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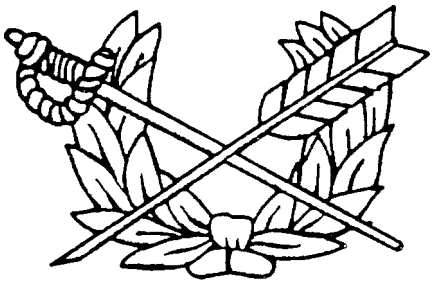

Military Law Review

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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experience and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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MILITARY LAW REVIEW

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MILITARY RULES OF EVIDENCE SYMPOSIUM: AN INTRODUCTION

by Robinson O. Everett*

A decade ago, after a two-year effort initiated by the Department of Defense General Counsel, the President promulgated the Military Rules of Evidence. These rules have had an enormous impact on the military justice system and on the conduct of courts-martial. It seems especially propitious, therefore, that we celebrate the tenth anniversary of the Military Rules of Evidence with a review of some of the significant developments in the Military Rules over the past decade. This issue of the *Military Law Review* contains numerous insights concerning the origin of the Military Rules of Evidence and the key evidentiary issues facing military practitioners today.

The Military Rules have been instrumental in allowing the military to deal with the challenges of an evolving and changing legal system. The past decade has seen remarkable growth in the number and complexity of new evidentiary issues. For example, the number of child abuse cases being tried by courts-martial has grown at a remarkable rate. The inevitable result has been the proliferation of evidentiary issues concerning the scope of hearsay exceptions under Military Rules of Evidence 803 and 804: What is an "excited utterance" or a statement "made for purposes of medical diagnosis or treatment"?[1] What is the scope of residual hearsay?[2] When is a declarant "sufficiently unavailable" to comply with the requirements of Military Rule of Evidence 804 and to overcome the accused's right of confrontation?

Military judges frequently have the first and most extensive exposure to new evidentiary issues, especially those involving scientific evidence. Because courts-martial are the only courts in which evidence obtained by drug testing is regularly used in criminal pro-

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*When he wrote this introduction, Robinson O. Everett was the Chief Judge of the United States Court of Military Appeals. Chief Judge Everett received a B.A. (magna cum laude) and a J.D. (magna cum laude) from Harvard University and an LL.M. from Duke University. In 1956 Chief Judge Everett joined the Duke Law School faculty on a part-time basis and since then has served continuously on that faculty, becoming a tenured member in 1967. In February 1980 Chief Judge Everett was appointed to the Court of Military Appeals, and he assumed this office on April 16, 1980. On 1 October 1990, Eugene R. Sullivan became Chief Judge of the Court of Military Appeals.

[1] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 803(2) and (4) [hereinafter Mil. R. Evid.].

[2] *See* Mil. R. Evid. 803(24), 804(b)(5).

secutions, military judges have been the first to deal extensively with the admissibility of such evidence in the face of constitutional and other challenges. In determining the admissibility of exculpatory polygraph evidence, military judges have been required to decide an issue left open by both the Federal Rules of Evidence and the Military Rules of Evidence—whether the *Frye* test still controls the admissibility of scientific evidence. This issue requires careful consideration.

An understanding of the relationship between the Federal Rules and the Military Rules provides valuable insights into both sets of rules and allows informed and constructive comparison of the two systems. For the most part, the Military Rules conformed to the Federal Rules of Evidence, which had been issued five years earlier. In several respects, however, the Military Rules are an improvement on the Federal Rules. For example, Military Rule of Evidence 412, the rape shield rule, is much better drafted than its federal counterpart. Military Rule of Evidence 201A provides a useful treatment of judicial notice of law for which there is no parallel in the Federal Rules. The Military Rules grant specific "privileges," while Federal Rule of Evidence 501—the rule that addresses privileges—merely refers to "the principles of the common law, as it may be interpreted by the courts of the United States in the light of reason and experience."

Unlike the Federal Rules, the Military Rules contain a section on exclusionary rules and related matters concerning self-incrimination, search and seizure, and eyewitness identification.[3] Arguably, the federal district courts have no need for such a section. Moreover, by attempting this codification, the draftsmen created the danger that conflict might develop between some of the Military Rules of Evidence and future decisions by the Supreme Court. Nonetheless, after a decade's experience—during which some conflicts of this type did develop[4]—I would agree with the view of the draftsmen that it was

> imperative to codify the material treated in Section III because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries. In all cases, the Rules represent a judgment that it would be impracticable to operate without them.[5]

[3] *See* Mil. R. Evid. sec. III analysis, app. 22, at **A22-5.**

[4] *E.g.*, the Military Rules of Evidence, **as** originally drafted, did not contain a "good faith exception."

[5] *See* Mil. R. Evid. sec. III analysis at A22-5.

Indeed, I believe that those who are responsible for updating the Federal Rules might well consider the desirability of expanding those rules to deal with some of the matters covered by Section III of the Military Rules.[6]

In some instances, the Military Rules may not have been applied exactly as the draftsmen had contemplated. As was true under prior military law, Military Rule of Evidence 405(a) allowed character to be proved by reputation or opinion;[7] but Military Rule of Evidence 404(a)(1) followed its federal counterpart by allowing only evidence "of a *pertinent trait* of *the character* of the accused." Subsequent judicial decisions—which sought to be responsive to the needs and customs of the unique military society—essentially have obliterated this limitation. Now an accused's general military character is admissible in almost any conceivable trial by court-martial.

This issue of the *Military Law Review* offers a great deal to the reader. The authors examine and critique the origin, development, and possible future of the Military Rules of Evidence. Only through such self-examination can the military justice system live up to its full potential and remain responsive to a constantly changing military society. The military practitioner—and many others—will benefit greatly from studying this issue of the *Military Law Review*.

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[6]Fortunately, an excellent opportunity has existed for bringing the experience with the Military Rules of Evidence to the attention of those charged with amending the Federal Rules. Professor Stephen Saltzburg, a co-author of an authoritative textbook, S. Saltzburg, L. Schinasi & D. Schlueter, The Military Rules of Evidence Manual (1986), served for many years as Reporter on the Federal Rules of Evidence; he is currently a member of the Advisory Committee that deals with these rules. Professor David Schlueter, another co-author of this textbook, is currently the Reporter, and, at the present time, I am serving as a member of the Advisory Committee on the Rules.

[7]Dean Wigmore, a principal draftsman of the chapter on evidence in the Manual for Courts-Martial, had criticized as too restrictive the civilian practice whereunder only reputation evidence was admissible to prove character; Federal Rule of Evidence 405(a) remedied this defect.

THE MILITARY RULES OF EVIDENCE: ORIGINS AND JUDICIAL IMPLEMENTATION

by Fredric I. Lederer*

No man should see how laws or sausages are made.' **
Otto von Bismarck

I. INTRODUCTION

The tenth anniversary of the Military Rules of Evidence is an appropriate time to pause and reflect upon the rules, their implementation, and their future. In addition, enough time has passed to permit a more detailed discussion of the drafting of the rules than has heretofore taken place.'

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*Lieutenant Colonel, Judge Advocate General's Corps (USAR); Professor of Law, Marshall-Wythe School of Law of the College of William and Mary in Virginia. Commissioned in 1968, LTC Lederer served as a trial and defense counsel at Fort Dix, New Jersey, while an excess leave officer attending Columbia University School of Law. Following receipt of his J.D. in 1971, he clerked for the late Frederick vP. Bryan, United States District Judge for the Southern District of New York. He was then assigned as trial counsel and Courts and Boards Officer at Fort Gordon, Georgia. For the four years following he was a member of the criminal law faculty at The Judge Advocate General's School and received his LL.M. from the University of Virginia School of Law in 1976. From 1977-78, he was a Fulbright-Hayes research scholar in Germany, studying civilian and military European criminal law. During 1978-80 he was a member of the Joint Service Committee on Military Justice Working Group where he was the primary co-author of the Military Rules of Evidence, author of the Analysis of those rules, and a co-drafter of the revision to articles 2 and 3 of the UCMJ. Having resigned his Regular Army commission in 1980, he served as an Individual Mobilization Augmentee military judge at Fort Eustis until 1987 when he was assigned as Individual Mobilization Augmentee Deputy Commandant, The Judge Advocate General's School. Nothing contained in this article is necessarily the opinion of any member of the Department of Defense in general or of The Judge Advocate General's School and its staff and faculty in particular. The author acknowledges with gratitude the assistance of Majors Lisowski and Warner, of The Judge Advocate General's School's Criminal Law Division, Mrs. Diane Lederer, and Mrs. Ruth Knight in reviewing and commenting on this article while in draft.

**Nat'l L.J., December 24, 1984, at 2 (quoting Bismarck). There are other English versions of this famous cynical observation, including "There are two things that one should never watch in the making, one is sausage, the other is legislation." Heritage Foundation Reports, The Heritage Lectures; No. 144, November 20, 1987 (in this version, the author added his own observation, ''I think that the quote does disservice to sausage makers, who at least produce something that people want").

'The editor of the Military Law Review asked me to prepare this commemorative article in light of my role as co-author of the Military Rules of Evidence. Because I often was not privy to the thoughts and actions of my co-authors and their relationships with the institutions they represented, aspects of this article necessarily present my own perspective on the rules and best detail the Army's position on various issues. Further, because most of the records reflecting the details of the writing of the rules are no longer reasonably available, much of what follows necessarily stems from memory. Memory is, however, notoriously fragile and imperfect. Should my recollections prove inaccurate, I hope that those with more correct information will set them right.

Because of the diffuse nature of law reform and what is often the extraordinary delay between an idea for change and its adoption, determining with precision who should be credited with originating any significant legal reform is often difficult. That, however, is not the case with the Military Rules of Evidence. The "father" of both the rules and our contemporary military criminal law reform process is Wayne Alley, who was a Colonel and the Chief of the Criminal Law Division of the Office of The Judge Advocate General of the Army.[2] The Military Rules of Evidence owe their existence to many different people,[3] but the originator of the Military Rules of Evidence project was clearly Colonel Alley. An extraordinarily competent attorney, Colonel Alley not only began and initially supervised the project, but also articulated the basic guidance to the drafters without which drafting would still be going on.

The Federal Rules of Evidence were effective in 1975, and that same year Colonel Alley formally proposed that the military revise the Manual for Courts-Martial to adopt, to the extent practicable, the new civilian rules.[4]

11. THE MANUAL FOR COURTS-MARTIAL

The necessity for the codification cannot be appreciated fully without an understanding of the place of the Manual for Courts-Martial in military law. Promulgated by the President under the authority prescribed by Congress in article **36** of the Uniform Code of Military Justice,[5] the Manual has the force of law and is subordinate only to the Constitution, treaties, and federal statutes.

As discussed in *Trial* by *Court-Martial*:[6]

> The Manual for Courts-Martial had its origins in private treatises such as Winthrop's 1886 Military Law and Precedents dealing

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[2]After promotion and service as Judge Advocate of United States Army Europe then General Alley retired to assume the post of Dean of the University of Oklahoma School of Law, a position he left **a** few years later to become a United States District Judge.

[3]Other individuals who have been credited with responsibility for the Military Rules of Evidence include Deanne Siemer, who was the Department of Defense General Counsel at the time of the drafting, and then Chief Judge Alhert Fletcher of the Court of Military Appeals.

[4]Telephone interview of Judge Wayne Alley (May 23, 1990) [hereinafter Interview].

[5]10 U.S.C. § 836 (1988).

[6]F. Gilligan & F. Lederer, Trial By Court-Martial. Criminal Procedure in the Armed Forces § 1-54.00 (pending 1991 publication) (unomitted footnotes renumbered).

with military law in the Army context.[7] In 1889, one such work, "Instructions for Courts Martial and Judge Advocates," written by Captain Arthur Murray, was officially promulgated at Fort Leavenworth, Kansas, and was expanded and published in 1895 as a "Manual for Courts-Martial."[8]

> Murray's work served as the prototype of every *Manual* issued during the next 15 years (1901, 1905, 1907, 1908, 1909, 1910). All were pocket-sized books with small type, similar in size and style to the many other manuals. . . .The *Manual* was published in a somewhat enlarged version in 1917, but was not basically changed until Colonel Wigmore revised it in 1921 to reflect the substantial changes in the Articles of War that were enacted in the previous year. . . .[9] A condensed edition of the *Manual* was issued in 1928 which, with minor changes, remained in force until 1949.[10]

As a result of the 1948 amendments to the Articles of War, a 1949 Manual for Courts-Martial was promulgated. Soon after, the enactment of the Uniform Code of Military Justice required the publication of the substantially revised 1951 Manual for Courts-Martial, which for the first time covered all of the armed forces. In turn, the Military Justice Act of 1968 gave rise to the 1969 Manual for Courts-Martial. . . .

Until the 1980 amendment to the 1969 Manual for Courts-Martial, the Manuals were basically "howto guides" coupled with basic hornbook type discussion and compilations of necessary legal information. That format, consistent with all of the prior Manuals, proved highly troublesome. Inasmuch as the President had statutory authority under article 36 to prescribe rules and procedures for courts-martial, the Manual had the force of law. It was impossible to determine, however, what portions of the Manual were intended to have that force. Much of the 1969 Manual, for example, appeared to include

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[7]The Navy's equivalent of the Manual for Courts-Martial was Naval Courts and Boards, an official publication, that was amended in 1923 and 1937. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966,* 17 A.F. L. Rev. 55 (1975). It appears, however, that the current Manual is descended directly from the Army's publication.

[8]The Army Lawyer: A History of The Judge Advocate General's *Corps,* 1775-1975, 94-95 (1975) (remainder of note omitted).

[9]*Id.* at 95-96.

[10]*Id.* at 138.

> numerous past decisions of the Court of Military Appeals. It was often impossible to tell whether the Manual meant to adopt those decisions as positive law or was merely setting them forth for the edification of the reader. This was especially true in the portion of the Manual setting forth evidentiary matters. The publication of the Military Rules of Evidence in rules format began the format revision designed to emphasize what is binding and what is explanatory.

The codification of the Military Rules of Evidence thus began against a backdrop of an amorphous partial evidentiary codification that was set forth in the Manual often in hornbook fashion. Codification therefore required determination of the origins of specific military evidentiary rules and their desired utility vis-a-vis the civilian law of evidence.

111. THE ORIGINS OF CODIFICATION

The Army proposed and strongly advocated evidentiary codification." Codification was by no means unanimously supported by the armed services, however. The Navy, for example, opposed it.[12] In 1975, in what could be said to be a harbinger of things to come, a member of the Office of the Judge Advocate General of the Navy reported on a Federal Bar Association seminar about the "new" Federal Rules of Evidence and recommended that "relatively low priority . . . be given to their quick implementation in the military.''[13] Among other matters, he reasoned that the Manual for Courts-Martial already had ''a well thought out set of rules located in one convenient place," that the new evidentiary rules would generate ''asubstantial amount of litigation," that the civilian rules would have to be scrutinized and adapted "to any peculiarities of the military system," and that a "great deal of effort and expense . . . might be required in instructing each judge advocate in the field.''[14]

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[11]Judge Alley reports that General Persons, The Judge Advocate General of the Army while Colonel Alley was chief of the Criminal Law Division, was a strong supporter of the project and essential to its success. Interview, *supra* note 4.

[12]*See supra* note 4. Lack of initial Savy support did not mean lack of Naval assistance later in the project. The Navy member on the Working Group, Commander Jim Pinnell, was an extraordinarily hardworking and dedicated colleague.

[13]Memorandum, William M. Trott to Code 20, JAG:204.1:WMT:lkb (17 Mar. 1975).

[14]Naval recalcitrance once again surfaced in 1979. On 16 May 1979, I forwarded the following memorandum to The Assistant Judge Advocate General of the Army:

> 1. Earlier today, LCMDR Pinnell, USN, distributed copies of a memorandum agenda concerning the 30 May meeting of the Joint Service Committee on Military Justice. Originally, the meeting was to be used to begin to review the Working Group's product. The memo, however, five pages in length, propounds a series of questions which in effect call the entire revision effort of

Codification took place under the auspices of the Joint Service Committee on Military Justice. The process by which codification occurred notwithstanding opposition[15] and bureaucratic inertia best was summed up in 1986 by then DOD General Counsel H. Lawrence Garrett, III:[16]

> The Joint Service Committee was originally established as a result of the problems encountered by the group that drafted the 1969 version of the Manual for Courts-Martial. The drafting group reported that their task has been "monumental" due to the failure during the fifties and sixties to consider adequately many of the developments in law that occurred after issuance of the 1951 Manual (which implemented the new Uniform Code of Military Justice). An ad hoc group was formed, and a formal charter was signed by the services Judge Advocates General in 1972 assigning to the Committee responsibility for considering amendments to the UCMJ and the Manual. The chairmanship rotated among the services on a biennial basis, with the group operating primarily on the basis of consensus.
>
> In 1975, the chairmanship rotated to the Chief of the Army's Criminal Law Division, then-Colonel Wayne Alley. . . .
>
> The original motivation for establishment of the Joint Service Committee—the need to keep the Manual current with devel-

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the past year into question. The memo was authored by CMDR Ed Byrne, Chief of Criminal Law of the Navy, and represents his personal views rather than those of the Navy TJAG. He is the Chairman of the Joint Service Committee.
2. Chief Judge Fletcher, acquainted with the memo by Bob Mueller of the Working Group, joined our meeting to voice his strong concern over what he viewed as a possible attempt to "scuttle" the evidence project. . . .
3. . . . At present, this is hopefully a minor matter that may be resolved without great effort. However, it does provide the possibility of a major confrontation with DOD General Counsel and the Court of Military Appeals on one side and the Navy (and possibly the Air Force as well) on the other. . . .

Memorandum, Major Fredric Lederer to Major General Lawrence Williams, subject: Revision of the Rules of Evidence (16 May 1979).

[15] One can only speculate as to why most lawmakers choose to proceed with or refrain from law reform. Absent a pressing visible need for change, usually the reformers' claim of future improvement in the law is countered by claims of contemporary legal adequacy and needless expense. In actual fact, one can argue that most people are inherently comfortable with the status quo and reluctant to change, particularly if they have invested great personal effort in the thing to be changed. This is often summed up by the old adage, "If it ain't broke, don't fix it." Unfortunately, the adage discourages improving a product or process assumed to be adequate; we would probably still be living in caves if we took it seriously.

[16] Garrett, *Reflections on Contemporary Sources of Military Law*, The Army Lawyer, Feb. 1987, at 38, 39-40.

opments in the law—was a matter of particular concern to Colonel Alley. In January, 1975, President Ford signed legislation establishing the Federal Rules of Evidence, which contained reforms greatly simplifying trial of criminal and civil cases. Other changes in federal criminal law, particularly as a result of Supreme Court decisions, also created the potential for parallel changes in the Manual and the Code. In view of article 36, UCMJ, which generally requires us to follow federal criminal rules of evidence and procedure to the extent practicable and not inconsistent with the Code, Alley believed a vigorous and systematic review effort was necessary to comply with the Code.

Despite these opportunities, Colonel Alley found his chairmanship to be a source of frustration rather than reward. In the absence of a crisis, the requirement for consensus proved to be a powerful disincentive to developing the level of effort on a joint service basis necessary to produce reform proposals.

By late 1977, little had been accomplished. At that time, however, one of my predecessors, Deanne Siemer, developed an interest in military justice and asked a member of our staff to meet with the services to assess the legislative process. Colonel Alley readily seized on this chance to break the logjam. He recommended that an effort be initiated to adopt the Federal Rules of Evidence, with appropriate modifications, into the Manual for Courts-Martial. Alley suggested that the project would serve three separate goals:

> first, it would meet the Article 36 requirement that we generally apply federal rules; second, it was a discrete project that could be accomplished with one year's concerted effort, establishing a pattern of work that the Joint Service Committee could carry into the future; and third, the efficiencies in trial practice generated by the new rules would demonstrate to the services the benefits of serious attention to law reform on a sustained basis.

Colonel Alley's initiative was adopted by the General Counsel who established the Evidence Project as a DOD requirement and placed a member of our staff on the working group.[17]

Drafting began in early 1978. Ms. Siemer forwarded the final draft

[17] *Id*

to the Office of Management and Budget on September 12, 1979.[18] Colonel Alley had been optimistic; codification took somewhat longer than the year he had predicted. Despite the complexity of the process and service disagreement,[19] the project was a success, and on March 12, 1980, the President issued an executive order amending the Manual for Courts-Martial and promulgating the Military Rules of Evidence, effective 1 September 1980.[20]

IV. THE FORMAL CODIFICATION STRUCTURE

The Joint Service Committee on Military Justice Working Group drafted the Military Rules of Evidence. The Working Group "was composed of two representatives from the staff of the Court of Military Appeals, and one representative from the Army, Navy, Air Force, Coast Guard, and Office of the General Counsel of the Department of Defense, respectively. The Marine Corps did not participate at the drafting level."[21] The Working Group was responsible to the Joint Service Committee on Military Justice, which then was composed of the chief of the criminal law branch of each of the Armed Forces, including the Marine Corps, and one representative each from the Office of the DOD General Counsel and the Court of Military Appeals.[22] Although the Joint Service Committee was the supervisory agency and reviewed the rules, its role in the codification proved to be relatively minor;[23] most disputes were resolved within the Working Group or outside the formal codification structure.

Article 67(g) of the Uniform Code of Military Justice[24] creates the "Code Committee," a body composed of The Judge Advocate General of each of the Armed Forces, the Director of the Marine Judge Ad-

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[18]DOD E.O. Doc. 241 (September 12, 1979).

[19]*See, e.g., infra* note 43 and accompanying text.

[20]Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

[21]Lederer, *The Military Rules of Evidence: An Overview*, 12 The Advocate 113, 114 (1980). The Working Group members who drafted the rules were Commander Jim Pinnell (Navy), Major Fredric Lederer (Army), Major James Potuk (Air Force), Lieutenant Commander Tom Snook (Coast Guard), Mr. Robert Mueller (Court of Military Appeals), Ms. Carol Scott (Court of Military Appeals), and Mr. Andrew Effron (DOD General Counsel).

[22]The Joint Service Committee representatives of these institutions also served on the Working Group.

[23]This is not to minimize the importance of the Joint Service Committee. It spent a significant amount of time reviewing the rules and made a number of important decisions in the process.

[24]Uniform Code of Military Justice, art. 67(g), 10 U.S.C. § 867(g) (1988) [hereinafter UCMJ].

vocate Division, and the judges of the Court of Military Appeals.[25] The Code Committee met once to resolve several minor interservice conflicts.[26]

The final draft of the Military Rules of Evidence "was forwarded through the General Counsel of the Department of Defense to the Office of Management and Budget, which circulated the rules to the Department of Justice and other agencies, and finally forwarded them to the President via the White House Counsel's office."[27]

This sterile description of the "chain of command" fails to impart an accurate picture of how the rules actually were drafted and approved—a picture that only can be viewed via a detailed rendition of the actual codification process.

V. CODIFICATION BEGINS

The Working Group began its activities in early 1978. Because I did not join it until approximately August 1978,[28] I lack first hand knowledge of its early activities. Clearly, the Working Group had begun the drafting process. I believe, however, that it had not gone into "high speed operation" primarily because higher authority initially had failed *to* supply it with adequate guidance.

The most important question faced by the Working Group was the definition of its mission. Although the Working Group's charter was to draft new evidentiary rules using the Federal Rules of Evidence as its basis, the scope of its task was unclear. Were the Federal Rules of Evidence to be adopted verbatim, modified slightly, or used simply as a point of departure? Given the option, each member of the Working Group, for example, preferred to modify substantially, if not to redraft entirely, at least one of the Federal Rules of Evidence.[29] Draft-

[25]To the best of my knowledge, the Coast Guard General Counsel participated on behalf of the Coast Guard.

[26]One such conflict concerned whether to retain Rules 407, 408, 409, and 411 because of their civil application.

[27]Lederer, *supra* note 21, at 113, 114.

[28]Replacing then Major John Bozeman.

[29]It was apparent to the Working Group that a number of the Federal Rules **of** Evidence badly needed clarification. Although Fed. R. Evid. 607 permits impeachment of a party's own witness. for example, Fed. R. Evid. 608(b) permits impeachment by "prior bad acts" only on cross-examination. "slippage" that is questionable. More important was Fed. R. Evid. 609(a)(2)'s limitation on impeachment by prior conviction to convictions involving "dishonesty or false statement." It was clear that "dishonesty" was dangerously misleading. *See, e.g.*, Memorandum, Fred Lederer to the Evidence Committee, subject: Commentary to the Military Rules of Evidence 6 (7 Feb. 1979).

ing appeared to be an interminable process when Colonel Alley gave the Working Group the "marching orders" that made the project possible. He instructed the Working Group that it was to adopt each Federal Rule of Evidence verbatim, making only the necessary wording changes needed to apply it to military procedure, unless a substantial articulated military necessity for its revision existed, or, put differently, unless the civilian rule would be unworkable within the armed forces without change.

Colonel Alley's instructions not only made pragmatic sense, they incorporated a fundamental philosophical position: military evidentiary law should be as similar to civilian law as possible. Military evidentiary law as found in the Manual for Courts-Martial had begun as nearly identical with prevailing civilian federal law,[30] in part due to the efforts of Professor Wigmore, author of the 1921 revision. Nevertheless, the process of incorporation of case rulings without periodic systemic revision had created a wide gap between civilian and military practice in some areas, a gap that the advent of the Federal Rules of Evidence broadened considerably. Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.[31]

Although generally dispositive,[32] Colonel Alley's instructions left open several major policy questions. One was raised in the debate over adoption of Rule 201, Judicial Notice of Adjudicative Facts. Commander Pinnell argued most strongly that the distinction between

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[30] *Cf.* Fed. R. Evid.

> The [first] Manual contained no formal discussion of evidence and only a few brief notes on credibility, competency and proof of intent. The author advised that the court should follow as far as possible the evidentiary rules of the criminal courts of the United States—but that since members were not versed in legal science they should not be overly concerned with technicalities.

The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975, 95 (1975).

[31] This was ensured by Mil. R. Evid. 1102, which provides for the automatic adoption of amendments to the Federal Rules of Evidence unless the President instructs otherwise.

[32] What was "unworkable" or not "practicable" in article 36 terms was a frequent subject of debate. Arguing that they were unnecessary and thus not mandated, the court representative, for example, objected to modifying Rules 803 and 804 to preserve previously articulated hearsay exceptions (and to expand them to laboratory reports and chain of custody receipts) as well as to alter Rule 902 to include military attestation certificates. Similarly, the Air Force objected to revising Rule 1102 to provide the President six months before an amendment to the Federal Rules of Evidence automatically applied to the Armed Forces. Occasionally, alternative "tests" were argued. The Air Force opposed Rule 507, Political Vote, on the grounds that it was unnecessary and ridiculous. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

adjudicative and legislative facts in the Federal Rules of Evidence was so unintelligible and confusing as to make it unworkable in the military context. Although persuasive in the context of Rule 201, redrafting it would have set a precedent that would have permitted substantial alterations in otherwise acceptable rules.[33] Ultimately,[34] the Working Group decided that although Federal Rule 201 was either poorly written or unduly sophisticated, it was workable.[35] We therefore adopted it,[36] mooting the general philosophical debate.

A less significant question concerned rules primarily of application to civil cases. The Navy initially opposed retention of Rules 407 (Subsequent Remedial Measures), 408 (Compromise and Offer to Compromise), 409 (Payment of Medical and Similar Expenses) and 411 (Liability Insurance) on the grounds of irrelevancy. Although clearly the original intent of most if not all of these rules applied solely to civil cases,[37] they were not necessarily inapplicable to

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[33]My internal report on the matter read:

> [Federal] Rule 201(a) allows judicial notice of adjudicative facts only [,] attempting to distinguish between adjudicative and legislative facts. The distinction is a difficult one, even for the author of the concept. Accordingly. the Navy representative moved to eliminate the word, "adjudicative" leaving only the word "facts." This precipitated a major argument as [to] the Group's purpose with the Air Force and COMA members stating that their intent was to adopt the Rules without modification except as required by military operations. The Navy member argued that it was ridiculous to adopt a rule that is poorly drafted and which can be improved (in this case, most of the States have refused to adopt the specific rule). CPT Effron of DOD took an intermediate position agreeing that if a Rule would cause so much confusion as to render it virtually useless. it should be modified. Discussion of this specific Rule was deferred pending further study as to its accepted interpretation in the civilian courts. The general philosophical debate has, however, importance beyond the specific rule and represents a continuing clash between the representatives. While I mould agree with the Navy's position personally, it seems clear that too much work has been done to reasonably push that position. Consequently, my position at present is that we must adopt the specific Federal Rule unless it is either contra to military law (to be interpreted rather widely) or is so poorly drafted as to make its adoption almost an exercise in futility. . . .

