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ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE—A STUDY IN VAGUENESS

ROBINSON O. EVERETT*

Congress, when the Uniform Code of Military Justice was adopted,¹ sought to assure that every serviceman be apprised of the obligations imposed by the Code. Therefore, it provided that many of the articles of the Uniform Code "be carefully explained to every enlisted person" soon after his entrance on active duty, and that thereafter copies of the Code and of the Manual for Courts-Martial be made available for his "personal examination."² However, there is one article of the Code—article 134³—which would seem in many ways to defy explanation, and whose true meaning might baffle the examination of the most skilled lawyer. With awesome generality, it provides:

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.

Article 134, sometimes called the "General Article,"⁴ and its companion, article 133,⁵ which proscribes conduct unbecoming an officer and gentleman, have ancient antecedents. The former "has been a part of our military law since 1775, and directly traces its origin to British sources."⁶ Both the Articles of War and the Articles for the Government of the Navy contained similar sweeping prohibitions. And, despite objections that it was vague, the General Article has withstood constitutional attack.⁷

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¹ Act of May 5, 1950, 10 U.S.C. §§ 801-940. In 1956 the Uniform Code was reclassified as part of the revision of Title 10 of the U.S. Code.

² 10 U.S.C. § 937, art. 137 (1956).

³ 10 U.S.C. § 934, art. 134 (1956).

⁴ See *United States v. Herndon*, 1 U.S.C.M.A. 461, 464, 4 C.M.R. 53, 56 (1952); *United States v. Snyder*, 1 U.S.C.M.A. 423, 425, 4 C.M.R. 15, 17 (1952).

⁵ 10 U.S.C. § 933, art. 133 (1956).

⁶ *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953). For further background on Article 134, see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 11-12. As is pointed out by Wiener, originally "the general article did not confer a general criminal jurisdiction."

⁷ *United States v. Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953). See also *Grafton v. United States*, 206 U.S. 333 (1907); *Ex parte Mason*, 105 U.S. 696 (1881); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858).

Concerning the provisions of article 134 it has been said that they "have acquired the core of a settled and understandable content of meaning."⁸ It should be interesting to discover whether this observation is completely accurate and, if so, what constitutes the "core" of meaning. Furthermore, should some change be made in the current interpretation and application of article 134?

THE THREE CLAUSES OF ARTICLE 134

Three types of conduct come within article 134: (a) Disorders and neglects which prejudice good order and discipline in the armed forces; (b) service-discrediting conduct; and (c) crimes and offenses not capital. Frequently the same act will fall within two or possibly all categories. For instance, behavior which transgresses Title 18 of the United States Code and therefore clearly constitutes a "crime and offense not capital" may also be prejudicial to good order or service-discrediting. Or perhaps the same conduct may be both disorderly and service-discrediting.⁹

The Manual for Courts-Martial,¹⁰ in dealing with disorders, seems to limit the possible realm of criminal liability by stating:¹¹

"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.

However, the moderate approach taken in the Manual has not always been manifest in the judicial interpretations of article 134.

In an early case the Court of Military Appeals considered the criminal liability of a marine who was charged with enticing other servicemen at Camp Lejeune to engage in sexual intercourse with a female.¹² Apparently this conduct was not considered service-discrediting since it "transpired in the semi-privacy of a military reservation."¹³ Moreover, the court recognized that simple fornication probably would not violate

⁸ *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953). In support of this observation, it was noted that "no less than forty-seven offenses cognizable thereunder" are explicitly included in the Table of Maximum Punishments which is set out in the 1951 Manual for Courts-Martial.

⁹ The Court of Military Appeals once stated: "The 'discredit' and 'disorders and neglects' categories have been used, we believe, confusingly, and at times interchangeably, by the services." See *United States v. Herndon*, 1 U.S.C.M.A. 461, 464, 4 C.M.R. 53, 56 (1952). However, some might question the extent to which the court has eliminated the confusion.

¹⁰ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951.* (hereinafter cited *MANUAL*.)

¹¹ *MANUAL*, para. 213a at 381 (1951).

¹² *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

¹³ *Id.* at 425, 4 C.M.R. at 17.

article 134. Nonetheless, the enticement "clearly evinced to his fellow Corpsmen a wanton disregard for a moral standard generally and properly accepted by society" and constituted "a manifest example of conduct prejudicial to good order and military discipline."¹⁴ Exemplifying still further its concept of conduct prejudicing good order, the court intimated that "drunkenness, use of profane language, wearing improper uniform, use of indecent language to a female, uncleanness in person, and gambling" might constitute disorders if they occurred in the presence of members of the armed forces.¹⁵

Only a few weeks had passed when, in *United States v. Herndon*,¹⁶ the court indicated that it might have some reservations concerning its previous indication that misconduct "in the semi-privacy of a military reservation" could not be service-discrediting. However, it relied on the prejudicial-to-good-order clause of article 134 in holding that a navy lieutenant could be prosecuted for receiving stolen property on a military reservation. The opinion quotes approvingly Colonel Winthrop's remark about "disorders and neglects":¹⁷

"In this comprehensive term are included all such insubordination; disrespectful or insulting language or behaviour towards superiors or inferiors in rank; violence; immorality; dishonesty; fraud or falsification; drunken, turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; neglect or evasion of official or routine duty, or failure to fully or properly perform it;—in fine all such 'sins of commission or omission,' on the part either of officers or soldiers as, on the one hand, do not fall within the category of the 'crimes' previously designated, and, on the other hand, are not expressly made punishable in any of the other ('foregoing') specific Articles of the code, *while yet being clearly prejudicial to good order and military discipline.*"

In concluding that it constituted a disorder for a soldier to accept money from another enlisted man to transport a Korean female in the government vehicle which he drove, the Court of Military Appeals commented: "Any irregular or improper act on the part of a member of the armed services which directly and substantially affects adversely the discipline or good order of the service may be made the subject of a charge."¹⁸ More recently the court has indicated that it considered that any solicitation to commit a crime would fall within the "disorders and neglects" clause of article 134.¹⁹

¹⁴ *Id.* at 427, 4 C.M.R. at 19.

¹⁵ *Id.* at 426, 4 C.M.R. at 18.

¹⁶ 1 U.S.C.M.A. 461, 4 C.M.R. 53 (1952).

