The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice

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OF THE UNIFORM CODE OF MILITARY JUSTICE

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INTRODUCTION

W e begin this discussion by taking certain liberties with the Uniform Code of Military Justice, for that Code mentions only one “General Article,” Article 134, and we are going to use that description in referring to Article 133, “Conduct Unbecoming an Officer and Gentleman,” as well. However, considering the history and indeed the very nature of these two articles, the reader will readily understand that the term “general” is here being used merely in a sense opposite to the term “specific,” that is, in regard to the rather generic ideas of criminality or misconduct, which in some instances consist only of a failure to comply with certain necessary military standards, expressed in both of these articles. It also will be found that some of the particular acts or omissions which run afoul of these two articles do not always have convenient criminal connotations of the type immediately recognizable by one trained in the common law, but perhaps somewhat unfamiliar with military life, customs, and historical development. Such crimes as murder, robbery and larceny are traditionally recognized as abhorrent and as calling for punishment at the hands of the state by all of us, military and civilian; and even the act of being drunk in or out of uniform in a public or private place, being an offense under Article 134 if sufficiently discreditable, 1 would hardly give pause to

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the average police court judge. However, the Article 134 offenses of dishonorable failure to pay debts, incapacitating oneself for the proper performance of duties through previous indulgence in intoxicating liquors, and discharging a firearm through carelessness, and many other instances of questionable conduct which for one reason or another fall within the proscriptions of the general articles, may not be too well understood by every student or practitioner of the law as amounting to conduct for which a criminal penalty may or should be imposed.

The true general article, Article 134, makes punishable by its terms three different types of offenses, whether committed by an officer or an enlisted person. These are disorders and neglects to the prejudice of good order and discipline in the armed forces, conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital. Of course, it may well be that one act will suffice to fall under the ban of all three of these proscriptions. Article 133 makes punishable conduct unbecoming an officer and a gentleman indulged in by an officer, cadet, or midshipman, and it need hardly be said that anyone occupying one of these positions of honor who is guilty of unbecoming conduct is very apt to find that he has also violated at least one of the tenets of Article 134. In order better to under-

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3 Uniform Code of Military Justice [hereinafter cited as UCMJ] art. 134, 10 U.S.C. §934 (1958) states: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

4 UCMJ art. 133, 10 U.S.C. §933 (1958) states: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

stand the meaning and reasons for these articles, a necessarily brief excursion into their history might prove helpful.

**HISTORY**

The very early English military codes\(^6\) contained no general articles and dealt principally with the prohibition of specific types of misconduct which might adversely affect the internal discipline of the army in its encampments or while on the march. Of particular concern were the property rights of officers and soldiers among themselves. A prisoner, or the ransom that one might obtain from a prisoner, was obviously a most valuable spoil of war in those days, for the Articles of Richard II contain a number of provisions which carefully detail a captor's rights in this respect.\(^7\)

As a result of the labors of King Gustavus Adolphus (Gustavus II) of Sweden and his ministers, we see a remarkably detailed and developed military code in existence early in the seventeenth century.\(^8\) After dealing with almost every conceivable aspect of military life, in and out of camp, in the first 115 articles of his code signed in the year 1621, his Article 116 reads as follows:

> Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent country may against all right and reason be burdened withall, whatsoever offense finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction for it.

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\(^7\) Arts. XII, XIX, XXII.

\(^8\) See Winthrop 907 (app. III), quoting Code of Articles of King Gustavus Adolphus of Sweden, 1621. There were, of course, earlier Continental European military codes. Winthrop 17-18. Gustavus Adolphus, no doubt with the help of his chief ministers, was a genius for detail in all matters military. The author has seen some of his Tables of Organization and Tables of Equipment in the military museum in Stockholm. In many respects, these tables are remarkably similar in format to the tables in use in modern armies. There are many other items of interest concerning Gustavus Adolphus and his times in the National Museum in Stockholm.
The above general article is very probably the ancestor of our present Article 134, for the military code of the great Swedish king was translated into English and published in London in 1639\(^9\) and seems to have had a considerable influence on later English military codes. Although Gustavus Adolphus does not mention "crimes or offenses not capital" in his general article, probably because he had no need to express a noncapital limitation under the legal system of his time and place, he has included both of the other aspects of our present general Article 134, with interesting limitations, however, on the modern theory of the offense of casting discredit on the military service. It will be noticed in this latter connection that the "miserable and innocent country" must be "burdened against all right and reason." Anyone who has ever studied conditions as they existed during Gustavus' time will have no trouble in agreeing with him that the war-ravaged lands affected by his military operations and those of others were truly in a miserable condition, but the phrase "burdened against all right and reason" perhaps requires some explanation. This explanation is found in other articles of the code which attempt carefully to limit and control what appears to be a vested right in the soldiery to pillage under certain conditions and to impose heavy burdens on the citizenry.\(^10\)

One might ask why it was that Gustavus felt the need for his particular general article. The answer to this question is supplied inferentially by the Code itself. It has already been indicated that the general article was preceded by 115 articles, mostly punitive in nature, and a further reading

\(^9\) See WINTHROP 19, 907 n.1 (app. III); DAVIS, MILITARY LAW OF THE UNITED STATES 340 (3d ed. 1915). It seems that Gustavus' general article was also the ancestor of one of our claims statutes. UCMJ art. 139, 10 U.S.C. §939 (1958). The Articles of the Earl of Arundel, published in 1639 during the reign of Charles I, are printed in 1 CLODE, MILITARY FORCES OF THE CROWN 429-40 (1869). The general article in that code reads: "In whatever cases or accidents that may occur, for which there is no special order set downe in the lawes here published, there the ancient course of marshall discipline shall be observed untill such time as his Excellence the Lord General shall cause some further orders to be made and published in the Armie, which shall thenceforward stand in force upon the paines therein expressed."

\(^10\) See, e.g., Articles 93-96 of the Articles of Gustavus Adolphus.
will show that eleven more specific offenses are listed following the general article, apparently as an afterthought. Even among persons with such vivid imaginations as Gustavus and his ministers, it was realized that it would be asking too much of human intelligence to attempt to forecast and catalogue every possible event which might unduly burden the civilian populace or which might be disruptive of military discipline, and perhaps gravely so. War was an immensely complicated affair even in those days, indeed one may say particularly in those days with their gross lack of communications. The maintenance of effective disciplinary control in this rough era—the one factor that distinguished an army in any real sense of the word from a mere mob of bandits, plunderers, and potential deserters—was a difficult and exacting task beyond all modern military experience. Consequently, some means had to be found to correct possible omissions and oversights in the structure of the military law, and that means, then as now, was the general article.

After passing over some earlier British military codes, we next come to the British Articles of War of James II, promulgated in 1688. These contain sixty-four articles, and in them one can clearly see some of the progenitors of certain articles of the Uniform Code. Of chief interest here is the last of these articles, the general article, which states:

All other faults, misdemeanors, and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offense by these Articles, and the Laws and Customs of War.\footnote{11 See WINTHROP 928 (app. V), quoting Articles of War of James II, art. LXIV. Winthrop sets forth a still earlier English general article, that found in the Articles of the Earl of Essex of 1642. It is substantially the same as the James II version except that the word "offenses" is used where the word "misdemeanors" is found in the later code, and the limitation upon punishment amounting to the loss of life or limb is omitted. The Articles of the Earl of Essex are printed in PIPON, MILITARY LAW, app. 11 (3d ed. 1863), with the exception of a few missing articles which are printed in 1 CLODE, op. cit. supra note 9, at 443. The general article was dubbed}
The British Articles of War of 1765, which were in force at the beginning of our Revolutionary War, contained a somewhat different version of the general article. Section XX, Article III, of that military code provided:

All Crimes not Capital, and all Disorders or Neglects, which Officers and Soldiers may be guilty of, to the Prejudice of good Order and Military Discipline, though not mentioned in the above Articles of War, are to be taken Cognizance of by a Court-martial, and be punished at their Discretion.