Memorandum, Fed. R. Evid. Working Group Meeting, from MAJ Fredric Lederer to COL Doug Clause, para. 1.e. (1 Sept. 1978).

[34]This occurred following a meeting of members of the Working Group with Professor Steve Saltzburg, University of Virginia School of Law, and a personal meeting with Professor Edward Imwinkelried. then of the University of San Diego Law School. Memorandum, Fred Lederer to the Evidence Committee, subject: Commentary to the Military Rules of Evidence (7 Feb. 1979).

[35]*Cf. id.* at 2.

[36]The Working Group did, however. draft a unique Rule 201A, Judicial Notice of Law, to clarify matters ordinarily dealt with in the civilian courts by Fed. R. Crim. P. 26.1. Mil. R. Evid. 201A analysis at A22-4.

[37]*See, e.g.*, Fed. R. Evid. 409: "Evidence of furnishing or offering or promising to pay medical. hospital, or similar expenses occasioned by any injury is not admissible to prove liability for the injury."

criminal cases, particularly considering military offenses based on negligence. In final voting at the Joint Service Committee, on May 30, 1979, the Air Force opposed Rule 408; and the Navy, Air Force, and Marine Corps opposed Rules 409 and 411. The Joint Service Committee adopted Rule 408 and sent Rules 409 and 411 to the Code Committee, which adopted them.

Two major policy questions remained: 1) whether to codify privilege rules; and 2) whether to codify the law of search and seizure, interrogation, and eyewitness identification.

Although the draft Federal Rules of Evidence had included privilege rules, they proved highly controversial, and Congress elected to proceed without them.[38] The Manual for Courts-Martial, however, had a comprehensive body of these rules. The Working Group readily decided that because many military personnel were stationed in places where they did not have easy access to legal advice, accessibility and certainty required the adoption of specific privilege rules.[39]

The "constitutional" issues proved more complex. Although determining what constituted academic comment and what was positive law in the area was particularly difficult, the Manual's evidentiary chapter extended to search and seizure, interrogation, and eyewitness identification as well as to more traditional evidentiary topics. Not only did the Federal Rules of Evidence fail to address these matters, no other codification had either.[40] To the extent that these matters were of importance, they could have been placed in the planned procedural revision of the Manual.[41] Although that would not have been unreasonable, it was undesirable if only because the "constitutional"[42] portion of the Manual governed matters of enormous importance that occurred daily throughout the armed forces and that customarily were dealt with by nonlawyers. After debate, the Working Group elected to codify the area, albeit in a very careful fashion that codified some issues[43] while leaving others to case law development. The drafters' intent was clear and plain: the new rules were to function as positive law rather than as a useless

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[38] This left only Fed. R. Evid. 501 recognizing and establishing a federal common law of privileges.

[39] *See infra* text accompanying notes 80-82 (discussion of the privilege rules).

[40] To date, no other jurisdiction has codified these topics.

[41] That revision ultimately produced the Rules for Courts-Martial.

[42] This is, of course, somewhat of a misnomer as interrogation is governed as well by UCMJ art. 31.

[43] The issues that were codified were those that dealt with matters such as searches and inspections, normally handled by nonlawyers.

summary of what the drafters thought the current law to be.[44] The decision to codify remained controversial, however, and, at the last possible moment, the Air Force attempted to "missile" the search and seizure codification.[45]

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[44]The contrary position, ***see,*** *e.g.*, United States v. Postle, **20** M.J. 632 (N.M.C.M.R. 1985), is difficult to understand. The President has power to create rules of both evidence and procedure under article 36, augmented by his constitutional authority as Commander in Chief. Clearly, the President may limit the government's action in these areas (as distinguished from expanding it beyond the limits imposed by the Constitution or statute):

> Normal rules of statutory construction provide that the highest source authority will be paramount *unless* a lower source creates rules that are constitutional and provide greater rights for the individual. As applied to the Military Rules of Evidence, if a section III search rule is more restrictive of government conduct than Supreme Court constitutional interpretation, then the military should be bound by the more restrictive, constitutional, subordinate rule. It follows then that military trial and appellate courts should not be free to ignore the Military Rules of Evidence and adopt reasonableness as the standard for assessing fourth amendment conduct.

Gilligan & Smith, *Supreme Court—1989 Term, Part II*, The Army Lawyer, May 1990, at 85, 89 (calling into question the value of codifying "constitutional rules"),

The careful crafting of the rules makes it apparent, even if one ignored all other evidence of intent, that some rules were to be absolutely binding while others were to use case precedent. ***See,*** *e.g.*, Mil. R. Evid. 314 (k). To argue that the constitutional codification was simply declarative of then existing law is to ignore the intent and structure of the rules and to defy common sense. The Working Group assumed that desirable Supreme Court case law changes would be adopted through amendment of the rules, a process that has in fact worked handily. ***See*** *generally infra* text accompanying notes 118-144.

[45]On 30 July 1979. Brigadier General Taylor, Acting The Judge ,Advocate General of the Air Force, wrote to Major General Harvey, The Judge Advocate General of the Army, expressing his concern over the codification of search and seizure noting that the rules would impact "on the present and future state of discipline, readiness and command authority." General Harvey responded briefly, endorsing the rules. Subsequently, the Department of the Air Force nonconcurred with that part of the rules. Memorandum, Colonel Carl R. Abrams, Office of Legislative Liaison, for Director, Legislative Reference Service, DOD General Counsel (30 Aug. 1979). In relevant part. page two of this memo stated:

> The Department of the Air Force nonconcurs with rules 311-317, which establishes rules governing search and seizure in trials by courts-martial. for the following reasons:
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> (1) In many cases, the rules purport to overrule United States Court of Military Appeals decisions which are based on constitutional principles. Adoption of these rules may create disorder, in that the court, since the decisions were based on constitutional principles, will no doubt invalidate those provisions of the Manual.
>
> (2) The rules establish concrete rules of law governing searches and seizures. In the military environment, search and seizure is a very fluid area of the law. It may well be that we should, as the Federal Courts have done, leave interpretation to the courts. In addition, because this area of the law is so fluid, we may be bound by rules in the Manual which are more restrictive than those advanced by the Supreme Court.
>
> We recognize, however, that at least four of the rules (311, 312. 315 and 317) which provide procedural guidance to the field could be useful and extremely beneficial to both judge advocates and nonlawyers. We could support the retention of those rules. Further we also could support many of the other rules. but

The actual initial codification process was simple. Individual members of the Working Group took responsibility for specific areas or rules, prepared drafts, and circulated them. The Working Group would then meet and debate policy and text. Particularly in the latter part of the phase, meetings were held at the Court of Military Appeals, away from the usual demands of the telephone.

By intent, each member of the Working Group represented an armed force or other institution and was the primary liaison with that institution.[46] What differed radically was the nature of the relationship between the Working Group representative and the institution represented. Commander Pinnell, responsible to Captain Ed Byrne, briefed Navy JAG flag officers periodically and circulated rules drafts throughout the Navy JAG Corps. The Army functioned quite differently. Although General Persons, The Judge Advocate General of the Army when Colonel Alley created the codification project, showed a great deal of interest in it, subsequent general officer supervision within the Army was virtually absent.[47] Circulation of the proposed rules within the Army similarly was limited; The Judge Advocate General's School,[48] members of the judiciary, and government

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only after careful evaluation and redraft.

Interestingly, aspects of this futile effort are contradictory. Only one rule arguably extended the power of the government—Rule 313(b), Inspections. All the others were within the clear parameters of case law. Yet, the memo confidently predicted action by the Court of Military Appeals to "overrule" the rules while, at the same time, it expressed concern that the Air Force might be bound by rules more restrictive than necessary. At the same time that the Air Force objected to the search and seizure rules, it failed to mount a broadside attack on the confession and interrogation rules, 301-306.

The Court of Military Appeals has invalidated only one of the constitutional rules: the part of Mil. R. Evid. 315(d)(2) that permitted a commander to delegate the power to authorize searches, United States v. Kalscheur, 11 M.J. 373 (C.M.A. 1981), and its unprecedented holding nullified a rule that did nothing more than to restate prior law. It has, however, periodically ignored them. ***See*** *Gilligan & Smith, Supreme Court—1989 Term,* ***Part*** *11,* The Army Lawyer, May 1990, at **85** n.45.

After the decision was made to promulgate the rules, the Army, Navy, Marine Corps, and Coast Guard participated in a worldwide training program conducted by then Commander Jim Pinnell and Major Fred Lederer. With the exception of one installation in Colorado Springs, however, the Air Force chose not to participate. Although no connection between the above memo and the Air Force boycott ever was made, one must wonder whether a connection actually did exist.

[46]One exception to this general rule was that the Navy representative, Commander Pinnell, represented the Marine Corps as well as the Navy.

[47]During the drafting phase, I reported regularly to Colonel James Clause, Chief, Criminal Law Division, Office of The Judge Advocate General of the Army, for whom I worked. Generally speaking, Colonel Clause either concurred in my positions or permitted me substantial discretion. Soon after the rules were in near final form, Colonel Clause was reassigned to the Army Court of Military Review and replaced by then Colonel, now Brigadier General, Wayne Hansen.

[48]The Judge Advocate General's School Criminal Law Division supplied seven pages of thoughtful and detailed comments, a number of which led to alterations of the rules.

and defense appellate counsel received drafts and were asked to comment. The various members of the Working Group held differing degrees of independence.[49] To the best of my knowledge, however, these differences had virtually no effect on debate within the Committee.[50]

Because the Working Group members were institutional representatives, the Working Group's decisions tended to be final, and few matters required formal consideration at higher levels. The Joint Service Committee did meet to resolve several interservice disputes,[51] and the Code Committee met once to discuss the rules.[52]

After a final official coordination from the Department of Defense General Counsel's office,[53] the Working Group forwarded the rules to the Department of Justice, the Department of Transportation, and

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[49]Among the armed forces representatives, I held the largest degree of individual discretion. Colonel Clause directed me to draft a hearsay exception for laboratory reports, Mil. R. Evid. 803(6) & (8), and not to attempt to modify Mil. R. Evid. 615. Otherwise I was permitted nearly unlimited independence.

"Despite occasional efforts of the Navy representative to bring to bear the alleged unified position of senior Navy leadership. Of course, the Working Group was deeply concerned about the political feasibility of its changes. In this regard, although he was not technically chair of the committee, Andrew Effron held what usually was viewed as final authority because the DOD General Counsel determined the nature of the final draft that would leave the Pentagon. A great deal is owed to Mr. Effron for his extraordinary efforts to ensure completion of the rules in a form of which all could be proud.

[51]One of my "favorite" memories of the Joint Service Committee concerned the draft of Rule 321. Eyewitness Identification. In light of the potentially substantial changes made in the Rule. I had recommended that the Analysis contain a suggestion that prior to an attempted government identification of the accused, defense counsel could ask the trial judge for permission to seat the accused in the gallery. A member of the Committee—not the Army representative I hasten to add—exclaimed in shock, "You know we can't do that, we'd never get any identifications."

[52]The most important decision made by the Code Committee concerned the application of former testimony to courts-martial, article 32 investigations. and similar proceedings. Unfortunately. its resolution of this issue created more trouble than it solved. ***See*** *infra* text accompanying notes 74-79.

[53]The coordination process proved to be quite instructive. It occurred. with a "short fuse," after a number of members of the Working Group had been given leave with the express knowledge of, and presumed implicit consent of, the DOD General Counsel's Office. It was apparent that the DOD General Counsel did not wish the services to challenge the circulated draft, particularly changes that had been made in her office. The services responded to the DOD draft with numerous proposed correction.;. These ranged from a request to restore proposed Rule 412A, Fresh Complaint, through objection to changing the judge's duty to advise an apparently uninformed witness of his or her self-incrimination rights from "should advise" to "may advise." to a protest at the omission of "anus or vagina" and the substitution thereof of "other body cavities" in Rule 312(c). Intrusion into Body Cavities. Memorandum. MG Clausen, Acting Army TJAG, for General Counsel. DOD, 23 July 1979. subject: DOD Draft of the Military Rules of Evidence (14 Aug. 1979).

the Office of Management and Budget for coordination. After minor changes in response to comments by the Department of Justice, the Working Group sent the rules to the White House for the President's signature.

After the Working Group finished preparing the rules, the Drafters' Analysis was written. For each new rule, the Analysis was to contain its origin, the changes it made in military law, and, as appropriate, practice commentary. I wrote the Analysis, and the Working Group and the Joint Service Committee on Military Justice reviewed and edited it. Concurrent with the concluding portion of the rules project, Commander Pinnell and I traveled around the world presenting on-site instruction for Army, Navy, Coast Guard, and Marine personnel.[54]

VI. SELECTED RULES

Although space does not permit a detailed review of each of the rules, discussion of the origin of some of the rules is illustrative of the rule-making process and perhaps of independent interest.

A. *PRESUMPTIONS*

Article III of the Federal Rules of Evidence codifies in Rule 301 the Thayer ''burstthe bubble" form of presumption[55] for presumptions not otherwise defined by statute or case law. Although the Manual dealt with presumptions to some degree, presumptions were not codified as part of the rules. Instead, Section III was used for the codification of the law of search and seizure, interrogation, and eyewitness identification. To the best of my memory, presumptions were not codified, not because of their inherent difficulty and complexity,[56] but rather because members of the Working Group failed to understand fully their importance. Instead, the Working Group quickly accepted the decision of the framers of the Federal Rules of Evidence not to codify presumptions in criminal cases and refused to adopt Federal Rule 301 because of its application to civil cases.[57]

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[54]The Air Force did not participate. ***See*** *supra* note **45.**

[55]This shifts only the burden of production (also called the burden of going forward). Once an adequate amount of evidence is introduced to counter the presumed fact, the "bubble bursts" and the presumption vanishes. It is named after Professor Thayer.

[56]In lieu of Fed. R. Evid. 301, states have often adopted, for example, the Morgan true rebuttable presumption, which shifts the burden of proof as well as the burden of production. Still more difficult in light of the Bill of Rights are presumptions in criminal cases. *Compare* Fed. R. Evid., art. III, ***with*** Uniform Rules of Evidence, art. III.

[57]I believe that the primary proponent of noncodification was Mr. Effron, who may well have understood entirely the law and issues involved—something I surely did not.

In retrospect, the omission of presumptions from the Military Rules of Evidence seems inconsequential and fully in keeping with the goal of ensuring that military evidentiary law remains as similar to civilian evidentiary law as possible. At the same time, adoption of a presumption rule applicable to criminal cases might have been of value to judges and counsel.

B. PLEAS, PLEA BARGAINING, AND OATHS DURING PROVIDENCY

The Working Group had no problem adopting Federal Rule of Evidence 410, which protected the plea bargaining process. The drafters were concerned with the unique nature of the military procedure that permits an attempt to resign "for the good of the service" and expanded the rule to protect against statements submitted as part of such an attempt.[58]

There was debate as to whether an accused pleading guilty should be examined under oath during the providency inquiry. Commander Pinnell argued strenuously that the oath requirement was necessary to protect the integrity of the plea and to avoid pretrial agreements by innocent accused. I maintained that an innocent accused willing to plead guilty to obtain a plea bargain was not likely to be deterred from doing so by the oath, which simply would add to the coercive nature of the criminal justice system. In its original form, Rule 410 was promulgated without a requirement that the providency inquiry be conducted under oath. That requirement, however, was added as part of the Rules for Courts-Martial.[59]

C. THE RAPE SHIELD RULE; FRESH COMPLAINT

Federal Rule of Evidence 412 presented special problems. Under military law as it then existed, evidence of lack of chastity of a rape victim or of sexual relations outside marriage was admissible for impeachment and to establish consent. It was apparent that the usual form of this evidence was irrelevant, psychologically damaging to

[58]The drafters were concerned with formal procedures that required a confessional request for an administrative discharge. We did not discuss, nor did we intend to reach. the type of conduct that the Court of Military Appeals subsequently has protected via Rule 410. *See, e.g.*, United States v. Brabant, 29 M.J. 259, 263-64 (C.M.A.1989); United States v. Barunas, 23 M.J. 71 (C.M.A. 1986).

[59]R.C.M. 910 (e). Commander Pinnell had declared his intent to adopt the oath requirement at the first opportunity. The change illustrates the importance of the individuals assigned to drafting duty.

many complainants, and often was given unwarranted value by fact-finders. The question was, however, what to do about the situation.

Given its attempt to limit sharply evidence relating to a victim's past sexual history, Federal Rule of Evidence **412** seemed an unduly complex rule with significant constitutional difficulties. The rule itself is an unusual one. Outside of the District of Columbia, limited federal criminal jurisdiction provides that most rape cases are tried in state courts. Viewed objectively and without concern for individual bias or political implications,[60] Rule **412** was unnecessary. Basic principles of logical relevance coupled with Federal Rule of Evidence **403** should have been sufficient, and a proposal was made not to adopt Rule **412** in favor of a more general statement of the application of the principle of relevancy. Ms. Siemer, DOD General Counsel, rejected that position, and the Working Group adopted Rule **412.**

Having decided (or directed) to adopt the federal rape shield rule, the Working Group was left with several important details. The Group quickly deleted the civilian rule's requirement that the proponent of evidence covered by the rule give fifteen days notice of proffer because it might unnecessarily delay trials. More important, the Working Group considered Rule **412** to be both too limited and too expansive. It was too limited because of its focus only on rape, and accordingly, the Group expanded Military Rule of Evidence **412** to include other offenses such as sodomy.[61]

It was, however, also too expansive in its provision that evidence of past reputation or opinion of the character of a victim be per se inadmissible. One can create hypotheticals in which such evidence, offered by the defense, would be constitutionally necessary for a fair trial. Under normal circumstances, the constitutional guarantees would supersede an evidentiary rule, and the evidence would be admitted. Rule **412** is a highly unusual rule, however, and a different

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[60]Of course, Rule **412** was an important symbol for these very reasons, and it was evident that, given past military law, it was essential that some form of clear break with the past be demonstrated.

[61]At Colonel Alley's request, the Army proposed an additional section that would have admitted "past sexual behavior as a prostitute" if there were other evidence of consent, evidence that the alleged sexual act was performed by the victim for payment, and evidence that "the complaint of the nonconsensual sexual offense was made by the victim as a result of subsequent dispute concerning payment for the sexual act." Colonel Alley had found that the Army in Europe had a number of cases in which prostitutes had alleged rape following disagreement on the proper remuneration. The additional section would have clarified Rule 412's application to this situation. The other services, however, unanimously rejected it. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

result can apply. The rule provides that if its procedural requirements are met, otherwise barred evidence, other than opinion or reputation evidence, may be admitted when constitutionally required.[62] The plain meaning of the rule is that reputation or opinion evidence is never admissible. Accordingly, the defense is estopped from using it, and if a fair trial demands its use, the only remedy is to abate the trial or to dismiss the charges. This somewhat abnormal situation makes perfect sense considering the legislative history of Federal Rule of Evidence 412, which includes concern that complainants not be psychologically injured by improper cross-examination. Although the Working Group believed that concern to be substantial, it felt that dismissal of charges would not be in the best interests of society or the complainant, and the Group preferred to remove the absolute language from Rule 412(a). The Working Group's sole female member strongly objected, and the Navy concurred in her objection. As a result, we decided to place our intent in the Analysis rather than the rule.[63]

A collateral consequence of the adoption of the Federal Rules of Evidence was the elimination of the specific Manual declaration of admissibility of evidence of fresh complaint, Considering the number of sex offenses that occur in the armed forces, members of the Working Group preferred to codify "fresh complaint"—which in the military had been broad enough to include the identity of the offender[64]—and to preserve it in the military rules. The military members of the Joint Service Committee[65] unanimously approved the policy decision, and we drafted proposed Rule 412A, Fresh Complaint Concerning a Sexual Offense. Ms. Siemer overruled the attempt to retain fresh complaint evidence.[66] Accordingly, the present rules per-

[62] *See, e.g.*, United States v. Perry, 14 **M.J.**856 (A.C.M.R. 1982).

[63] Accordingly, we attempted for political reasons to preserve our intent via the "legislative history" rather than modifying the rule itself.

[64] MCM, 1969 (Rev. ed.), para. 142*c*.

[65] Voting Sheet, Joint Service Committee on Military Justice (SO May 1979)(policy decision). The Court Representative objected to inclusion of the proposed Rule 412A on the grounds that it was not within the Federal Rules of Evidence and that fresh complaint evidence was not probative. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

[66] During final coordination, the Army responded officially: "The Rules omit any explicit reference to fresh complaint. Specific recognition of this exception to the hearsay rule should be included in the Rules. The omission of a specific fresh complaint is of significant concern to the Department of the Army." Memorandum for General Counsel Department of Defense (Attn: Director, Legislative Reference Service) Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (5 Aug. 1979). In a memorandum directly to the DOD General Counsel, General Clausen wrote:

> Recommend Rule 412A (Fresh Complaint) be restored. The omission of the topic from the Federal Rules reflects only the minimal number of cases involving sexual assaults in the Article III courts and is apparently an oversight. Its omis-

mit fresh complaint evidence on the merits only when admissible under Rule 801(d)(1)(B) as a prior consistent statement when the complainant is alleged to have fabricated his or her testimony or when admissible as an "excited utterance"[67] or other hearsay exception.[68]

D. BIAS IMPEACHMENT

The Federal Rules of Evidence failed to codify bias impeachment. In one sense, this was eminently reasonable given the impeachment structure of those rules. Because the basic impeachment rule is one of logical relevance under Rules **401** and **402,** the drafters codified only those areas that departed from the concept—most notably those rules that limited admissibility. It seemed clear to me that although the federal approach might be analytically sound, it might prove highly troublesome in military practice. The Manual for Courts-Martial not only had a bias impeachment rule, but also expressly permitted the use of extrinsic evidence. Absent a similar provision in the Military Rules of Evidence, litigation over this essential form of impeachment was probable. Accordingly, bias was codified as Rule 608(c), a national model.[69]

> sion from the Military Rules will result in the exclusion of evidence of fresh complaint in all but those few cases which would come within the very limited relevant exceptions to the hearsay rule. Evidence of fresh complaint, or lack thereof, is probative and valuable. Considering the unfortunately large number of sexual assault cases common to the armed forces, the rule is clearly needed. Evidence of fresh complaint does not involve any of the detrimental factors that led to Federal Rule of Evidence 412, and there appears to be no social or political justification for its omission.

Memorandum, MG Clausen, Army Acting TJAG, for General Counsel, DOD, 23 July 1979, subject: DOD Draft of the Military Rules of Evidence (14 Aug. 1979). The Air Force agreed with this position, stating:

> Although there is no comparable rule in the Federal Rules of Evidence, the Air Force strongly recommends the inclusion of **412A** in the military rules Apparently, it was not included in the Federal Rules due to oversight or a general belief that the infrequent trial of sexual offenses in Federal Courts negated its necessity. Most states have adopted some concept of the "fresh complaint" doctrine, and the Code Committee approved the insertion of this rule in the military rules.

Memorandum for General Counsel Department of Defense (ATTN: Director, Legislative Reference Service) D/D E.O. Doc. 241, Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (AFLI 4664) (30 Aug. 1979).

[67] *See, e.g.*, United States v. Smith, 14 M.J. 845 (A.C.M.R. 1982).

[68] Somewhat ironically, despite my enthusiasm for a fresh complaint rule during drafting, I have concluded that fresh complaint is neither justified nor necessary. It is hard to defend the doctrine when declaring as irrelevant a "fresh complaint" of a nonsexual offense, such as robbery.

[69] Interestingly, despite general acceptance in the federal district courts, the question of whether bias was permitted under the Federal Rules of Evidence had to be resolved by the Supreme Court in 1984. United States v. Abel, 469 U.S. 45 (1984).

E. THE HEARSAY RULE— LABORATORY REPORTS

Drug prosecutions were (and are) a major component of military criminal legal practice. At the time the Military Rules of Evidence were written, a fair degree of litigation time had been devoted to the admissibility of forensic laboratory reports in courts-martial. Given the confrontation clause, there was strong reason to doubt that these records had the type of reliability that justified their admission. As a practical matter, however, the abolition of these reports was considered unacceptable by the services, and express exceptions for laboratory reports and chains of custody were incorporated into Rules 803(6) and (8) along with a list of otherwise acceptable documents then listed as hearsay exceptions in the Manual.[70]

F. THE HEARSAY RULE— ARTICLE 32 TESTIMONY

Although the Military Rules of Evidence contain several drafting errors,[71] the provision for use of prior article 32 testimony is one of the worst.[72] Under the 1969 Manual, article 32 investigation testimony could be offered at trial by court-martial if the declarant was unavailable and the prior testimony had been under oath, subject to cross-examination, and recorded on a verbatim record. Federal Rule of Evidence 804(b)(1), however, provides that a hearsay exception exists for testimony of an unavailable declarant when it is:

> Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

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[70] I drafted the laboratory exceptions at the direction of Colonel Clause. *See supra* note 47. I added the exception for chain of custody documents for reasons of consistency and because I believed that they were in fact proper business records. A little noticed aspect of chain of custody forms is, however, that they usually do not provide space for reports of the condition of the material being transferred and thus are not relevant on the issue of condition or contamination. The court representative opposed the changes on the grounds that they were not in the Federal Rules of Evidence and inadequate military necessity existed for them. Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

[71] *See, e.g.*, Mil. R. Evid. 311(g)(2). In adopting Franks v. Delaware, 422 U.S. 928 (1978), the rule refers to "the allegation of falsity or reckless disregard for the truth." The rule should have used "perjury" or "intentional misstatement" instead of "falsity."

[72] I drafted it.

The focus of the federal rule is on the motivation of the declarant at the earlier proceeding. The 1969 Manual provision did not include motive. When drafted, Military Rule of Evidence 804(b)(2) attempted to adopt the federal rule while retaining the original Manual rule for military proceedings, including article 32 investigations.

> Testimony given as a witness at another hearing of the same or different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. . . .

The text of the rule technically was sufficient because the second sentence set forth a special and distinct rule for military proceedings. Notwithstanding this, some could argue that it is unclear from the text whether the second sentence, dealing with unique military proceedings, stands alone or is governed by the similar motive rule in the first sentence.

The exception was one of the few rules to be discussed at length by the Joint Service Committee on Military Justice. The Marine representative questioned the way the military provision had been grafted onto the basic civilian rule. Distracted by other business, I failed to recognize fully the implications of the text, and I convinced the Committee to rely on the Analysis.[73] This was done badly by any

[73] I subsequently reported:

> The Marine Corps has objected to one aspect of Rule 804 . . . . Subdivision (b)(1) [Former Testimony] was modified in committee to make testimony given at courts-martial, Article 32 proceedings, or their equivalents admissible when a verbatim record is made of the proceedings. This language was a result of the requirement in the Federal Rule that the party against whom the testimony is being offered have had a "similar motive" at the first proceeding to develop testimony by direct, cross, or redirect examination. The Committee is unanimous (with the probable exception of the Court Representative) that Article 32 testimony et al. should be admissible as former testimony pursuant to the modification. The difficulty lies in the draftsmanship. It is presumed that the Marine Corps would support specific language in the Rule making it clear that the "similar motive" language is not relevant, but the Court would probably object. The Navy is willing to resolve the issue via the Analysis but the Marines may object. Either solution should be acceptable to us. The problem is complicated by the USCMA recognition that Article 32's were intended to be discovery devices by Congress. Hence, there is a valid argument that specific language in the Rule would be inappropriate. Present law, however, allows use of Article 32 testimony as former testimony when a verbatim record has been made.

Post Joint Service Committee summary submitted to Colonel Wayne Hansen (July 1979).

standard. It became fatal, however, when the issue was sent to the Code Committee for resolution, and the Code Committee determined that, without amending the rule, it wished *both* sentences to be read together, thus requiring proof of similar motive *and* a verbatim record for article 32 and similar hearings.[74] The Analysis reflects the Code Committee's intent in that regard: "The Rule is explicitly intended to prohibit use of testimony at an Article 32 hearing unless the requisite similar motive was present during the hearing."[75] The final irony occurred when the Court of Military Appeals decided the question of how to interpret the rule, the judges having participated in the decision that merged the two provisions into one. Having previously decided that discovery was not "a *prime* object of the pretrial investigation,"[76] in *United States v. Conner*[77] Judges Everett and Cox dispensed with the Analysis and held:

> [A]s we interpret the requirement of 'similar motive,' if the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of Mil. R. Evid. 804(b)(1) and of the Sixth Amendment are satisfied even if that opportunity is not used, and the testimony can later be admitted at trial.[78]

As a consequence, the court accepted the similar motive test and then gutted it by rendering it meaningless.[79] All this could have been avoided by a minor redraft of the rule.