¹⁷ *Id.* at 464, 4 C.M.R. at 56.

¹⁸ *United States v. Alexander*, 3 U.S.C.M.A. 346, 348, 12 C.M.R. 102, 104 (1953).

¹⁹ *United States v. Goodnight*, 9 U.S.C.M.A. 542, 26 C.M.R. 322 (1958); *United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

In so far as service-discrediting conduct is concerned, little heed has been given to the early statements that article 134 "is not intended to set up a moral standard for the conduct of an individual in private" and that conduct was probably not service-discrediting if it occurred on a military reservation.²⁰ For instance, drunkenness in a public place was held service-discrediting even though the accused wore civilian clothes at the time and his identity as a member of the military was not obvious to view.²¹ It has even been stated that "in the military sphere drunkenness in the privacy of one's own quarters is a punishable offense."²²

In *United States v. Berry*,²³ the Court of Military Appeals, though still declining to rule definitely whether simple fornication could be punished under article 134, concluded that fornication in the known presence of a third person is service-discrediting. The evidence showed that Berry and another soldier named Mitchell, who was tried with him in a common trial, had picked up two German girls in a Berlin cafe and then gone with them to a hotel where the two servicemen shared a room and also shared each girl. Thus, the only third persons who witnessed the service-discrediting conduct were persons who were engaged in identical conduct, and even with the same participants. Criminal liability seems here to result from the soldiers' thrift in sharing the same room instead of fornicating in two adjoining rooms.

A retired rear admiral was recalled to duty to be court-martialed under article 133 for conduct unbecoming an officer, in that he had associated with known sexual deviates. The admiral challenged the sufficiency of the evidence and contended that the element of disgrace to the services was lacking since the association occurred solely in the presence of sexual deviates. The Court of Military Appeals noted that the accused had misconceived the evidence "for the conduct was observed by Intelligence agents and at least one female was present."²⁴ Moreover, "assuming the correctness of the defense estimate of the evidence," the *Berry* case demonstrated the fallacy of the defense argument.

One thing especially disturbing about this opinion is its implication that conduct not otherwise service-discrediting can become service-discrediting because it is discovered by investigators and, therefore, is no longer completely private. There are very few parallels for holding that behavior becomes criminal simply because the policeman is alert enough to "catch someone in the act."

At the present time there seems to be quite a movement afoot to eliminate from judicial scrutiny many types of "private" conduct that

²⁰ *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

²¹ *United States v. McMurtry*, 1 C.M.R. 715 (1952).

²² *United States v. Lowe*, 4 U.S.C.M.A. 654, 658, 16 C.M.R. 228, 232 (1954).

²³ 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).

²⁴ *United States v. Hooper*, 9 U.S.C.M.A. 637, 647, 26 C.M.R. 207, 217 (1958).

heretofore have been punishable. For instance, in England, where prostitution, fornication, and adultery committed in private have long been immune from punishment, it has been recently and authoritatively proposed—partially as a result of the late Doctor Kinsey's investigations—that still other types of sexual immorality be exempted from prosecution.²⁵ In the United States where the American Law Institute has been formulating a new Model Penal Code there has been considerable sentiment in the same direction.²⁶ On the other hand, in the application of article 134—and without any mandate from Congress that can be termed in any way "specific"—the tendency has seemed to be in the opposite direction.

Yet in one area—that of gambling debts—the Court of Military Appeals has refused to hold that disregard of a "moral obligation" can be service-discrediting. Apparently any failure to pay a gambling debt, however discreditable that failure may appear to the average serviceman, will not fall within article 134.²⁷ Indeed, even the giving of a worthless check in connection with a gambling transaction cannot be the basis for a court-martial.²⁸

Where gambling is not involved, it is held that the giving of a bad check or the failure to pay a debt, if dishonorable and not merely negligent, is service-discrediting and therefore in violation of article 134.²⁹ The rationale underlying this view has been well-stated, as follows:³⁰

Moreover, members of the military community—easily identified through the wearing of the uniform—are inevitably grouped in the public mind as a class—with the result that a failure by one to discharge monetary responsibilities tends to brand all not only as criminal persons, but as poor credit risks as well, in the eyes of the civilian population. Too, the ancient ethical traditions of the profession of arms cannot safely be left out of account in this connection. Historically, of course, these moral customs have possessed a particularly binding force in the case of commissioned officers—but they have not at all been rejected in that of enlisted personnel. And they have always dictated a high standard of promissory responsibility.

²⁵ *Report of the Committee on Homosexual Offenses and Prostitution* (1957).

²⁶ See 23 Law Week 2606 (May 24, 1955).

²⁷ *United States v. Lenton*, 8 U.S.C.M.A. 690, 25 C.M.R. 194 (1958); *United States v. Walter*, 8 U.S.C.M.A. 50, 23 C.M.R. 274 (1957). Also, the exercise of one's legal rights and privileges, such as the privilege against self-incrimination, is not discreditable conduct. *United States v. Sinigar*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1955).

²⁸ *United States v. Young*, 8 U.S.C.M.A. 695, 25 C.M.R. 199 (1958); *United States v. Walter*, 8 U.S.C.M.A. 50, 23 C.M.R. 274 (1957).

²⁹ *United States v. Lightfoot*, 7 U.S.C.M.A. 686, 23 C.M.R. 150 (1957); *United States v. Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955); *United States v. Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955).

³⁰ *United States v. Kirksey*, 6 U.S.C.M.A. 556, 559, 20 C.M.R. 272, 275 (1955).

In support of the criminal liability imposed on the "dishonorable" debtor, it should be noted that since service personnel are very transient and their pay not subject to garnishment, their sources of credit might well dry up were not article 134 available as a weapon for the outraged creditor. So perhaps there is some justification for the military exception to the usual rules against imprisonment for debt. Unfortunately, though, as many military lawyers will testify, article 134 is sometimes used as a lever by overreaching finance companies or sellers to secure payment of unjust claims. Time and again a serviceman will be terrified into paying a claim because of a letter from his alleged creditor—often with a copy to the accused's commander—wherein he is informed that he is subject to prosecution under article 134. Although the Armed Services disavow any intent to become a collection agency, and will even provide the aid of legal assistance officers for service personnel who deny the existence or validity of a claim, it seems clear that many servicemen are not willing to take the chance that a court-martial might find their failure to pay a debt was "dishonorable."³¹

The Manual for Courts-Martial makes clear that "crimes and offenses not capital" is a phrase that refers only to crimes under federal law—for the most part Title 18 of the United States Code. Thus, failure of a finance officer to render his accounts,³² transportation of a stolen vehicle in interstate commerce,³³ wiretapping,³⁴ intimidating a witness in a court of the United States,³⁵ or aiding in the overthrow of the United States Government³⁶ could, under some circumstances constitute transgressions of article 134 since they are specifically prohibited by federal statutes other than the Uniform Code of Military Justice.