It will be noticed immediately that the mere limitation upon punishment amounting to the loss of life or limb found in the general article of James II appears in the 1765 general article as a jurisdictional limitation, not only in time of peace, upon the prosecution by courts-martial of "crimes not capital" under that article. This is not difficult to understand, for less than a year after the articles of James II were promulgated, the English Revolution took place, James II lost his throne to William and Mary, and the first British Mutiny Act was passed by Parliament. This act, although the principal event which brought it about was the defection to James of a detachment of mostly Scottish troops, had the effect of prohibiting the exercise of court-martial jurisdiction in places where the British civil courts were in operation except with respect to offenses (mutiny, sedition, and desertion in this particular act) specifically made the subject of such juris-

"the Devil's Article" by the British soldier because of its catch-all nature. See Winthrop 720 nn.64 & 67. For general remarks concerning British military codes antedating that of James II, see Winthrop 18-19. See also 1 Winthrop, Military Law 8 n.1 (1st ed. 1886) for a possible explanation of the frequent use of the year 1686 instead of 1688 in referring to this code of James II.

12 Winthrop 931 (app. VII). A 1774 edition of this code changed the general article by substituting for the word "Court-Martial" the words "General or Regimental Court Martial, according to the Nature and Degree of the Offence." See Davis, op. cit. supra note 9, at 341 and app. B. This change also appears in the American military codes of 1775, 1776, and 1806. See note 14 infra. The British military code of 1692 for use "in the Low Countries and Ports beyond the Seas" is printed in Walton, History of the British Standing Army 1660-1700, app. LI (1894). The general article in this code is the same as that in the 1688 code of James II except that the word "crimes" is added to the list of prohibitions and the limitation upon punishment amounting to the loss of life or limb is omitted. The cited appendix to Walton's work also contains materials concerning earlier codes.
diction by Parliament itself. In this manner, Parliament reaffirmed and strengthened a position long held by that body and by the civil courts but not always followed by the British sovereigns under whose royal prerogative the various military codes had normally been promulgated. Although the extreme limitations upon court-martial jurisdiction imposed by the first Mutiny Act were relaxed by succeeding Mutiny Acts, we find that even as late as 1765 British court-martial jurisdiction was considerably restricted. Section XX, Article II of the British Articles of that year permitted the trial by court-martial of civil capital crimes and other civil offenses only in places where there were no British civil courts. In other places, trial for such crimes and offenses was to be held in the civil courts. Jurisdiction over capital military offenses was granted by specific articles of the code. Naturally enough, therefore, the general article quoted earlier in this text was limited to "crimes not capital," and even these crimes had to have a military aspect by reason of being prejudicial to good order and military discipline. As we shall see later in this paper, this change from the general article of James II has had a profound effect upon American military law lasting to this very day.

With minor exceptions not material to our discussion, the language of the above quoted British general article of 1765 is found in all American Articles of War up to and including those of 1874, and the 1874 Articles remained in

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13 See Winthrop 929 (app. VI), quoting the First British Mutiny Act of 1689; see also Lee v. Madigan, 358 U.S. 228 (1959); Clode, Military and Martial Law 20 (2d ed. 1874); Tytler, Military Law 18 (3d ed. 1814); Winthrop 19-20; British War Office, Manual of Military Law 10-11 (1939 reprint). There is considerable argument about the effect of this act on court-martial jurisdiction, and the original act is often misquoted by limiting its effect on non "life or limb" offenses to "time of peace." The material in the citation to Tytler points out that the "time of peace" limitation was an innovation of a Mutiny Act passed in Queen Anne's reign. Despite the apologetic interpretations of the effect of the First Mutiny Act which can be found in some of the above citations and elsewhere, the author's version of the matter would seem to be supported by the actual state of military law during the reign of George III as reflected in the British Articles of 1765 discussed in the text. See also the limited use of the 1692 Code mentioned in note 12 supra; Walton op. cit. supra note 12, at ch. XXVI.
effect until a major revision by Congress in 1916. It should be noted that all but one of the clauses found in the present Article 134 of the Uniform Code are found in the British Code of 1765. The missing clause—conduct of a nature to bring discredit upon the armed forces—did not appear in the American Articles of War until the revision of 1916. Thus, remembering that Gustavus Adolphus did deal with this matter in his code after the fashion of his times, there is a rather remarkable hiatus of almost three centuries in this one respect.

In Section XV, Article XXIII, of the British Articles of 1765, we find the ancestor of our other general article—conduct unbecoming an officer and gentleman. The cited article reads:

Whatsoever Commissioned Officer shall be convicted before a General Court-martial, of behaving in a scandalous infamous Man-
ner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our Service.

Hazarding a guess for which the author fears he can supply no authority, one might say that some deep-seated socio-
logical reason accounts for the presence in this code of such an article and the absence of a similar article in the otherwise detailed military codes of the preceding century. And indeed it may be true that behavior “unbecoming the Character of an Officer and a Gentlemen” appears as an offense in the 1765 Code because the notion of the English gentleman, and the moral and ethical standards expected of him, had finally crys-
tallized and emerged in the eighteenth century, whereas the much earlier and perhaps less complicated and exacting notion of chivalry had already become outworn and was certainly less adhered to, in the seventeenth century. Romantic as this may be, those who know the course of legislation will probably feel more inclined to suspect that the inclusion of the offense in question came about as the result of a “scandalous infamous”

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14 Winthrop 953 (app. IX), quoting American Articles of War of 1775, art. L; Winthrop 961 (app. X), quoting 1776 Articles, § XVIII, art. 5; Winthrop 976 (app. XII), quoting 1806 Articles, art. 99; Winthrop 986 (app. XIII), quoting 1874 Articles, art. 62.
incident involving an officer that occurred shortly before the article denouncing such conduct first made its appearance. Whatever may be the true reason for this innovation, this general article involving officers appears virtually unchanged in the American Articles until the military code of 1806. In the code of that year, the phrase "behaving in a scandalous, infamous manner" was deleted, probably in an effort to promote better standards, and the article acquired its present form—merely denouncing conduct unbecoming an officer and a gentleman. Although no changes were made in the American Articles of 1874, the revision of 1916 added cadets to the persons subject to this article and, as we know, the Uniform Code added midshipmen. Until the advent of the Uniform Code of Military Justice, dismissal (the word "discharge" was used prior to the 1786 amendments to the American Articles) was a mandatory sentence upon conviction.