G. PRIVILEGES

Given the Working Group's mandate to adopt the Federal Rules of Evidence to the extent practicable, the drafters were limited in their creativity. Because the Federal Rules of Evidence lack specific privilege rules, however, the normal limitation did not apply to codification of privileges. The military privilege rules were taken in part from the 1969 Manual for Courts-Martial and the proposed but unenacted Federal Rules of Evidence dealing with privileges, and were written partially from scratch.

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[74]From an academic standpoint, the Code Committee's decision was eminently reasonable, and, I now think, correct. The failure to modify Rule 804(b)(1) to expressly state the Code Committee's intent, however, was a major error that led first to unnecessary confusion and litigation and then to its nullification.

[75]Mil. R. Evid. 804 analysis at A22-51.

[76]United States v. Arruza, 26 M.J. 234 (C.M.A. 1988) (citing United States v. Eggers, 11 C.M.R. 191, 194 (1953)) (emphasis added).

[77]27 M.J. 378, 387-90 (C.M.A. 1989).

[78]*Id.* at 889.

[79]Concurring in the result, Judge Sullivan wrote of "the majority opinion's evisceration of Mil. R. Evid. 804(b)(1)." ***Id.*** at **392.**

Andy Effron drafted the privilege rules. Although all the privilege rules were done well, his genius shines through in Military Rule of Evidence 501. A hybrid masterpiece,[80] the rule provides both for codified individual privileges and for those privileges ''generally recognized in the trial of criminal cases in the United States district courts." As a result, military law has a body of specific privileges and may adopt other new privileges that are accepted by the federal district courts. Codification of privileges is inherently difficult given the major policy questions and the fear of preventing growth in the law to adjust to new situations. Military Rule of Evidence 501 is an ideal compromise between total, rigid, codification and abandonment of the effort in favor of a case law approach.

Space prohibits a detailed review of the privilege rules, but it may suffice to note that the codification is one of the most complete[81] and useful in the nation.[82]

H. THE CONSTITUTIONAL CODIFICATION IN GENERAL

The Section III rules are unique in the United States and are a compromise between the military's need for fixed rules with stability and certainty and the lawyer's desire for case-by-case adjudication and change. They are binding because they either accurately codify existing constitutional case law or are more favorable to the accused than case law prescribes. Except insofar as individual provisions intentionally leave matters "free to float" with case law, they were intended to be absolutely binding on all personnel and were to be altered solely by amendment.[83]

When drafting the search and seizure and interrogation rules,[84] I attempted to use the following guidelines:

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[80] Which the ABA Section on Criminal Justice Committee on Rules of Evidence and Criminal Procedure has adopted as a preferred alternative to the present Federal rule.

[81] And arguably one of the best.

[82] *See, e.g.*, Mil. R. Evid. **505,** Classified Information. One of the most unusual provisions found in the rules is Mil. R. 511(b), which I believe I drafted initially. That rule provides in part that the transmission of otherwise privileged information by telephone remains privileged even if overheard in a predictable fashion. Intended to recognize modern life, particularly in the armed forces with communications monitoring, the rule is a unique recognition of social changes due to technology.

[83] *But see infra* note 118 and accompanying text (discussing judicial abrogation and indifference).

[84] Mr. Effron drafted the eyewitness identification rules and collaborated on Mil. R. Evid. 313(b), Inspections.

1. Procedural rules should be binding and should be spelled out in detail.[85]

2. Areas of the law that are of importance only to lawyers ordinarily should be left to case law development.[86]

3. Areas of law that are of importance to nonlawyers should be codified in a binding fashion and should be spelled out in detail.[87] Change should be through amendment of the rules.

4. If the answer to a legal question is unclear and we are unable to resolve it by policy decision, no answer should be codified;[88] applicable Supreme Court language should be used, however unclear;[89] or, as complete an answer as is accurate should be given, with the remainder of the question left to case law.[90]

5. When desirable, room should be left for unanticipated major changes in the law.[91]

Although one could disagree with any given provision, one would have thought that taken as a whole the structure would have addressed adequately all legitimate concerns about "over codification," limiting the development of the law, or supplying "inadequate guidance to the field." That it did not[92] for many critics may be more of a comment on the common law orientation of American lawyers, or on the hubris of judges, than an indication of inadequacy.

I. INTERROGATIONS—NOTICE TO COUNSEL

Within the Working Group one of the more controversial provisions was the notice to counsel rule—Military Rule of Evidence

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[85] *See, e.g.*, Mil. R. Evid. 301. 311.

[86] *See, e.g.*, Mil. R. Evid. 311(a)(2) ("the accused would otherwise have grounds to object to the search or seizure under the Constitution"); Mil. R. Evid. 311(c)(1) (a search or seizure is unlawful if "in violation of the Constitution of the United States as applied to members of the armed forces").

[87] *See, e.g.*, Mil. R. Evid. 314.

[88] *See, e.g.*, Mil. R. Evid. 305(c).

[89] *See, e.g.*, Mil. R. Evid. 301(d) ("except when there is a real danger of further self-incrimination"); Mil. R. Evid. 314(f)(1) ("criminal activity may be afoot").

[90] *See, e.g.*, Mil. R. Evid. 305(f) ("if a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately"). At the time this was written, the impact of asserting the right to counsel was unclear. Edwards v. Arizona, 451 U.S. **477** (1981), and Arizona v. Roberson, 486 U.S. 675 (1988), came later. The rule specified what was known—that interrogation had to stop, but left open and to case law the question of resumption.

[91] *See, e.g.*, Mil. R. Evid. 314(k) (other searches).

[92] *See infra* text accompanying notes 118-44.

305(e)[93]—which implemented the decision of the Court of Military Appeals in *United States* v. *McOmber*[94] in an effort to ensure that interrogators did not nullify a represented suspect's right to counsel. The Navy representative strongly opposed the rule and forecast dire consequences if it were adopted,[95] while the Air Force attempted to limit its reach.[96] The rule was adopted and, contrary to the expressed fears, apparently has proven neither unworkable nor controversial,[97]

J. SEARCH AND SEIZURE—BODILY VIEWS AND INSPECTIONS [98]

When originally drafted, Military Rule of Evidence 312 dealt primarily with strip and intrusive body searches. As such, it was to the best of my knowledge the first binding rule of its type in the nation and, insofar as that aspect is concerned, it has held up quite well. Neither Rule 312 nor Rule 313(b), Inspections, however, dealt adequately with urinalysis—primarily because they were not intended to do so.

When the rule was drafted, the services' general policy was to locate drug abusers and either treat them or discharge them using a medical justification. Military Rule of Evidence 312(f), Intrusions for Medical Diagnosis, was an "open sesame" designed to permit urinalysis or other procedures for valid medical reasons.[99] When first the Navy and then the other services abandoned in whole or in part the medical justification for urinalysis,[100] the Rule 312(f) "escape clause" lost its utility.

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[93] "When a person subject to the Code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed."

[94] 1 M.J. 380 (C.M.A. 1976).

[95] As well as promising repeal at the earliest possible moment.

[96] The Air Force wished to eliminate that part of the notice requirement that applied when the interrogator "reasonably should know" that counsel had been obtained. Memorandum for General Counsel Department of Defense (Attn: Director, Legislative Reference Service) D/D E.O. Doc. **241,** Proposed Executive Order "Prescribing Amendments to the Manual for Courts-Martial, United States, 1969 (Revised Edition)" (AFLI 4664) **2** (30 Aug. 1979).

[97] At the same time, the rule has bolstered the protection afforded military personnel from the type of implicit coercion potentially found in the military environment.

[98] Now amended to read "Body views and intrusions." *See infra* text accompanying notes 122-25.

[99] *See* Mil. R. Evid. 312(f) analysis of A22-19.

[100] *See, e.g.*, Murray v. Haldeman, 16 M.J. 74, 77 (C.M.A. 1983) (citing "The Carlucci Memorandum," a December 28, 1981, DOD memorandum issued by Deputy Secretary of Defense Carlucci allowing "evidence obtained by compulsory urinalysis to be used for disciplinary action").

Inherent in this discussion is the assumption that Military Rule of Evidence 312 was intended to apply to urinalysis and forcible extraction of bodily fluids. When the rule was revised concurrently with the promulgation of the Rules for Courts-Martial, however, Military Rule of Evidence 312(d)'s title was changed from "Seizure of Bodily Fluids" to "Extraction of Body Fluids." The change in title was needed because the subsection "does not apply to compulsory production of body fluids (e.g., being ordered to void urine), but rather to physical extraction of body fluids (e.g., catheterization or withdrawal of blood),"[101] an analysis concurred in by the Court of Military Appeals.[102] This was erroneous; the rule always was intended to apply to urinalysis outside the scope of the medical exception in Rule 312(f). That is why the section was entitled "seizure." That the rule was not drafted well for this purpose, however, is apparent.[103]

K. SEARCH AND SEIZURE—INSPECTIONS

Arguably, the most important aspect of the "constitutional" codification was Rule 313(b), Inspections. It is the only rule expressly issued by the President using his authority as Commander in Chief.[104] Unlike the other rules, it is the only rule intended to regulate directly day-to-day nonlaw enforcement activities of the armed forces.

To be understood, Rule 313(b) must be placed in context. When the drafting project began, it did so against the backdrop of a major worldwide drug abuse problem and an activist Court of Military Appeals without a unified theory of inspections,[105] a court that was hostile to prosecutions based on inspections for drugs. Judge Perry in particular viewed drug possession and sale as "evidence of crime"[106] and could not accept an inspection for drugs as a proper administrative inspection.[107] His view seemed mistaken as drug use rendered successful military operations impossible; drugs—like unlawful weapons—seemed a fundamental aspect of the health, welfare, and operational readiness of the armed forces. The court's

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[101]Mil. R. Evid. 312 analysis at A22-19.

[102]*Murray*, 16 **M.J.** at 77.

[103]As a consequence Mil. R. Evid. 313(b) was subsequently amended to state that. "[a]n order to produce body fluids, such as urine, is permissible in accordance with this Rule." Although this resolves the urinalysis "inspection" issue, it leaves open an order to produce urine incident to a probable cause seizure.

[104]Mil. R. Evid. 313(b) analysis at A22-20.

[105]*See, e.g.*, United States v. Thomas, 1 M.J. 397 (C.M.A. 1976).

[106]United States v. Roberts, 2 M.J. 31, 36 (C.M.A. 1976).

[107]The court changed its perspective in United States v. Middleton. 10 M.J. 123 (C.M.A. 1981).

holdings, therefore, seriously threatened readiness. At the same time, we had the perception that some commanders were perjuring themselves during suppression motions by testifying that they were conducting traditional "health and welfare" inspections when they were really looking for drugs. Such conduct was clearly horrendous and unacceptable.

Accordingly, Rule 313(b) was drafted to realign the concept of "health and welfare inspections,"[108] and it stated explicitly that "[a]n inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command." The rule assumed, for example, that there was some form of reasonable expectation of privacy in one's belongings in a barracks,[109] but that the military's interest in readiness, as well as the individual's interest in a secure and safe environment, justified inspection for drugs when that inspection was not intended as a subterfuge for a search of an individual. When viewed against the backdrop of the drug problem, Rule 313(b) had enormous consequence and potentially permitted near carte blanche authority to inspect in some badly troubled commands. That result seemed fully appropriate when the usually minimal expectation of privacy was viewed against the administrative need.

Rule 313(b) subsequently was amended. Among other changes, using the decision of the Court of Military Appeals in *United States v. Middleton*,[110] the drafters deleted the requirement for "a case-by-case showing of the adverse effects of weapons or contraband (including controlled substances) in the particular unit, organization, installation, aircraft, or vehicle examined."[111] The rule thus assumes that drugs (included within the definition of contraband) are sufficiently adverse to military readiness and the like to permit administrative inspections. It shifts the primary focus to prohibiting subterfuge searches intended for prosecutorial purposes. The drafters of the amendments acted in an appellate legal environment far more favorable to inspections for drugs than we did.

Contemporary civilian case law[112] suggests that even the present

[108] *See* ***generally*** Mil. R. Evid. 313(b) analysis at A22-20—A22-24.

[109] The rule, however, also applied to all other locations including on post quarters.

[110] 10 M.J. 123 (C.M.A. 1981) (*Middleton* was not based, however, on Rule 313(b)).

[111] *See* Mil. R. Evid. 313(b) analysis at A22-23.

[112] *See, e.g.*, Michigan Dep't of State Police v. Sitz, 15 U.S.L.W. 4781 (U.S. June 14, 1990); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Exec. Ass'n, 109 S. Ct. 1402 (1989). *Cf.* Griffin v. Wisconsin, 483 U.S. 868 (1487); New Jersey v. T.L.O., 469 U.S. 326 (1986).

Rule 313(b) may be more conservative than needed. The rule retains the distinction between an administrative inspection and an examination intended to locate evidence for prosecutorial purposes. Major Pat Lisowski[113] has suggested that many commanders would testify, if they could, that they see little distinction for readiness purposes between inspecting for drugs to rid the unit of them[114] and looking for offenders to prosecute to deter others. In civilian life, the war against drugs poses agonizing choices between personal privacy and liberty on the one hand, and our strong desire to eliminate drug trafficking and use on the other. Presumably, however, the fourth amendment provides some basic reservoir of privacy for civilians that cannot be altered despite public desire. It is by no means clear that the fourth amendment need function similarly in the armed forces.

When Rule 313(b) initially was drafted, it was apparent that there was a reasonable legal argument that inspections were simply not "searches" within the scope of the fourth amendment. The Analysis states in part: "Consequently, although the fourth amendment is applicable to members of the Armed Forces, inspections may not be 'searches' within the meaning of the fourth amendment by reason of history, necessity, and constitutional interpretation.''[115] Although I find it troubling, at least in its attempted application to civilian life, I believe that the doctrine of original intent readily could be used to remove all military inspections—whatever their intent—from fourth amendment regulation.[116] This would permit inspections with prosecutorial purposes, although arguably it would prohibit a subterfuge inspection intended solely to obtain evidence against a single individual.

Although it may be that reappraisal of the application of the fourth amendment to military inspections[117] would yield significantly greater command freedom—freedom sustainable by the United States Supreme Court—it is not clear that increasing command flexibility in this manner is desirable as a policy matter. Implementation of such

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[113]The outgoing search and seizure expert from the Criminal Law Division of The Judge Advocate General's School.

[114]Or to forestall their appearance.

[115]Mil. R. Evid. 313(b) analysis at A22-20.

[116]The same result might follow from an assumption that there is a de minimis expectation of privacy throughout the armed forces. I think, however, that various reasonable expectations do in fact exist and would hesitate to rewrite Rule 313(b) on that basis.

[117]Because of the structure of the Military Rules of Evidence, Rule 313(b) would have to first be amended before such a change could be effective. Of course, the Court of Military Appeals first could endorse such an approach in dictum.

a change might send a signal to personnel at all levels that might significantly impair morale and thus might entail an unreasonable socio-political cost.

VII. THE RULES IN ACTION—JUDICIAL RESISTANCE

In a common law system based on precedent, a new statute presents a new starting point. Unless the constitutionality of the statute is called into question, the statute is valid and must be applied. As cases are presented to the courts, the courts interpret the statute and, through case law precedent, often alter the statute's meaning in the process. Certainly, the court may interpret the text in a fashion inconsistent with its historical intent.[118] Should the legislative authorities disagree with the judicial interpretation, they are free to revise the statute and reinitiate the process of interpretation. This description of the common law process is known to and is accepted by all Anglo-American lawyers and often is taken for granted by them. It is thus the same process that we expected to

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[118] The Court of Military Appeals has done this, for example, in the area of character evidence. Like its federal counterpart, Military Rule of Evidence 404(a)(1) permits the accused to offer on the merits "evidence of a pertinent trait of the character of the accused." The analysis to the rule states, "It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders." Mil. R. Evid. 404 analysis at A22-32. Interpreting the rule, however, the court has gone well beyond the limited use intended by the drafters *See, e.g.*, United States v. **Wilson,** 28 M.J. 48, 49 n.1 (C.M.A. 1989). ***See generally*** Smith, ***Military Rule of Evidence 404(a)(1): An Unsuccessful Attempt to Limit the Introduction of Character Evidence on the Merits,*** 33 Fed. **B.** News & J. 429 (1986) ("An analysis of these cases leads to a conclusion that the drafters' intent behind Mil. R. Evid. 404(a)(1) to limit the nature of admissible character evidence has been all but ignored—and that the interests of justice have been better served as a result") ***Id.*** at **430.**

Clearly the text of a rule is the primary source of law. In one of my first cases as a military judge after drafting the rules, I was faced with an eyewitness identification suppression motion brought under Rule 321. After argument by counsel, I felt constrained to apply the rule as explicitly written even though its analysis suggested a different outcome. Although I think it proper to consult legislative history to interpret a statute or rule, if the "plain meaning" is susceptible of only one interpretation, I believe that interpretation to be binding.

apply once the Military Rules of Evidence were promulgated.[119] We did not expect the degree of judicial resistance that took place.[120]

Although most courts in the armed forces, at all levels, have applied the rules routinely and have dealt with them as one would expect, that has not always been the case. The actions of the Court of Military Appeals have been particularly disturbing given its role as the "Supreme Court of the Armed Forces." The court has shown a surprising and alarming willingness to ignore and twist the rules,[121] especially the "constitutional'' rules.

Although trivial, one of the earliest harbingers of the court's attitude may be *United States v. Armstrong*.[122] A pre-rules case, *Armstrong* examined the application of the article 31 right against self-incrimination to a blood test of a suspected drunk driver convicted of involuntary manslaughter. In discussing article 31(b), Chief Judge Everett referred to "body fluids''[123] and then, via a lengthy explanatory footnote,[124] stated: "Although Mil. R. Evid. 312(d) uses the term 'bodily fluids,' we choose to employ the words 'body fluids,' . . . . '' Although strictly speaking, the court did not use its own terminology in lieu of the rule's,[125] it signaled its willingness to substitute its own preferences for those promulgated by the President.

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[119]It may be that United States v. Alleyne, 13M.J. 331 (C.M.A.1982), is an illustrative case. Faced with the refusal of a soldier to permit an exit examination of personal property when he was leaving a United States installation in Korea, the property was seized and searched yielding evidence of theft. After deciding that civilian case law permitted exit customs searches, the court briefly referred to Mil. R. Evid. 314(c) and. noting that the rule,

> seems to limit overseas gate searches to occasions of entry. Since such a distinction would be at odds with the rationale for border searches and with the precedents on the subject—and since the Rule does not purport specifically to preclude the exit search—we are unwilling in this instance to find a negative implication in the authority granted by the Rule to make entry searches.

13 M.J. at 335. One could argue that if the search were not authorized by Rule 314 in some particular, including the 314(k) new type of search "escape clause," it would be unlawful. One could read the court'sopinion, however, as interpreting Rule 314(c) implicitly to permit exit searches through poor drafting. Although I know this to be erroneous given my knowledge of the original intent of the provision (which considered the interests in protecting against improper entry of property to be different from those associated with exits), it is the type of thing one might expect an American court to do within the scope of the "game" of statutory interpretation.

[120]Concededly, the rules are not statutes themselves but they were promulgated by the President under both statutory authority, UCMJ art. 36, and his inherent authority as Commander in Chief; thus, they have the force of law.

[121]At least "twisting" rules is sometimes part of the "interpretation game." Ignoring rules is an entirely different matter.

[122]9 M.J. 374 (1980).

[123]*Id.* at 378.

[124]*Id.* n.5.

[125]Rule 312 subsequently was amended to use "body" fluids, and the court's first review of the rule properly addressed the new, and preferred, terminology.

Far more worrisome was the court's statement in Murray *v. Haldeman*:[126] "However, it is not necessary—or even profitable—to try to fit compulsory urinalysis within the specific terms of that rule. We have made clear that a search may be reasonable even though it does not fit neatly into a category specifically authorized by a Military Rule of Evidence."[127] This was error. Military Rule of Evidence 314(k) recognizes new types of searches approved via case law; it is quite clearly not a "near miss" rule. As the court is bound by the rules, either a search is authorized by them or it is unlawful—unless it is a new type under Rule 314(k).

Having set the stage, the court then proceeded to an unprecedented form of judicial sleight of hand in United States *v. Tipton*.[128] Tipton involved the reliability of an informant who supplied information that ultimately resulted in the apprehension of the accused. The unanimous court discussed and applied the Supreme Court's Illinois *v. Gates*[129] decision, which abrogated the *Aguilar/Spinelli* two-prong[130] test for probable cause to search. The court did this notwithstanding the fact that *Aguilar/Spinelli* was written into Military Rules of Evidence 315(f)(2) and 316(d).[131] Amazingly, the Tipton opinion fails even to cite the Military Rules of Evidence. The court had no problem, however, discussing Rule 313(c), Inventory, in United States *V. Dulus*,[132] a case decided less than one month after Tipton. In *Dulus* the court used, and perhaps "stretched," the rule to justify an "inventory" search of an airman's automobile after his apprehension and confinement.

The Court of Military Appeals was not the only offender during this period. In 1982, the Air Force Court of Military Review, discussing Rule 614(b)'s requirement that questions of a witness by court members be submitted in writing, referred to "the procedure *suggested*" by the rule and disparaged it.[133]

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[126] 16 M.J. 74 (C.M.A. 1983).

[127] *Id.* at 82. The opinion continues:

> Compulsory urinalysis under the circumstances of the present case is justified by the same considerations that permit health and welfare inspections. Therefore, we conclude that the draftsmen of the Rules did not intend to invalidate that procedure *sub silentio* by their failure to authorize it specifically. Indeed, Mil. R. Evid. 314(k) makes this very point .... *Id.*

[128] 16 M.J. 283 (C.M.A. 1983).

[129] 462 U.S. 213 (1983).

[130] The two prongs of this test are 1) reliability and 2) basis in fact.

[131] *Compare Tipton with* United States v. Bollerud, 16 M.J. 761 (A.C.M.R. 1983) (holding that the Military Rules preempted application of *Gates).*

[132] 16 M.J. 324 (C.M.A. 1983).

[133] United States v. Miller, 14 M.J. 924, 926 (A.F.C.M.R. 1982) (emphasis added).

In 1984, Chief .Judge Everett invited me to address the annual Homer Ferguson Conference on the topic of the Military Rules of Evidence. I spoke[134] on rules compliance and quite bluntly asserted that *Tipton* in particular compelled the conclusion that the Court of Military Appeals was either incompetent or lawless. In fact, incompetence was impossible, at least in the sense of ignorance of the rule's existence. After all, one of the drafters of the rules, Mr. Robert Mueller, a highly competent and responsible lawyer, had represented the court during drafting and was still at the court. What the court actually had done was to disregard the rules and thereby set itself above the President's statutory authority—and it had done so without the minimum judicial candor expected from a court when it feels it is right and proper to deviate from an apparently applicable statute or regulation.

Following *Tipton,* the Navy-Marine Corps Court of Military Review directly addressed the binding nature of the rules. In *United States v. Postle*[135] the court, in dicta, discussed the potential application to the military of the "good faith exception" enunciated in *United States v. Leon.*[136] Having first conceded that the text of the Military Rules of Evidence excluded that exception and that "to conclude otherwise is to open a court to attack on the ground that its interpretation of the law is nothing more than judicial legislation—an exercise of power which we believe to be the antithesis of that granted courts created under Article I of the United States Constitution . [,]"[137] the court handily found that the "Constitution is a fluid and dynamic law" and that the

> drafters, well aware of this flexibility in the Constitution—and the unpredictable vagaries of its interpretation—must have intended that rules of evidence enacted to incorporate the then extant Constitutional principles on the subjects addressed be interpreted with equal flexibility. These "constitutional rules" . . were intended to keep pace with, and apply to the military. the burgeoning body of interpretative constitutional law . . not to cast in legal evidentiary concrete the Constitution as it was known in 1980.[138]

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[134]With his **prior** knowledge and consent
[135]20 M.J. 632 (N.M.C R. 1985).
[136]468 U.S. 897 (1984).
[137]*Postle*, 20 M.J. at 643.
[138]*Id.*

That this attractive and facile statement clearly is wrong is immediately evident from a review of the text of the rules,[139] the Analysis, and the post-promulgation history of the rules.

The rules were written in large measure to supply *certainty* and *predictability* to this critical area of military law. Given the worldwide dispersion of the armed forces, the comparative lack of legal advice, and the need for consistent procedures throughout the armed forces, the drafters—and the President—intentionally set much of the Military Rules of Evidence in "concrete."[140] The assumption was that as *desirable* or binding changes occurred in the constitutional case law enunciated by the Supreme Court, the Military Rules would be amended.[141] This already had happened when the Navy-Marine Corps Court of Military Review decided *Postle*; actually, the court referred to the amendment of the rules to adopt the *Gates* abolition of *Aguilar/Spinelli*,[142] so it obviously was well aware of it. Although codification of constitutional law may well be desirable in civilian life as well, it is particularly easy to apply in the military, given the daily awareness of, and reliance of the armed forces on, periodically changed service regulations and directives.

The services are not in agreement on the binding effect of the rules. The Air Force Court of Military Review, for example, finally has held that it is bound by the rules.[143] Although infrequent, the Court of Military Appeals, however, still is playing fast and loose with the rules,[144] thus abdicating not only its own judicial responsibilities, but also its role as supervisor and "role model" for the subordinate military courts.

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[139]While concededly the "plain meaning" school of statutory analysis has its difficulties, the extraordinarily careful drafting of the rules, insofar as what was "fixed" and absolute and what was clearly and expressly designed to change with case law makes the *Postle* declaration extraordinarily difficult to accept. When other factors are added—the "legislative" history and the subsequent revision history of the rules—it becomes incredible.

[140]I note drolly that in the worldwide lectures that Commander Pinnell and I presented in 1980 and, I believe, in my 1984 Homer Ferguson Lecture, I routinely commented that we often had "set the rules in concrete" to ensure certainty and predictability.

[141]Pursuant to DOD Directive 5500.17 (January 1985), the .Joint Service Committee on Military Justice is required to perform an annual review of the Manual for Courts-Martial and to forward to the DOD General Counsel's Office proposals for revision. ***See*** *generally* Garrett, ***Reflections on*** *Contemporary* ***Sources*** *of Military Law*, The Army Lawyer, Feb. 1987, at 38, 40. This process has worked well, and the Manual has been amended a number of times as a result. Gilligan & Smith, *supra* note 44, at 85 n.49.

[142]20 M.J. at 642.

[143]United States v. Johnson, 21 M.J. 553, 556-57 (A.F.C M.R. 1985) (en banc).

[144]*See* United States v. Conner, 27 M.J. 378 (C.M.A. 1989) (discussed *supra* note 66).

If one accepts the statement that the Military Rules of Evidence are binding and that some courts, including the Court of Military Appeals, are choosing not to follow them, one must ask why judicial resistance exists.

I would posit that the core of judicial resistance to the rules is nothing more—or less—than the traditional reluctance of Anglo-American judges to be bound by statute. Both our legal system and our law schools are case oriented.[145] The emphasis in law school is on understanding precedent and applying it. In the process we all too often convey the message that the only limit that exists to case—and statutory—interpretation is the creativity of the student. Students then become lawyers wedded to the adversary system who consequently, as zealous advocates, must argue the interpretation most favorable to the client, subject only to the slight limitations of professional ethics. When counsel *ascends* to the bench, the entire system emphasizes the judge's individual independence and power, albeit one usually subject to appellate review. It would hardly be surprising then that many judges would find themselves disinclined to take seriously evidentiary rules, particularly unique evidentiary rules that limit what was nearly unfettered individual creativity, especially if the rules prohibited a result that the court would like to reach.

The price of judicial noncompliance with the Military Rules of Evidence is plain: the appellate courts that are engaging in this not so genteel resistance deprive the military criminal legal system of its predictability and stability. Of perhaps greater significance, they call into question their own legitimacy under the law.

VIII. THE RULES: APPRAISAL AND FUTURE

The Military Rules of Evidence are now a fixture of military legal practice. Law students who become military lawyers find the evidentiary rules applicable to courts-martial substantially identical with the majority rules in force in the United States. Civilian attorneys who appear before courts-martial are not hindered by unique, outmoded, rules easily subject to individual judicial interpretation. Perhaps even more important, the creation of the rules gave birth to what appears to be a continuing, active, and successful military law reform effort. The Military Rules of Evidence have not been placed in the Manual for Courts-Martial and abandoned to the ravages of time; rather, they have been revised periodically as thought ap-

[145] Which to some degree is surprising when one considers the ever increasing impact not only of statutes but. most especially, of administrative rules.

propriate to adopt changes in the law.[146] Even as this article is being written, the process is under way to adopt the recent change to Federal Rule of Evidence 609(a).