Except where the Assimilative Crimes Act³⁷ is involved—a very limited situation involving some military reservations and other federal enclaves—the fact that an act violates a state law does not ipso facto

³¹ See also EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES*, at 65-66 (1956).

³² *United States v. Doyle*, 3 U.S.C.M.A. 585, 14 C.M.R. 3 (1954).

³³ *United States v. McCarthy*, 4 U.S.C.M.A. 385, 15 C.M.R. 385 (1954).

³⁴ *United States v. Noce*, 5 U.S.C.M.A. 715, 19 C.M.R. 11 (1955). But wiretapping is not an offense if committed overseas since Section 605 of the Communications Act is not extraterritorial in effect and has no application to a telephone communication made and completed within the boundaries of a foreign country. *United States v. Gopaulsingh*, 5 U.S.C.M.A. 772, 19 C.M.R. 68 (1955). Many other parts of the Federal Criminal Code would be subject to the same limitation and therefore the "crimes and offenses not capital" clause in article 134 will have its chief applicability to conduct in the United States. See also EVERETT, *op. cit. supra* note 31, at 67.

³⁵ *United States v. LaSage*, 22 C.M.R. 853 (1956); *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).

³⁶ *United States v. Blevens*, 5 U.S.C.M.A. 480, 18 C.M.R. 104 (1955).

³⁷ 18 U.S.C. § 13 (1950). Recently this act was upheld as constitutional in *United States v. Sharpnack*, 355 U.S. 286 (1958), despite an attack on grounds of improper delegation of federal legislative power.

make it a violation of article 134.³⁸ Also, although at least one senate committee seems not to have realized it,³⁹ conduct may transgress the law of a country where a serviceman is stationed and still not be a violation of article 134.⁴⁰ Obviously, though, conduct which is service-discrediting or prejudicial to good order can also violate state or foreign laws.

There have been instances in which the fact that the conduct violated a state statute was specifically alleged in connection with a prosecution based on article 134, and even where the court-martial was instructed with reference to the state law.⁴¹ It could be argued that the violation of the state law was ipso facto service-discrediting. However, this argument would, in practical effect, mean that the "crimes and offenses" clause of article 134 was not limited to federal crimes.⁴² Then, if the violation of the state law is not of itself and automatically service-discrediting, should it even be alleged?

As a general rule, a prosecuting attorney in civilian practice cannot allege and prove a crime for which the defendant is not being tried. Indeed, gratuitously to allege and prove that an accused has committed some offense with which he was not charged might well constitute prejudicial error. On this analogy it would seem highly dubious to allege and prove the violation of state or foreign law when prosecuting under article 134.

On the other hand, are not statutes—be they state or foreign—a good embodiment of some of the norms and customs that are prevalent in the particular jurisdiction? And is not their violation some index of possible discredit to the American Armed Forces within the area involved? This question in turn poses the still-unanswered problem of what "discredit" Congress was referring to when it enacted article 134. American troops are stationed all over the world; in some countries where they are located behavior such as bigamy, which is not condoned in the United States, and can be prosecuted under article 134, might be socially and legally acceptable—and would in no wise discredit our Armed Forces. Conversely, conduct that is acceptable in the United States might transgress the taboos and laws of many foreign countries where we maintain armed forces. While flexibility may be desirable in a legal system, it is questionable that Congress intended to delegate the

³⁸ MANUAL, para. 213c, at 383 (1951). See also *United States v. Grosso*, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957); *United States v. Leach*, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956); *United States v. Thompson*, 3 U.S.C.M.A. 620, 14 C.M.R. 38 (1954). Is it bribery for purposes of article 134 if a state rather than a federal official is "bribed." See *United States v. Smith*, 23 C.M.R. 629 (1957).

³⁹ See EVERETT, *op. cit. supra* note 31, at 66.

⁴⁰ MANUAL, *op. cit. supra* note 38.

⁴¹ See *United States v. Grosso*, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957); *United States v. Leach*, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956).

⁴² EVERETT, *op. cit. supra* note 31, at 67.

criminal liability of American service personnel to the varying opinions in different American states and foreign countries concerning what conduct is permissible—opinions evidenced by state or foreign laws. This being so, it would seem desirable for the Court of Military Appeals to hold outright that usually a violation of state or foreign law will be immaterial and inadmissible in a prosecution under article 134. Unfortunately no such explicit holding has been forthcoming.

THE FORM SPECIFICATIONS

The Manual for Courts-Martial sets forth in an appendix approximately sixty Form Specifications—many with several indicated permissible variations—which can be used in drafting charges under article 134.⁴³ These Form Specifications correspond roughly to forms used by a draftsman in drawing up an indictment or information; usually they tend to be brief and set forth the bare minimal requirements of the offense,⁴⁴ with details available presumably through the pre-trial investigation or a motion for a bill of particulars. Many of the offenses dealt with in the Form Specifications are not mentioned anywhere else in the Manual for Courts-Martial or in the Uniform Code itself.

The fact that these Form Specifications have been promulgated in the Manual for Courts-Martial, which is itself a presidential executive order promulgated more or less contemporaneously with the Uniform Code's enactment,⁴⁵ would give them great weight in the ascertainment of the core of meaning in article 134. Of course, some problem might be presented concerning the delegation to the President of the power to provide the standards of guilt.⁴⁶ However, many of the Form Specifications have been carried forward from Manuals for Courts-Martial which antedated the Uniform Code and Congress may well have acquiesced in the interpretation in those earlier Manuals of article 134's predecessors.⁴⁷ Also, the 1951 Manual seems to have been given congressional attention and presumably Congress' displeasure would have been made known had it felt that the Form Specifications went beyond the intentment of the general article.⁴⁸ Under these circumstances, any objection as to delegation is less convincing.