As mentioned previously, it was not until the extensive revision of the Articles of War in 1916 that the phrase "conduct of a nature to bring discredit upon the military service" appeared in the predecessor of our present Article 134 of the Uniform Code. One other significant change was also made

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15 Winthrop 953 (app. 1X), quoting American Articles of War of 1775, art. XLVII; Winthrop 961 (app. X), quoting 1776 Articles, § XIV, art. 21; Winthrop 972 (app. XI), quoting 1786 Articles, art. 20. See Davis, op. cit. supra note 9, at 468.
16 Winthrop 976 (app. XII), quoting American Articles of War of 1806, art. 83. Higher standards were, in fact, required under the new article. See Winthrop 710-11; Benét, Military Law and Courts-Martial 274-77 (6th ed. 1868).
17 Winthrop 986 (app. XIII), quoting American Articles of 1874, art. 61.
18 Articles of War of 1916, ch. 418, § 3, art. 95, 39 Stat. 666.
19 See note 4 supra.
20 The original bill for the Uniform Code as submitted by the Department of Defense retained the feature of mandatory dismissal. Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1235 (1949). This was amended during the course of the Senate hearings apparently at the request of the Navy. Hearings on S. 337 and H.R. 4040 Before a Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. 286 (1949). Dismissal had not been a mandatory punishment for this offense in the Navy, such conduct having been punished under an Article 134 type of general article in that service. See Naval Courts and Boards § 99 (1937); Articles for the Government of the Navy, art. 22, Rev. Stat. § 1624 (1875). A recent Army study has resulted in an Army recommendation that mandatory dismissal upon conviction of Article 133 be reinstated. Report by the Committee on the Uniform Code of Military Justice 16 (1960).
in that year, and we will discuss that change first. The 1916 Article in question was Article 96, and it will be necessary to set out in full both that article and the one it replaced, Article 62 of the Articles of 1874. Article 62 provided:

All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental garrison, or field-officers' court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.\(^\text{21}\)

Article 96 read:

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.\(^\text{22}\)

It will readily be noticed that the phrase “though not mentioned in these articles” has been placed at the head of the sentence in Article 96. This was not done merely as a result of a grammarian’s exercise in better phrasing. Prior to the decision of the Supreme Court of the United States in \textit{Grafton v. United States},\(^\text{23}\) it had long been held that the “crimes not capital” clause of Article 62 of the Articles of 1874 was qualified by the “prejudice of good order and military discipline” clause. The similar British general article had been given the same interpretation. In \textit{Grafton}, however, the Supreme Court intimated that the “crimes not capital” clause of Article 62 was not limited by the “prejudice of good order and military discipline” clause, and Article 96

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\(^{21}\) \textit{Wintrop} 991 (app. XIII).

\(^{22}\) 39 Stat. 666 (1916). It should also be noticed that the phrase “which officers and soldiers may be guilty of” appearing in Article 62 of the 1874 Articles was broadened to include all “persons subject to military law” in Article 96 of the 1916 Articles.

\(^{23}\) 206 U.S. 333 (1907).
of the 1916 Code was rephrased accordingly.\footnote{Comparison of the Proposed New Articles of War with the Present Articles of War and Other Related Statutes 50 (1912) (War Dep't document accompanying transmission of proposed new articles to Chairman, Military Committee, House of Representatives); Revision of the Articles of War, Hearing on H.R. 23628 Before the House Committee on Military Affairs, 62d Cong., 2d Sess. 81-82 (1912) (Statement of Gen. Crowder); See "Explanation" accompanying S. 1032, 63d Cong., 1st Sess. 48 (1913); Comparative Print Showing S. 3191 With the Present Articles of War and Other Related Statutes 58 (1916) (Sen. Comm. Print prepared for the use of the Sen. Comm. on Military Affairs, 64th Cong., 1st Sess.). For the original interpretation of the "crimes not capital" clause of Article 62 of the 1874 Articles and its British counterpart, see Winthrop 723-24 and materials there cited. See also Winthrop 990 (app. XIII), quoting 1874 Articles, arts. 58-59.} There was a sound historical reason, however, for the earlier interpretation of the "crimes not capital" clause of Article 62 of the 1874 Article, for this article was a direct descendant of the general article of the British Articles of War of 1765, with the same phraseology in all material respects; and, as we have already seen in our discussion of that general article, its "crimes not capital" clause granted no court-martial jurisdiction at all over noncapital civil crimes unless they were divested of their purely civil nature because of being prejudicial to good order and military discipline. What jurisdiction there was over crimes of a strictly civil nature under the 1765 British Code was specifically granted in another article of the code, with express limitations regarding the place where the crime was committed.

Probably the most important change in the 1916 general article, however, is the addition of the "conduct of a nature to bring discredit upon the military service" clause. It would certainly suit the convenience of the author, and undoubtedly would bring relief to the reader, if it could merely be said that this clause was simply a recognition that something had been left out of this general article for many centuries, that at last it was recognized that unspecified offenses involving the civilian populace which might bring discredit upon our arms were as important as unspecified offenses within the military which were disruptive of military discipline. Unfortunately, and even surprisingly, the matter cannot be passed over quite so lightly, for the first memorandum ac-
companying the proposed new legislation, written in 1912, had this to say about the clause in question:

The new language introduced in the article is for the purpose of covering the cases of retired enlisted men who are guilty of conduct (not crimes) which is discreditable and yet not directly prejudicial to discipline; such as refusing to make proper provision for the support of their families, or the disgraceful non-payment of a debt incurred for the necessaries of life.25

In the same year, we find the then Judge Advocate General, Brigadier General Enoch H. Crowder, making the following statement concerning the discredit clause before the House Committee on Military Affairs, which was considering a House bill containing the proposed new military code:

That [the discredit clause] was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position, we can try him under the sixty-first article of war for conduct "unbecoming an officer and a gentleman." We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to good order and military discipline; because the act of a man on the retired list, away from any post, cannot reasonably be said to affect military discipline. . . . Sometimes it is because of refusal to support their families while on retired pay; complaints of creditors come into the office; . . . I wanted that language in there to try those retired soldiers whose cases became flagrant.

Despite General Crowder's stated restrictions on the new clause, fears were expressed that it was too broad and sweeping, and the committee chairman suggested that it be deleted.26

A later memorandum on the subject, that accompanying Senate Bill 1032 in 1913, commences its explanation bravely enough but, unfortunately, loses force and becomes rather

25 Comparison of the Proposed New Articles of War, supra note 24. (Emphasis added.)
26 Revision of the Articles of War, Hearing on H.R. 23628, supra note 24, at 83-84.
hopelessly involved in the field of enlisted retirement as it moves along. It stated:

The clause "all conduct of a nature to bring discredit upon the military service" has been interpolated in order to cover clearly conduct on the part of enlisted men, particularly retired enlisted men, which would tend to discredit the service but which at present does not constitute a criminal offense, and which is not clearly prejudicial to good order and military discipline because of the fact that the offender is at the time not directly associated with a military command.27

In what is apparently the last piece of written legislative history relating to Article 96, the "Comparative Print" accompanying Senate Bill 3191 in 1916, the discredit clause is not mentioned at all, although other changes in the article are explained.28 Parenthetically, it may be of interest to note that the 1916 Articles, after many and various vicissitudes, were finally enacted into law only as part of the Army Appropriation Act for the fiscal year 1917.29

The newborn chick cautiously peeped from the egg, however, in the discussion of the freshly enacted Article 96, found in the 1917 Manual for Courts-Martial. After stating that the "principal" object of including the clause dealing with discreditable conduct was to provide a remedy with respect to errant retired enlisted men—making again the reference to those who were apparently finding it difficult to live on their retired pay—it said:

There is, however, a limited field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not made punishable by any specific article or by the other parts of the general article.30

When World War I had shown the necessity for once more amending the Articles of War (not, however, Article 96)

