T. ODIERNO, *Foreword* to U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22].

[3] A query of Amazon.com's Books Department for "leadership" yields 121,681 results. *See* Amazon.com, http://www.amazon.com (last visited Sept. 5, 2014).

[4] LOGAN ET AL., *supra* note 1, at 281–83.

[5] *Id.* at 4.

[6] *Id.* at 36.

[7] *Id.* at 253–64. The author's gauge to assess a tribe's stage based on their language is simple and will resonate with any reader with leadership experience. Language expressing an attitude of "life sucks" characterizes stage one; "my life sucks" is stage two culture; persons at stage three culture use "I'm great [and you're not]" language; stage four is "We're great [and they're not]" is stage four; and "Life is great" is stage five language.

[8] *Id.* at 6.

[9] *Id.*

[10] *Id.* at 18.

[11] *Id.* at 266–68. *See also supra* note 7 and accompanying text (describing the kinds of language themes associated with various stages of development).

[12] LOGAN ET AL., *supra* note 1.

A. A Problematic Sample

At first blush, the massive sample size of 24,000 people appears to lend credibility to the study.[13] However, over 15,000 of the people in the study were trained and observed by members of their own organization instead of by independent researchers, raising some concerns of skewed results.[14] The study employed no apparent safeguard to ensure any studied organization's leaders or representatives did not exaggerate their culture's improvement or progress. The authors are cognizant of this shortcoming, noting that such bias is unlikely because their study's early work consistently indicated that people accurately report, or "peg" others' stages, despite consistently exaggerating their own developmental stage.[15] This assurance rings hollow for two reasons.

First, because the authors measure culture by looking to language,[16] respondents taking the post-training assessment have essentially been given the correct answers to the test. Respondents taking the post-test know which language indicates a higher-functioning culture, so their use of this language when evaluated is unsurprising.[17] The second problem with including this population in the sample is that the people administering both the training and test were likely the respondents' supervisors (or at least some organizational representatives) who were also responsible for the training. The authors' original assumption that people "peg" others accurately did not apply to this sample, which was infected by the magnified self-interest of the respondents' own employer interviewing them about the training that employer paid for in order to make the employee better. While the authors point to other literature to address this concern, that work appears to only corroborate the *Tribal Leadership* authors' conclusion that people tend to overestimate their own stage of development.[18] An assessment where the respondents were unaware someone was monitoring their language would provide a significantly more reliable measure of whether and how much their language and culture truly changed. If the numbers were as consistent as indicated, the authors should have left out these potentially problematic data points.[19]

B. Tribal Leadership Is Better Than . . . What?

The research contains no comparisons to competing leadership models and very limited research involving control groups. The majority of data giving rise to the authors' theory was taken from populations trained on the principles of *Tribal Leadership*.[20] The authors deemed the *Tribal Leadership* model a success because these organizations had progressed into more advanced stages.[21] The study appears credible with its large sample size and sophisticated techniques to measure the respondents' language.[22] Without meaningful comparisons, however, the only conclusion one can draw is that the respondents' language changed, not necessarily that a better culture emerged.

To measure whether groups trained in *Tribal Leadership*'s techniques ultimately outperformed others, the authors conducted a "deep" comparison study of their theory.[23] The first part of the study involved training selected teams ("mostly . . . considered problematic by management") from a commercial real estate firm and comparing trained teams' revenue against other non-trained teams.[24] The authors conclude that this study confirmed their theory's effectiveness, reporting that six of their trained teams finished the study ranked in the top fifteen in the seventy-five team field.[25] Notably, the authors did not report where these teams ranked before the study, how many total teams received training, or whether any of their trained teams regressed.

In the second part of the comparison study, the authors trained a small start-up within the same real estate firm in *Tribal Leadership*'s principles. The authors hailed the start-

[13] *Id.* at 278.

[14] *Id.* at 277.