⁴³ Appendix 6, Specifications 118-176. Many Form Specifications have several possible variations. For instance Form Specification 171 in the Manual entitled "Threat, communicating" reads: In that — did, (at) (on board) —, on or about —19—, wrongfully communicate to — a threat to (injure — by —) (accuse — of having committed the offense of —) (—).

⁴⁴ See note 43 *supra*.

⁴⁵ Exec. Order No. 10214, 3 C.F.R., 1949-1953 Comp., p. 3.

⁴⁶ The problem of legislative delegation has recently been considered by the Supreme Court in *United States v. Sharpnack*, 355 U.S. 286 (1958).

⁴⁷ See *MANUAL FOR COURTS-MARTIAL*, U. S. ARMY, 1949, at 327-333; *MANUAL FOR COURTS-MARTIAL*, U. S. ARMY, 1928, at 254-7. Cf. *United States v. Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955).

⁴⁸ Presumably the requirement in article 36 of the Uniform Code, 10 U.S.C. § 836, that all rules and regulations promulgated by the President "be reported to the Congress" reflects a legislative desire to keep a close watch on military justice.

PRE-EMPTION

American judges are by now well familiar with a doctrine of pre-emption, under which state legislation is frequently invalidated because it concerns a field that has been pre-empted by federal laws. A somewhat similar doctrine is applied in military law with respect to article 134's applicability.

The leading case is *United States v. Norris*,⁴⁹ where the Court of Military Appeals held that a prosecution for the wrongful taking of property could not be maintained because the area of behavior that it concerned had been "pre-empted" by another punitive article of the Uniform Code—article 121, which concerns larceny and wrongful appropriation. This holding signified that an accused could not be prosecuted if, by reason of drunkenness or otherwise, he wrongfully took another's property without having the specific intent required for conviction under article 121. Thus, the Armed Forces could not evade the specific intent requirement of article 121 by resort to the general article.

Subsequent cases plot a rather erratic course. It has been held that: (a) offenses involving unauthorized absence must be prosecuted within the restrictions of articles 85, 86, and 87 of the Uniform Code,⁵⁰ (b) any larceny from the person must meet the demands of article 122, dealing with robbery,⁵¹ (c) all misbehavior before the enemy must fall within article 99,⁵² (d) false swearing in judicial proceedings must conform to article 131, which proscribes perjury and demands that the falsity be material.⁵³

There are several cases which are difficult to reconcile with the foregoing. For instance, article 129 of the Uniform Code deals with burglary and article 130 with housebreaking. Both offenses, as defined there, require a specific intent to commit a criminal offense in the building entered. However, the Court of Military Appeals has held that under article 134 a serviceman can be prosecuted for "unlawful entry" when he enters a building without any intent to commit offense therein—a situation often posed by proof of extreme intoxication.⁵⁴ Such a holding, as will appear from the subsequent discussion, is all the more dangerous since the maximum punishments are, for the most part, not prescribed by the Congress in the punitive articles.

⁴⁹ 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

⁵⁰ *United States v. Deller*, 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953); *United States v. Johnson*, 3 U.S.C.M.A. 174, 11 C.M.R. 174 (1953).

⁵¹ *United States v. Rios*, 4 U.S.C.M.A. 203, 15 C.M.R. 203 (1954).

⁵² *United States v. Hallett*, 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954).

⁵³ *United States v. Smith*, 9 U.S.C.M.A. 236, 26 C.M.R. 16 (1958). For the materiality requirement in a different context, see *United States v. Dozier*, 9 U.S.C.M.A. 443, 26 C.M.R. 223 (1958).

⁵⁴ *United States v. Love*, 4 U.S.C.M.A. 260, 15 C.M.R. 260 (1954). However, the wording of the Form Specification for unlawful entry, together with other circumstances, persuaded the court that there could be no unlawful entry into an automobile. *United States v. Gillin*, 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958).

Article 117 of the Uniform Code—a section which might itself be accused of some vagueness—proscribes the use of “provoking or reproachful words or gestures” towards any other person subject to the Uniform Code. Article 127 makes extortion punishable, and defines it as the use of threats to obtain something of value. For the former offense an accused person can receive confinement for up to 3 months; for the latter, confinement up to three years. However, it has been held that, despite the pre-emption precedents, an accused can be tried under article 134 for “communicating threats” and be punished therefor by up to three years’ confinement.⁵⁵ Should not the Court of Military Appeals have found that articles 117 and 127 had pre-empted the field of speech offenses and left no scope for article 134. The desirability of such a position seems all the greater in light of the relative maximum punishments.

Cheating—even when it involves money—is an offense that has not been pre-empted by article 121 which includes larceny, embezzlement, and obtaining property by false pretenses.⁵⁶ The fraudulent burning of the accused’s own house with the intent to defraud an insurance company—behavior which did not constitute arson under the common law but which has been made punishable by legislation in many states—was deemed to violate article 134, even though Congress had, in article 126, enacted a broad arson statute that would cover the burning of another’s property.⁵⁷ And even though some types of solicitation to commit offenses, are made specifically punishable under article 82, the Court of Military Appeals has held that any solicitation to commit a crime is punishable as a disorder, and permits up to four months’ confinement.⁵⁸

In most jurisdictions, proof of involuntary manslaughter is held to require more than simple negligence of the sort that would authorize a judgment for damages. In adopting article 119 which covers manslaughter and requires “culpable negligence” for an involuntary manslaughter conviction, Congress also intended something more than simple negligence. However, it has been held that punishment can be inflicted under article 134 for “negligent homicide” which requires only simple negligence.⁵⁹ Thus, the field of homicide was not pre-empted by articles 118 (murder) or 119 (manslaughter).

⁵⁵ *United States v. Kelly*, 9 U.S.C.M.A. 26, 25 C.M.R. 288 (1958) (instructions defining “threat”); *United States v. Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28 (1954). For other cases which hold that certain types of speech can be punishable under article 134, see *United States v. Grosso*, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957) (defamation); *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956) (obscene words uttered over the telephone).

⁵⁶ *United States v. Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957).

⁵⁷ *United States v. Fuller*, 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958).