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27 See "Explanation" accompanying S. 1032, supra note 24.
28 COMPARATIVE PRINT SHOWING S. 3191, supra note 24.
30 MCM, 1917, para. 446 (II). One might note the legal hedging and uncertainty caused by the absence of the discredit clause in the earlier articles as disclosed in Winthrop's discussion of the prejudice of good order and military discipline clause. WINTHROP 723-32 n.17.
and the 1921 Manual for Courts-Martial was promulgated to announce the amendments of 1920 and other changes in military law prompted by the war, the authors of that Manual must have found that the discredit to the service clause of Article of War 96 had more than the "limited field" envisioned by the authors of the 1917 Manual. The new Manual, after suggesting various applications of the clause to members on active duty, simply stated that "another principal" object was to take care of the case of retired members.\(^{31}\) This marked the beginning of a steady retreat from the position taken by the drafters of the 1916 Articles, for we find that the 1928 Manual speaks of retired enlisted persons as being only "one object" of the discreditable conduct clause,\(^{32}\) and the 1949 Manual omits all mention of retired enlisted persons in this connection.\(^{33}\) The drafters of the Uniform Code of Military Justice were either unaware of this history of the clause or thought it unworthy of consideration, for they are completely silent about it,\(^{34}\) and the 1951 Manual also makes no mention of retired enlisted persons in its discussion of discreditable conduct.\(^{35}\) As for case law, the most cursory glance through the indexes of both the Court-Martial Reports and the Reports of the Court of Military Appeals\(^{36}\) will disclose cases far too numerous to cite of persons on active duty having been tried and convicted of offenses only remotely prejudicial to good order and military discipline but clearly "of a nature to bring discredit upon the armed forces." It is obvious, therefore, that the limitations which the authors of the 1916 Articles attempted to place upon the clause were unjustified at the time, never really obtained a foothold in the law, and have since been deservedly forgotten.

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\(^{31}\) MCM, 1921, para. 446 (II).
\(^{32}\) MCM, 1928, para. 152(b).
\(^{33}\) MCM, 1949, para. 183(b).
\(^{34}\) Hearings on H.R. 2498, supra note 20, at 1235.
\(^{35}\) MCM, 1951, para. 213(b). As far as the Army is concerned, present policy is that complaints or accusations against retired persons not on active duty are "normally" outside the responsibility of that Military Department and are to be pursued through the civil courts. Army Regulations 600-10, para. 25a(3) (1958).
\(^{36}\) See citators and index to 1-25 C.M.R. (1958); index and tables to 1-10 U.S.C.M.A.
Thus we come to an end of our formal history. However, because of the very nature of the subject, it will be necessary to dip back into the past from time to time in the following paragraphs.

CRIMES AND OFFENSES NOT CAPITAL

To one reading Article 134 without possessing a knowledge of its background and interpretation, it might seem that the apparently unlimited prohibition against the commission of "crimes and offenses not capital" found in that Article would cover all manner of noncapital crimes and offenses not otherwise specifically set out in the Uniform Code, regardless of the jurisdictional source of the particular offense in question. Consequently, it might appear that offenses against municipal, state, and foreign laws were intended to be included. Such, however, is not the case.

This question was somewhat vividly brought to the fore in the hearings on the Uniform Code held before a subcommittee of the Committee on Armed Services. There, Mr. Felix Larkin, then Assistant General Counsel, Office of the Secretary of Defense, and one of the chief spokesmen for the Uniform Code, was asked what was meant by the "crimes and offenses not capital" clause. When the ensuing conversation indicated some confusion as to whether state criminal laws were intended to be within the scope of the clause, Mr. Larkin clarified the matter as follows:

... I believe a violation of a State law would be punishable under the code to the extent it is construed as conduct to the prejudice of good order and discipline but not to the extent of the specific State law itself. We purposely want to avoid trying personnel who happen to commit an offense under State law, by virtue of the tremendous variations between State laws and by virtue of the necessity that would fall upon the court of trying them according to the procedural practices and perhaps even the substantive provisions of one State as against another. But, if the act is to the prejudice of good order and discipline, the fact that it also incidentally is a State law violation as well would bring it under this jurisdiction but not triable as the State would try it.\(^{37}\)

\(^{37}\) *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1239 (1949).*
One will immediately observe, of course, that Mr. Larkin neglected to mention that the discredit to the armed forces clause might come into play here also, but this omission was no doubt due to an oversight. As we shall see later, in actual practice it is the discredit clause, and not the prejudice to discipline clause, which is normally considered in case of acts which happen also to violate state or foreign laws. However, Mr. Larkin's assertion that a violation of state law would not as such be triable under the "crimes and offenses not capital clause" represented the interpretation given to that clause in the 1921 Manual for Courts-Martial and in all succeeding Manuals.\footnote{MCM, 1921, para. 446 (III); MCM, 1923, para. 152(c); MCM, 1949, para. 183(c); MCM, 1951, para. 213(c).} Although the language of the 1917 Manual had apparently adopted a broader view which was certainly subject to an interpretation that military prosecution for violations of state and even foreign laws would be permitted under the "crimes and offenses not capital" clause,\footnote{MCM, 1917, para. 446 (III); see WINTHROP 721.} it seems that the law must have changed in this respect at some time between 1917 and 1921, for the contrary assertions in the 1921 Manual, along with other changes, were stated in the introduction to that Manual to have been based on "the results of decisions made by the Office of the Judge Advocate General and the War Department."\footnote{MCM, 1921 (introduction at XI).}

Certainly at present it can be said that the "crimes and offenses not capital" clause is restricted to violations of federal laws or local laws enacted under the authority of Congress, such as those found in the Criminal Code of the District of Columbia. And even such laws, in order to be properly utilized under the clause in question, must be applicable in the place where the offense is committed.\footnote{MCM, 1951, para. 213(c).} These principles should not be confused with the entirely different principles found in the second paragraph of paragraph 127(c) of the Manual which deal with the use of federal and District of Columbia laws for the determination of maximum punishment.
peals in *United States v. Grosso*. In that case it was stated in the majority opinion:

A violation of a state statute does not by itself constitute a violation of Article 134. . . . The violation must, in fact, and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct. Undoubtedly, if we were to examine the statutes of the several states, we would find hundreds of acts which are made locally punishable but which would not be violations of military law.

In dissenting on other grounds, Judge Latimer, after quoting the statement of Mr. Larkin set out earlier in this article, stated:

That quotation merely restates the rule long established in military law to the effect that the proper yardstick to be used to determine the criminality of an act made punishable by a state statute is its impact on good government in the military community. The purpose of Article 134 of the Code . . . is to prescribe that measuring rod and, while the state statute may for state purposes, define the crime, before it becomes a military offense the prohibited conduct must, as the Article provides, have a direct and proximate impact on good order, discipline, or credit of the service.

It would not be proper to take leave of this problem, however, without pointing out that under some conditions state laws become, in effect, federal laws under the Federal

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42 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957). The somewhat related proposition that a violation of state law, or municipal or foreign law, is not automatically an offense of a nature to bring discredit on the military has been law in the Army at least from the time of the 1928 Manual for Courts-Martial. MCM, 1928, para. 152(b). Prior to this time, however, it seems that the contrary was the case. MCM, 1921, paras. 446 (II, III). And in the Navy, it appears that a violation of state, municipal, or foreign law was considered to be, per se, conduct "to the prejudice of good order and discipline" in violation of Article 22 of the Articles for the Government of the Navy up to the time of the passage of the Uniform Code. NAVAL COURTS AND BOARDS § 98 (1937). However, the language of Navy Article 22 differed materially from the Army general article. The mentioned Article 22 read: "Offenses not specified.—All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct."