The periodic spasm of judicial indifference and resistance to the rules is troublesome, particularly inasmuch as it sends signals to the trial bench. Should it continue, it may undermine the rules in toto. At present, however, it might be viewed as occasional obstructions on the expressway; that is, the careful driver must take note of the hazards and accommodate them, but the speedy progress forward usually is not affected significantly.

The Military Rules of Evidence not only routinely govern trials by courts-martial worldwide, but also guide law enforcement personnel and commanders in their daily need to protect the rights of military personnel while they enforce the law. The apparatus that gave rise to the rules continues to function. It has given birth to the Rules for Courts-Martial and has assisted in the revision of the Uniform Code of Military Justice. In the future, the military will amend the rules as society and law change. The structure behind them should ensure a vibrant military legal system at the forefront of criminal justice in the United States. Colonel Alley wrought well!

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[146]Gilligan & Smith, *supra* note **44, at** 85 **n.49; *see also supra*** note 141.

THE USE OF EVIDENCE OF AN ACCUSED'S UNCHARGED MISCONDUCT TO PROVE *MENS REA:* THE DOCTRINES THAT THREATEN TO ENGULF THE CHARACTER EVIDENCE PROHIBITION

by Edward J. Imwinkelried*

I. INTRODUCTION

The accused is charged with homicide. The indictment alleges that the accused committed the murder in early 1990. During the government's case-in-chief at trial, the prosecutor calls a witness. The witness begins describing a killing that the accused supposedly committed in 1989. The defense strenuously objects that the witness's testimony is "nothing more than blatantly inadmissible evidence of the accused's general bad character." However, at sidebar the prosecutor makes an offer of proof that the 1989 killing was perpetrated with "exactly the same *modus operandi* as the 1990 murder." Given this state of the record, how should the trial judge rule on the defense objection?

Federal Rule of Evidence 404(b),[1] which is virtually identical to Military Rule 404(b),[2] supplies the answer to the question. On the one hand, the first sentence of Rule 404(b) forbids the judge from admitting the evidence as circumstantial proof of the accused's conduct on the alleged occasion in 1990. That sentence provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[3] Figure 1 depicts the theory of admissibility banned by the first sentence of the rule.[4]

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[1]Fed. R. Evid. 404(b).

[2]Military Rule 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3]Fed. R. Evid. 404(b).

[4]E. Imwinkelried, Uncharged Misconduct Evidence § 2:18 (1984).

Figure 1

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACT	THE ACCUSED'S SUBJECTIVE, PERSONAL CHARACTER, DISPOSITION OR PROPENSITY	THE ACCUSED'S CONDUCT IN CONFORMITY WITH HIS OR HER CHARACTER ON THE CHARGED OCCASION

Thus, the prosecutor cannot offer the witness's testimony about the 1989 incident to prove the accused's disposition toward murder and, in turn, use the accused's antisocial disposition as evidence that the accused committed the alleged 1990 murder.

On the other hand, the second sentence of Rule 404(b) permits the judge to admit the evidence when it is relevant on a noncharacter theory. That sentence reads that uncharged misconduct evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[5] In our hypothetical case, the trial judge could allow the prosecutor to introduce the 1989 incident to establish the accused's identity as the perpetrator of the 1990 killing. If the two killings were committed with the identical, unique *modus operandi*, the uncharged incident is logically relevant to prove the accused's identity as the perpetrator of the charged crime without relying on a forbidden character inference.[6] Hence, the judge could properly admit the testimony with a limiting instruction[7] identifying the permissible and impermissible uses of the evidence.

The admissibility of uncharged misconduct evidence is the single most important issue in contemporary criminal evidence law.[8] The issue has figured importantly in several of the most celebrated criminal trials of our time. Although Wayne Williams was formally charged with the murders of only Nathaniel Cater and Jimmy Ray

[5]Fed. R. Evid. 404(b).
[6]E. Imwinkelried, *supra* note 4, §§ 3:10-14.
[7]Fed. R. Evid. 105.
[8]Imwinkelried, *Uncharged Misconduct: One of* **the** Most *Misunderstood Issues in Criminal Evidence*, 1 Crim. .Just. 6, 7 (1986).

Payne, the Georgia trial judge permitted the prosecutor to introduce evidence about ten other killings.[9] The national media made the prosecution's hair and fiber evidence the centerpiece of the trial, but that evidence was merely a means to the end of tying all twelve killings together. Similarly, uncharged misconduct evidence was a vital part of the prosecution's case against Claus von Bulow; the prosecution presented testimony about the accused's affair with Mrs. Isles on the theory that the affair supplied the motive for the accused's attempt to kill his millionairess wife.[10]

The numbers confirm the importance of the issue of uncharged misconduct evidence!' Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.[12] In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases.[13] In some jurisdictions, errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases.[14]

Recent years have witnessed several frontal assaults on the first prong of the uncharged misconduct doctrine, prohibiting the prosecutor from offering evidence of an accused's uncharged crimes on a character theory as circumstantial proof of conduct. Some commentators have argued that the distinction between character and noncharacter theories of relevance is illusory; according to this argument, even the purportedly noncharacter theories entail assumptions about the accused's tendencies and disposition.[15] Alternatively, other commentators have contended that an accused's uncharged crimes can be so highly probative even on a character theory that it would be irrational to exclude them.[16] In one jurisdiction, prosecutors have

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[9]Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983).

[10]E. Imwinkelried, *supra* note 4, § 1:01.

[11]Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine,* 50 Mo. L. Rev. 1, 2 (1985).

[12]2 J. Weinstein & M. Berger, Weinstein's Evidence 404 (1989); S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 361 (2d ed. 1986)("heavily litigated in federal and military courts").

[13]22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239 (1978).

[14]Casenote, *Evidence—The Emotional Propensity Exception,* 1978 Ariz. St. L.J. 153, 156 n.29.

[15]*See generally* Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence,* 66 Iowa L. Rev. 777 (1981).

[16]Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom,* 130 U. Pa. L. Rev. 845, 883, 890 (1982); *see also* Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact With a Child,* 34 S.D.L. Rev. 604 (1989) (urging recognition of limited sexual offender exception to general character evidence prohibition in child sexual abuse prosecutions).

argued that a proposition adopted by the state electorate has the effect of abolishing the general ban on evidence of an accused's bad character.'[17]

To date, the direct attacks on the character evidence prohibition have been unsuccessful. The American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence recently reaffirmed the distinction between character and noncharacter theories of logical relevance.[18] For their part, the courts uniformly have declined the invitation to overturn the character evidence prohibition.[19]

However, the advocates of the traditional ban on character evidence should take little solace from the failure of the direct attacks on the ban. Notwithstanding the failure of the direct attacks, the ban is imperiled. The threat to the ban arises from two emerging lines of case law governing the use of an accused's uncharged misconduct to prove the accused's *mens rea*. The use of the defendant's other crimes to prove intent is already the most widely used basis for admitting uncharged misconduct evidence.[20] These new lines of authority, however, threaten to expand the admissibility of uncharged misconduct to establish *mens rea* to the point that this use of the evidence may substantially undermine the character evidence prohibition.

The purpose of this article is to describe and critique these two lines of authority. The first section of the article discusses one line, namely, the case law advancing the proposition that the first sentence in Rule 404(b) is automatically inapplicable whenever the prosecutor offers uncharged misconduct to support an ultimate inference of

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[17] In 1982 the California electorate adopted Proposition 8, amending the state constitution. Mendez. *California's New Law on Character Evidence: Evidence Code 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. Rev. 1003 (1984). California prosecutors have argued that Proposition 8 overturns the character evidence prohibition in that state. *E.g.*, People v. Jordan, 202 Cal. App. 3d 1127, 249 Cal. Rptr. 269 (1988); People v. Nible, 200 Cal. App. 3d 838, 846 n.5, 247 Cal. Rptr. 396, 400 n.5 (1988); People v. Perkins, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984).

[18] ABA Comm. on Rules of Crim. Proc. & Evid., Crim. Just. Sect., Federal Rules of Evidence: A Fresh Review and Evaluation 28 (1987) ("a line can be drawn based on whether or not the proof's line of reasoning seeks to make use of the particular propensity known as 'character'").

[19] Frank v. Superior Court, 48 Cal. 3d 632, 770 P.2d 1119, 257 Cal. Rptr. 650 (1989); People v. Perkins, 159 Cal. App. 3d 646, 205 Cal. Rptr. 625 (1984); Williams v. Superior Court, 36 Cal. 3d 441, 449 n.6, 683 P.2d 699, 704 n.6, 204 Cal. Rptr. 700, 705 n.6 (1984).

[20] 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5242 (1978); Reed, *The Development of the Propensity Rule in Federal Criminal Causes, 1840-1975*, 51 U. Cin. L. Rev. 299, 306 (1982).

mental intent rather than physical conduct. The next section of the article analyzes the second line of authority. That line includes the decisions urging that under the doctrine of objective chances, the prosecutor routinely can offer uncharged misconduct on a non-character theory to prove intent. Both lines of authority are spurious, and both represent gave threats to the continued viability of the character evidence prohibition.

11. THE DOCTRINE THAT THE CHARACTER EVIDENCE PROHIBITION IS INAPPLICABLE WHEN THE PROSECUTOR OFFERS THE ACCUSED'S UNCHARGED MISCONDUCT TO ESTABLISH THE ULTIMATE INFERENCE OF THE ACCUSED'S *MENS REA*

The first sentence of Rule 404(b) embodies the character evidence prohibition. In pertinent part, the first sentence of Rule 404(b) precludes a prosecutor from introducing evidence of an accused's other crimes "to prove the [accused's bad] character . . . in order to show action in conformity therewith."[21] On its face, the wording of the rule suggests that the rule comes into play only when the prosecutor offers the uncharged misconduct to support an ultimate inference of conduct.[22] Suppose that in a given case, the prosecutor offers testimony about the accused's uncharged misconduct to support the ultimate inference that the accused committed the charged offense with the requisite *mens rea.* Figure 2 depicts the prosecutor's theory of admissibility.

Figure 2

ITEM OF EVIDENCE ---→	INTERMEDIATE INFERENCE ---+	ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACT	THE ACCUSED'S TENDENCY TO FORM A CERTAIN *MENS REA*	THE ACCUSED'S FORMATION OF THE *MENS REA* ON THE CHARGED OCCASION

[21] Fed. R. Evid. 404(b).

[22] 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5242, at 488 (1978); Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation,* 1988 Utah L. Rev. 479, 524-25; Teitelbaum & Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent,* 13 N.M.L. Rev. 423, 431 (1983).

Given the wording of the first sentence Rule 404(b), the prohibition is arguably inapplicable whenever the prosecutor proposes relying on this theory of admissibility. The prosecutor will argue that an inference of mens ***rea*** differs from an inference of action or conduct,[23]

The prosecutor's argument is not only plausible; there is a wealth of case law embracing the argument.[24] Indeed, it currently may be the prevailing view that the character evidence prohibition codified in Rule 404(b) is inapposite when the prosecutor's ultimate purpose is proving the accused'smens *rea*.[25] The California equivalent of Rule 404(b) is Evidence Code 1101(b).[26] The federal Advisory Committee used § 1101(b) as one of its models in drafting Rule 404(b).[27] Section 1101(b) forbids the prosecution from offering uncharged misconduct evidence to support an ultimate inference of "conduct on a specified occasion.''[28] In a recent case, the California Supreme Court emphasized that § 1101(b) forbids the prosecutor from introducing the accused's uncharged misconduct "only 'when offered to prove [defendant's] *conduct* on a specified occasion.'''[29] In that case, the court held that the character evidence prohibition in § 1101(b) was inapplicable because ''[t]he prosecutor offered the evidence to prove defendant's state of mind ... rather than defendant's conduct on any particular occasion."[30] Other decisions similarly have permitted prosecutors to argue that if an accused entertained the required ***mens rea*** during a similar uncharged incident, ''heprobably harbor[ed] the same intent" at the time of the charged offense.[31]

This doctrine is a dangerous one and is threatening to emasculate the character evidence prohibition.[32] Several courts[33] have warned that this doctrine has the potential to swallow up the character

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[23]*See supra* note 22.

[24]Myers, *supra* note 22, at 531; *see also* United States v. Weddell, 890 F.2d 106, 107-08 (8th Cir. 1989)("Where intent is an element of the crime charged, evidence of other acts tending to establish that element is generally admissible").

[25]Myers, *supra* note 22, at 531.

[26]Cal. Evid. Code § 1101(b).

[27]Adv. Comm. Note, Fed. R. Evid. 404(b).

[28]Cal. Evid. Code § 1101(b).

"People v. Bittaker. 48 Cal. 3d 1046, 1096. 774 P.2d 6.59. 688, 259 Cal. Rptr. 630. 659 (1989) (emphasis in the original).

[30]*Id.*

[31]People v. Wade, 44 Cal. 3d 975, 990-91, 7.50 P.2d 794, 244 Cal. Rptr. 90.5.*cert. denied*, 109 S. Ct. 248 (1988).

[32]Teitelbaum & Hertz, *supra* note 22. at 491.

[33]Thompson v. United States. 546 A.2d 414, 421 (D.C. App. 1988); United States v. Oppon, 863 F.2d 141, 149 (1st Cir. 1988)(Coffin, J., concurring); ***see*** *also* Ordover. *Balancing the Presumptions of Guilt and* ***Innocence:*** *Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 13.5. 152-53 (1989).

evidence prohibition. Admittedly, that warning is somewhat overstated. Even if we posit that the prohibition in the first sentence of Rule 404(b) is inapplicable when uncharged misconduct is used to prove mens *rea*, evidence *of* the accused's uncharged misconduct would not become automatically admissible in every prosecution; the prosecutor still would have to convince the judge that the uncharged incident is similar enough to the charged offense to satisfy the requirement of logical relevance under Rule 401.[34] However, there is a large element of truth in the warning; the acceptance of the doctrine would represent a major inroad on the character evidence prohibition. Intent is an element of every true crime.[35] Accepting the premise that the character evidence prohibition is inapplicable to evidence offered to establish mens *rea*, the courts could rationalize admitting evidence of any similar uncharged crimes as **a** matter of course.

In the final analysis, however, the doctrine is not only dangerous; the doctrine is unsound. A careful analysis of the theory of admissibility depicted in Figure 2 dictates the conclusion that the theory implicates the core concerns of the character evidence prohibition. In principle, the courts should treat the theory as impermissible character reasoning.

A. THE POLICY RATIONALES FOR THE CHARACTER EVIDENCE PROHIBITION

As Figure 1 demonstrates, the forbidden character theory of relevance entails two inferences. Each inference presents a distinct probative danger, and the combination of probative dangers constitutes the policy justification for the character evidence prohibition.[36]

The first inferential step in character reasoning requires the jury to focus on the accused'sdisposition or propensity. The jurors must ask themselves: What type of person is the accused? Is the accused a law-abiding, moral person or a lawbreaking, immoral individual? At a conscious level, the jurors must dwell on the accused's personal character.[37]

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[34]Fed. R. Evid. 401.

[35]Thompson v. United States, 546 A.2d 414, 421 (D.C. App. 1988); Ordover, *supra* note 33, at 152; Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1221 (1986).

[36]E. Imwinkelried, *supra* note **4**, at § 2:18.

[37]Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 Crim. L.Q. 43, 46, 48, 54, 56 (1979).

While consciously deciding whether to infer the accused's subjective bad character from the accused's uncharged crimes, at a subconscious level the jurors may be tempted to punish the accused for the other crimes.[38] The temptation may be especially acute when the testimony indicates that the accused has not as yet been convicted of and punished for the uncharged crime.[39] The uncharged misconduct evidence may create the impression that to date, the accused has unjustly escaped punishment for the uncharged misdeeds.[40] The jurors may be tempted to rectify that injustice by punishing the accused now for the uncharged crimes—even though they have a reasonable doubt about the accused's guilt of the charged offense.[41]

If the jury convicted the accused for that reason, the basis of the conviction would be improper. Under our accusatory criminal justice system, it is axiomatic that the accused need answer only for the crime he or she is currently charged with.[42] The Supreme Court has held that the eighth amendment ban on cruel and unusual punishment precludes a state from criminalizing a personal status such as drug addiction.[43] If the uncharged misconduct evidence prompts the jury to convict in order to punish the accused for the uncharged crimes, in effect the jury has punished the accused for being a recidivist. When the admission of technically relevant evidence would realistically create the risk that the jury will decide the case on an improper basis, the risk is a probative danger that may warrant the exclusion of the evidence.[44] In their note to Federal Rule 403, the Advisory Committee states that Rule 403 authorizes the trial judge to exclude marginally relevant evidence that "suggest[s] decision on an improper basis."[45]

Like the initial inferential step in character reasoning, the second step poses a significant probative danger. Just as the jurors

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[38]Johnson, *The Admissibility of Extraneous Offenses in Texas Criminal Cases,* 14 S. Tex. L.J. 69, 78 (1973).

[39]Williams, *The Problem of Similar Fact Evidence,* 5 Dalhousie L.J. 281, 299 (1979).

[40]*Id.*

[41]*Id.*

[42]Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials,* 50 U. Cin. L. Rev. 713, 731 (1981); *Survey of Nebraska Law—Evidence,* 15 Creighton L. Rev. 281, 284 (1981).

[43]Robinson v. California, 370 U.S. 660 (1962); *see* Reed *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence,* 53 U. Cin. L. Rev. 113, 163-69 (1984).

[44]Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?,* 41 Vand. L. Rev. 879. 889 (1988).

[45]Adv. Comm. Note, Fed. R. Evid. 403.

misdecide[46] the case if they rest their verdict on an improper basis, they may be guilty of misdecision if they overestimate the probative value of a particular item of evidence.[47] The jurors can commit inferential error by ascribing undue weight to an item.[48] This possibility of inferential error materializes when a jury engages in the second step in character reasoning.

On the one hand, the available psychological studies indicate that once they have characterized the accused's general character, the jurors are likely to attach great weight to that characterization in determining whether the accused acted "in character" on the occasion of the charged offense.[49] Even when they have only fragmentary data about an individual, many laypersons tend to form oversimplified perceptions of the individual's character.[50] Thus, having concluded that the accused is disposed to criminal misconduct, the jurors may ascribe great significance to that conclusion in deciding whether the accused committed the charged crime.

On the other hand, the empirical studies indicate that the general construct of character is a relatively poor predictor of a person's conduct[51] on a given occasion. At one time, the trait theory, championed by Gordon Allport, was quite popular.[52] That theory viewed a person's general character as a reliable predictor of conduct across widely differing situations. However, in the 1960's Walter Mischel introduced the competing theory of specificity or situationism.[53] Mischel attacked the trait theory by pointing to studies showing a lack of cross-situational consistency. Those studies demonstrated that

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[46] 6 J. Bentham, The Works of Jeremy Bentham 105-09 (J. Bowring ed. 1962).

[47] Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence,* 18 U.C. Davis L. Rev. 59, 83 (1984).

[48] *Id.* at 90; Lempert, *Modeling Relevance,* 75 Mich. L. Rev. 1021, 1030-31 (1977).

[49] Lawson, *Credibility and Character: A Different Look at an interminable Problem,* 50 Notre Dame L. Rev. 758, 776 (1975).

[50] Munday, *Stepping Beyond the Bounds of Credibility: The Application of Section 1(f)(ii) of the Criminal Evidence Act 1898,* Crim. L. Rev. 511, 513-14 (1986):

> Psychologists have reported for several decades on the tendency of people to judge one another on the basis of one outstanding "good" or "bad" characteristic. This is popularly known as the "halo effect." In essence, it represents our propensity to oversimplify our perception of others' personalities and to take for the whole that portion of someone else's personality which happens to be visible to us. This tendency to exaggerate the representativeness of particular conduct is especially dangerous in the case of the misconduct and bad character of the accused . . . .

[51] *See generally* Mendez, *supra* note 17; Spector, *Rule* 609: *A Last Plea for its Withdrawal,* 32 Okla. L. Rev. 334, 351-53 (1979).

[52] Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence,* 58 U. Colo. L. Rev. 1, 26 (1986-87).

[53] *Id.* at 27.

"moral conduct in one situation is not highly correlated with moral conduct in another."[54] In light of the available studies, we can have little confidence in the construct of character as a predictor of conduct.[55] Although some psychologists still subscribe to a modified version of the trait theory,[56] there is considerable evidence discrediting the popular faith in the predictive value of a person's general character.[57] Situational factors are often more determinant of human behavior.[58] The upshot is that the jurors may give character far more weight than it deserves.[59]

As previously stated, the admission of evidence of an accused's uncharged crimes creates the danger that the jurors will convict despite a reasonable doubt about the accused's guilt of the charged offense. Combined with that danger, the risk of the jurors' overestimation of the probative value of the accused's bad character furnishes the rationale for the character evidence prohibition prescribed by the first sentence of Rule 404(b).

B. THE APPLICABILITY OF THE POLICY RATIONALES TO THE PROSECUTION'S USE OF THE ACCUSED'S UNCHARGED MISCONDUCT TO PROVE THE ACCUSED'S MENS REA

To be sure, the theory of relevance depicted in Figure 2 differs superficially from the forbidden theory depicted in Figure 1. However, on closer scrutiny, it becomes clear that the two theories are indistinguishable in terms of the pertinent policy considerations. The theory depicted in Figure 2 poses both of the probative dangers inspiring the character evidence prohibition.

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[54]Campbell v. Greer, 831 F.2d 700. 707 (7th Cir. 1987) (citing Burton, *Generality of Honesty Reconsidered.* 70 Psych. Rev. 481 (1963)).

[55]22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239 (1978).

[56]Crump, *How Should We Treat Character Evidence Offered to Prove Conduct?*, 58 U. Colo. L. Rev. 279. 283 (1987). For some persons, character appears to be a good predictor of behavior in specific situations. Sherman & Fazio. *Parallels Between Attitudes and Traits as Predictors of Behavior*, 51 J. Personality 308, 309, 312 (1983).

[57]W. Mischel. *Alternatives in the Pursuit of the Predictability and Consistency of Persons: Stable Data That Yield Unstable Interpretation*, 51 J. Personality 578, 584-85 (1983).

[58]Lawson, *supra* note 49, at 778-81.

[59]Elliott, *The Young Person's Guide to Similar Fact Evidence*, 1983 Crim. L. Rev. 284. 287.

At the outset, it is evident that when the prosecutor relies on the theory depicted in Figure 2, there is a grave risk that the jurors will be tempted to return a guilty verdict resting on an improper basis. Evidence of the accused's uncharged misconduct is potentially prejudicial because the jurors may perceive the uncharged conduct as immoral[60] and consequently react adversely to the accused.[61] For the most part, it is the accused's wrongful intent that gives the conduct its perceived immoral quality. As Shakespeare wrote, "There is nothing either good or bad, but thinking makes it so."[62] When a writer wants to express the thought that a person has a criminal disposition, the writer frequently describes the person as having a "criminal mind"[63]—rather than a criminal arm or leg. Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion that the character evidence prohibition is designed to guard against. As Judge Goldberg has noted, the "character" referred to in Rule 404(b) is "largely a concept of a person's psychological bent or frame of mind."[64]

Compounding the probative danger, the theory set out in Figure 2 also poses the second probative danger underlying the prohibition: the risk that the jury will overestimate the probative worth of the evidence.

The theory certainly requires the jury to draw an intermediate inference as to the accused's disposition or tendency to form a particular *mens rea*. The charged offense occurred at one time and place, while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents,[65] the prosecutor must assume the accused's propensity to entertain the same intent in similar situations.[66] That assumption is the inescapable link between the charged and uncharged crimes.[67]

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[60] *See generally* Kuhns, *supra* note 15.

[61] Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147, 1162 (although the persons surveyed frequently differed in their evaluation of the prejudicial character of various items of evidence, "the greatest agreement . . . is found in connection with evidence suggesting immoral conduct by the defendant.").

[62] Hamlet, Act II, Sc. 2, Line 259.

[63] P. Roche, The Criminal Mind (1958).

[64] United States v. Beechum, **582** F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting), *cert. denied*, **440** U.S. 920 (1979); Ordover, *supra* note 33, at 166.

[65] Ordover, *supra* note 33, at 158.

[66] Myers, *supra* note 22, at 526.

[67] United States v. Rubio-Estrada, 857 F.2d 845, 853 (1st Cir. 1988) (Torruella, J., dissenting); Ordover, *supra* note 33, at 160.

The trier of fact can reason from the starting point of the uncharged crime to a conclusion about the *mens rea* of the charged crime only through an intermediate assumption about the accused's character or propensity.[68]

The reliance on an assumption about a person's propensity or tendency to form the same intent creates the possibility that the jury will overvalue the uncharged misconduct evidence. If the only question were the accused's physical response, to some extent the resolution of the question would be reducible to the application of the laws of chemistry and physics. The application of the laws of the physical sciences can help predict the accused's physical reaction. It is the mental component of the accused's conduct that introduces the element of unpredictability. American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities.[69] The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time. Even if the accused entertained a certain intent during a similar uncharged incident, the accused may not have formed that intent on the charged occasion. The risk of overestimation exists because the response to a situation includes a variable mental component.

Despite the seeming differences between the theories depicted in Figures 1 and 2, the theories are indistinguishable in policy.[70] Both theories necessitate an intermediate assumption about the accused's propensity or tendency. Both theories create a risk of prejudice to the accused; in attempting to decide at a conscious level whether the accused has a tendency to entertain a certain ***mens rea***, the jurors may conclude subconsciously that the accused is a repulsive, immoral individual—the type of person who should be incarcerated even if there is a reasonable doubt of his guilt of the charged offense. Finally, in applying both theories, the jury can easily overestimate the probative value of the uncharged misconduct evidence. Thus, whether

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[68]Teitelbaum & Hertz, *supra* note 22, at 427, 429; **see** United States v. Logan. 18 M.J. 606 (A.F.C.M.R. 1984) (the prosecution argued "that if the accused stole items not charged it could be inferred that he had the requisite intent with regards to the items charged"; the court held that the prosecution's argument was merely **an** attempt to demonstrate that "the accused is a 'bad man'").

[69]W. LaFave **& A.** Scott, Criminal Law §§ 3.1, 3.4, 3.5, 4.2 (2d ed. 1986); R. Perkins & R. Boyce, Criminal Law 826-35. 950-75 (3d ed. 1982).

[70]Teitelbaum & Hertz. *supra* note 22, at **427.**

the question arises at common law[71] or under Federal Rule 404(b),[72] the court should hold that the theory depicted in Figure 2 violates the character evidence prohibition.[73] The prohibition applies whether the ultimate inference is the physical act of pulling a trigger or the mental act of forming an intent to kill.[74]

III. THE DOCTRINE THAT THE PROSECUTOR MAY ROUTINELY OFFER EVIDENCE OF THE ACCUSED'S UNCHARGED MISCONDUCT TO PROVE INTENT UNDER THE DOCTRINE OF OBJECTIVE CHANCES WITHOUT VIOLATING THE CHARACTER EVIDENCE PROHIBITION

Section I demonstrated that the character evidence prohibition applies even when the prosecutor offers the testimony about the accused's other crimes to establish an ultimate inference of *mens rea*. For that reason, when the government contemplates offering uncharged misconduct to prove *mens rea*, it is incumbent on the prosecutor to articulate a tenable noncharacter theory of logical relevance.

In some fact situations the prosecutor readily can develop a valid, noncharacter theory of admissibility. Assume, for instance, that the accused is charged with knowing receipt of stolen goods from Mr. A on September 1, 1990. The prosecutor has evidence that on March 1, 1990, under very suspicious circumstances, the accused received other stolen property from A: the accused met A in an alley at 2:00 am., A demanded that the accused pay in $1.00 bills, and the identification numbers on the items of personalty had been defaced. In this case, the prosecutor may offer the testimony about the March 1st incident without relying on any inference about the accused's

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[71] Ordover, *supra* note 33, at 158:

> Even Julius Stone, the staunchest supporter of the inclusionary rule, condemns this sort of reasoning as a perversion of the rule. Where the prior crime evidence is offered to prove the defendant's "tendency" or "mental attitude (intent) along that particular line of crime," we are admitting evidence "precisely for the reason that the original rule excluded it."

[72] Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1232 (1986) ("This reasoning fails to comport with the plain language of ER 404(b)").