⁵⁸ *United States v. Goodnight*, 9 U.S.C.M.A. 542, 26 C.M.R. 322 (1958) (soliciting the disobedience of a regulation is only a “simple disorder”); *United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

⁵⁹ *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952). Cf. *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952), where a

Some of the results can be upheld on the ground that the offense held punishable under article 134 is specifically proscribed by a Form Specification in the 1951 Manual for Courts-Martial—and that these forms embodied in an executive order that was contemporaneous with the Uniform Code are entitled to great weight. This argument might be used with respect to the unlawful entry, negligent homicide, and communicating threats cases.⁶⁰ But even this argument does not explain the result as to the fraudulent burning of one's own house or the solicitation to commit a crime other than those specified under article 82 (the very article which is entitled solicitation).

Moreover, if pre-emption is to be applied why not also apply it to hold that the Manual itself has pre-empted all the offenses under article 134? In other words, if conduct is not specifically prohibited somewhere in the Manual for Courts-Martial—be it in the Form Specifications or elsewhere—it would then be held that it could not be considered to the prejudice of good order or service-discrediting, because that field of conduct has been pre-empted by the Manual. Of course, this would give some meaning to the Uniform Code's requirement that a complete text of the Manual for Courts-Martial should be made available to any person on active duty for his personal examination,⁶¹ for he would know that if his contemplated behavior was criminal it would be specifically referred to somewhere in the Manual. Admittedly, this would sacrifice some flexibility in the application of article 134, but any unwarranted area of immunity could easily be rectified by new legislation or by amendment of the Manual and acquiescence therein by Congress.

The case law has not, however, developed along these lines. Instead, time and again allegations have been held legally sufficient on the analogy of some offense prohibited in the Manual for Courts-Martial. For instance, acceptance of money for transporting a passenger in a government vehicle was analogized to graft and bribery, which are dealt with in the Manual.⁶² So, too, with the acceptance of money for services in

negligent homicide conviction was upheld under the law of war rather than under article 134.

⁶⁰ Form Specifications 174, 144, and 171, respectively. In a number of the cases great weight is given to the wording of the Form Specification or to their absence. See, *e.g.*, *United States v. Gillin*, 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958) (unlawful entry); *United States v. Eagleson*, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (hit and run driving). However, in *United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956)—another hit and run case, where the liability of a passenger was being considered—the Court of Military Appeals noted: "However the sample specification is only a procedural guide. By itself it cannot create an offense." In *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953), the court, in holding that there was no offense of wrongful taking under article 134, emphasized that the Manual contained no sample specification for this offense.

⁶¹ 10 U.S.C. § 937, art. 137 (1956). In at least one recent Supreme Court case, absence of notice of an ordinance led to reversal of a conviction thereunder. *Lambert v. California*, 355 U.S. 225 (1957).

⁶² *United States v. Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953).

obtaining a pass.⁶³ A recent opinion notes that the accused was convicted of "indecent assault upon a married woman, in violation of article 134."⁶⁴ One can find "indecent assaults" in the Manual; but there seems to be no reference therein to such an attack "upon a *married* woman."⁶⁵ Is this still another new crime?

In illustrating the conduct which is unbecoming an officer and gentleman and therefore violates article 133, the Manual mentions "public association with notorious prostitutes."⁶⁶ Admiral Hooper was prosecuted under this article for publicly associating with "persons known to be sexual deviates, to the disgrace of the armed forces." The Court of Military Appeals held that this charge was permissible on the analogy to association with notorious prostitutes.⁶⁷ As for notoriety, this was deemed to be covered by the allegations "known to be sexual deviates" and "to the disgrace of the armed forces." One must question the desirability of upholding such a prosecution by analogy without more specific authorization from either the Code or the Manual.

The Manual contains a Form Specification under article 134 which is entitled "gambling with subordinate,"⁶⁸ and apparently embodies the view that a superior and subordinate should not compromise their respective ranks by gambling together. The old maxim *expressio unius, exclusio alterius* would indicate that gambling per se was not illegal, and that for two persons of equal rank to gamble does not transgress article 134. However, the Court of Military Appeals, which has inveighed against gambling, does not seem to share this view.⁶⁹

In military law the use of the pre-emption doctrine as to article 134 has been a healthy development. Without it the Armed Services would be almost completely free to evade the requirements of other punitive articles of the Uniform Code. Suppose that X plus Y constitute a violation of some article of the Code. Without pre-emption, it could be contended that X alone was service-discrediting conduct. Since the President sets the maximum punishments—except for capital offenses—he could then, by executive order, authorize a maximum punishment for X that would be the same as for X plus Y. Absent pre-emption, the

⁶³ United States v. Bey, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954).

⁶⁴ United States v. Bugros, 9 U.S.C.M.A. 276, 26 C.M.R. 56 (1958).

⁶⁵ MANUAL, Form Specification 120, at 488 (1951). Apparently, the Court of Military Appeals is willing to hold that an unmarried serviceman violates article 134 by marrying a woman who has a husband, even though the accused does not meet the usual bigamy requirement, stated in Form Specification 126 of the Manual, that the bigamist have a living spouse. United States v. Wille, 9 U.S.C.M.A. 623, 26 C.M.R. 403 (1958).

⁶⁶ MANUAL, para. 212, at 301 (1951).

⁶⁷ United States v. Hooper, 9 U.S.C.M.A. 637, 26 C.M.R. 207 (1958).

⁶⁸ MANUAL, Form Specification 143, at 491.

⁶⁹ United States v. Walter, 8 U.S.C.M.A. 50, 23 C.M.R. 274 (1957).

overt act requirement could be eliminated from conspiracy; the intent requirement could be removed from larceny; and so forth.⁷⁰

Unfortunately pre-emption has been rejected in several instances where its application would have been both desirable and consistent. Moreover, the Court of Military Appeals should have applied pre-emption with respect to the Manual for Courts-Martial and held that an offense not covered specifically in the Manual could not be the basis for a prosecution under article 134.

INSTRUCTIONS ON THE OFFENSE

In civil courts, the judge instructs the jury on the elements of the offense that must be found beyond a reasonable doubt in order to convict. Similarly, under the Uniform Code, the law officer—a well qualified attorney who sits apart from the members of the court-martial—instructs them on the elements of the offenses charged and on any other legal issues concerning the findings or the sentence.