[15] *Id.* at 278. The authors reached the conclusion that someone could accurately "peg" another's developmental stage by focusing on language using a sophisticated analysis of several respondents' responses to open-ended survey questions focusing evaluation on words which appeared in close proximity to each other.

[16] *Id.* at 266–67.

[17] The circumstance where a respondent behaving differently when knowingly observed is known as the "Hawthorne Effect" first studied by researcher Henry A. Landsberger. *See generally* Rob McCarney et al., *The Hawthorne Effect: A Randomised, Controlled Trial*, BIOMEDICAL CENT. MED. METHODOLOGY, Jul. 3, 2007, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1936999/.

[18] LOGAN ET AL., *supra* note 1, at 278 n.10 (citing DON EDWARD BECK, SPIRAL DYNAMICS: MASTERING VALUES, LEADERSHIP, AND CHANGE (1995)). According to the authors' footnote, this work only affirms the notion that people tend to overestimate their own developmental stage. In an effort to ensure the employer perceives the employee as "bought in" to the pricey consulting, the employee will overemphasize their responses in the post-test to demonstrate that they are a "team player" with a future in the organization.

[19] *Id.* at 264.

[20] *Id.* at 267–68.

[21] *Id.*

[22] *Id.* The authors used open-ended interviews with respondents and analyzed which popular words clustered near each other in each respondent's responses. *See also supra* note 7 and accompanying text.

[23] LOGAN ET AL., *supra* note 1, at 278.

[24] *Id.*

[25] *Id.*

up's ultimate success as further evidence supporting their theory because this group generated "significant revenue," despite starting with essentially zero.[26] Whether or not this second success can be attributed to the authors' methodology, producing an "upgraded" culture is extremely questionable. Talent or simply market timing could have been the driving forces behind this start-up's success. Without a control group starting from a similar baseline, attributing that success to the team's training in Tribal Leadership is unsound.

It is ultimately unsurprising that the authors struggle to produce data that conclusively proves their leadership model to be superior because no such leadership model exists. In spite of the authors' massive study size, questions linger about whether the observed firms' culture improved at all, or whether any financial success was due to market factors, as opposed to organizational culture. *Tribal Leadership* is, regrettably, not the silver bullet its authors purport it to be. However, the aspiring Army leader should read the book as a compliment to the Army's current leadership doctrine.

III. *Tribal Leadership* and the Army Leader

The authors posit that "[e]very organization is really a set of small towns."[27] If this were true, the Army would be made up of some very strange towns. With few exceptions, the entire population of most of the Army's "small towns" would move away and be replaced by new residents every few years.[28] Such significant personnel turnover—particularly in the leadership of the organization—makes it very difficult to establish a long-lasting, dominant culture in an Army unit as contemplated in *Tribal Leadership*. The book is valuable to the Army leader because it elaborates on the importance of organizational culture and provides tools to assess and impact that culture.

A. Expanding the Aperture: Getting Organizational Culture into the Picture

While *Tribal Leadership* emphasizes organizational culture, the guidance on this topic found in *Army Leadership* is limited.[29] *Tribal Leadership*'s central theory is that each tribe has a dominant culture,[30] and that an organization's success relies upon the leader's responsibility to upgrade the tribe's culture as the tribe further embraces the leader.[31] Conversely, *Army Leadership* provides sparse and generic guidance on how a leader can assess and improve organization climate.[32] *Army Leadership* suggests using a "Unit Climate Assessment" to understand the unit's climate.[33] This tool, however, is currently geared toward supporting the Army Equal Opportunity Program and sexual harassment prevention.[34] Such a narrow assessment can do little for a leader other than confirm whether the unit has any issues with cultural diversity and respect for others. Such a study may miss many other problems in the unit and does not serve to diagnose the causes or to propose solutions to any of these issues. In this manner, *Tribal Leadership* supplements Army doctrine on organizational culture, so it can be seen as more than a possible area of concern for treatment of others, but as a potential driving force behind a unit's success. Moreover, *Tribal Leadership* provides guidance with *how* to assess the culture and what techniques would be appropriate to advance members of the organization to a more mature, productive culture.