44 *Id.* at 572-73, 23 C.M.R. at 36-37.
Assimilative Crimes Act, with respect to acts or omissions occurring in places which are within the state in question but under the exclusive or concurrent jurisdiction of the United States. In such an event, a violation of a noncapital criminal provision of the state law is punishable as a violation of federal law under the "crimes and offenses not capital" clause.

Of course, an offense must in fact be not capital in order properly to be chargeable under the "crimes and offenses not capital" clause. This limitation, however, has a much more far-reaching and sweeping effect than might at first be thought. Suppose, for example, a member of the military service commits an offense denounced as a capital offense by a federal statute, other than the Uniform Code, for which he could be tried in a federal court, and the offense is not one found in any specific article of the Uniform Code. Suppose, further, that the offense in question is both disruptive of military discipline and of a nature to bring discredit upon the armed forces. Now, obviously, the offender could not be tried for this offense under the "crimes and offenses not capital" clause of Article 134, but could he be tried for the offense on a noncapital basis under the theory of one or both of the other two clauses? By a divided court, the Court of Military Appeals, in the case of United States v. French has answered this question in the negative. Judge Latimer, the author of the principal opinion, after comparing the Articles of War of James II with the American Articles of War of

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47 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959). Judge Quinn, in his opinion purportedly "concurring in the result" (there were other offenses sustaining the sentence as affirmed by the intermediate appellate tribunal), apparently felt that the accused could be convicted under Article 134 on the noncapital basis of service discrediting conduct despite the similarity of language between the allegations of the specification in question and the provisions of a Federal statute denouncing a capital offense. Judge Ferguson, concurring in the result, stated that he was in general agreement with most of the principal opinion but that his concurrence was limited because of choice of language therein which he deemed "unfortunate." Judge Ferguson did not specify these choices of language.
1775 and apparently not noticing that the "crimes not capital" clause was a British innovation found in the British Articles of 1765 and not an American innovation, stated:

In light of the time and circumstances under which Congress enacted the precursor statutes to Article 134, we believe that body intended to erect an absolute barrier against military courts trying peacetime offenses which permitted the imposition of the death penalty in civilian courts. Apparently the legislative department of the Government intended that category of crimes should be tried before a civilian court and jury under civilian rights and privileges. If we are certain in that regard, then it is positive that this case falls under the bar for if the specification as herein alleged was pleaded in one charge in an indictment, a conviction would permit the imposition of a death penalty by a Federal civilian judge. Following this hypothesis one step further, if an indictment was returned which did not include an allegation that the information related to national defense [the allegation which made the offense capital], then only a ten-year penalty could be imposed and the case would not be capital.48

Elsewhere in his opinion, Judge Latimer pointed out that since all federal capital offenses would necessarily tend to bring discredit on the military services, to permit the trial of such capital offenses on the basis of this clause would render meaningless the "crimes and offenses not capital" clause. The opinion went on to state that the same reasoning would prevent trial of such an offense on a noncapital basis as conduct unbecoming an officer and a gentleman under Article 133. If, however, the offense in question, although capital under a federal statute, is also specifically denounced by the Uniform Code, it can then be tried by court-martial under the appropriate specific article whether capital or noncapital, for the specific article would amount to a direct legislative grant of court-martial jurisdiction with respect to the offense denominated by that article.49

48 Id. at 178-79, 27 C.M.R. at 252-53. The historical error mentioned in the text of this paper would not affect the result of the French decision.
49 Id. at 180, 27 C.M.R. at 254.
THE PROBLEM OF DEFINITENESS

The Article 134 type of general article has been attacked on a number of occasions as lacking in that degree of definiteness constitutionally required of criminal statutes. This is not particularly surprising since the requisite elements of definiteness in the ordinary civilian criminal statute are normally, except in the case of crimes well known to the common law,50 spelt out in the statute itself, and therefore it could be expected that one unfamiliar with military law and traditions might have some difficulty with such phrases as "crimes and offenses not capital," "disorders and neglects to the prejudice of good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces." However, to a military lawyer or even to a military man who is not a lawyer, these terms have at least as much meaning as do the terms murder, assault, larceny, or embezzlement to the nonmilitary member of the bar. And it is precisely for this reason that the legal attacks on the general article have failed. Two cases, one decided in the last century and one in this century, should suffice to settle the problem before us.

In Dynes v. Hoover,51 decided in 1858, the Supreme Court of the United States had before it the case of a sailor who had been convicted by a Naval court-martial of "attempting to desert" in violation of the thirty-second Article for the Government of the Navy. That article, the Navy general article, read: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The plaintiff, Dynes, who had brought suit for false imprisonment against Hoover, a United States Marshal who had imprisoned him pursuant to the naval conviction, com-

50 See, e.g., 18 U.S.C. § 113 (1958) ("assault with intent to commit murder or rape"); 18 U.S.C. § 114 (1958) ("with intent to maim or disfigure, cuts.

51 61 U.S. (20 How.) 65 (1858).
plained among other things that the above quoted article was too indefinite. In holding that the article was a sufficiently legal criminal statute upon which to base a conviction, the Court said:

And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial, and the offences of which the different courts-martial have cognizance.\(^5\)

In 1953, the matter was raised again, this time before the Court of Military Appeals.\(^5\) One Frantz had been convicted by court-martial of wrongfully having in his possession with intent to deceive an armed forces liberty pass, well knowing the same to be false, in violation of Article 134. He appealed his conviction contending that Article 134, as applied to his case, was unconstitutional because of vagueness. Despite the fact that the appellant had thus limited his constitutional objections to the application of the Article to the facts of his particular case, the court felt that it was necessary to determine whether the Article was sufficiently definite "on its face and generally as well."\(^6\) In determining that the Article was sufficiently definite, the court said:

Surely the third clause of the Article is not vague. However, we cannot ignore the conceivable presence of uncertainty in the first two clauses. Assuming that civilian precedents in the field are applicable in full force to the military community, we do not perceive in the Article vagueness or uncertainty to an unconstitutional

\(^5\) Id. at 82.  
\(^6\) Id. at 163, 7 C.M.R. at 39.
degree. The provision, as it appears in the Uniform Code, is no novelty to service criminal law. . . . On the contrary, it has been part of our military law since 1775, and directly traces its origin to British sources. . . . It must be judged, therefore, not in vacuo, but in the context in which the years have placed it. . . . That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than forty-seven different offenses cognizable thereunder explicitly included in the Table of Maximum Punishments of the Manual. . . .

After pointing out that a certain minimum amount of indistinction would always be present in legislation of this nature which would have to be dealt with on a case to case basis, the court stressed the military importance of the general article in the following manner:

[T]he briefest of terminal references must be made to the presence of special and highly relevant considerations growing out of the essential disciplinary demands of the military service. These are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development.

It should be quite clear that the same principles that appear in the two cases we have discussed in connection with Article 134 would apply with equal force to Article 133.

THE DOCTRINE OF PRE-EMPTION

Before becoming too deeply involved in this doctrine, if it can be called a doctrine, it will be necessary to explain what is meant, and what is not meant, by "pre-emption." This will be done in inverse order.