Under the most recent decisions of the Court of Military Appeals, the members of the court-martial will be the ultimate arbiters of what is service-discrediting or prejudicial to good order. It has been held that, under penalty of reversal of a conviction, the law officer must specifically instruct in an article 134 prosecution—other than for a “crime and offense not capital”—that, in order to convict, the court members must find that the behavior alleged and proved did either prejudice good order and discipline or discredit the Armed Forces. For instance, a conviction of assault on an air policeman in the execution of his duties was reversed for failure to give such an instruction.⁷¹

In some instances it might be appropriate for this matter to be submitted to the members of the court-martial. However, it seems that generally, as a matter of law, the violation of the standards of article 134 would be almost self-evident. Who could seriously contend that it did *not* prejudice good order to assault an air policeman in the performance of his duties? Or that it was not service-discrediting to assault a woman with the intent to commit rape?⁷² Since both types of behavior are specifically prohibited by the Manual, it is all the more difficult to conceive of their ever falling outside of article 134's scope.

A court-martial which did acquit even though convinced beyond a reasonable doubt that the assaults had taken place would have perpetrated a monumental miscarriage of justice. Why then provide the occasion for

⁷⁰ This was pointed out by Chief Judge Quinn in *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). See also *United States v. Rios*, 4 U.S.C.M.A. 203, 15 C.M.R. 203 (1954).

⁷¹ *United States v. Gittens*, 8 U.S.C.M.A. 673, 25 C.M.R. 177 (1958). Cf. *United States v. Williams*, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957) (narcotics offense).

⁷² See *United States v. Grimes*, 9 U.S.C.M.A. 272, 26 C.M.R. 52 (1958).

any such miscarriage—and, at the same time, furnish a new source of reversible error. Just as some conduct has been held to present a “clear and present danger” as a matter of law⁷³—ascertainable by the judge—some conduct should be deemed service-discrediting or prejudicial to good order as a matter of law—ascertainable by the law officer.

Perhaps the submission to the court members in all cases of the question whether the conduct prejudices good order or discredits the services constitutes a safety valve against the judicial tendency to extend the scope of article 134. But it would seem more desirable—and more productive of uniformity—to place further legal limitations on the scope of article 134, instead of leaving the matter to the trier of fact.

It is arguable that some borderline cases should be submitted to the court-martial members—the triers of fact—for a determination whether the acts alleged and proved meet the basic demands of article 134. And, if some should be submitted, then—as a matter of administrative convenience and simplicity—it may be just as well to require submission in every case. This seems the only basis on which to justify the instructional rule presently in vogue, and this certainly is not the foundation on which that rule has rested.

MENS REA

Some writers on criminal law have urged that criminal responsibility should generally be limited to intentional conduct and never predicated on simple negligence. Certainly civilian decisions reflect no uniformity in this regard.⁷⁴ Nor do the interpretations of article 134.

Thus, more than negligence is required to sustain a conviction for failure to pay a debt or for giving a bad check.⁷⁵ Possession of narcotics by reason of a negligent mistake is not punishable.⁷⁶ Nor is a negligent indecent exposure.⁷⁷ On the other hand, simple negligence will sustain a conviction for negligent homicide;⁷⁸ in a bigamy prosecution an unreasonable mistake which leads to remarriage will justify conviction.⁷⁹ Careless discharge of a firearm or unlawful entry would also probably not require more than negligence.⁸⁰

In some instances, to permit punishment under article 134 for con-

⁷³ *Dennis v. United States*, 341 U.S. 494 (1951).

⁷⁴ See *Morissette v. United States*, 342 U.S. 246 (1952) for an excellent discussion of *mens rea*.

⁷⁵ *United States v. Connell*, 7 U.S.C.M.A. 228, 22 C.M.R. 18 (1956); *United States v. Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 554 (1955); *United States v. Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955).

⁷⁶ See *United States v. Greenwood*, 6 U.S.C.M.A. 209, 19 C.M.R. 335 (1955).

⁷⁷ *United States v. Manos*, 8 U.S.C.M.A. 734, 26 C.M.R. 238 (1958).

⁷⁸ See *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952).

⁷⁹ *United States v. Bateman*, 8 U.S.C.M.A. 88, 23 C.M.R. 312 (1957).

⁸⁰ See Form Specifications 140 and 174. Cf. *United States v. Simmons*, 1 U.S.C.M.A. 691, 5 C.M.R. 119 (1952).

duct that is only negligent would seem questionable. This point has already been made with respect to negligent homicide—where pre-emption came into play. Congress clearly did not consider that mere neglect was automatically non-punishable.⁸¹ And article 134 itself speaks of “disorders and neglects to the prejudice of good order and discipline.” Therefore, because of the close connection between conduct prejudicing good order, on the one hand, and service-discrediting conduct, on the other, probably it would be inappropriate to hold that negligence could suffice for the former and not the latter. And clearly, the Court of Military Appeals shows no sign of taking any such position.

PUNISHMENT

Article 134, like most of the other punitive articles of the Uniform Code—but unlike most civilian penal legislation—does not state the maximum punishments imposable for violations. Thus, except for capital punishment,⁸² and subject to the statutory prohibition of cruel and unusual punishment,⁸³ a court-martial would appear free under this article to impose any penalty it saw fit. In fact, however, this is not at all the case, since the President, in the Manual for Courts-Martial and in subsequent amendatory executive orders, has stated in detail the maximum punishments authorized for various offenses.⁸⁴ Of course, these limitations, when applicable, are binding on courts-martial.

This system for setting the maximum punishments raises several problems. For one thing, has Congress improperly delegated to the President a legislative function of prescribing the punishment for crimes? There would certainly be some authority to that effect;⁸⁵ but, in light of the long-continued military practice in this regard and the required submission to Congress of the regulations on military justice promulgated by the President, it can be argued that Congress has always retained

⁸¹ For instance, a negligent failure to obey an order or regulation would seem to fall within the wording of article 92, 10 U.S.C. § 892. Article 99, 10 U.S.C. § 899, punishes for misbehavior before the enemy one who through “neglect” endangers the safety of a unit that is in the presence of the enemy. A negligent loss or destruction of military property of the United States falls within article 108, 10 U.S.C. § 908. A sentinel who falls asleep on post would apparently be punishable irrespective of the cause therefor so long as it was physically possible for him to stay awake. See article 113, 10 U.S.C. § 913.