[73] Judge Toruella has persuasively argued for this holding in a series of cases. United States v. Garcia-Rosa, *876* F.2d 209, 221 (1st Cir. 1989); United States v. Cortijo-Diaz, *875* F.2d 13 (1st Cir. 1989); *Rubio-Estrada*, *857* F.2d at 853 (Toruella, J., dissenting).

[74] E. Imwinkelried, Uncharged Misconduct Evidence § 2:18 (1984).

general bad character.[75] The March 1st incident should have placed the accused on notice that A is a fence for stolen property, and the jury may make the common sense inference that the accused's knowledge of As status as a fence continued until September 1st.

In other cases, however, it is more difficult to determine whether the prosecutor has developed a legitimate noncharacter theory of relevance—or whether the prosecutor is merely endeavoring to cloak an illicit character theory. In a growing number of cases, prosecutors are citing the doctrine of objective chances as their theory of noncharacter relevance.[76] In the main, the courts have approved of prosecutors' invocations of the doctrine.[77] However, several commentators have argued that prosecutors are now smuggling inadmissible bad character evidence into the record under the guise of invoking the doctrine of objective chances.[78] The purpose of this section of the article is to assess that argument. The first part of this section describes the doctrine of chances and analyzes the use of the doctrine to prove the *actus reus* in the case. The next part of this section evaluates the more controversial application of the doctrine, namely, its use to establish *mens rea*.

A. THE USE OF THE DOCTRINE OF CHANCES TO PROVE THE ACTUS REUS

In the last decade, our society has come to the distressing realization that there is extensive child abuse in the United States.[79] Throughout the United States, prosecutors are making a more determined effort to convict child abusers.[80] There may be indisputable medical evidence that the alleged victim has suffered a fracture or subdural hematoma.[81] However, the accused often defends on the theory that the child sustained the injury accidentally. For example, the accused might contend that the child incurred the injury by falling off a swing set or down a flight of stairs. In these cases, the prosecutor's primary problem of proof is establishing an *actus reus—a*

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[75] *Id.* §§ 5:21-:28 (1984).

[76] Comment, supra note 35, at 1225, 1227, 1233.

[77] *E.g.*, United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 94 S. Ct. 1566 (1974); State v. Allen, 301 Or. 569, 725 P.2d 331 (1986); People v. Spoto. 1990 W.L. 93074 (Colo.).

[78] Ordover, *supra* note 33, at 168; Orfinger, *Battered Child Syndrome: Evidence of Prior Acts* in *Disguise,* 41 Fla. L. Rev. 345, 362, 366 (1989).

[79] Orfinger, *supra* note 78, at 345-36.

[80] *Id.* at 346-47.

[81] *Id.* at 348.

social loss or harm[82] caused by human agency.[83] At trial, the principal challenge facing the prosecution will be convincing the jury that the child's injury resulted from the intervention of another human being.[84] To meet that challenge, prosecutors frequently rely on the doctrine of chances.

United States v. Woods[85] is the paradigmatic case.[86] In *Woods*[87] the accused stood trial for infanticide. The victim had died of cyanosis. The accused claimed that the suffocation was accidental. To rebut the accused's claim, the prosecutor offered evidence that over a twenty-five-year period, children in the accused's custody had experienced twenty cyanotic episodes. The defense objected to the admission of the testimony on the ground that the testimony amounted to impermissible evidence of the accused's bad character. However, the prosecution rejoined that the testimony was relevant on a non-character theory, that is, the doctrine of chances.

Figure 3 depicts the theory of logical relevance underlying the doctrine.

Figure 3

ITEM OF EVIDENCE	→ INTERMEDIATE INFERENCE	→ ULTIMATE INFERENCE
THE ACCUSED'S UNCHARGED ACTS	THE OBJECTIVE IMPROBABILITY OF SO MANY LOSSES BEFALLING THE ACCUSED ACCIDENTALLY	AN ***ACTUS REUS***

[82] R. Perkins & R. Boyce, Criminal Law 605 (3d ed. 1982).

[83] Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment,* 31 Or. L. Rev. 267, 270-71 (1952).

[84] W. LaFave & A. Scott, Criminal Law §§ 3.1-.2 (2d ed. 1986); R. Perkins & R. Boyce, Criminal Law 830-31 (3d ed. 1982).

[85] 484 F.2d 127 (4th Cir. 1973).

[86] Note, *Evidence—Proof of Prior Events Admissible Generally and Specifically to Demonstrate* Corpus *Delicti Because the Relevance of and Need for the Evidence Outweighed Its Prejudicial Impact,* 52 **Tex.** L. Rev. 585 (1974).

[87] United States v. Woods, 484 F.2d 127 **(4th** Cir. 1973), *cert. denied,* 94 *S.* Ct. 1566 (1974).

Under both the doctrine and the character theory shown in Figure 1, the trier of fact begins at the same starting point, the evidence of the accused's uncharged crimes. However, when the trier engages in character reasoning, the initial decision facing the trier is whether to infer from the evidence that the accused has a bad character.[88] In contrast, under the doctrine of chances, the trier need not focus on the accused's subjective character. Under the doctrine of chances, the initial decision facing the trier is whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused.[89] The decision is akin to the determination the trier must make in a tort case when the plaintiff relies on *res ipsa loquitur*. In the tort setting, the trier must decide objectively whether the most likely cause of the plaintiff's injury is the defendant's negligent act.[90] In the present setting, the trier must determine whether the more likely cause of the victim's injury is the act of another human being.

Assume *arguendo* that statistics compiled by the United States Public Health Service indicate that during a twenty-five-year period, only two percent of American children experienced an accidental cyanotic episode. Contrast that figure with the incidence of cyanotic episodes experienced by the children in Ms. Woods' custody. Suppose, for example, that during the same twenty-five-year period, twenty percent of those children had cyanotic episodes. The frequency of the episodes among those children far exceeds the national average for such episodes. The episodes are so recurrent among those children that it is objectively implausible to assume that all those episodes were accidental.[91] Either one or some of those episodes were caused by human intervention, or Ms. Woods is one of the most unlucky people alive.[92]

Like the theory of relevance shown in Figure 2, on its face the doctrine of chances differs from the character evidence theory depicted in Figure 1. More importantly, unlike the theory shown in Figure 2, the doctrine is distinguishable from a character reasoning theory in terms of the pertinent policies. The probative dangers posed by the doctrine differ to a marked degree from the risks raised by a character theory.

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[88] Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 Crim. L.Q. 43, 46, 48, 54, 56 (1979).

[89] *Id.* at 48-49; Comment, *Developments in Evidence of Other Crimes*, 7 U. Mich. J.L. Ref. 535, 539 (1974).

[90] G. Morris & C. Morris, Torts 117-25 (2d ed. 1980); Prosser and Keeton on the Law of Torts § 40 (W. Keeton 5th ed. 1984).

[91] Comment, *supra* note 35, at 1225.

[92] Elliott, *supra* note 59, at 289.

One risk raised by a character theory is that, at least at a subconscious level, the jury will be tempted to punish the accused for uncharged misdeeds. That risk is acute under a character theory because the theory forces the jury to concentrate on the accused's character or disposition. The jurors must consciously address the question, "What type of person is the accused?" There is no need for the jurors to grapple with that question under the doctrine of chances. There is an undeniable possibility that on their own motion, the jurors may advert to the question. However, unlike a character theory, the doctrine of chances does not compel the jurors to focus on the accused's subjective disposition.[93] Consequently, the nature of the initial inferential step under the doctrine significantly reduces the risk of a decision on an improper basis.

The second probative danger raised by a character theory is that the jury will overvalue the probative worth of the item of evidence. Although general character has only slight[94] or small[95] relevancy to the issue of the accused's conduct on a specific occasion, we fear that the jurors will treat character as a reliable predictor of conduct.[96] There is less risk of overestimation of probative value under the doctrine of chances. The doctrine invites the trier to compare the accused's experience with statistical data or the trier's knowledge of everyday human experience. We commonly accept the trier's knowledge of "the ways of the world" as a trustworthy basis for legal reasoning. That knowledge is one of the bases for the *res ipsa loquitur* doctrine,[97] and the jury instructions in many jurisdictions specifically encourage jurors to employ that knowledge as a basis for resolving factual disputes.[98]

Because the theory of relevance depicted in Figure 3 is distinguishable from the forbidden theory depicted in Figure 1, prosecutors

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[93] E. Imwinkelried, *supra* note 4, § 4:01.

[94] 1 B. Jefferson, California Evidence Benchbook § 21.3 (2d ed. 1982); Comment, *Evidence—Other Crimes—&lancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity,* 6 Rut.-Cam. L.J. 173, 183-84 (1974).

[95] Blakey, *An Introduction to the Oklahoma Evidence Code,* 14 Tulsa L.J. 227, 271 (1978).

[96] R. Cross & N. Wilkins, An Outline of the Law of Evidence 172 (1964).

[97] G. Morris & C. Morns, Torts 117-25 (2d ed. 1980); Prosser and Keeton on the Law of Torts § 40 (W. Keeton 5th ed. 1984).

[98] *E.g.*, 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions—Civil and Criminal § 10.01 (3d ed. 1977) (this instruction tells the jury that in evaluating a witness' scredibility, the jurors should consider "the probability or improbability of the witness' statements .... ''); 1 L. Sand, J. Siffert, W. Loughlin & S. Reiss, Modern Federal Jury Instructions para. 7.01 (1989) ("In deciding the question of credibility, remember that you should use your common sense, ... and your experience").

properly may rely on the doctrine of chances as a noncharacter theory for satisfying Rule 404(b).[99] However, the courts should not admit uncharged misconduct evidence as a matter of course whenever the prosecutors assert that the evidence is relevant under the doctrine of chances to prove the *actus reus*. Rather than accepting the prosecutor's argument as *ipse dixit*, the courts should carefully evaluate the evidence to ensure that the prosecutor has established the factual predicate for invoking the doctrine.[100] In theory, there is a wide distinction between character reasoning and the use of the doctrine of chances to establish the *actus reus*. In practice, however, the distinction can be a thin,[101] difficult line for the jurors to draw: while the two doctrines posit different intermediate inferences, under both doctrines the jurors draw an ultimate inference of conduct. Moreover, the lax application of the doctrine of chances can eviscerate the character evidence prohibition. Just as every true crime includes a *mens rea*, an *actus reus* is also an essential element of each true crime.[102] If uncharged misconduct becomes routinely admissible to prove the *actus reus*, there will be little left to the prohibition. Before admitting evidence of the accused's uncharged crimes to establish the *actus* under the doctrine of chances, the trial judge must ensure that the prosecutor has strictly satisfied the following foundational requirements.

Each uncharged incident must be roughly similar to the charged crime. In the hypothetical at the outset of this article, the prosecutor offered testimony about the accused's uncharged crime to establish the accused's identity as the perpetrator of the charged offense. The prosecutor argued that the uncharged incident was relevant on a noncharacter theory because both crimes evidenced the same distinctive *modus operandi*. When the prosecutor relies on the *modus operandi* theory to establish identity, there must be a high degree of similarity between the charged and uncharged incidents.[103] Although the crimes need not be carbon copies,[104] the test is stringent.[105] The similarities must be so striking that they create the

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[99]Comment, *supra* note 35, at 1227.

[100]1 B. Jefferson, ***supra*** note 94, § 21.4.

[101]United States v. Bass, 794 F.2d 1305, 1313 (8th Cir.), *cert. denied*, 479 U.S. 869 (1986).

[102]W. LaFave & A. Scott, *supra* note 69, §§ 3.1- .2; R. Perkins & R. Boyce, *supra* note 69, at 605-11.

[103]Carter v. Hewitt, 617 F.2d 961, 968 (3d Cir. 1980); Shifflet, *Admissibility of Evidence Disclosing Other Crimes*, 5 Hastings L.J. 73, 76 (1954).

[104]United States v. Ingraham, 832 F.2d 229, 232 (1st Cir. 1987), ***cert. denied,*** 108 S. Ct. 1738 (1988).

[105]United States v. Lail, 846 F.2d 1299 (11th Cir. 1988)

inference that all the acts are the handiwork[106] of the same criminal.[107] Assume, for example, a variation of the Woods fact situation. The body of the victim, who died of cyanosis, was found under a heavy blanket and several thick pillows. A year earlier another child in the accused's custody died of cyanosis. However, on the earlier occasion the body was found at the bottom of a hay stack on the premises. Because the two incidents lack a common "signature quality"[108] *modus*, the judge could not admit testimony about the earlier incident to show the accused's identity as the perpetrator of the charged offense.

To trigger the doctrine of chances, the uncharged incident must also be similar to the charged crime.[109] A dissimilar uncharged incident has, at most, a negligible effect on the probability of an accidental occurrence of the social harm.[110] However, the required degree of similarity is not as great as the degree necessary to invoke the *modus operandi* theory!" Under the doctrine of chances, it suffices that all the incidents fall into the same general category.[112] In the variation of the Woods case in the preceding paragraph, the earlier cyanotic episode would probably be admissible to help establish the *actus reus.* In both incidents, the cause of death was cyanosis; it is objective improbability of so many accidental cyanotic episodes that generates the inference of an *actus reus.*

Considering the losses in both the charged and uncharged incidents, the accused has suffered the loss more frequently than the typical person endures such losses accidentally. The courts and commentators intuitively recognize that when the prosecutor resorts to the doctrine of chances, it is highly relevant to consider the number of losses the accused has suffered. The *Woods* case is a classic example of the utilization of the doctrine because the twenty other

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[106]United States v. Morano, 697 F.2d 923, 926 (11th Cir. 1983); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); United States v. Park, 525 F.2d 1279 (5th Cir. 1976).

[107]R. v. Morris, 54 Cr. App. Rep. 69, 80 (1970).

[108]United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982), *cert. denied,* 461 U.S. 909 (1983); United States v. Rappaport, 19 M.J. 708 (A.F.C.M.R. 1984); People v. Alvarez, 44 Cal. App. 3d 375, 118 Cal. Rptr. 602 (1975); Dickey v. State, 646 S.W.2d 232, 240 (Tex. Cr. App. 1983); Collazo v. State, 623 S.W.2d 647 (Tex. Cr. App. 1981).

[109]Comment, *supra* note 35. at 1230, 1234.

[110]*Id.* at 1230.

'"United States v. Baldarrama, 566 F.2d 560 (5th Cir.), *cert. denied,* 439 U.S. 844 (1978); United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977), *cert. denied,* 439 U.S. 847 (1978)); Shifflet, *Admissibility of Evidence Disclosing Other Crimes,* 5 Hastings L.J. 76 (1954); Survey *Evidence—State v. Ellis: The Other Wrongful Act Rule,* 15 Creighton L. Rev. 281, 288 (1981).

[112]E. Imwinkelried, *supra* note 4, §§ 3.11, 5.05.

cyanotic incidents were so numerous.[113] However, in analyzing the propriety of applying the doctrine in a particular case, the courts[114] and commentators[115] have tended to focus on the absolute size of the number of incidents. The debate usually is phrased in terms of whether a single uncharged incident is enough to trigger the doctrine of chances.[116]

It is submitted that the focus on the absolute size of the number of incidents is wrong-minded. Instead, the courts should consider the relative frequency of the incidents. The most meaningful question is whether, cumulatively, the losses suffered by the accused—the number of cyanotic episodes experienced by the accused's children or the number of fires at buildings owned by the accused—exceed the frequency rate for the general population. The total number of losses must reach an improbability threshold,[117] and the number reaches that threshold only when the frequency with which the accused suffers the losses is greater than the general frequency with which such losses occur.

Revisit the Woods fact situation. Assume again that during the relevant twenty-five-year period, only two percent of the children in the United States experienced cyanotic episodes. During that period, the children in Ms. Woods' custody had twenty cyanotic incidents. Suppose that there were a total of one hundred children in her custody during those twenty-five years. Thus, twenty percent of the children in the accused's custody experienced cyanotic episodes. The uncharged incidents are highly probative of an *actus reus* because the accused's incidence of losses is several times the frequency for the general population.

The key is the relative frequency rather than brute number of incidents. Vary the facts. Suppose that Ms. Woods had been in charge of a huge orphanage during the twenty-five-year period. During the twenty-five year-period a total of 3,000 children were in the custodial care of the orphanage. The constant is that during the twenty-five year period, the children in her custody suffered a total of twenty cyanotic episodes. Should the judge admit the uncharged misconduct evidence in this variation of the Woods case? The answer is No. The evidence has not attained the improbability threshold. During the same period two percent of American children experienced cyanotic episodes. Although the absolute size of the number of uncharged

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[113]United States v. Woods. **484** F.2d 127 **(4th** Cir. 1973). *cert. denied*, 415 U.S. 979 **(1974).**

[114]State v. Allen, 301 Or. 569, 725 P.2d 331 (1986).

[115]Comment, *supra* note 35, at 1228.

[116]*See supra* notes 114-115; People v. Spoto. 1990 **W.L.** 93074 (Colo.).

[117]Comment, *supra* note 35, at 1228.

incidents—twenty—is impressive, only 1.5% of the children in the accused's custody had cyanotic experiences. The relative frequency of the accused's losses does not make it objectively improbable that on the occasion of the charged offense, the child's death resulted from an actus **reus.**

How can the prosecutor establish the frequency with which the type of loss involved in the case occurs in the general population? There may be pre-existing data compilations. Government agencies or private research organizations might have gathered empirical data, for example, in the form of an epidemiological study.[118] The studies may be so authoritative that the data is judicially noticeable,[119] or the study may fall within the learned treatise exception to the hearsay rule.[120] If the data has not been compiled but it is accessible, the prosecutor can retain an expert to use recognized statistical techniques to gather the data establishing the frequency.[121] Failing all other methods, the prosecutor can ask the judge to rely on his or her conception of common human experience to resolve the question of whether the accused suffered the loss more frequently than the typical person could expect to sustain the loss. This last technique is imprecise. However, it is the same sort of judgment that the trial judge makes when the judge must decide whether a *modus operandi* is so unique that it is probably the handiwork of a single criminal. In making that decision, the judge rarely has the benefit of empirical data about the frequency with which a particular *modus* is used.[122] Yet every jurisdiction allows the judge to rely on common sense and experience to make that decision.

Of course, as the proponent, the prosecutor has the burden of establishing all the foundational facts conditioning the admissibility of the uncharged misconduct evidence under the doctrine of chances.[123] At the end of his or her analysis of all the foundational testimony, the judge genuinely may doubt whether the frequency of the accused's losses exceeds the incidence for the general population. In that event, the judge has no choice but to exclude the pro-

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[118]Dore, *A Proposed Standard for Evaluating the Use of Epidemiological Evidence in Toxic Tort and other Personal Injury Cases, 28* Howard *L.J.* 677 (1985).

[119]Fed. R. Evid. 201(b) (2) states that "[a]judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

[120]Fed. R. Evid. 803(18); Imwinkelried, *The Use of Learned Scientific Treatises Under Federal Rule of Evidence 803(18), 18* Trial 56 (Feb. 1982).

[121]P. Giannelli & E. Imwinkelried, Scientific Evidence § 15-4(B) (1986).

[122]United States v. Rogers, 769 F.2d 1418 (9th Cir. 1985), is an exceptional case. In that case, eyewitnesses described the bank robber as wearing a bandanna. The prosecutor went to the length of presenting an F.B.I. agent's testimony that of the 1,800 bank robberies in the Los Angeles area during a certain time period, only two involved persons wearing a bandanna.

[123]E. Imwinkelried, *supra* note 4, § 9:49.

secutor's evidence. If the judge has no satisfactory basis for determining the frequency of such accidental occurrences among the general populace, the judge may not admit the uncharged misconduct evidence under the aegis of the doctrine of chances.

The issue of the occurrence of an actus reus *must be in bona fide dispute: the prosecution must have a legitimate need to resort to the uncharged misconduct to prove the* actus reus. The first two foundational requirements, mandating proof of similarity and a frequency of loss exceeding the improbability threshold, flow from the character evidence prohibition codified in Rule 404(b). If either requirement is unmet, the prosecutor has not triggered the doctrine of chances; the uncharged misconduct evidence does not possess relevance on a noncharacter theory. The last foundational requirement, though, flows from Federal Rule of Evidence 403.

Bare logical relevance on a noncharacter theory is not enough to guarantee the admissibility of uncharged misconduct evidence. The evidence also must pass muster under Rule 403. Rule 403 permits the judge to exclude logically relevant evidence when the accompanying probative dangers outweigh the probative value of the evidence. The Advisory Committee Note to Rule 403 indicates that in assessing the probative value of an item of potentially prejudicial evidence, the judge ought to consider whether the proponent has a bona fide need to introduce that item.[124]

We shall consider the question of the extent of the prosecution's need for uncharged misconduct evidence in detail in the next subsection devoted to the use of uncharged misconduct evidence to prove *mens rea*. We shall defer the in-depth discussion of prosecution need until that subsection, because that subsection addresses the primary topic of this article, the use of uncharged crimes to establish intent. However, even an abbreviated discussion of the case law governing the use of other crimes to prove *actus reus* must make the point that the prosecutor may resort to other crimes evidence for that purpose only when the occurrence of the *actus reus* is in genuine dispute. In a 1990 decision[125] the Court of Appeals for the Ninth Circuit made that point in emphatic fashion. The case was a habeas corpus proceeding based on a state conviction. Like Ms. Woods, the accused in this case was charged with infanticide. Unlike Ms. Woods, the accused did not contend that the decedent child suffered the injuries accidentally; as the Ninth Circuit commented, "[i]n the instant case, no claim was made that the child died accidentally."[126] Nevertheless,

[124] Adv. Comm. Note, Fed. R. Evid. 403. ("The availability of other means of proof may also be an appropriate factor"); S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 362 (2d **ed.** 1986) ("actually disputed").

[125] McGuire v. Estelle, 902 F.2d **749** (9th Cir. 1990).

[126] *Id.* at 754.

as in *Woods*, the trial judge permitted the prosecutor to introduce uncharged misconduct evidence for the stated reason that the evidence was relevant to prove the *actus reus*. The Ninth Circuit not only held that the trial judge erred, but also ruled that the uncharged misconduct evidence was so virulent that the erroneous admission of the evidence denied the accused due process and rendered the trial fundamentally unfair.[127] The court emphasized that while highly prejudicial, the evidence had minimal probative value, because the accused had not disputed the issue of the occurrence of an *actus reus*.[128]

The Ninth Circuit's insistence that the issue be controverted is well taken. Uncharged misconduct evidence often has dual logical relevance; even when the evidence is relevant on a noncharacter theory, it also incidentally shows the accused's bad character.[129] If the charge is infanticide and the uncharged misconduct evidence establishes the death of several other children in the accused's custody, the criminal disposition inference is patent even when neither the prosecutor nor the judge mentions the inference. If the judge admits uncharged misconduct to prove the *actus reus* when the evidence has only tenuous[130] probative value for that purpose, there is a significant risk that the jurors will misuse the evidence by drawing the forbidden character inference.[131] Unless the prosecution has a bona fide need to use the evidence to prove the occurrence of an actus *reus*, the predominant effect[132] on the jurors' minds may be to "serve mostly to demonstrate that the Defendant had the propensity to commit the crime charged, the one impermissible use of such evidence."[133]

B. THE USE OF THE DOCTRINE OF CHANCES TO PROVE THE MENS REA

In criminal law, conduct can be "accidental" in two, very different senses. As subsection **A** explained, conduct can be accidental in the sense that the conduct does not represent an *actus reus*. A social loss such as a death can occur without the causal intervention of another human being; the death may be the result of "an act of God"

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[127] *Id.* at 753-54.

[128] *Id.* at 754.

[129] Note, *Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. Va. L. Rev. 142, 144 (1951).

[130] Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Trials*, 14 S. Tex. L.J. 69, 74 (1973); Carter, *The Admissibility of Similar Facts Evidence*, 69 Law Q. Rev. 80, 92 (1953).

[131] Z. Cowen & P. Carter, Essays on the Law of Evidence 121-23 (1956).

[132] United States v. Burkhart, 458 F.2d 201, 204-05 (10th Cir. 1972); Ordover, *supra* note 33, at 147.

[133] United States v. Anthony, 712 F. Supp. 112, 117 (N.D. Ohio 1989).

such as an earthquake or flood.[134] As the Woods case illustrates,[135] when the accused claims that the conduct in question was accidental in this fundamental sense, the prosecutor sometimes legitimately may offer uncharged misconduct evidence under the doctrine of chances to negate the claim.

There is a second sense in which allegedly criminal conduct can be accidental. The accused may admit that he performed the *actus reus,* but claim that he did so with an innocent state of mind.[136] For example, the accused may concede that he had possession of a contraband drug, but deny that he knew that the substance was an illegal drug; he might testify that he thought that the substance was a lawful medicine.[137] Or an accused might admit that he received stolen property, but defend on the theory that he was unaware that the property was stolen.[138] In this context, when the accused characterizes the conduct as "accidental," the accused means that he or she performed the act without the required ***mens rea.***

Just as the government may offer evidence of the accused'sother crimes to disprove "accident" in the first sense, the prosecutor may attempt to introduce uncharged misconduct evidence to negate "accident" in the second sense.[139] Dean Wigmore proposed the following hypothetical to exemplify this use of uncharged misconduct evidence:

> [I]f A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair

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[134]R. Perkins & R. Boyce, Criminal Law 610 (3d ed. 1982).

[135]United States v. Woods, 484 F.2d 127 (4th Cir. 1973), *cert. denied,* 415 U.S. 979 (1974).

[136]W. LaFave & A. Scott, *supra* note 69, § 5.1.

[137]United States v. Meneses-Davila, 580 F.2d 888 (5th Cir. 1978); United States v. Greenwood, 19 C.M.R. 335, 341-42 (C.M.A. 1955).

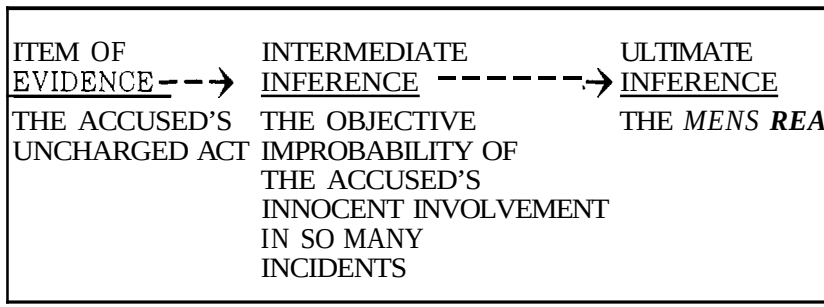
[138]R. Perkins & R. Royce, *supra* note 69, at 394-405.

[139]Comment, *supra* note 35, at 1226.

> possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e, a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i.e.*, criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.[140]

Essentially, Dean Wigmore relies on the theory of logical relevance depicted in Figure **4.**

Figure 4



Like the theory shown in Figure **3,** this theory enables the jury to reason about the case without relying on any forbidden inferences about the accused's subjective, personal character. As under Figure **3,** the intermediate inference in this theory is a conclusion about the objective improbability[141] of the accused's innocent involvement in so many similar incidents such as instances of possession of contraband drugs or receipts of stolen property.

However, like the theory depicted in Figure **3,** this theory easily can be abused. As Section I noted, intent is an essential element of every true crime.[142] Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke Wigmore's doctrine of chances; the prosecutor can

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[140] 2 J. Wigmore, Evidence in Trials at Common Law § **302** (1979); Myers, *supra* note 22, at 516-17; Ordover, *supra* note **33,** at 169; Teitelbaum & Hertz, *supra* note **22,** at 425-26.

[141] Ordover, *supra* note 33, at 168.

[142] W. LaFave & **A.** Scott, *supra* note 69, §§ 3.1, **3.4-** .5, 3.8; R. Perkins & R. Boyce, *supra* note 69, at 826-40.

always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove mens *rea*. If the courts accept these arguments uncritically, the prosecutor may be able to introduce bad character evidence in disguise.[143] Unfortunately, as one commentator has already observed,[144] there is mounting evidence that the courts have tended to be too receptive to prosecutors' invocation of the doctrine of chances to prove *mens rea*.[145]

To counter this tendency, the courts should enunciate clearly and rigorously enforce the foundational requirements applicable when the prosecutor relies on the doctrine of chances to establish *mens rea*. The requirements parallel the foundational requirements for invoking the doctrine to prove the *actus reus*.