First, the doctrine of pre-emption does not prohibit a multiplication of charges, that is, charging one aspect of an act under a specific article and another aspect of the

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55 Ibid.
56 Id. at 163-64, 7 C.M.R. at 39-40.
same act under Article 134 or 133, or both, provided the other aspect so charged is a cognizable offense under the general article in question. If and when such a duplication may prejudice an accused at all it is not because of any doctrine of pre-emption but rather because of the rules governing multiplication of charges. The author is not to be understood as suggesting an indiscriminate use of such a procedure. Unnecessary multiplication normally serves only to confuse the members of the court, to make life difficult for the law officer in drafting his instructions, to lead to possibilities of error with regard to the sentence, and to lay the proceedings open to charges by the defense that the accused is being improperly portrayed as a "bad man."

Secondly, the doctrine of pre-emption has nothing to do with singly charging an offense denounced by a specific article as a violation of Article 134 or 133 when no elements of the specific offense are left out of the specification and no new elements are added. There would normally be no point in doing this anyway.

The doctrine of pre-emption does come into play, however, or rather, the question arises as to whether the prohibition of

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58 It might be argued that the discussion of Article 134 in the Manual for Courts-Martial, 1951, which, with respect to each of the three clauses, appears to restrict the operation of the Article to offenses not made punishable by a specific article (MCM, 1951, para. 213(a) (b) (c)) would, in close cases at least, prohibit such multiplication of charges with respect to Article 134. However, this restriction would appear to rest on a tender reed, for the Article itself in introducing its three proscriptions uses the phrase "though" not specifically mentioned in the Code, not "unless" specifically so mentioned. Article 133 has no restrictive language of any kind, and, indeed, double charges are expressly permitted here. See the penultimate paragraph of the "Discussion," MCM, 1951, para. 212. The above cited provisions of the Manual pertaining to Article 134 should not be confused with the provisions against unreasonable multiplication of charges found in paragraph 26(b) of the Manual.


60 Ibid.

61 With respect to an Article 134 charge, at least, if there is any particular reason for using such a procedure it will probably be an illegal one and will be stricken down by the courts. See Roshorough v. Rossell, 150 F.2d 809 (1st Cir. 1945); WINTERBOP 721; compare Grafton v. United States, 206 U.S. 333 (1907). And if a specification is laid under Article 134 which could have been laid under a specific article, the court-martial, reviewing, or appellate authorities will simply change the charge so that it will recite the appropriate specific article. United States v. Hallett, 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954); United States v. Deller, 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953).
the doctrine applies, when an attempt is made to charge an offense under Article 134, or Article 133, which is similar to, but not the same as, an offense specifically proscribed by the Code either because one or more elements have been added or left out or because the offense charged otherwise lies in the same field of criminality as the specifically denounced offense in question. In such a case, the problem always is one as to whether Congress, in enacting the specific article, intended completely to cover—to pre-empt—in that article the entire field of criminality pertaining to that particular department of crime, and consequently would brook nothing greater or less and had turned its face away from the possibility of any non-identical general article twins. This, obviously, is a problem of statutory construction of the specific articles, not one of construing the general articles.

Prior to the Uniform Code and for a relatively short time thereafter, this doctrine appeared not to have been recognized by military appellate tribunals. Indeed, the theory current in those days seemed to be that the Article 134 type of general article encompassed, as stated by Winthrop, "acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter . . ." and acts similar to those specifically denounced but "which lack the gravamen expressed in the term 'knowingly,' 'wilfully,' or the like"—all this without paying any particular attention to any possible exclusionary construction of the specific articles themselves.62

In United States v Norris,63 decided by the Court of Military Appeals early in 1953, the accused had been found guilty of the offense of wrongful appropriation in violation of Article 121 of the Code. That Article denounces the offenses of larceny and wrongful appropriation and requires that there be an intent permanently to deprive, defraud,
or appropriate in the case of larceny, and an intent temporarily to do one or more of these things in the case of wrongful appropriation. Because of instructional difficulties at the trial, the board of review (an intermediate military appellate tribunal) determined that the accused could not legally be convicted of having the temporary intent necessary for wrongful appropriation, and, acting on the basis of prior service precedents, sustained only a conviction for "wrongful taking" without such temporary intent in violation of Article 134. In reversing the conviction, the Court of Military Appeals said:

We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.

We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined. It follows that there is no offense known as "wrongful taking" requiring no elements of specific intent, embraced by Article 134 of the Code.64

As might be noticed, the decision in this case is at least partially based on the fact that the drafters of the Manual, in their supporting material, had stated that wrongful appropriation, as defined by Article 121, included "offenses heretofore known as misappropriation, misapplication, joyriding, wrongful taking and using, and wrongful conversion." Actually, in his concurring opinion, the late Judge Brosman indicated that this was the principal, if not the only, reason for his concurrence.65

In another case decided by the Court of Military Appeals in 1953, the case of United States v. Deller,66 the ac-

65 Ibid.
66 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953). When an accused raises the issue of pre-emption, he normally does so with one or more of the following reasons or contentions in mind: that the pre-empted act is no offense at all;
Cursed had been convicted of absence without leave "with the wrongful intent of permanently preventing completion of his basic training and useful service as a soldier" in violation of Article 134. Article 86 of the Uniform Code, which specifically makes punishable absence without leave, nowhere mentions such an intent. However, Article 85, the desertion Article, defines one type of desertion as an unauthorized absence with intent to shirk important service. The Court of Military Appeals, after holding that basic training constituted "important service," affirmed a conviction of desertion with intent to shirk such service in violation of Article 85. In the course of its opinion the court said:

[O]ffenses sounding in unauthorized absence may be reached and penalized only under the provisions of Articles 85, 86, and 87 of the Code . . . proscribing, respectively, desertion, absence without leave, and missing movement. With a single exception not relevant here [probably breach of restriction is meant; actually, there are others, such as breach of quarantine], there are simply no offenses of an unauthorized absence type cognizable under Article 134. 67

This case turned upon statutory construction of the absence without leave Article (Article 86) found in the discussion of that Article in the Manual, wherein it was said that the Article was designed to cover "every case not elsewhere provided for" in which a member of the armed forces was through his own fault not at the place where he was required to be at the prescribed time. 68

In United States v. Hallett, 69 the accused was tried under a specification alleging that, being before the enemy, he was guilty of cowardly conduct in that he wrongfully failed to accompany his platoon on a combat patrol, in violation of Article 99. By exceptions, the court-martial found him

that the pre-empting offense carries a lesser penalty; or that the instructions upon the elements of the pre-empted offense do not fit the elements of the pre-empting offense.

67 Id. at 413, 12 C.M.R. at 169.
not guilty of this offense but guilty merely of wrongfully failing, while being before the enemy, to accompany his platoon on the patrol, in violation of Article 134. The predecessor of Article 99 of the Uniform Code, Article 75 of the Articles of War, had contained a clause making punishable the act of one who "before the enemy, misbehaves himself." This generalized provision had been left out of Article 99, despite the protests of the then Judge Advocate General before the congressional committee considering the Uniform Code. No provision in Article 99 covered the conduct of which the accused was found guilty. The court held that under the circumstances, Congress had covered in Article 99 the "entire range of offenses which are assimilable to misbehavior before the enemy."\(^70\) and that no room was left in this area for the application of Article 134. The court did sustain, however, under the finding of the court-martial, a conviction of unauthorized absence in violation of Article 86.