⁸² For certain specified offenses capital punishment is authorized by the Uniform Code, but in the absence of such authorization the maximum punishment could include confinement up to life imprisonment—at least within the limits set by the President.

⁸³ 10 U.S.C. § 855, art. 55. *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953).

⁸⁴ 10 U.S.C. § 856, art. 56, states expressly: “The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.” For the Table of Maximum Punishments see pages 219-227 of the Manual. Sometimes, during periods of emergency or otherwise, the maximum punishment is changed by the President, or removed entirely.

⁸⁵ *Cf. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *People v. Grant*, 242 App. Div. 310, 275 N.Y. Supp. 74 (3d Dep’t 1934).

control.⁸⁶ Besides, the courts have often placed military justice in a special niche and refused to apply thereto the principles that might apply to other areas of criminal law administration.⁸⁷

Secondly, the Manual itself creates uncertainty by its provision that the maximum limits of punishment which it provides are "not binding upon courts sentencing officers, warrant officers, aviation cadets, cadets, midshipmen, and civilians subject to military law."⁸⁸ Taken literally, this statement might create improper vagueness as to punishment; but a court might well take the position that, to avoid vagueness and a possible discriminatory application of the law, it should invalidate the purported exclusion of certain categories of persons from the benefits of the Manual's limitations on maximum punishments.⁸⁹

However, with respect to some offenses under article 134, additional hurdles still remain. Since some conduct which has been held to violate article 134 is not mentioned explicitly anywhere in the Code or the Manual, it follows that the maximum punishment for such conduct may be somewhat vague. Of course, if the offense falls within the article's clause covering "crimes and offenses not capital," a maximum penalty can be easily determined by looking at Title 18 of the United States Code, or whatever other portion of the federal statutes the conduct may violate.

In other instances, the Manual for Courts-Martial provides the following formula for ascertaining the maximum punishment:⁹⁰

"127c. Maximum punishments.—The punishment stated opposite each offense listed in the Table of Maximum Punishments is hereby prescribed as the maximum punishment for that offense, and for any lesser included offense if the latter is not listed, and for any offense closely related to either if not listed. If an offense not listed in the table is included in an offense which is listed and is also closely related to some other listed offense, the lesser punishment prescribed for either the included or closely related offense will prevail as the maximum limit of punishment.

"Offenses not listed in the table, and not included within an

⁸⁶ Cf. *United States v. Sharpnack*, 355 U.S. 286 (1958).

⁸⁷ For views concerning the proper judicial review of Courts-martial see *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); *Burns v. Wilson*, 346 U.S. 137 (1953).

⁸⁸ MANUAL, para. 127a. at 213 (1951).

⁸⁹ It might be possible to argue that officers should be subject to more severe penalties than enlisted men, since the former are in a special position of trust. On this basis, one could justify not giving them the benefit of the President's limitations on maximum punishments. However, there is no reason to hold that "civilians subject to military law" should be subject to a higher punishment than a man in uniform. Indeed, this provision seems to make an unreasonable discrimination; and, in addition, it spawns undesirable vagueness. It would seem proper to hold that any limitation of punishment stated by the President is applicable to all persons subject to military law, except perhaps for special geographical differentiation to permit higher penalties to be imposed for offenses in danger or combat areas.

⁹⁰ MANUAL, para. 127c. at 214 (1951).

offense listed, or not closely related to either, remain punishable as authorized by the United States Code (see, generally, Title 18) or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service. With respect to other matters which properly may be considered in fixing punishment, see 76a, 123, and 154a."

A few cases will display the operation of this formula. The maximum punishment for persons accused of accepting money to transport someone in a government vehicle or to get liberty passes for trainees was determined upon a supposed analogy to bribery and graft, for which offenses the Manual specifically authorizes three years' confinement.⁹¹ Enticement of others to engage in sexual intercourse with prostitutes was analogized to pandering—which authorizes five years' confinement—even though some elements of pandering were absent.⁹² In *United States v. Blevens*,⁹³ which concerned an accused who had twice deserted to East Germany and co-operated with the Communists there, the court ruled that the conduct was service-discrediting and the punishment should be determined by analogy to a Smith Act violation—even though the Government had apparently failed to allege and prove all the elements required in a Smith Act prosecution.

In some cases a suggested analogy to a major offense has been rejected. For instance, although solicitation to commit any crime constitutes an offense, the Court of Military Appeals ruled that it could not be analogized for punishment purposes to the solicitation to desert or commit mutiny, which are the subject of article 82 and permit up to three years' confinement. Instead it could only be punished as a "simple disorder," subject to a maximum punishment of four months' confinement and forfeiture of two-thirds pay for a like period.⁹⁴ A similar result was reached where the prosecution concerned the unauthorized possession of a false pass, but the Government pressed for the application of an analogy to the punishment of three years' confinement authorized for possession of a false pass with an intent to deceive.⁹⁵

One Cramer was found guilty of wrongfully and dishonorably defiling the flag of the United States. However, the Court of Military Appeals

⁹¹ *United States v. Bey*, 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954); *United States v. Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953).

⁹² *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

⁹³ 5 U.S.C.M.A. 480, 18 C.M.R. 104 (1955). Compare *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952) (analogy to federal statutes concerning obstruction of justice); *United States v. Messenger*, 2 U.S.C.M.A. 21, 6 C.M.R. 21 (1952) (impersonation of officer); *United States v. Hogsett*, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958) (postal offense).

⁹⁴ *United States v. Goodnight*, 9 U.S.C.M.A. 542, 26 C.M.R. 322 (1958); *United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957). But cf. *United States v. Charles*, 9 U.S.C.M.A. 424, 26 C.M.R. 204 (1958).

⁹⁵ *United States v. Blue*, 3 U.S.C.M.A. 550, 13 C.M.R. 106 (1953).

rejected the assimilation of this conduct for punishment purposes to the utterance of disloyal statements, with three years' authorized confinement, and instead held that the maximum penalty was the thirty days confinement and \$100 fine authorized by U.S.C. 3 for defiling the flag.⁹⁶ In *United States v. Melville*,⁹⁷ it was ruled that wrongful cohabitation is only a "simple disorder" punishable by four months' confinement and forfeiture of pay, and could not be analogized for punishment purposes to adultery—which, unlike wrongful cohabitation, requires proof of sexual intercourse and that one of the parties was married at the time of the offense.