B. Insightful, Prescriptive Guidance

The Army's leadership literature is mostly descriptive, defining leadership in generic terms of what leaders should be, know, and do.[35] Perhaps intentionally, Army leadership doctrine is not prescriptive, providing very little specificity on how to implement these principles. This approach is sensible. Leadership is very individualized, so non-prescriptive doctrine facilitates leaders growing into a "style" with which they are most comfortable and encourages diverse leader development. The consequence, however, is that even the well-intended, self-aware leader could find himself following the Army's guidance in a way that is counterproductive.

For example, *Army Leadership* discusses the role of constructive feedback multiple times, but provides no guidance on what constitutes constructive feedback or even

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[26] *Id.* at 279.

[27] *Id.* at 3.

[28] U.S. DEP'T OF ARMY, REG. 614-5, STABILIZATION OF TOURS para. 2-1 (1 May 1983). Army policy is to stabilize personnel for only twelve months after arrival on station.

[29] U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADRP 6-22]. ADRP 6-22 "describes the Army's view of leadership." *Id.* at iv.

[30] LOGAN ET AL., *supra* note 1, at 17.

[31] *Id.* at 5.

[32] ADRP 6-22, *supra* note 29, paras. 7-5 to 7-7. It is worth noting that Army doctrine distinguishes "culture" from "climate." Culture is "the shared attitudes, values, goals, and practices that characterize the institution over time," while climate is a more short-term expression of "how members feel about the organization."

[33] *Id.* para. 7-20.

[34] *Id.* Army Command Climate Surveys focus on Army Equal Opportunity and Sexual Harassment policies. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 6-1, 7-1, and app. E (6 Nov. 2014).

[35] ADP 6-22, *supra* note 2, para. 22. The Army Leadership Requirements Model consists of "attributes" that the Army leader must "be" and "know," and "competencies" the Army leader must be able to "do." Leader attributes are character, presence, and intellect; competencies are leads, develops, and achieves. *Id.*

contemplates that there may be different types of constructive feedback.[36] In contrast, *Tribal Leadership* urges subtle, but important, differences in constructive feedback for persons who are at different developmental stages.[37] This extra insight can help the Army leader formulate how she wants to approach providing constructive feedback in order to yield a more productive result.

Perhaps the most obvious area where *Tribal Leadership* supplements Army leadership doctrine is in the "Develops" arena.[38] Like the *Tribal Leadership* authors, Army doctrine recognizes the critical relationship between an organization's leader and its culture (although *Army Leadership* refers to it as "climate").[39] The Army's guidance, however, can be summarized with the simple and unhelpful phrase "create a positive climate by setting goals."[40] *Tribal Leadership* would encourage the leader to carefully consider and assess the current cultural and developmental stage of the organization before setting goals. The same goal could have vastly different responses with people at different stages—perhaps even causing more harm than good. For example, if the organization is dominated by stage two culture, with only one stage three "star" performer,[41] achievement of a goal could drive them apart with the stage two people convinced nobody appreciated their role in achieving the goal and the stage three person believing that the group only succeeded because he dragged everyone across the finish line.[42]

IV. Conclusion

Tribal Leadership is a suitable supplement to Army leadership doctrine with its insight into organizational culture. This book is a valuable read for the Army leader because it provides specific guidance to assess and leverage culture within the organization, an area the Army's current leadership doctrine does not fully explore. The organizationally-oriented approach is an excellent companion to the Army's current inward-focused leadership doctrine. The Army leader who has read *Tribal Leadership* is equipped with more tools to assess their unit's culture and—most importantly—tools to improve it.