Each uncharged incident must be roughly similar to the charged crime. To bring the doctrine into play, the prosecutor must show that the uncharged incident is similar to the charged offense. As Dean Wigmore emphasized in the analysis of his famous hypothetical, the facts give rise to an inference of *mens rea* because "the chances of an inadvertent shooting on three successive similar occasions are extremely small . . ."[146] It flies in the face of common sense to assume that on all three occasions, the accused had an innocent state of mind;[147] a coincidence of three, inadvertent similar acts is objectively unlikely.[148]

In several respects, this foundational requirement tracks the corresponding requirement that the prosecutor must satisfy when the government relies on the doctrine of chances to prove the *actus reus*. The degree of similarity between the charged and uncharged incidents need not be as great as the degree required when the prosecutor relies on the *modus operandi* theory to prove identity.[149]

Further, under both applications of the doctrine of chances, the prosecutor must demonstrate that the physical elements of the charged and uncharged offenses are similar.[150] The earlier discussion of

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[143]Ordover, *supra* note 33, at 168.

[144]*Id.*

[145]In Harvey v. State, 604 P.2d 586 (Alaska 1979), the trial judge permitted the prosecution to introduce uncharged misconduct evidence to disprove accident and establish mens *rea* even though the accused did not defend on the basis of lack of *mens rea*.

[146]2 J. Wigmore, Evidence in Trials at Common Law § 302 (1979); People v. Spoto. 1990 W.L. 93074 (Colo.).

[147]United States v. Semak, 536 F.2d 1142, 1145 (6th Cir. 1976).

[148]*Id.*

[149]United States v. Peterson, 20 M.J. 806 (N.M.C.M.R. 1985); People v. Robbins, 45 Cal. 3d 867, 755 P.2d 355. 248 Cal. Rptr. 172 (1988), *cert. denied,* 109 S. Ct. 849 (1989).

[150]Comment, *supra* note 35, at 1230.

the *Woods* case pointed out that the charged and uncharged incidents were sufficiently similar to trigger the doctrine of chances because all the incidents involved the same medical condition, cyanosis.[151] While the physical elements must be similar,[152] the courts apply the similarity requirement laxly. Suppose, for example, that the accused is charged with knowing possession of heroin and defends on the basis that he was unaware that the substance in his possession was a contraband drug. In all likelihood, the court would permit the prosecutor to introduce testimony about uncharged incidents in which the accused was found in possession of marijuana[153] or amphetamine~. In short, the physical elements of the charged and uncharged events need not be identical.[155]

The courts are less tolerant of dissimilarities between the victims of the charged and uncharged incidents.[156] When the charged crime is a sexual offense against a young girl, the judge may exclude prosecution testimony about an uncharged offense against a boy.[157] If the charged offense is a sexual offense against a child, the judge may bar evidence of an uncharged crime against an adult.[158] In a case charging an assault on a police officer, the judge may well sustain a defense objection to evidence of uncharged attacks on private person~ The courts should insist that the victims be similar when the prosecutor offers uncharged misconduct evidence under the doctrine of chances to prove *mens rea*. The focus is the accused's state of mind. The accused's intent may vary with the victim's identity. The accused may have radically different attitudes toward different groups of persons, and the trier can infer wrongful intent much more confidently if the accused has victimized the same type of person on other occasions.

Considering the accused's involvement in both the charged and uncharged incidents, the accused has been involved in such events more frequently than the typical person. Proof of similarity between the charged and uncharged incidents is a necessary condition to invoking the doctrine of chances. However, standing alone, proof of

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[151] *See supra* notes 103-112 and accompanying text.

[152] Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297, 310 (1982); Case Note, *Evidence: Prior Crimes Used to Show Specific Intent and Identity*, 50 Marq. L. Rev. 133, 134 (1966).

[153] United States v. Skramstad, 649 F.2d 1259 (8th Cir. 1981).

[154] United States v. Parkison, 417 F. Supp. 730 (E.D. Wis. 1976).

[155] United States v. Cardillo, 708 F.2d 29 (1st Cir.), *cert. denied*, 464 U.S. 1010 (1983); Note, *Evidence—Admissibility of Other Crimes*, 18 Wake Forest L. Rev. 571, 582-83 (1982).

[156] Comment, *supra* note 35, at 1230.

[157] Garza v. State, 632 S.W.2d 823 (Tex. App. 1982).

[158] Comment, *supra* note 35, at 1230.

[159] United States v. Jaqua, 485 F.2d 193 (5th Cir. 1973); *see also* United States v. San Martin, 505 F.2d 918 (5th Cir. 1974).

similarity is insufficient to bring the doctrine into play. Another necessary condition is proof that the accused has been involved in similar incidents so often that it is objectively unlikely that he became involved innocently. This foundational requirement is obviously similar to the second foundational requirement applicable when the prosecutor relies on the doctrine of chances to prove the occurrence of an *actus reus*. In applying both requirements, the judge must engage in relative frequency analysis. However, the requirements differ in kind and degree, and the differences may make it more difficult for the prosecution to satisfy this foundational requirement when the issue is the accused's *mens rea*.

The requirements for the two applications of the doctrine of chances differ in kind because the application determines the nature of the frequency the judge must analyze. When the prosecutor invites the court to apply the doctrine to prove the *actus reus*, the focus is on the frequency of a particular type of loss—the death of a child in a person's custody or the fire at a person's building. In contrast, when the prosecutor asks the court to employ the doctrine to establish *mens rea*, the relevant frequency is the incidence of the accused's personal involvement in a type of event—the discharge of a weapon in Wigmore's hypothetical, the possession of contraband drugs, or the receipt of stolen property. To intelligently decide whether the prosecutor's evidence exceeds the objective improbability threshold,[160] the judge must define the correct relative frequency.

The difference in kind between the foundational requirements under the two applications of the doctrine **of** chances results in a further difference in degree. The requirements differ in the practical degree of difficulty of proving the relevant frequencies. Many empirical studies document the incidence of social losses such a5 cyanotic episodes, deaths caused by asphyxiation, and fires. Quite apart from the utility of this data to judges struggling with the application of the doctrine of chances, there are other important social reasons for collecting the data. Many of these data collections play **a** critical role in medical diagnosis. Other data collections are useful to businesses such as insurance companies. In a given case, it may be relatively easy for the prosecutor to marshal1 the frequency data needed to satisfy the foundational requirement applicable when the question is the occurrence of the *actus reus*.

However, it is far more difficult to find the relevant frequency data when the question is the existence of the *mens rea*. There may be little or no data on such questions as how often the typical citizen is likely to be found in possession of contraband drugs or stolen pro-

[160] Comment, *supra* note 35, at 1227

perty. The judge is more likely to have to rely on her common sense and knowledge of human experience. The extent of the judge's pertinent knowledge may be an intuitive belief that the inadvertent possession of illicit drugs or stolen property is probably a "once in a lifetime" experience for an innocent person. Thus, there is ordinarily more conjecture when the prosecutor invokes the doctrine of chances to prove *mens* rea—all the more reason, of course, to employ the doctrine cautiously. As when the prosecutor relies on the doctrine of chances to prove the *actus reus*, the burden of proving the preliminary facts rests on the prosecutor.[161] If after weighing all the foundational testimony the judge believes that it would be speculative to find that the prosecution has attained the improbability threshold, the judge should exclude the uncharged misconduct evidence.

The issue of the existence of the mens rea *must be in bona fide dispute: the prosecution must have a legitimate need to resort to the uncharged misconduct evidence to prove intent.* Subsection A observed that uncharged misconduct offered to prove the *actus reus* must pass muster under Federal Rule 403 as well as under Rule 404(b).[162] The same observation obtains when the prosecution attempts to introduce evidence of the accused's other crimes to establish the *mens rea*. The prosecution must have a bona fide need to resort to the potentially prejudicial uncharged misconduct evidence.[163] To assess the extent of the prosecution need, the judge must painstakingly evaluate the state of the record when the prosecutor offers the evidence. There are four possible variations of the state of the record.

In one variation, the accused already has disputed the issue of the existence of the *mens rea*. There are several ways in which the accused could do so. During opening statement,[164] the defense attorney might assert that at the time of the *actus reus*, the accused had an innocent state of mind. The accused[165] or a defense witness[166] may give testimony calling into question the existence of the *mens rea*. If a prosecution witness's testimony points to the existence of the *mens rea*, a pointed cross-examination by the defense attorney could serve to place intent in doubt.[167] The common denominator in these

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[161] E. Imwinkelried, *supra* note 4, §§ 9:47, 9:49.

[162] *See supra* note 124 and accompanying text.

[163] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 362 (2d ed. 1986) ("actually disputed"); *see* United States v. Brooks, 22 M.J. 441 (C.M.A. 1986); United States v. Rappaport, 22 M.J. 445 (C.M.A. 1986).

[164] United States v. Badolato, 710 F.2d 1509 (11th Cir. 1983); United States v. Olsen, 589 F.2d 351 (8th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979)); United States v. Cohen, 489 F.2d 945, 950 (2d Cir. 1973).

[165] United States v. Erb, 596 F.2d 412 (10th Cir.), *cert. denied*, 444 U.S. 848 (1979); Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. Rev. 261, 277 (1977).

[166] People v. Nible, 200 Cal. App. 3d 838, 247 Cal. Rptr. 396 (1988).

[167] E. Imwinkelried, *supra* note 4, § 8:14.

cases is that intent is more than a purely formal issue. The accused is actively contesting[168] the intent issue. All courts agree that this state of the record warrants the receipt of otherwise admissible uncharged misconduct evidence to establish *mens rea*.

Now shift to the variation at the polar extreme. Assume that the parties have entered into a formal stipulation as to the existence of intent.[169] The accused might have decided to defend on a theory other than lack of *mens rea*. If the accused and the prosecution stipulate to the existence of the intent, the stipulation effectively removes the *mens rea* issue from the range of dispute in the case. In this state of the record, all courts agree that unless the uncharged misconduct evidence is relevant to another issue, the evidence is inadmissible to prove intent.

While it is easy to determine the proper outcome in the first two variations of the state of the record, the next two variations are troublesome.

In the third variation, although there is no formal stipulation, the accused informally concedes the *mens rea* issue. There might be several reasons why the accused would be willing to informally concede intent absent a formal stipulation. In many jurisdictions, the accused cannot compel the prosecution to enter into a stipulation.[170] Even if the accused offered to formally stipulate, the prosecution might reject the offer. Or the defense might be reluctant to enter into a formal stipulation. Suppose, for instance, that the accused intended to defend on an alibi or misidentification theory.[171] Even though the accused does not contemplate contesting the intent element of the crime, the accused might be leery of stipulating that whoever committed the *actus reus* possessed the requisite ***mens rea***. Unless the judge clearly explains the law governing stipulations,[172] a juror might suspect that any accused who knew enough about the crime to stipulate to the **mens** *rea* must have been involved personally in the crime. The juror might not realize that evidence law permits parties to stipulate to the existence of facts which they lack personal knowledge of.

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[168]United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977); United States v. Broadway, 477 F.2d 991 (5th Cir. 1973); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); Elliott, *supra* note 59, at 292, 296.

[169]Currently, a sharp split of authority exists among the courts over the question of whether the accused can force the prosecution to enter into a stipulation as to the existence of an ultimate fact in the case. E. Imwinkelried, *supra* note 4, § 8:11. An analysis of that split of authority is beyond the scope of this article.

[170]E. Imwinkelried, *supra* note 4, § 8:11.

[171]*Id.* § 8:13.

[172]*See generally* E. Imwinkelried, Evidentiary Foundations 307-12 (2d ed. 1989).

In this light, the accused may well find herself in a situation in which she is willing to concede informally the existence of *mens rea*. Assume that the defense counsel assures[173] the trial judge that during both opening statements and closing argument, the defense counsel will state expressly that as far as the defense can tell, the perpetrator of the charged crime possessed the required *mens rea*. The defense counsel also assures the judge that the defense will not object if the judge mentions and highlights the informal concession during the final jury charge.[174] If the defense makes and lives up to these assurances, the trial judge should exclude any uncharged misconduct testimony offered to prove **mens** *rea*. It is true that there is still a chance that the jurors could acquit for want of evidence of intent. However, given the defense concessions and the judicial comment, it would be highly irrational for the jurors to do so. Realistically, the possibility is so remote that it does not justify exposing the accused to the much livelier possibility that the jury will misuse the testimony as general bad character evidence. On balance, the judge should rule the uncharged misconduct evidence inadmissible in this variation.

In the last variation of the state of the record, although the accused explicitly defends on another theory such as alibi or misidentification, the accused is unwilling even informally to concede the *mens rea*.[175] The defense attorney may want to leave open the possibility that the jury will acquit for lack of evidence of intent. The defense attorney might be especially tempted to follow this tack when the charge requires a special *mens rea* element and the jury instruction on the *mens rea* element seems to impose an onerous burden on the prosecution.

In this variation, the prosecution generally should be entitled to introduce otherwise admissible uncharged misconduct evidence to establish the *mens rea*. When the prosecutor is relying on the doctrine of chances to prove *mens rea* rather than the *actus reus*, there may be little admissible evidence of the *mens rea* other than uncharged crimes evidencing the same intent,

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[173] If the defense attorney reneges on the assurance during summation, the prosecution may move to reopen the evidence. People v. Tassel, 36 Cal. 3d 77, **83** n.3, 679 P.2d 1, 4 n.3, 201 Cal. Rptr. 567, **570** n.3 (1984).

[174] In many states, the trial judge has lost the common-law power to comment on the evidence. H. Kalven & H. Zeisel, The American Jury 418-21 (1966). It would not constitute "comment" for the judge to merely mention the defense's informal concession; even in jurisdictions barring judicial comment on the weight of the evidence, the judge may sum up. *Id*. However, the judge should go beyond merely summarizing the state of the record. The judge should tell the jury that there is no real dispute over the existence of the ***mens*** *rea*. Because the prohibition of judicial comment is designed to protect the accused, the accused should be deemed competent to waive the prohibition.

[175] E. Imwinkelried, *supra* note 4, § 8:15.

The *actus reus* is a social loss caused by human agency.[176] There is often readily available physical evidence of the loss itself. In a homicide prosecution, a forensic pathologist can describe the body and authenticate photographs of the cadaver. Moreover, the prosecution may have expert testimony attesting that the loss was caused by human agency. Based on the wound pattern on the cadaver, the pathologist can opine that the manner of death was homicidal.[177]

In contrast, in the typical case in which the prosecutor attempts to establish the *mens rea*, the prosecutor may have little alternative evidence. In rare cases, the prosecutor is fortunate; the prosecutor has evidence that shortly before, during, or shortly after the crime the accused made statements reflecting the *mens rea*. However, more commonly, the prosecutor has no evidence of such statements. Worse still, the prosecutor often has no physical evidence or expert testimony. The prosecutor may be able to prove a death by producing a photograph of the cadaver, but no camera is capable of capturing and recording the mens *rea* of intent to kill. Further, the courts are more reluctant to admit testimony about *mens rea* by mental health experts than testimony about manner of death by forensic pathologists.[178] There has been extensive criticism of expert testimony by psychiatrists and psychologists.[179] There is widespread skepticism about the ability of mental health experts to retrospectively determine an accused's state of mind. In part due to that skepticism, in **1984** Congress amended Federal Rule of Evidence 704 to add the following language:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[180]

It is true that the prosecutor can invite the jury to infer the *mens rea* from the percipient witnesses' testimony describing the evidently rational, calculating manner in which the perpetrator committed the

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[176] *See supra* notes 82-84 and accompanying text.

[177] P. Giannelli & E. Imwinkelried, Scientific Evidence § 19-10(B) (1986).

[178] *See generally id.*, ch. 9.

[179] Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967) (Bazelon, J.); Burger. *Psychiatrists, Lawyers and the Courts, 28* Fed. Probation 3, 7 (June 1964); Shell, *Psychiatric Testimony: Science or Fortune Telling?*, Barrister, Fall 1980, at 8; Ziskin, *The Importance of Hard Data to Software Techniques*, in Scientific and Expert Evidence 1097, 1100-02 (2d ed. 1981).

[180] Fed. R. Evid. 704(b); *see* Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 Cornell L. Rev. 620 (1987).

actus reus.[181] In an exceptional case, that inference might be virtually conclusive evidence of an accompanying criminal intent.[182] However, that inference may be the prosecutor's only evidence of intent other than any available uncharged misconduct testimony. The prosecutor typically has many more evidentiary options when he or she endeavors to prove the *actus reus*. Apart from the uncharged misconduct testimony, there may be a dearth of evidence usable to establish *mens rea*.

In addition, if the defense refuses to concede the existence of *mens rea* and the judge nevertheless excludes the prosecution's uncharged misconduct evidence probative of intent, the jury instructions may make it very difficult for the prosecution to sustain its burden of proof. Absent a defense concession, the judge will have to charge the jury on the essential elements of the crime, including the *mens rea*. There is substantial authority that even absent an express defense request, the trial judge has a sua sponte obligation to instruct the jury on the elements of the charged offense.[183] We must assume that the jurors will be attentive to the instructions and apply them conscientiously. On that assumption, there is a good possibility that the jury will acquit for want of evidence in intent. When the question is the existence of the *mens rea*, the prosecutor ordinarily has a much more compelling need to resort to probative uncharged misconduct evidence. If the accused does not at least informally concede the existence of the mens *rea*, the prosecutor should presumptively[184] be entitled to introduce evidence of similar, sufficiently frequent uncharged incidents to prove intent under the doctrine of chances.

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[181] E. Imwinkelried, *supra* note 4, § 8:20.

[182] Comment, *supra* note 35, at 1222, 1224, 1236. Suppose, for example, that a hidden surveillance camera happened to videotape a murder on a business premises. The film shows the perpetrator load the weapon, hide in wait for the victim, shoot the victim three times, poke the body to ensure that the victim was dead, and fire a final shot for good measure. Viewing the film, any juror in his or her right mind would conclude that the perpetrator possessed the intent to kill at the time of the *actus reus*.

[183] *E.g.*, People v. Geiger, 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984); People v. Wickersham, 32 Cal. 3d 307, 650 P.2d 311, 185 Cal. Rptr. 436 (1982); People v. Modesto, 59 Cal. 2d 722, 382 P.2d 330, 331 Cal. Rptr. 225 (1963).

[184] Arguably, even absent a defense concession, the uncharged misconduct evidence should be inadmissible when the testimony about the *actus reus* almost conclusively demonstrates the existence of the *mens rea*. *See supra* note 182. However, such cases will be extremely rare.

IV. CONCLUSION

Following the example of the United Kingdom,[185] our courts may one day relax the character evidence prohibition in criminal cases. Distinguished American commentators have called for that relaxation.[186] However, at least for now, the American courts seem determined to adhere to the conventional prohibition.

If we are to continue to make any pretense of enforcing the prohibition, we must repudiate both of the doctrines discussed in this article. The character evidence prohibition is violated when we permit a prosecutor to rely on the theory depicted in Figure 2 to justify the admissibility for uncharged misconduct evidence. As Section II of this article hopefully demonstrated, that theory of admissibility is character evidence pure and simple.[187] While the theory differs cosmetically from traditional character reasoning, the theory squarely poses both of the probative dangers inspiring the character evidence prohibition. If the prosecutor's only argument for the admission of uncharged misconduct evidence is that theory of logical relevance, the prohibition mandates the exclusion of the evidence

The rejection of the theory depicted in Figure 2 will give prosecutors even more incentive to resort to the doctrine of objective chances. As Section III noted, a doctrine of chances theory possesses legitimate, noncharacter relevance. However, the theory is susceptible to abuse. The distinction between a verboten character theory and a permissible chances theory is a thin line[188] that a lay juror could easily lose sight of. To guard against that risk, the courts should en-

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[185]In R. v. Boardman [1975] A.C. 421, the House of Lords decided to relax the rigid character evidence prohibition. The Lords concluded that the difference between character and noncharacter theories of logical relevance is largely a difference of degree. Lord Cross argued that in a given case, an act of uncharged misconduct might have so much probative value—even on a character theory—that it would be an affront to common sense to exclude testimony about the misconduct. However, the Lords made it clear that the uncharged crime must have extraordinary probative value on a character theory to warrant admissibility. In the great majority of criminal cases. English courts still find character evidence inadequately probative. Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman*, 48 Mod. L. Rev. 29, 30, 37, 43 (1985). "Like Banquo's ghost," the distinction between character and noncharacter theories "reappears to demand attention" in English law. Allan. ***Similar Fact Evidence and*** *Disposition: **Law, Discretion,** and **Adniissihility.*** 48 Mod. L. Rev. **253,** 263 (1985).

[186]Hutton, *Commentary: **Prior** Bad **Acts** Evidence in **Cases** of **Sexual Contact with a Child,*** 34 S.D.L.Rev. 604 (1989); Kuhns, *supra* note 15; Uviller, *Evidence of Character **to** Prove Conduct: Illusion, Illogic, and **Injustice in the Courtroom***, 130 U. Pa. L. Rev. 846 (1982).

[187]Myers, *supra* notr 22, at 526.

[188]United States v. Bass, 794 F.2d 1305 (8th Cir.), *cert. denied*, 479 U.S. 869 (1986).

force rigorously the foundational requirements for triggering the doctrine of chances. The courts should admit uncharged misconduct evidence under the doctrine to prove **mens *rea*** only when the prosecutor can make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person. The prosecutor's uncharged misconduct testimony must satisfy both foundational requirements to ensure genuine noncharacter relevance under Rule 404(b). Even if the prosecutor can surmount the similarity and relative frequency hurdles, the judge should exclude the evidence under Rule **403** unless the intent issue is in bona fide dispute.

Intellectual honesty demands the repudiation of both of the doctrines currently threatening to engulf the character evidence prohibition. If we are going to modify or abolish the prohibition, it should be done explicitly in a straightforward fashion—not by legerdemain.

MILITARY RULE OF EVIDENCE 804(b)(3)'s STATEMENT AGAINST PENAL INTEREST EXCEPTION: CAN THE RULE STAND ON ITS OWN?

by Mark E. Sharp*

I. INTRODUCTION

When a witness is unavailable[1] to testify, Military Rule of Evidence 804(b)(3) provides, as an exception to the hearsay rule, for the admission of a statement against the declarant's penal interest:

> Statements against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.[2]

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'Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804(a) [hereinafter Mil. R. Evid. 804(a)].

> ***Definitions*** d ***unawvilability.*** "Unavailability as a witness" includes situations in which the declarant-
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> (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or
>
> (6) is unavailable within the meaning of Article 49(d)(2). A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement of wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Id.

[2]Mil. R. Evid. 804(b)(3).

The language of the rule is virtually identical to that found in Federal Rule of Evidence 804(b)(3),[3] which was promulgated in 1975.

The sixth amendment to the United States Constitution gives the accused in a criminal trial the right "to be confronted with the witnesses against him."[4] Even a casual reading of the Military Rules of Evidence and the sixth amendment indicates that neither can be read literally if they are to coexist. If a statement can be used at trial without the declarant testifying, the accused has no chance to confront the "witness against" him. If the sixth amendment were construed strictly, it would prohibit the use of all hearsay evidence, requiring confrontation of all "witnesses against" the accused. Rule 804(b)(3) does not require confrontation and, by its terms, seems to be in irreconcilable conflict with the sixth amendment.

Military Rule of Evidence 804(b)(3) leaves several questions unanswered. While the rule admits into evidence statements against penal interest that tend to inculpate the accused, what constitutional criteria should be examined to determine whether such statements should be admitted'?Why does the rule require corroboration for exculpatory but not for inculpatory statements against penal interest'? Why is this the only hearsay exception requiring corroboration? Does the rule conflict with the accused's right to present evidence in his or her favor?[5]

The answers to these questions lie in case law. The Committee on the Military Rules of Evidence intended that Military Rule of Evidence 804(b)(3) apply to statements against penal interest to the same extent as Federal Rule of Evidence 804(b)(3). Accordingly, this article will review the admissibility of statements against penal interest at common law and judicial interpretation of the applicability of the confrontation clause until the adoption of the Federal Rules of Evidence in 1975. It will then examine the legislative history of

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[3]The Federal Rule provides:

> Statement against interest. **A** statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability. or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. **A** statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed. R. Evid. 804(b)(3).

[4]U.S. Const. amend. VI.

[5]*See* Washington v. Texas, 388 U.S. 14 (1967) (legislature cannot arbitrarily establish rules that prevent whole categories of witnesses from testifying on the basis of a priori categories that presume them unworthy of belief).

the Federal Rules of Evidence. It will analyze United States Supreme Court cases dealing with the interplay between the penal interest exception and the confrontation clause that have been decided since the Federal Rules of Evidence were adopted, and it will discuss the views of various commentators on this issue. Finally, the article will review and discuss recent military case law to see if a coherent theory of how the confrontation clause and the penal interest exception interrelate has evolved and whether military courts are faithfully following Supreme Court precedents.

II. STATEMENTS AGAINST PENAL INTEREST, THE CONFRONTATION CLAUSE, AND THE COMMON LAW

Most people believe the confrontation clause was placed in the Constitution to avoid trials by ex parte affidavits.[6] The most famous of these trials was Sir Walter Raleigh's,[7] in which Raleigh was tried by ex parte affidavits for treason. He was prohibited from cross-examining affidavit evidence accusing him of conspiring to commit treason; as a result, he was convicted and eventually executed.

Apparently, the prohibition against hearsay evidence was part of the common law in the seventeenth century.[8] Why did the drafters of our Constitution adopt the confrontation clause? Some argue[9] that the language of the confrontation clause came from the Virginia Declaration of Rights, which stated: "in all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses."[10] The colonists hated the Royal Admiralty Courts," which the British used to enforce all trade laws. Because these courts were based on civil law, no confrontation rights existed in them.[12] Perhaps the drafters intended to ensure that the new legal system in the United States would have a common law adversarial nature.[13]

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[6] *See generally* F. Heller, The Sixth Amendment 104 (1951); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 551 (2d ed. 1982); Graham, *The Right of Confrontation and the Hearsay Rule, Sir Walter Raleigh* ***Loses*** *Another* ***One,*** *8* Crim. L. Bull. 99 (1972); Lilly, *Notes on the Confrontation Clause and Ohio* v. ***Roberts,*** 36 Fla. L. Rev. 207 (1984).

[7] *See* 2 Howell, State Trials 1 (1816).

[8] Lilly, *supra* note 6, at 207, 209; Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause,* 83 Colum. L. Rev. 159, 161 (1983) [hereinafter Keller].

[9] Lilly, *supra* note 6, at 210.

[10] *Id.* at 210 (citing 6 American Archives 1561 (P. Force, ed. 4th Series 1846)).

[11] *Id.* at 211.

[12] *Id.*

[13] *Id.* at 212.

Even though the exceptions to the hearsay rule were very narrow at the time the Constitution was adopted,[14] the colonists presumably wanted more protection than the common law or statute could provide. The colonists might have feared the loss of the confrontation right by legislation or judicial fiat. The best way to ensure the continued existence of this right was to include it among the fundamental rights guaranteed in the Bill of Rights.

One can argue that the confrontation clause prohibits the introduction of any evidence against a defendant in a criminal trial unless the evidence is live witness testimony. This interpretation would require a witness to testify as to each and every item of evidence, even when the evidence was trivial or when the witness no longer could discuss the evidence intelligently (such as a notation made in a record book years earlier). At the other extreme, one could argue that so long as a live witness testifies, that witness may discuss the hearsay statement of another. This view would define "witness against" as any witness who testifies in court.[15]

The United States Supreme Court never has adopted either of these extremes and has taken a middle ground.[16] The Supreme Court decided over a century ago in *Reynolds v. United States*[17] that a defendant's confrontation rights are not absolute and that the defendant can lose them at trial by misbehavior, such as procuring the unavailability of a witness.[18] Even in a case such as *Mattox v. United States*,[19] in which there was no misconduct by the defendant, the Supreme Court would not adopt an inflexible approach. In *Mattox* the defendant was tried for murder. Two witnesses testified at his first trial

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[14] *See, e.g.*, Borgy v. Commonwealth, 51 Va. (10 Gratt.) 722 (18.53)(witness who had testified at former trial merely out of state, not dead, former testimony inadmissible); Kendrick v. State, 29 Tenn. (10 Hum.)479 (1850)(admitting testimony of deceased taken before a magistrate). Both of these cases are cited with approval in Mattox v. United States. 156 U.S. 237, 241-42 (1895).

[15] Lilly, *supra* note 6, 207-08. Lilly develops this argument in some detail.

[16] In Ohio v. Roberts, 448 U.S. 56 (1980), the Court noted:

> If one were to read this language [of the Confrontation Clause] literally. it would require, on objection, the exclusion of any statement made by a declarant not present at trial. See Mattox v. United States, 156 U.S. 237. 243 (1895)("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"). But, if thus applied, the Clause would abrogate virtually every hearsay exception. a result long rejected as unintended and too extreme.

Id. at **63** (citation omitted).

[17] 98 U.S. 145 (1879).