The District of Columbia Code has been utilized in determining punishment in several cases. In one, the offense involved was the solicitation of a prospective witness wrongfully to refuse to testify, for which fifteen years' confinement is authorized under the United States Code but only three years under the District of Columbia Code.⁹⁸ In accord with the previously quoted paragraph 127c of the Manual for Courts-Martial, the three year maximum was applied.

In *United States v. Mardis*,⁹⁹ "the accused was convicted of wrongfully keeping a disorderly house, in violation of article 134." Such an offense is not adverted to anywhere in the Manual for Courts-Martial; but the Court of Military Appeals considered that nonetheless it constituted conduct which transgressed article 134. Even though the offense occurred in Texas, the opinion of the court turns to the District of Columbia Code to determine both the maximum punishment *and* the elements of the offense.

Consideration of these and other cases concerning the maximum penalties for article 134 violations might well produce resort to a Ouija board to predict the outcome of future litigation. Although the use of legal analogy is well-known both in Anglo-American and European law, the determination of maximum punishments by analogy from penalties specified in an executive order is a highly unusual phenomenon. What one confronts in some of these article 134 cases is really a double delegation—delegation from Congress to the President of the power to set maximum punishments for crime, and from the President to military tribunals of the power to fill in by analogy any gaps that he may have left in the penal framework.

VAGUENESS

Many of the problems of vagueness under article 134 stem from the widespread use of analogy to which military justice now seems com-

⁹⁶ *United States v. Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957).

⁹⁷ 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958).

⁹⁸ *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

⁹⁹ 6 U.S.C.M.A. 624, 20 C.M.R. 340 (1956).

mitted.¹⁰⁰ Actually this use challenges one premise on which article 134 has been sustained against constitutional attack—namely, that its meaning has been solidified by long years of military tradition.

If prosecutions under article 134 and the penalties inflicted thereunder were limited by the specific provisions of the Manual for Courts-Martial, the results might be supportable. Since the Manual is made readily available to every serviceman, he has very adequate notice of its contents—indeed, far more adequate notice than that which a citizen receives concerning the provisions of many statutes.¹⁰¹ Objections about an alleged delegation of legislative power to the President could be countered by showing that the Manual has received some type of congressional ratification, or at least has been acquiesced in by Congress.

Any gaps in the Manual's listing of offenses and punishments could be rectified by Congress through legislation or by the President through an amending executive order. And these would operate only prospectively—and not retroactively like some of the "analogies" involved in interpreting article 134. Other situations could be coped with by the promulgation of military orders, the disobedience of which would itself be punishable so long as the order related to a proper military purpose.¹⁰² For instance, if a serviceman's operation of a bawdy-house proved service-discrediting or prejudicial to good order, he could be ordered to desist from such conduct—and, if he disobeyed, he could then be punished for the disobedience.

¹⁰⁰ There are some subsidiary problems of vagueness that have been created by some of the precedents under article 134. For instance, in *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 207 (1958) (*supra* text at notes 24 and 67), where the accused was prosecuted for association with persons "known to be sexual deviates," the question is posed: "Known" to whom? Cf. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). In prosecutions under article 134 for offenses such as "indecent acts," or "indecent liberties," difficulty with vagueness can be present. In Louisiana, the term "indecent assault" in a statute has been held unconstitutionally vague. *State v. Comeaux*, 131 La. 930, 60 So. 620 (1913). For representative military precedents in connection with similar offenses, see *United States v. Williams*, 9 U.S.C.M.A. 55, 25 C.M.R. 317 (1958); *United States v. Klutz*, 9 U.S.C.M.A. 20, 25 C.M.R. 282 (1958); *United States v. Nastro*, 7 U.S.C.M.A. 373, 22 C.M.R. 163 (1956); *United States v. Brown*, 3 U.S.C.M.A. 454, 13 C.M.R. 10 (1953); *United States v. Burden*, 2 U.S.C.M.A. 547, 10 C.M.R. 45 (1953). The Manual for Courts Martial in Form Specification 150 deals with loaning money at "an usurious and unconscionable rate of interest" but never purports to set a maximum rate of interest. Is this sufficiently definite?

¹⁰¹ As has already been noted, the courts are beginning to place more emphasis on the need for the defendant to have some reasonable notice of the law he is charged with violating. *Lambert v. California*, 355 U.S. 225 (1957). In this same connection one is reminded of the Supreme Court's words in defending a Naval predecessor of article 134 against a charge of vagueness: "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 offenses of which the different courts-martial have cognizance." *Dynes v. Hoover*, 61 U.S. 65 (1858). Query whether this observation applies fully today to article 134.

¹⁰² 10 U.S.C. § 892, art. 92. See also EVERETT, *op. cit. supra* note 31 at 49-50. Note, 36 N.C.L. REV. 515 (1958).

CONCLUSIONS

As one writer has recently pointed out, article 134's predecessors became more and more inclusive over the years.¹⁰³ The same process has continued under the Uniform Code. The result has been the spawning of new and undesirable vagueness in a statute which was already on the constitutional borderline.

The drastic remedy would be a decision that article 134 is unconstitutional by reason of vagueness and delegation of legislative power. More desirable, however, would be a holding that article 134's scope went no further than the express provisions of the Manual for Courts-Martial, and that the technique of analogy could not be used either to determine what constitutes an offense, or what will be the maximum penalty therefor.

The application of the pre-emption doctrine should be made more consistent. The significance of the violation of state or foreign law in an article 134 prosecution should be reconsidered. Also, present legal requirements should be revised concerning the submission to court-martial members of the issue whether the accused's conduct prejudiced good order or was service-discrediting; sometimes these requirements are nothing more than pitfalls for the unwary law officer.

With some reform, the good features of article 134 can probably be preserved. Without such reform this article will probably someday be stricken as unconstitutional—and at the very least will lead to a continuing mistrust of military justice on the part of the civilian bar and the public generally.

¹⁰³ Wiener, *supra* note 6.