The case of United States v. Frayer\(^71\) represents an interesting split of opinion on this matter within the Court of Military Appeals. The accused was convicted of communicating a threat, an offense for which the Manual provides a sample specification\(^72\) and an entry in the Table of Maximum Punishments,\(^73\) both listed under Article 134. On appeal, the accused contended that this sort of offense was preempted by Article 127 of the Code, the article denouncing extortion. The court, with Judge Ferguson dissenting on this point, held that the act of communicating a threat was properly an offense in violation of Article 134. Judge Latimer's rationale in this connection is particularly illuminating:

There seems to be some misapprehension about the power of Congress to make one act a crime under two or more punitive Articles. There is no such proscription, for the bar that has been erected is that an accused shall not be twice tried or punished for the same offense. But that is not to say that the Government

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\(^{70}\) Id. at 382, 15 C.M.R. at 382.
\(^{72}\) MCM, 1951 (app. 6c, Spec. No. 171).
\(^{73}\) MCM, 1951, para. 127(c).
cannot elect to prosecute once under any statute which has been violated. By way of illustration, when a member of the military misses a movement, he can be charged with violating either Article 86 [absence without leave] or Article 87 [missing movement] . . . . Examples could be multiplied, but from the foregoing it ought to be evident that, unless there are clear indications that Congress, by enacting one statute, intended not to permit prosecution under any other law, then the Government may choose which punitive Article will be used to support the specification and charge. 74

Judge Latimer, as had Judge Quinn, then found that there was no indication that Congress had intended to pre-empt the field of threats when it enacted Article 127. Judge Ferguson, in dissenting on this point, indicated that he would approach the problem of pre-emption by finding evidence of legislative intent in the phrase “Though not specifically mentioned in this chapter” [Code] appearing in Article 134 itself. 75 He felt that Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive articles.

There have been two recent cases on this subject. In one, United States v. McCormick, 76 the accused was convicted of assault and battery upon a child under the age of sixteen in violation of Article 134 77 and, on appeal, contended that this offense was pre-empted by the assault article, Article 128. This Article denounces ordinary assault and two kinds of aggravated assault, no mention being made of assaults upon children. Judge Ferguson, again referring to his concept that the phrase “Though not specifically mentioned in this chapter” [Code] was one of limitation, held that the offense in question was pre-empted but that the error thereby caused was de minimis in view of the other offenses of which the accused stood convicted. Judge Quinn’s opinion was neutral

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75 See note 58 supra.


77 The Manual contains a specification for this offense and an entry therefor in the Table of Maximum Punishments, both listed under Article 134. MCM, 1951, para. 127(c), Table of Maximum Punishments; MCM, 1951 (app. 6c, Spec. No. 125).
on the question of pre-emption, and Judge Latimer, after noting that the three opinions resulted in no law being decided on the matter of pre-emption, stated that there was no congressional intent to blanket the entire field of assaults with Article 128.

In the other case, *United States v. Picotte*, the accused was charged with kidnapping in violation of Article 134. The case fell under the “crimes and offenses not capital” clause since under the circumstances the provisions of the Colorado kidnapping statute had been assimilated under the Federal Assimilative Crimes Act. On appeal, the accused contended that the kidnapping charge was pre-empted by Article 97 of the Code, which proscribes the offense of unlawful detention. Judge Latimer, using the same approach employed by him in earlier cases, held that the offense of kidnapping was not pre-empted by Article 97, principally on the ground that, in that Article, Congress had intended only to define the less serious offense of false arrest or false imprisonment and had not intended to cover the more serious offense of kidnapping. Judge Quinn concurred, and Judge Ferguson, although he concurred in the result on the ground that there could be no possibility of pre-emption under his view of Article 97 (he would limit the article to military abuses of the power to detain), nevertheless gave notice that he had not retreated from his theory of the doctrine of pre-emption as expressed in earlier cases.

It would appear that the doctrine of pre-emption as explained at the beginning of this chapter and as expounded in Judge Latimer’s opinions, which now seem to express the views of the majority of the court, would apply to questions of pre-emption arising under Article 133 as well as to those arising under Article 134. If the matter is to be controlled by reference to the intent of the legislature in covering, or not covering, in a specific article the whole field of criminality to which that Article pertains, and if it is found that the legislature did intend to cover that field

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entirely in the Article in question, then it is difficult to imagine how there could be any room left in that field for the operation of other concepts, such as conduct unbecoming an officer and a gentleman.  

The True Nature of the General Articles

It is very easy to become somewhat overly aware of case law in connection with any research of a legal problem involving the general articles. Indeed, and perhaps to his ultimate dismay, a member of the legal profession nurtured in the case by case or Holmesian doom theory of the study of law can become quite bogged down in a veritable morass of legal decisions and opinions on this subject that can well turn out to be a somewhat annoying form of non-stare decisis law. This apparent anomaly suggests a comparison with certain procedural aspects of the romanesque legal systems on the European Continent. As any student of comparative law well knows, in those systems case law is used only as a sort of guide or appeal to reason, and when the chips are down on a difficult legal point and the case is ripe for decision the judge will go back to the basic legal principles of the statute, unadulterated by any legal gloss—particularly case law.  

Our general articles, except for the “crimes or offenses not capital” clause of Article 134, lend themselves peculiarly well to this type of approach, for they seek to express theories or principles of guilt as distinguished from mere denunciations of certain prohibited acts. Whether this is due to the fact that at least one of our general articles—Article 134—and much of earlier court-martial procedure may be traced to Continental European sources is difficult to determine. However, whatever the historical or other reasons may be, it is clear that in the general articles apart from

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80 For an interesting, though non-technical, presentation of the Continental European romanesque legal systems, see Wigmore, Panorama of the World’s Legal Systems ch. XV (1936); Burdick, The Bench and Bar of Other Lands, chs. III-V (1939).
the "crimes or offenses not capital" clause we are not dealing with such things as dishonorable failure to pay debts, assault and battery upon minor children, and other conveniently identifiable delicts or crimes alone. We are dealing with theoretical but nevertheless intensely practical concepts of guilt, deeply flavored with important and even crucial considerations of public policy which in cold fact are probably well understood by even the most ignorant offender. These theories of guilt, which in some instances may have a mens rea somewhat different from that ordinarily found in common-law crimes but which are still much more meaningful than those expressions of criminality contained in some of our so-called "malum prohibitum" statutes that are becoming more and more prevalent in the civilian field, are simply but lucidly expounded in the following terms—"disorders and neglects to the prejudice of good order and military discipline," "conduct of a nature to bring discredit upon the armed forces," and "conduct unbecoming an officer and a gentleman." Should there be any lingering doubt as to the precise nature of these terms, that doubt has been dispelled with respect to matters prejudicial to good order and military discipline and conduct unbecoming an officer and a gentleman by the terse provisions of the Manual,81

81 The Manual discussion of Article 134 (para. 213(a)) states inter alia: "'To the prejudice of good order and discipline' refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable."

The Manual discussion of Article 133 para. 212 states, inter alia: "Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer.

"There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet, or midshipman cannot fall without seriously compromising his standing as an officer, cadet, or midshipman or his character as a gentleman. This article
following ancient precedent.\textsuperscript{82} The Court of Military Appeals has quite effectively defined the limits of the “conduct to the discredit of the armed forces” clause by indicating that conduct reflecting only \textit{some} measure of discredit on the armed forces is not enough,\textsuperscript{83} and that in this clause “Congress intended to proscribe conduct which directly and adversely affected the good name of the service,” \textsuperscript{84} thus paralleling the limitations upon the “prejudice of good order and military discipline” clause found in the Manual.