[18] *Id.* In *Reynolds* the Supreme Court held that in defendant's second trial for bigamy. there was no constitutional error to admit testimony given at his first trial by his then alleged second wife. Her testimony at the first trial had been given subject to full cross-examination, and the Court was convinced that the defendant had procured her absence at the second trial.

[19] 156 U.S. 237 (1895).

and were subject to cross-examination, After that conviction was reversed[20] but before Mattox could be retried, the witnesses died. At his second trial, Mattox objected to the government's introduction of transcripts of their testimony at the first trial. The Court held that this did not violate the confrontation clause, stating that the clause must "give way to considerations of public policy and the necessities of the case."[21]

The decisions in ***Reynolds*** and *Mattox* are not difficult to understand. Both involved former testimony, which has become an established exception to the hearsay rule[22] and does not violate the dictates of the confrontation clause.[23] The use of former testimony, however, is not without its limits. In ***Motes v. United States***[24] the Supreme Court reversed a conviction that was based on testimony at a prior trial. In ***Motes,*** however, the witness was unavailable at trial because of the negligence of the government.

The prohibition against the use of statements against penal interest can be traced to ***The Sussex Peerage.***[25] Augustus D'Este claimed to be a legitimate son of the Duke of Sussex. To prove that his mother had been married to the Duke, he sought to introduce into evidence statements of the deceased clergyman who performed the marriage in violation of The Royal Marriage Act.[26] The statements were against the clergyman'spenal interest, but the House of Lords rejected them because no proprietary interest of the clergyman was involved. Even though this was not a criminal case and no confrontation problems were involved, commentators generally have cited it for the proposition that only statements against pecuniary or proprietary interest were admissible as exceptions to the hearsay rule at common law.[27] Wigmore severely criticized it.[28] He believed that the case was not argued strongly and was not considered by the judges in light of the precedents then existing.[29] Wigmore considered ***The Sussex Peerage*** case to be a step backward. Nevertheless, he conceded that it became a solid part of English common law.[30]

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[20]Mattox v. United States, 146 U.S. 140 (1892).

[21]*Mattox*, 156 U.S. at 243.

[22]*See* Fed. R. Evid. 804(b)(1); Mil. R. Evid. 804(b)(1).

[23]Ohio v. Roberts, 448 U.S. 56 (1980).

[24]178 U.S. 458 (1900).

[25]8 Eng. Rep. 1034 (1844).

[26]12 Geo. 3, ch. 11 (prohibiting the marriage of certain members of the English aristocracy without the consent of the crown).

[27]*See* McCormick, Evidence § 278 (3d ed. 1984); Keller, ***supra*** note 8, at 162; Comment, ***Federal Rule*** *804(b)(3) and Inculpatory Statements Against Penal Interest, 66* Calif. *L.* Rev. 1189, 1189 n.6 (1978) [hereinafter Bergeisen].

[28]5 Wigmore, Evidence § 1476 (Chadbourne rev. ed. 1974).

[29]*Id.* § 1476 n.8. Wigmore cited, among other cases, *Standen v. Standen*, Peake 32 (1791), for the proposition that a clergyman's confession that he had married persons without the publication of banns was admissible because this act was a felony and the clergyman's confession placed him in a dangerous situation.

[30]5 Wigmore, ***supra*** note 28, § 1476 n.7.

The United States Supreme Court first examined whether a statement against penal interest might be admissible in evidence as an exception to the hearsay rule in *Donnelly v. United States.*[31] In *Donnelly* the defendant was charged with murder. He attempted to introduce into evidence a deceased third party's confession to the murder. The Supreme Court held the confession inadmissible because it was against the declarant's penal interest only, and not against any pecuniary interest.[32] The Court relied on *The Sussex Peerage*[33] and authority in this country.[34] *Donnelly* did not involve any confrontation problems, because an exculpatory statement was to be introduced. By holding such statements inadmissible under the common law, however, the *Donnelly* court seemed to make moot any future confrontation clause problems in this area.

In *Krulewitch v. United States,* the Supreme Court strictly limited the type of hearsay evidence that would be admissible in criminal trials.[35] In that case, the government sought to introduce an out-of-court statement made by Krulewitchs co-conspirator. The trial court admitted the statement as one made by a co-conspirator in the course of a conspiracy, but the Supreme Court reversed. The Supreme Court pointed out that the statement had been made over a month after the conspiracy had ended. The Court refused to permit the expansion of the co-conspirator exception to the hearsay rule to include statements made in the furtherance of an alleged but uncharged conspiracy aimed at preventing detection and punishment.[36] *Krulewitch*, like *Donnelly,* contained no discussion of the confrontation clause Because federal common law prohibited the admission of co-conspirator statements after the termination of the conspiracy, no constitutional problem was presented.

Although *Donnelly* prohibited the use of statements against penal interest in a criminal trial, and *Krulewitch* seemed to restrict tightly the use of co-conspirator statements, these kinds of statements still presented problems when defendants were tried jointly. The government would attempt to introduce the confession of ***A***, a co-defendant of *B* in their joint trial. Certainly the jury would hear the confession of ***A***, even though it would not be admissible against *B,* but what remedy did *B* have to ensure that the jury would not consider ***A's*** confession in determining *B's* guilt?

The United States Supreme Court addressed this problem in *Delli Paoli v. United States.*[37] Orlando Delli Paoli and four others were

[31]228 U.S. 243 (1913).
[32]*Id.* at 273.
[33]*See supra* notes 25-30 and accompanying text.
[34]*Donnelly,* 228 U.S. at 274.
[35]336 U.S. 440 (1949).
[36]*Id.* at 442-43.
[37]352 U.S. 232 (1957).

charged with conspiracy to possess and transport unstamped alcohol, and to evade payment of taxes on it. After the termination of the conspiracy but before trial, defendant Whitley confessed to the crime in the presence of his attorney and a government agent. At the joint trial of the five co-defendants, the government introduced the confession of Whitley for use solely against him. The trial court admitted the confession with instructions to the jury that it could be considered only in determining Whitley's guilt.[38] Delli Paoli objected to the jury instructions on the basis that they did not adequately protect him from jury consideration of Whitley's confession in determining his own guilt.

In a **5-4** decision, the United States Supreme Court upheld Delli Paoli's conviction. In approving the use of jury instructions prohibiting the jury from considering the confession of a co-defendant in a joint trial, the Supreme Court said:

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.[39]

Justice Frankfurter dissented. He argued that an admonition to the jury not to use the confession of a co-defendant against the other defendants was not enough: "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors."[40] Frankfurter's analysis of the admissibility of the evidence turned on how devastating it would be to the defendant; this was a significant portent of things to come:

> It may well be that where such a declaration [of a co-conspirator] only glancingly, as it were, affects a co-defendant who cannot be charged with the admitted declaration, the rule enforced by the Court in this case does too little harm not to leave its application to the discretion of the trial judge. But where the conspirator's statement is so damning to another against whom it is inadmissible, as is true in this case, the difficulty of in-

[38] *Id.* **at 234.**
[39] *Id.* **at 242.**
[40] *Id.* **at 247 (Frankfurter, J., dissenting).**

troducing it against the declarant without inevitable harm to a eo-conspirator, the petitioner in this case, is no justification for causing such harm.[41]

There was no discussion in *Donnelly, Kmlewitch,* or *Delli Paoli* about the confrontation clause. The Supreme Court assumed that statements by co-conspirators after the termination of the conspiracy and statements against penal interest were inadmissible because no exceptions allowing them existed at common law. Thus, the cases were concerned not with the confrontation clause, but with determining common law hearsay exception rules.

The Supreme Court began a new examination of the confrontation clause in *Douglas v. Alabama.*[42] Douglas was charged with assault with intent to murder. The prosecution called Douglas's convicted accomplice to testify against him. When the accomplice invoked his privilege against self-incrimination, the state's attorney produced the accomplice's confession and, under the guise of cross-examination to "refresh" the accomplice's recollection, the prosecutor read from the document, stopping every few sentences to ask whether the accomplice made the statement. After the accomplice refused to answer any questions, the state's attorney called law enforcement officers, who identified the document as the accomplice's confession. The document was not offered in evidence.

Douglas's conviction was reversed by the United States Supreme Court. The Court first held that the confrontation clause is applicable to the states.[43] It then noted that a primary interest of the confrontation clause is the right of cross-examination:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief.[44]

That the procedure in *Douglas* violated the defendant's right to confront the witness is easy to see. The witness simply refused to

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[41] *Id.* at 247-48. This "devastating effect" analysis was adopted by the Court in Bruton v. United States. 391 U.S. 123(1968), and has become a key part of confrontation clause analysis. **See** *infra* note 68.

[42] 380 U.S. 415 (1965).

[43] *Id.* at 418.

[44] *Id.* (quoting from Mattox v. United States, 156 U.S. 237. 242-43 (1895))

answer any questions about his confession. Even though the confession was not offered in evidence, and therefore was not to be considered in determining defendant's guilt, the jury had heard it and the damage had been done.[45] The procedure used by the state's attorney in *Douglas* was so obviously unfair that Justices Harlan and Stewart voted to reverse the conviction on due process grounds, even though they disagreed with the majority's ruling.[46]

After *Douglas* it seemed clear that a statement against penal interest could not be admitted into evidence at a criminal trial against anyone but the declarant. *Douglas* presented the perfect opportunity to allow such statements into evidence and to revise the rule in *Donnelly*[47] prohibiting their use. In *Douglas* the statement definitely was made; law enforcement officers verified that. It was very much against the declarant's penal interest. As well, because the declarant was clearly "unavailable," the Court could have taken a rule of necessity approach similar to that in *Mattox*.[48] Nevertheless, instead of allowing an accomplice's confession into evidence as an exception to the hearsay rule in the same manner as former testimony,[49] the Supreme Court prohibited its use as a violation of the defendant's rights under the confrontation clause.

Douglas also signaled a shift in the Supreme Court's view of the efficacy of jury instructions in protecting a defendant from the consideration of inadmissible evidence. The confession in *Douglas* never was admitted into evidence, so the jury must have been instructed not to consider it. While the confession was very damaging to the defendant, so too was the confession in *Delli Paoli*. Therefore, the new analysis of whether constitutional error existed had to involve some determination of how much the defendant's case was damaged by the inadmissible evidence. Because *Douglas* was an extreme case, the decision was easy.

The Supreme Court also was concerned with the reliability of statements that were offered against a defendant who had not had an opportunity to cross-examine the declarant. ***Pointer*** *v. Texas*,[50] decided the same day as *Douglas*, placed limits on the use of former testimony. In Pointer's robbery trial, the state's attorney introduced the transcript of a witness's testimony at Pointer's preliminary hearing. At the preliminary hearing, Pointer was not represented by

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[45] *Id.* at 419; see *infra* notes 60-61 and accompanying text.
[46] *Douglas*, 380 U.S. at 423 (Harlan, J., concurring, and Stewart, J., concurring separately).
[47] 228 U.S. 243 (1913); see *supra* notes 31-34 and accompanying text
[48] 156 US. 237 (1895); see *supra* notes 19-21 and accompanying text.
[49] *See supra* notes 17-24 and accompanying text.
[50] 380 U.S. 400 (1965).

counsel and had no opportunity to cross-examine the witness. At trial, the state showed that the witness had moved out of the state with no intention to return.

Although *Pointer* invoived the use of former testimony, it was testimony at a hearing at which the defendant had no adequate opportunity to cross-examine the witness.[51] In reversing Pointer's conviction, the Court held that a preliminary hearing was a "critical stage" of the state's criminal proceedings;[52] therefore, the defendant was entitled to counsel at such a stage.[53] Pointer had no counsel at the proceeding, and, as a result, he was denied the right to confront the witness.[54]

The Supreme Court emphasized the importance of cross-examination at trial as a confrontation clause right in *Barber* [:. *Page*.[55] In that case, Jack Barber was tried in an Oklahoma state court for armed robbery. A witness who was charged jointly with Barber testified against Barber at Barber's preliminary hearing. At the time of trial, the witness was in a federal prison in Texas; the Oklahoma state's attorney made no effort to secure his presence at trial, and the witness's statement against Barber was admitted in evidence.

Barber was represented by counsel at his preliminary hearing. His lawyer, however, also represented the co-defendant who testified against Barber. As a result, Barber's lawyer did not cross-examine the co-defendant.[56] The Supreme Court held that, even though Barber may have waived his right to cross-examine the witness at the preliminary hearing, the use of the preliminary hearing testimony deprived Barber of his rights under the sixth and fourteenth amendments. The Court noted that the confrontation clause was a trial right.[57] Again, however, Barber's lack of a real opportunity to cross-examine the witness at the preliminary hearing loomed large.

Thus, in 1968, the Supreme Court did not recognize any exception to the hearsay rule involving statements against penal interest that would pass constitutional muster. Even with former testimony, a hearsay exception that traditionally had been recognized at common law, the court required a hearing in which the defendant had an adequate opportunity to cross-examine the witness.

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[51] *Id.* at 407.
[52] *Id.* at **403.**
[53] *Id.* at 407.
[54] *Id.*
[55] 390 U.S. 719 (1968).
[56] "This is **a** perfect example of the problems that arise when a lawyer represents two co-defendants with conflicting interests. ***See,*** *e.g.*, Virginia Code of Professional Responsibility DR 5-105 (1986).
[57] *Barber*, 390 U.S. at 725.

Bruton v. United States[58] was decided in this atmosphere. The facts in *Bruton* were not complicated. Bruton and Evans were tried jointly in a federal court on a charge of armed postal robbery. The government offered Evans' oral confession through the testimony of a postal inspector. The trial judge specifically instructed the jury that the confession was admissible only against Evans and could not be considered in determining Bruton's guilt.[59]

The Supreme Court reversed Bruton's conviction in a **5-4** decision. The Court overruled *Delli Paoli*,[60] adopting Justice Frankfurter's dissent[61] and noting that limiting instructions are not sufficient to protect against the possibility that the jury will consider a codefendant's confession in determining a defendant's guilt. The Court held that because Evans did not testify, the use of his confession added substantial weight to the prosecution's case in a form not subject to any cross-examination. This violated Bruton's confrontation clause rights. The Court stated:

> Not only are the incriminations [of Evans] *devastating* to the defendant but their credibility is *inevitably suspect,* a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame to others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed *Pointer v. Texas.*[62]

In an important footnote, the Court stated:

> We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, see *Kmlewitch v. United States; Fishwick v. United States* . . . There is not before us any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.[63]

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[58] 391 U.S. 123 (1968).

[59] *Id.* at 125. This instruction was in accordance with the requirements of *Delli Paoli.* See supra notes 37-41 and accompanying text.

[60] *Bruton*, 391 U.S. at 126.

[61] *See supru* note 41.

[62] *Bruton*, 391 U.S. at 136 (emphasis added) (citations omitted).

[63] *Id.* at 128 n.3 (citations omitted).

Some have seized on this footnote to imply that perhaps *Bruton* was nothing more than a jury instructions case.[64] Such a view, however, is not easily defensible. That jury instructions were involved in *Bruton* actually strengthened the Court's holding. Obviously, because the Court in *Bruton* held that jury instructions could not cure the violation of the confrontation clause, its holding would be the same if such instructions were not given.[65]

Another argument is that *Bruton* might not apply outside the context of a joint trial.[66] Keller points out that the Supreme Court in *Bruton* discussed this issue only with regard to the adequacy of the jury instructions, and not with regard to whether Evans' statement was admissible against Bruton.[67] Although a joint trial may increase the risk that the jury cannot follow jury instructions, that has no bearing on whether the statement is actually constitutionally admissible in the first place.[68]

The Supreme Court noted that "[t]here is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."[69] One might argue that because statements against penal interest are now admissible under the Federal and Military Rules of Evidence, *Bruton* no longer applies.[70] Such a view would allow Congress to overturn Supreme Court precedent[71]—a practice violating the separation of powers doctrine established by *Marbury v. Madison*.[72] The Court in *Bruton* stated specifically that no "traditionally recognized" exception to the hearsay rule existed in that case. Thus, its reservation of judgment about whether such "traditionally recognized" exceptions to the hearsay rule could also qualify as exceptions to the confrontation clause could not have been meant to apply to statements against penal interest.

The Court made clear that an analysis of the damage done to the defendant's case in the form of statements not subject to cross-examination was now necessary whenever a confrontation clause problem was raised. It would follow logically that if the statement did not greatly damage the defendant, then it would not be error to admit it.

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[64] *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 85-86 (1970) (Stewart, J.); Fed. R. Evid. 804(b)(3) Advisory Committee Note; Bergeisen, *supra* note 27, at 1196 (arguing that *Bruton* reserved judgment on whether the confrontation clause applied to exceptions to the hearsay rule).

[65] Keller, *supra* note 8, at 167 (emphasis in original).

[66] *See, e.g.*, *Dutton*, 400 U.S. at 87.

[67] Keller, *supra* note 8, at 167-68.

[68] *Id.* at 167 n.58.

[69] *Bruton*, 391 U.S. at 128 n.3.

[70] *See, e.g.*, Bergeisen, *supra* note 27, at 1196-97.

[71] Keller, *supra* note 8, at 168.

[72] 5 U.S. (1 Cranch) 137 (1803).

The Supreme Court had an opportunity to follow this rationale one year after *Bruton* in *Harrington v. California*.[73] In *Harrington* the prosecution used the confessions of Harrington's three codefendants in a joint trial of all four for murder. One of the confessing codefendants testified and was cross-examined by Harrington's attorney, but the other two did not testify. The trial court, in accordance with *Delli Paoli*[74] (which was then controlling law) instructed the jury to consider each confession only against its maker.

The Supreme Court upheld Harrington's conviction, noting that while the use of the codefendant confessions violated Harrington's confrontation clause rights, the evidence obtained through the confessions was merely cumulative, and the other evidence against him was so overwhelming that the error was harmless.[75] Perhaps if the Court had stated that the evidence was not "devastating" to the defendant it could have ruled that the confession was admissible. Unfortunately, the Court muddied the waters.

The Supreme Court further defined the limits of the confrontation clause in *California v. Green*.[76] In that case, John Green was tried without a jury on a charge of furnishing marijuana to a minor. The minor told police and testified at Green's preliminary hearing that Green was his supplier of marijuana. The minor was under oath and subject to cross-examination at the preliminary hearing.

At Green's trial, the minor testified that he had taken LSD at the time of the alleged crime and could not remember anything about how he got his marijuana. California law[77] allowed the use of prior inconsistent statements to impeach a witness's trial testimony, so the prosecutor read into evidence excerpts of the minor's testimony at the preliminary hearing. The testimony was being used for the truth of the matters asserted therein. A police officer also testified that the minor had said that Green was the minor's marijuana supplier.

Understandably, given *Barber*, the Court could not produce a majority opinion on all points, but upheld Green's conviction with four justices following Justice White's opinion. That opinion held that because the minor had appeared at trial, was confronted by Green, and was subject to cross-examination, there was no violation of the confrontation clause.[78] As to the confrontation clause and the hearsay rule, the Court stated:

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[73]395 U.S. 250 (1969).
[74]352 U.S. 232 (1957).
[75]*Harrington*, 395 U.S. at 254.
[76]399 U.S. 149 (1970).
[77]Cal. Evid. Code § 1235 (Deering 1966).
[78]*Green*, 399 U.S. at 167.

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law . . . . [W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception . . . . [M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.[79]

The holding in *Green* was a step back from *Barber v. Page*.[80] One view is that *Green* cannot be reconciled with either *Barber* or *Douglas*.[81] The Supreme Court failed to reconcile this case with *Barber's* holding that cross-examination is a trial right. *Barber* implied that cross-examination at preliminary hearing is a poor substitute for cross-examination at trial. We must remember, however, that in *Barber* the witness was unavailable because the prosecution made no effort to obtain his presence at trial, even though he could be found in an out-of-state jail. Further, Jack Barber lacked any real opportunity to attack the former testimony offered against him because his lawyer had represented the unavailable witness along with Barber at the time of Barber's preliminary hearing.[82]

Green can be reconciled with *Douglas* on a number of grounds. In *Douglas* the Court was dealing with an out-of-court confession. This was not a traditionally recognized exception to the hearsay rule. In *Green* the Court simply followed longstanding precedent when it approved the use of former testimony. The confession in *Douglas* was not given subject to any sort of cross-examination; the former testimony in *Green* was. Finally, the witness in *Douglas* said nothing from the witness stand. The witness in *Green* came to court and testified, albeit differently from his former testimony. He gave the defendant a chance to cross-examine him and the jury a chance to observe his demeanor and weigh his credibility.

The Supreme Court seemed to back away dramatically from *Bruton* when it next examined the confrontation issue in *Dutton v. Evans*.[83] In *Dutton* the defendant, Alex Evans, was tried in a Georgia state court on a charge of murder. At trial, the prosecution presented the

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[79] *Id.* at 155-56 (citations omitted).
[80] 390 U.S. 719 (1968).
[81] Ross, *Confrontation and Residual Hearsay: A Critical Emmination, and a Proposal for Military Courts,* 118 Mil. L. Rev. 31, 48 (1987).
[82] *See supra* note 56 and accompanying **text.**
[83] 400 U.S. 74 (1970).

testimony of a prisoner in the jail in which Evans and his codefendants were housed after their arrest. The prisoner testified that he heard Evans' accomplice say, "If it hadn't been for that son-of-a-bitch Alex Evans, we wouldn't be in this now."[84] This testimony was admitted on the basis of a Georgia statute[85] that permitted as an exception to the hearsay rule the admission of co-conspirator statements made during the concealment phase of the conspiracy.

Again the Supreme Court failed to produce a majority opinion. Justice Stewart, writing for four of the justices, noted that the state presented some twenty witnesses, including an eyewitness who described in detail Evans' participation in the murder.[86] Justice Stewart wrote that Georgia's evidentiary rule did not necessarily violate the confrontation clause merely because the rule did not coincide with the federal hearsay exception: "[I]t does not follow that because the federal courts have declined to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy, such an extension automatically violates the confrontation clause."[87]

In light of the overwhelming evidence produced at trial against Evans, Justice Stewart wrote:

> In the trial of this case no less than **20** witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here . . . . His testimony, which was of peripheral significance at most, was admitted in evidence under a co-conspirator exception to the hearsay rule long established under state statutory law.[88]

Justice Blackmun, joined by Chief Justice Burger, concurred in Stewart's opinion, stating as an additional reason for upholding Evans' conviction that, if any error existed, it was harmless. Justice Harlan's opinion expressed the view that the due process clause[89] should control the admissibility of evidence and that the Georgia statute in question satisfied the requirements of the due process clause.[90] Four justices dissented in an opinion written by Justice Mar-

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[84] *Id.* at *77.*
[85] Ga. Code Ann. § **38-306 (1954).**
[86] *Dutton*, **400** U.S. at **87.**
[87] *Id.* at **81-82.**
[88] *Id.* at *87.*
[89] U.S. Const. amend V.
[90] *Dutton*, 400 U.S. at **93** (Harlan, J., concurring).

shall.[91] They believed that Evans had been denied his right to confront and cross-examine the witness against him because of the highly prejudicial nature of the statement.[92]

The statement offered in *Dutton* was not a statement against penal interest. As a result, the case sheds only a limited amount of light on whether the penal interest exception to the hearsay rule passes constitutional muster. The Court's analysis of the confrontation clause problem is worth noting. The plurality opinion looked at the other evidence in the case to determine whether the evidence offered through the co-conspirator's statement was "crucial" or "devastating" to the defendant.[93] In light of the other overwhelming evidence against Evans, the Court found no constitutional error.[94]

While Justices Blackmun and Burger believed this was also a harmless error case,[95] the plurality failed to adopt this reasoning. Thus, an analysis of whether hearsay evidence was "crucial" or "devastating" became necessary to determine whether the confrontation clause had been violated. This was not to say that an examination of whether the hearsay exception traditionally was recognized was unnecessary. As in *Bruton,* the statement in *Dutton* was made out of court and was not subject to any cross-examination. *Dutton,* however, involved a co-conspirator statement made during the concealment phase of the conspiracy,[96] a traditionally recognized exception to the hearsay rule; the statement against penal interest in *Bruton* was not so recognized.

The Supreme Court examined an exculpatory statement against penal interest in *Chambers v. Mississippi.*[97] Leon Chambers was tried in a Mississippi state court for murder. During the trial, he called a witness named McDonald to introduce McDonald's written confession to the crime. When the state's attorney cross-examined McDonald, McDonald recanted his confession and asserted an alibi. Chambers' motion to cross-examine McDonald as an adverse witness was denied on the basis of the Mississippi rule prohibiting the impeachment of one's own witness. Chambers also was prevented from presenting the testimony of three witnesses as to oral confessions allegedly made to them by McDonald shortly after the murder.

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[91] *Id.* at 100 (Marshall, J., dissenting).
[92] *Id.* at 110.
[93] *Id.* at 87.
[94] *Id.*
[95] *Id.* at 90 (Blackmun, J., concurring).
[96] Note that the Georgia rule differed from the federal rule enunciated in *Krulewitch* *See supra* notes 35-36 and accompanying text.
[97] 410 U.S. 284 (1973).

The Supreme Court reversed. The Court noted that declarations against penal interest traditionally had been excluded in federal courts[98] under the authority of *Donnelly*.[99] The Court stated:

> It is [usually] believed that confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest .... The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case .... The sheer number of independent confessions provided an additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest.[100]

Remember that the issue presented in ***Chambers*** was his right to cross-examine a witness who had changed his story. Chambers sought to introduce statements against penal interest into evidence, so no confrontation issue was presented. Nevertheless, the Court said that such statements could be admitted when the circumstances provided considerable assurances of their reliability, and again showed a preference for a defendant's right to cross-examine an adverse witness. An analysis of how an inculpatory statement against penal interest might affect a defendant's confrontation rights when offered by the prosecution would have to wait for another day.

To review, as of 1973 the Supreme Court viewed statements against penal interest as inherently suspect. When the Court decided ***Delli Paoli*** and *Bruton*, it assumed that those statements were inadmissible under any common law rule. Thus, the Court was not as open to finding a way for such statements to be used at trial as it was when it examined traditional hearsay exceptions such as former testimony and co-conspirator statements.

One could argue that the Court was not inclined to change what had been the rules of admissibility in this country of all of these statements for well over a century. The Court made clear, however, that, to the extent confrontation clause problems arose, it was going to focus on the reliability of a statement, how devastating it was to the defendant, whether the type of statement traditionally had

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[98] *Id.* at 299.
[99] 228 U.S. 243 (1913); see *supra* notes 31-34 and accompanying text.
[100] *Chambers*, 410 U.S. at 299-300 (citations omitted).

been admitted at common law, and whether the defendant had some chance to cross-examine the declarant. Because statements against penal interest were considered to be inherently suspect, they would require strict scrutiny.

III. THE LEGISLATIVE HISTORY OF FEDERAL RULE OF EVIDENCE 804(b)(3)

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Advisory Committee) began work on establishing a set of rules of evidence for federal courts in the mid-1960's[101] and published its preliminary draft in 1969.[102] For the first time, statements against penal interest were permitted into evidence:

> Statement Against Interest. **A** statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. This example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused.[103]

The Advisory Committee's note indicated that the common-law limitation of allowing only statements against a pecuniary or proprietary interest and not those against penal interest was "indefensible in logic."[104] This view was in accord with that of Wigmore, who held that this distinction never was found in the common law until *The Sussex Peerage* case.[105] Wigmore's position, that the distinction between pecuniary or proprietary interests and penal interests is illogical, found its way into the Model Code of Evidence[106] and the Uniform Rules of Evidence.[107] The preliminary draft, however, was careful to exclude the admission of inculpatory statements against

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[101] *See* Bergeisen, *supra* note 27, at 1191 n.9 (explanation of the process by which the Committee began its **work).**

[102] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates,* 46 F.R.D. 161 (1969) [hereinafter *Preliminary Draft*]

[103] *Id.* Rule 8-04(b)(4). The rule subsequently has been renumbered as 804(b)(3).

[104] *Id.*, Advisory Committee's Note. at 385.

[105] *See supra* notes 25-30 and accompanying text.

[106] Model Code of Evidence Rule 509(1) (1942).

[107] Uniform Rules of Evidence Rule 63(10) (superseded 1975).

penal interest on the basis that such statements traditionally had been viewed with suspicion.[108] Professor Cleary, the Reporter to the Committee, believed *Bruton* required this language.[109]

The Department of Justice opposed the language of the preliminary draft, except in very limited circumstances, and wanted a corroboration requirement for these exculpatory statements.[110] Nevertheless, the Department of Justice's criticisms were rejected by Professor Cleary as having been considered carefully and were viewed to be matters affecting the weight to be given to such evidence and not its admissibility."[111]

In 1971, after the proposed rules went through two cycles of submission to the Standing committee, publication for comment by bench and bar, and revision,[112] the rule remained almost unchanged.[113] The Department of Justice still opposed the proposed rule.[114] Senator John L. McClellan, Chairman of the Senate Subcommittee on Criminal Laws, then became involved.