Reading *Tribal Leadership* will prompt the Army leader to view her leadership experiences differently. She will think about what constitutes "tribes" and reflect on the developmental stages of different organizations in which she has previously served. Perhaps the most valuable takeaway from *Tribal Leadership* is the ability to identify persons in lower stages and employ some of the practical "leverage points" to move them—and hopefully the organization—to a higher level. A quick and fun read, *Tribal Leadership* will open the aperture of any leader and provide some additional tools to assess and work with subordinates who appear "stuck."

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[36] ADRP 6-22, *supra* note 29, paras. 5-15 and 7-60.

[37] *See* LOGAN ET AL., *supra* note 1, at 258–59 (providing distinctions on how to provide feedback to persons with different dominant cultures).

[38] The "Develops" competency charges the Army leader to, among other things, "create a positive environment." ADP 6-22, *supra* note 2, para. 22. *See also supra* note 35 and accompanying text.

[39] ADRP 6-22, *supra* note 29, para. 7-20. "Leader behavior has significant impact on the organizational climate." *Id.* *See also supra* note 33 (*Army Leadership*'s definition of "organizational climate").

[40] ADRP 6-22, *supra* note 29, paras. 7-20 – 7-23.

[41] Stage two people are generally disconnected from organizational goals and feel underappreciated. Stage three people are focused on "winning," and are marked by complaining about the low level of talent surrounding them. LOGAN ET AL., *supra* note 1, at 35. *See also supra* note 7 and accompanying text (describing the kinds of language themes associated with various stages of development).

[42] *See* LOGAN ET AL., *supra* note 1, ch. 3. The authors' detailed explanation regarding how the complex and counterintuitive relationship between Stage Two and Stage Three people can stagnate an organization is worth the read alone.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS) is restricted to students who have confirmed reservations. Reservations for TJAGLCS CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department, at (800) 552-3978, extension 3172.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252

FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222

NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for the career progression and promotion eligibility for all Reserve Component company grade JA's. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD) at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC, they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrollment in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 October all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours EST, 1 October 2015, will not be allowed to attend the December 2015 Phase II resident JAOAC. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3359, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

b. To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations, and requirements for Mandatory Continuing Legal Education.

c. The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

e. Please contact the TJAGLCS CLE Administrator at (434) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primarily mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the "Public" side of JAGCNet by using the following link: http://www.jagcnet.army.mil. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the "Legal Center and School" link across the top of the page. The page will drop down.

(2) If you want to view the "Army Lawyer" or "Military Law Review," click on those links as desired.

(3) If you want to view other publications, click on the "Publications" link below the "School" title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the "Law Library" that will provide access to additional resources.

c. If you have access to the "Private" side of JAGCNet, you can get to the TJAGLCS publications by using the following link: http://www.jagcnet2.army.mil. Be advised that to access the "Private" side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the "TJAGLCS" link across the top of the page and click on it. The page will drop down.

(2) Find the "Publications" link under the "School" title and click on it.

(3) There are several other resource links there as well. You can find links the "Army Lawyer," the "Military Law Review," and the "Law Library."

d. Access to the "Private" side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

(1) Active U.S. Army JAG Corps personnel;

(2) Reserve and National Guard U.S. Army JAG Corps personnel;

(3) Civilian employees (U.S. Army) JAG Corps personnel;

(4) FLEP students;

(5) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: https://www.jagcnet.army.mil/Register.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click “Submit.” The JAGCNet Service Desk Team will process your request within 2 business days.

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

c. For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jt cnet.army.mil/tjagsa. Click on “directory” for the listings.

d. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General’s Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a “Public Doc Libraries” section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the “Access” link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil.

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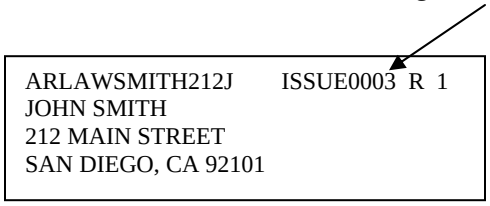

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