A few cases from the Court of Military Appeals will serve to show that the general articles are not to be considered as a fertile ground for crystallization by case law and that their general clauses are to be considered as expressing, in themselves, the governing law on the subject. Of course, as mentioned earlier, the cases are a guide and an appeal to reason. But one who relies on a particular case in this field had better be very sure that he has an exact parallel and, more importantly, even then he cannot assume that the judicial winds will not have changed in the meantime.\textsuperscript{85}

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\textsuperscript{82} WINTHROP 710-13, 723. With respect to conduct unbecoming an officer and a gentleman, Winthrop states, and so does the Manual by inference, that in order to constitute this offense the conduct in question must be unbecoming in regard to both concepts, officer and gentleman, not just one of them.\textsuperscript{83} United States v. Downard, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955). To be considered dishonorable, a failure to maintain a sufficient bank balance to cover a check or a failure to pay a debt must be characterized by deceit, evasion, false promise, bad faith, or gross indifference. See also United States v. Groom, 12 U.S.C.M.A. 11, 30 C.M.R. 11 (1960).\textsuperscript{84} United States v. Sanchez, 11 U.S.C.M.A. 216, 218, 29 C.M.R. 32, 34 (1960).\textsuperscript{85} United States v. Day, 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960). Here the Court of Military Appeals reversed a conviction for usury (loaning money at an “unconscionable” rate of interest), in violation of Article 134, on the ground that there was no such offense in military law, despite the fact that the present and earlier Manuals for Courts-Martial had listed usury as an offense under the general article and convictions for usury had long been sustained by military appellate tribunals. Judge Latimer wrote a strong dissent, stating that usury was in fact prejudicial to military discipline. This case, which is really atypical of the principles expressed in the text, will
An illustration of the validity of the proposition that the general provisions of the general articles are a law unto themselves and are not governed by particular judicial decisions is found in the case of United States v. Williams. In that case, the accused had been convicted of wrongfully using a habit forming narcotic drug in violation of Article 134. This offense is mentioned in the Manual under the discussion of the "prejudice of good order and military discipline" clause of Article 134. On appeal, the defense contended that the conviction could not stand because the law officer had failed to instruct the members of the court that in order to find the accused guilty they must find as one of the elements that the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces. In holding that the contention of the defense was correct, the court said:

It [the matter omitted by the law officer] is an element of the offense and must be instructed upon. The Government's contention that wrongful use of narcotics is prejudicial conduct as a matter of law would be equally applicable to practically every offense charged under the general Article. Accordingly, we hold that the law officer erred in failing to instruct the court that in order to find the accused guilty of the offense charged, it must find that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

probably cause some readers to think that the author might have qualified his statement to the effect that the standards of the general articles are capable of being understood by all service personnel by indicating that those who have had their convictions reversed on appeal might sometimes have difficulty in this connection.

87 Id. at 327, 24 C.M.R. at 137. Judge Latimer dissented on the ground that the Manual itself stated, with good reason, that wrongful possession of a habit forming narcotic drug was an offense under Article 134 and that this would be obvious to anyone. While the author personally agrees with the dissent, the case is nevertheless a useful vehicle to illustrate the point made in the text. Parenthetically, it might be of interest to know that the majority opinion points out that although it is necessary to instruct upon these matters, it is not necessary to allege in the pleadings that the conduct was prejudicial to good order and military discipline or that it was service discrediting.
It is very probable that the same instructional requirements would apply with respect to conduct unbecoming an officer and a gentleman.\footnote{See U.S. DEP'T OF THE ARMY PAMPHLET No. 27-9, MILITARY JUSTICE—THE LAW OFFICER, par. 74d (1958).}

Another case supporting the principles here suggested is the case of United States v. Snyder.\footnote{1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).} The accused had been convicted of three specifications of wrongfully and unlawfully attempting to entice another service member to engage in sexual intercourse with a female to be directed to him by the accused, in violation of Article 134. The Judge Advocate General of the Navy certified the case to the Court of Military Appeals asking whether the three specifications stated offenses under Article 134. In holding that they did, the court made some interesting comments concerning Article 134 in general. The court stated:

It is true, as urged by appellate defense counsel, that fornication, in the absence of aggravating circumstances, has been held not to be an offense under military law. United States v. Ord, 2 CMR (AF) 84. This is consistent with the view expressed earlier herein that Congress has not intended by Article 134 and its statutory predecessors to regulate the wholly private moral conduct of an individual. It does not follow, however, that fornication may not be committed under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment. Likewise it does not at all follow that, because simple fornication is not an offense cognizable under military law, neither is enticement or an attempt at enticement thereto.\footnote{Id. at 427, 4 C.M.R. at 19. See also United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956); United States v. Sanchez, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960)—act of bestiality with a chicken held criminal per se and a violation of Article 134, but the question of pre-emption by Article 125 (sodomy) was purposely not raised by the defense.}

Thus we see that the facts and circumstances, not the name by which a particular act may be called, will make or break any prosecution under the general articles, depending upon whether those facts or circumstances are judicially regarded as falling within the stated prohibitions or theories of
guilt of those articles. One limitation, however, upon this approach is the doctrine of pre-emption which has been previously discussed. When that doctrine is applicable, the concepts of the general articles fall by the wayside.

CONCLUSION

Those who have had any experience in the field of military justice will realize at once, of course, that there are many problems connected with the construction and application of the general articles which have not been touched upon in this discussion. The intent of the author was only to bring to light some of the rather obscure historical background of the articles and to mention, in a relatively brief form, what were thought to be their most important and troublesome aspects. If we have done nothing more, however, this paper should at least have indicated that the general articles are indeed living and growing members of the corpus of military law, that it is important to understand their ancestry which has given shape and meaning to their present day existence, and that a flexible and even philosophical approach must be employed in applying them to the circumstances and happenings of military life.

From the standpoint of maintaining the discipline and good name of the United States Armed Forces at home and abroad, the general articles, and in particular Article 134, are extremely valuable. Back in 1912 and 1913, when a major revision of the military code which later became the Articles of War of 1916 was under consideration, it was mentioned that fully twenty-five per cent of all "cases" tried in the Army were prosecuted under the predecessor to Article 134.91 It did not appear whether inferior court-martial cases were included in these statistics, but the probabilities are that

91 See COMPARISON OF THE PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 50 (1912); "Explanation" accompanying S. 1032, 63d Cong., 1st Sess. 48 (1913). In COMPARATIVE PRINT SHOWING S. 3191 WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 58 (1916), the statement was made that fifty per cent of the cases tried were Article 134 cases. This statement is probably erroneous.
they were not and that only general court-martial cases were considered in arriving at this percentage. In those days there were only forty-four specific articles, while today, under the Uniform Code, there are fifty-four specifically denounced crimes and offenses. Even so, taking a sampling from one of the services, during the calendar year 1960, fourteen percent of all offenses tried by Army general courts-martial were Article 134 offenses and twenty-three percent of all persons so tried were prosecuted under this article. Bringing our discussion thus to a close, it can readily be seen that the need for an effective means of solving unforeseen and often unforeseeable problems of military misconduct through the civilized processes of the law, which prompted Gustavus Adolphus to include a general article in his early code, is as much a requirement of a properly disciplined and controlled armed force in our present society as it was in those of former times.

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92 Statistics obtained from Court-Martial Records Branch, Military Justice Division, Office of The Judge Advocate General of the Army.