Senator McClellan wrote to Judge Albert B. Maris on the Advisory Committee and advised that he opposed the weakening of the administration of criminal justice, and especially the language of the penal interest exception.[115] Senator McClellan also attacked on another front. He introduced the Court Practice Approval Act,[116] a bill that would have stripped much of the rule-making power of the courts.[117] Understandably, the Advisory Committee, which had been

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[108] *Preliminary Draft, supra* note 102, at 386.

[109] *See* Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo. L.J. 851, 866 n.52 (1981).

[110] *Id.* at 870 n.67.

[111] *Preliminary Draft, supra* note 102, at 191.

[112] Keller, *supra* note 8, at 175.

[113] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 51 F.R.D. 315, 438 (1971) [hereinafter Revised Draft]. The changes in the rule came in the first section dropping the "strong assurances of accuracy" requirement found in Rule 8-04(a) of the Preliminary Draft for a requirement of simple "unavailability" in Rule 804(a) in the Revised Draft.

[114] Tague, *supra* note 109, at 872.

[115] Letter from Senator John L. McClellan to Judge Albert B. Maris, Committee on Rules of Practice and Procedure of the Judiciary Conference of the United States, *reprinted in* 117 Cong. Rec. 29,893 (1971). This was a surprising statement given the controlling law at the time.

[116] S. 2432, 92d Cong., 1st Sess. (1971).

[117] In Senator McClellan's own words:

> [The] bill was drafted to respond to a problem brought to light by the circulation of the Revised Draft of the Proposed Rules of Evidence for the United States Courts and Magistrates. It was dissatisfaction with those proposed rules that led me to examine the avenues open to the Members of this body by which they might express their criticism and make their voice heard. . .
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> Cong. Rec. 33,642 (remarks by Senator McClellan (1971)).

working for years on this project, feared that all of their work would be destroyed, and they compromised.[118] Thus, the last sentence prohibiting the use of statements against penal interest to inculpate a criminal defendant was dropped without explanation, and a corroboration requirement was added for exculpatory statements against penal interest in the unpublished draft of the rules that was submitted to the Supreme Court for approval in November 1971 and promulgated by the Supreme Court in November 1972.[119] Even with the changes, the Department of Justice opposed the rule, fearing that defendants still could use out-of-court confessions in their defense;[120] apparently it did not focus on the use of these statements by the government.

When the rule finally was submitted to the House of Representatives, the language was changed to include the prohibition regarding inculpatory statements against penal interest.[121] Not surprisingly, the Senate committee that reviewed the rule, and of which Senator McClellan was the chairman, rejected the language proposed by the House.[122] The Senate declined to follow the House's attempt to codify the rule in *Bruton*[123] and stated in support of its position:

> [T]he basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the Fifth Amendment's right against self-incrimination and, here, the Sixth Amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise.[124]

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[118] Tague, *supra* note 109, at 873 nn.85, 86; *see also* Keller, *supra* note 8, at 175 n.109 (discussion of how language of Rule 804(b)(3) was changed to Senator McClellan's liking in exchange for his tacit agreement not to destroy the rest of the Advisory Committee's work).

[119] *See* Supreme Court of the United States, Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 321 (1972) [hereinafter Supreme Court Draft].

[120] Tague, *supra* note 109, at 882. Chambers v. Mississippi, 410 U.S. 284 (1973), which might have made the Department of Justice's objections to the use of out-of-court confessions by defendants moot, had not yet been decided. *See supra* notes 97-100 and accompanying text.

[121] Subcomm. on Criminal Justice of the House Comm. on the Judiciary, Report on H.R. 5463 Comm. Print (1973), 93d Cong., 1st Sess., [hereinafter House Subcommittee Report] *reprinted in* 1974 U.S. Code Cong. & Admin. News 7075, 7089-90.

[122] Senate Comm. on the Judiciary, Report on Federal Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess., 7068 (1974), [hereinafter Senate Report] *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051.

[123] House Subcommittee Report, *supra* note 154, at 32, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7090.

[124] Senate Report, *supra* note 155. at 7068, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051.

The Conference Committee adopted the Senate's position, and the language prohibiting the use of inculpatory statements against penal interest did not become part of the rule.[125]

It is important to review what happened when the rule was adopted. At the time the rule first was proposed, it was accepted that statements against penal interest were not admissible in a criminal trial[126] and that this doctrine also applied to the states.[127] It was only when the Advisory Committee attempted to draft the rule in accordance with what it thought to be controlling law that a hue and cry arose. The criticisms of the proposed rule were born out of a misunderstanding of the controlling law and were not supported by any American common law precedent.

Further, one looks in vain in the legislative history for a discussion of how the proposed rule was meant to affect a defendant's rights under the confrontation clause. The rule restricts a defendant's use of statements against penal interest, but not the government's use of them. Worse, and with apparently no consideration of how it would be used, the rule seems to fly directly in the face of Supreme Court precedent holding that statements against penal interest are inherently unreliable and should be admitted only when "considerable assurances" of their reliability exist.[128] The only explanation for these problems is that Senator McClellan strong-armed the Advisory Committee into accepting changes in the rule that had not been considered carefully.[129]

The Advisory Committee stated that Federal Rule of Evidence 804(b)(3) does not purport to deal with questions of the right of confrontation.[130] Because of this, the rule leaves the Supreme Court's *Bruton* doctrine untouched.[131] Some commentators argue that the Advisory Committee note creates an ambiguity. Either the note means that all inculpatory statements against penal interest are reliable and should be admitted, or it means that such statements are not reliable and should not be admitted, but an explicit statement to that effect is not necessary.[132] Certainly the matter is far from clear.

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[125]H.R. 5463, 93d Cong. 2d *Sess.*, 120 Cong. Rec. 40,070 (1974) (Senate); *id.* at 40,896 (House of Representatives).

[126]*See Delli Paoli*, 352 U.S. 232; *Bruton*, 391 U.S. 123; *supra* notes 37-41 and 58-72 and accompanying text.

[127]*See Douglas*, 380 U.S. 415; *supra* notes 42-49 and accompanying text.

[128]*See Chambers*, 410 U.S. 284; *supra* notes 97-100 and accompanying text.

[129]*See supra* notes 115-25 and accompanying text.

[130]Fed. R. Evid. 804(b)(3) Advisory Committee Note.

[131]Keller, *supra* note 8, at 178.

[132]Bergeisen, *supra* note 27, at 1191.

The rule seems to violate the due process clause. It sets up a class of persons who are prevented from testifying on the basis of an a *priori* presumption that their testimony is unworthy of belief. Such a classification would be in violation of *Washington v. Texas*.[133]

The rule also seems to violate a defendant's right to equal protection of the laws.[134] Why are government witnesses who are testifying about statements against penal interest any more reliable than defense witnesses? Often, both types are criminals with questionable moral attributes who desire to share the blame for their misdeeds, get revenge, or, in the case of government witnesses, get some sort of favorable treatment in exchange for their testimony.

Because Congress cannot legislatively overturn Supreme Court constitutional holdings,[135] the rule cannot change the decision in *Bruton*. The Advisory Committee's note says that the rule is not meant to deal with confrontation clause questions and that the language codifying *Bruton* was omitted from the rule as superfluous. Thus, no support exists for an argument that *Bruton* no longer applies. Indeed, because everyone in the rule-making process assumed that inculpatory statements against penal interest were inadmissible, the rule should be interpreted in that light.

IV. SUPREME COURT DECISIONS SINCE THE PROMULGATION OF THE FEDERAL RULES OF EVIDENCE

Unfortunately, the Supreme Court has yet to decide the constitutionality of either Federal Rule of Evidence 804(b)(3) or Military Rule of Evidence 804(b)(3).[136] The language in several cases decided since the adoption of the Federal Rules of Evidence, however, gives us some idea of the Supreme Court's view of the confrontation clause.

The first significant confrontation clause case decided after the adoption of the Federal Rules of Evidence was ***Parker*** **I** *Randolph*.[137] In ***Parker*** three codefendants, including Harry Parker, were tried for murder in a joint trial in a Tennessee state court. Before trial, each

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[133]388 U.S. 14 (1967).

[134]U.S. Const. amend. XIV, § 1.

[135]*See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *supra* notes 71-72 and accompanying text.

[136]In addition to the Supreme Court's authority to decide on the constitutionality of the Military Rules of Evidence, the drafters of the Military Rules of Evidence expressed an intent that the rule be interpreted in light of the decisions of article III courts. Mil. R. Evid. 804(b)(3) analysis.

[137]442 U.S. 62 (1979).

defendant orally confessed. At trial, none of the defendants testified, but the trial court allowed into evidence the confession of each defendant with instructions to the jury that each confession could be used only against the defendant who made it and not against the others. The Supreme Court was unable to agree completely. Five of the justices, however, agreed that the admission of "interlocking" confessions with appropriate instructions to the jury did not violate the defendant's constitutional right of confrontation.

In *Parker* the confessions "interlocked" in the sense that much of the material in each of them was similar. Writing for the majority, Justice Rehnquist stated:

> *Bruton* recognized that admission at a joint trial of the incriminating extrajudicial statements of a nontestifying codefendant can have "devastating" consequences to a nonconfessing defendant, adding "substantial, perhaps even critical weight to the government's case." Such statements go to the jury untested by cross-examination and, indeed, perhaps unanswered altogether unless the defendant waives his Fifth Amendment privilege and takes the stand. The prejudicial impact of a codefendant's confession upon an incriminated defendant who has, insofar as the jury is concerned, maintained his innocence from the beginning is simply too great in such cases to be cured by a limiting instruction. The same cannot be said, however, when the defendant's own confession—"probably the most probative and damaging evidence that can be admitted against him,"—is properly introduced at trial.[138]

In addition to Parker's confession, the government produced a number of witnesses who saw the defendants at the scene of the crime. Thus, the admission of the similar "interlocking" confessions of the defendants was not devastating enough to constitute constitutional error.

The Court failed to adopt the harmless error approach endorsed by Justice Blackmun.[139] The distinction between harmless error and no constitutional error is particularly important to counsel and judges. A judge sworn to uphold the law wishes to avoid any error, however harmless an appellate court may later view it. Therefore, a judge reading the *Parker* opinion could allow an "interlocking" confession into evidence so long as the judge ruled that the confession was not devastating to the defendant's case and so long as the judge instructed the jury not to consider it against anyone except its maker. Had the Supreme Court adopted Justice Blackmun's sap-

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[138] *Id.* at 72 (citations omitted) (quoting *Bruton*, 391 U.S. at 128, **139).**
[139] *Id.* at *77* (Blackmun, J., concurring).

proach, the judge would be bound to prohibit the introduction of such evidence, and no analysis of "devastating effect" would be required.

Parker did not say that statements against penal interest, such as confessions, are admissible without restriction. It merely said that when the defendant confesses, the risk of harm to the defendant is lowered if the jury cannot be trusted to follow appropriate limiting instructions. *Parker* presented the Supreme Court with its first clear chance to overrule *Bruton*, perhaps with a reference to the newly adopted Federal Rule of Evidence 804(b)(3); nevertheless, the Supreme Court failed to do so. Indeed, the Court assumed that a statement against penal interest is inadmissible, although a jury may hear it if the defendant has confessed and if the jury is instructed to use it only against its maker.

The Supreme Court next examined the confrontation clause in *Ohio v. Roberts*.[140] In that case, Herschel Roberts was tried in an Ohio state court on charges of check forgery and possession of stolen credit cards. At his preliminary hearing, Roberts called the daughter of the victim and questioned her at length, attempting to get her to admit that she had given him the forged check and the credit cards. She testified that while she had let him use her apartment for a few days, she never had given him the check or credit cards.

The daughter failed to appear at trial, despite having been subpoenaed by the government. Her family had not heard from her for several months. The trial judge, relying on an Ohio statute[141] that allowed the use of testimony given at a preliminary hearing of a witness who could not be produced for trial, allowed into evidence the transcript of her preliminary hearing testimony.

The Supreme Court stated that the confrontation clause requires the prosecution to "produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[142] Because one purpose of the confrontation clause is to ensure accuracy at trial by giving the defendant an effective way to challenge prosecution evidence, the court went on to state that "the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"[143]

Commenting on the need for "adequate indicia of reliability," the Court stated:

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[140]448 U.S. 56 (1980).
[141]Ohio Rev. Code Ann. § 2945.49 (1975).
[142]*Roberts*, 448 U.S. at 65 (citation omitted).
[143]*Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particular guarantees of trustworthiness.[144]

The issue then became whether former testimony is a "firmly rooted" hearsay exception. The Supreme Court easily resolved that it is "firmly rooted" in light of *Mattox*,[145] *Mancusi v. Stubbs*,[146] and dicta in *Barber v. Page*.[147]

The Court's "firmly rooted" hearsay exception analysis attempts to limit a defendant's denial of confrontation to established common law hearsay exceptions, focuses on those exceptions that traditionally have survived analysis from courts rather than those that have been enacted legislatively, and gives a trial judge a relatively easy method to make on-the-spot decisions. The Court's analysis also logically follows the assumption that the drafters of the confrontation clause were aware of certain exceptions to the hearsay rule when they wrote the confrontation clause and did not intend to change them.

The Supreme Court examined the admissibility of a confession of a codefendant in *Lee v. Illinois*.[148] In that case, Millie Lee confessed to the police about the stabbing murder of her aunt and another person. She was allowed to meet with her boyfriend Edwin Thomas at the police station. In front of both of them, a police officer asked Lee about the confession she had just given that also implicated Thomas. Lee then said to Thomas: "They know about the whole thing, don't you love me Edwin, didn't you in fact say . . . that we wouldn't let one or the other take the rap alone . . . ."[149] Thomas then confused. While Thomas's confession was similar to Lee's, it differed significantly from hers in that it related that they had a previous discussion about committing the killings. Lee's confession indicated that the killings were the spontaneous result of an argument.[150]

Lee and Thomas were tried jointly by a judge without a jury. Neither testified at trial except in support of their motions to suppress their confessions. Both the prosecution and the defense relied

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[144] *Id.* at 66.
[145] 156 U.S. 237 (1895); *see supra* notes 19-21 and accompanying text.
[146] 408 U.S. 204 (1972).
[147] 390 U.S. 719, 725-26 (1968); see *supra* notes 55-57 and accompanying text.
[148] 476 U.S. 530 (1986).
[149] *Id.* at 533.
[150] *Id.* at 535.

heavily on the confessions. Lee's attorney argued that her confession would not support a finding that she was involved with the murder before or during its commission. The prosecutor attempted to rebut this theory by referring to what he incorrectly thought was Lee's confession (it was actually Thomas's). The confession contained a reference to a conversation between Lee and Thomas in which they allegedly discussed the murder immediately before committing it.[151] The trial judge rejected Lee's assertions that she was not involved in the murder and relied expressly on those portions of Thomas's statement that implicated Lee in planning the murder.

In the Supreme Court, the State of Illinois contended that Lee's rights under the confrontation clause were not violated because Thomas was unavailable and his statement was "reliable enough"[152] to warrant its admission into evidence. In a **5-4** decision the Supreme Court reversed the conviction, holding that Thomas's statement, as the confession of an accomplice, was "presumptively unreliable" and did not bear sufficient independent "indicia of reliability" to overcome the presumption.[153] The Court stated:

> Our cases recognize that [the] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally . . . More than this, however, the post-arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself. a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."[154]

The Court also referred to the "devastating" effect of an accomplice's confession and its role in confrontation analysis.[155]

The Court referred to its decision in *Ohio v. Roberts*[156] for the proposition that if hearsay evidence does not fall within a "firmly rooted hearsay exception," it is presumptively unreliable. The Court conceded that sufficient indicia of reliability could overcome the presumption of unreliability, but felt that such indicia were not pre-

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[151] *Id.* at 537.
[152] *Id.* at 539.
[153] *Id.* at **544.**
[154] *Id.* at 541 (*Bruton*, 391 U.S. at 141 (White, J., dissenting))
[155] *Id.* at 542.
[156] 448 U.S. 56 (1980).

sent in this case.[157] The mere fact that Thomas's confession was given voluntarily (for purposes of the fifth amendment) did not bear on the question of whether Thomas was also free from "any desire, motive or impulse [he] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders."[158]

The Court also rejected Illinois' assertion that the hearsay evidence in the case was a simple declaration against penal interest, stating: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful confrontation clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.''[159] Perhaps the Court left the door open for other types of statements against penal interest. Nevertheless, because the statement against penal interest "exception" is not "firmly rooted," it is hard to see how other similar statements could be admissible. Finally, the Court rejected Illinois' "interlocking confession''argument, holding that the differences between Lee's and Thomas's confessions were not insignificant.[160]

Lee was a 5-4 decision, and it is uncertain whether it would be decided the same way today. Two of the dissenting justices, Burger and Powell, have retired, however, so there is little reason at this point to question the holding. Note that, once again, there was no reference to Federal Rule of Evidence 804(b)(3) or to any other statutory basis on which the trial court could use Thomas's confession against Lee. The Court declined to hold that a statement against penal interest is admissible on that basis alone or that it is a "firmly rooted" hearsay exception. Indeed, at least as to accomplice testimony, it ruled that particular guarantees of trustworthiness, amounting to more than a showing that the confession was given voluntarily, were required to overcome the presumption that such a statement is inherently unreliable and devastating to a defendant's case.

The Supreme Court re-examined and rejected the interlocking confession rationale of *Parker* v. *Randolph* in *Cruz v. New York*.[161] In that case, Eulogio Cruz and his brother Benjamin were tried jointly before a jury for felony-murder in a gas station robbery. The state called as a witness Norberto Cruz, an unrelated friend of Eulogio, who testified that Eulogio had confessed to his involvement in the robbery-murder. The trial court allowed into evidence the videotaped

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[157] 476 U.S. at 545-46.
[158] *Id.* at 544.
[159] *Id.* n.5.
[160] *Id.* at 546.
[161] 481 U.S. 186 (1987)

confession of Benjamin, in which Benjamin detailed his and Eulogio's involvement in the crime. The trial court instructed the jury to use the confession only against Benjamin and not against Eulogio. The New York Court of Appeals affirmed Eulogio's conviction[162] on the basis that the confessions "interlocked" as required by *Parker v. Randolph*.[163]

The Supreme Court reviewed its decision in *Parker* stating that the plurality in that case followed the rationale of *Bruton* that the confrontation clause is violated only when the introduction of a codefendant's confession is devastating to the defendant's case.[164] The Court then reviewed its holding in *Parker* that when the defendant himself has confessed, his codefendant's confession seldom will be devastating enough to warrant the constitutional protections of confrontation and cross-examination. Writing for the majority, Justice Scalia rejected the reasoning of the plurality in *Parker*, stating:

> In fact, it seems to us that "interlocking" bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession . . . . Quite obviously, what the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms the same facts as the defendant's own confession it is more likely to be true. Its reliability, however, may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be *admitted as evidence* against the defendant, but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to disregard it is likely to be inconsequential.[165]

Thus, the Court held that when a nontestifying codefendant's confession is not admissible against the defendant at trial, the confrontation clause is violated if the confession is admitted, even if the confessions "interlock" and the jury is instructed not to consider the codefendant's confession against the defendant. Scalia's opinion went on to state that the defendant's own statement may be considered at trial in determining whether the codefendant's confession has sufficient indicia of reliability to be directly admissible against the defendant, assuming the codefendant is "unavailable" to testify.[166]

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[162] People v. Cruz, 66 N.Y.2d til, 485 N.E.2d 221 (1985)
[163] 442 U.S. 62 (1979).
[164] *Parker*, 481 U.S. at 191.
[165] *Id.* at 192 (emphasis in original) (citation omitted).
[166] *Id.* at 193.

The Court's opinion clearly discriminated between the devastating impact of a confession and its reliability. Because an "interlocking" confession would seem to have a very devastating impact on a defendant's case, it would need to have the substantial guarantees of reliability mentioned in *Lee* to be admitted. Thus, again, the Supreme Court stated emphatically that a statement's reliability is not the only factor in determining its admissibility under the confrontation clause; the harm it does to the defendant's case, especially when it "interlocks" with the defendant's own confession, must be considered. Thus, "interlocking" confessions no longer automatically qualify for admission.

Finally, the Supreme Court decided *Richardson v. Marsh*[167] the same day as *Cruz*. In that case, Clarissa Marsh, Benjamin Williams, and Kareem Martin were charged with assault and murder. Shortly after his arrest, Williams confessed. The confession was redacted to omit all references to Marsh and all references indicating that anyone other than Martin and Williams participated in the crime.[168] The confession largely corroborated the victim's account of the crimes except that the victim's account mentioned Marsh's involvement. Specifically, the confession mentioned a conversation between Williams and Martin on the way to the robbery in which Martin said that he would have to kill the victims after the robbery.[169] Marsh testified that she was with Martin and Williams in the car on the way to the robbery, but did not hear their conversation. She also admitted to being present at the robbery, but denied she had helped commit it.

The Supreme Court upheld Marsh's conviction. It distinguished the case from *Bruton* on the basis that the statement against penal interest in *Bruton* was incriminating on its face while the statement in this case became incriminating only when linked with other evidence.[170] The Court held that when the statement is redacted to eliminate any reference to the defendant and is not incriminating on its face, the jury is not as likely to ignore the court's instructions that it not be used against anyone but its maker? The Court did not, however, say that a redacted codefendant's statement can be used against the other defendant; it only said that such a statement may be admitted at a joint trial when the jury has been instructed to use it only against its maker.

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[167] 481 U.S. 200 (1987).
[168] *Id.* at 203.
[169] *Id.* at 204.
[170] *Cruz*, 481 U.S. at 208-09. Thus, the Court adopted the "evidentiary linkage" approach to *Bruton* questions. *See, e.g.*, United States v. Belle, 593 F.2d 487 (3d. Cir. 1979).
[171] *Cruz*, 481 U.S. at 208.

The Supreme Court continues to analyze statements against interest on the basis that they are inherently unreliable and not "firmly rooted" exceptions to the hearsay rule. They can be used against someone other than the declarant only when there has been a special showing of trustworthiness. Significantly, no case involving an inculpatory statement that was to be used against someone other than its maker has passed the Supreme Court's qcalifying test in this regard. A redacted statement may be used in a joint trial, so long as it does not, on its face, inculpate the defendant, but instead requires "evidentiary linkage" to do so. The jury, however, still must be instructed that the statement can be used only against its maker.

A statement against penal interest is not constitutionally admissible on that basis alone. Thus, the language of Federal Rule of Evidence and Military Rule of Evidence 804(b)(3) does not conform with Supreme Court dictates because it focuses only on reliability and not on the harm done to the defendant's case. At best, the rule provides a tool by which a prosecutor can attempt to introduce evidence that is otherwise constitutionally permissible; it cannot bootstrap a statement into evidence over a confrontation clause objection. Thus, confrontation clause analyses based on the language of the rules, and without reference to case law, are incomplete.

As we have seen, the Supreme Court traditionally has viewed statements against penal interest with special suspicion, holding them to be inevitably suspect. The Court clearly stated this view in *Bruton*[172] and re-emphasized it in *Lee:* "Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."[173]

The Supreme Court holds a different view of those hearsay exceptions, such as former testimony, that are "firmly rooted." The Court desires adequate indicia of reliability when the hearsay declarant is unavailable to testify and has ruled that reliability can be inferred without more when the hearsay exception is firmly rooted.[174] Thus, the Court does not look for those particularized guarantees of trustworthiness it requires when hearsay exceptions that are not firmly rooted, such as statements against penal interest, are involved.

The Supreme Court has had the opportunity to change its *Bruton* doctrine and approve the use of statements against penal interest both before and after the enactment of the Federal Rules of Evidence and the Military Rules of Evidence, yet the Court has declined to

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[172] *See supra* note [illegible]

[173] *Lee*, 476 US at 541

[174] *Roberts*, **448** U S at 66; **see** *supra* notes 140-47 and accompanying test

do so. Further, the *Bruton* Court stated specifically that it was not dealing with any recognized exception to the hearsay rule in that case.[175] *California v. Green*[176] taught us that the confrontation clause and hearsay rules are not coterminous; not every violation of the hearsay rules raises confrontation clause problems. Read together, these cases can mean only that the admission of a co-defendant's statement against his penal interest is a violation of the confrontation clause. The effectiveness of jury instructions in *Bruton* could be an issue only if they were meant to cure an underlying constitutional deprivation. Otherwise, *Green* would hold that the failure of the jury instructions to protect the defendant in *Bruton* might raise some hearsay problem. Without a constitutional deprivation, however, that is no concern of the Supreme Court.

V. MILITARY COURT DECISIONS, MILITARY RULE OF EVIDENCE 804(b)(3), AND THE CONFRONTATION CLAUSE

A. ''CRUCIAL" OR "DEVASTATING" EVIDENCE

As part of its constitutional analysis in virtually every case since *Bruton,* the Supreme Court has examined whether evidence offered without the opportunity for cross-examination is "crucial" or ''devastating.''[177] As mentioned above,[178] this is the only way to reconcile many of these cases.

When the Supreme Court decided *Parker v. Randolph*,[179] it used this analysis to hold that when a defendant already has confessed, the admission of his codefendant's confession against the codefendant in a joint trial is not a violation of the defendant's confrontation clause rights because the admission of the confession is not "devastating" to one who has confessed. When the Supreme Court overruled *Parker* in *Cruz v. New York*,[180] it did *so* on the basis that a codefendant's confession that ''interlocks" with a defendant's confession is extremely "devastating" to the defendant because it tends to show that his confession was accurate. While one can disagree with the results the Supreme Court has reached, one cannot deny

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[175] *See supra* note 63 and accompanying text.
[176] 399 U.S. 149 (1970).
[177] *See, e.g.*, Pointer **v.** Texas, 380 U.S. 400 (1965); *Harrington*, 395 U.S. 250; *Dutton*, 400 U.S. 74; Parker v. Randolph, 442 U.S. 62 (1979); *Cruz*, 481 U.S. 186.
[178] *See supra* notes 95 and 96 and accompanying text.
[179] 442 U.S. 62 (1979).
[180] 481 U.S. 186 (1986).

that a "devastation" analysis is an essential part of any decision about the admissibility of a statement against penal interest.

How have the military courts been performing this "devastation" analysis? The Air Force Court of Military Review undertook such an analysis in *United States v. Baran*.[181] In that case, Baran was tried by court-martial for rape. He claimed that his confessions to having intercourse with the victim were admitted into evidence without sufficient corroboration and that testimony concerning hearsay statements made by one of his eo-actors was admitted in violation of the confrontation clause.

In *Baran* the victim became extremely intoxicated playing cards with Baran and some of his friends. She apparently passed out and when she awoke, she found she was having intercourse with Airman Hawks. Eventually she got him to stop. She then got up and went into the next room where she expressed her anger at Airman Pasetti for the incident. She had no idea whether Baran had molested her.

Baran admitted to investigators that he took pictures of Pasetti and the victim having intercourse, that he had intercourse with the victim himself, and that he saw Hawks and the victim have intercourse as he, Baran, left the room. In his statement and at trial he asserted that the victim was awake, responsive, and consenting.[182]

Airman Gomez testified for the government about a statement made by Pasetti. Gomez testified that he was approached by Pasetti who asked him if he wanted an easy "f____." Pasetti told Gomez that Pasetti had a girl in the room and that he was "switching" on her. Pasetti told Gomez that the victim had gotten drunk and that she initially had insisted that everyone leave the room when Pasetti engaged in foreplay with her. She voiced no objection, however, when Baran entered the room and took pictures. Pasetti told Gomez that when Pasetti had finished, Pasetti put his hand in the victim's vagina and that, without her knowing it, "they" surreptitiously replaced Pasetti's hand with the hand of one of the other participants.[183] Obviously, these statements tended to prove the victim was too intoxicated to consent to intercourse.

Although it upheld Baran's conviction, the Air Force Court of Military Review analyzed the history of the admissibility of statements against penal interest and the Supreme Court's view of the requirements of the confrontation clause. The Court stated:

[181] 19 M.J. 595 (A.F.C.M.R. 1984).
[182] *Id.* at 597.
[183] *Id.* at 596.

> The Supreme Court has stated that, at a joint trial, the admission "of the incriminating extrajudicial statements of a nontestifying codefendant can have 'devastating' consequences to a non-confessing defendant." Although *Dutton v.* Evans did not involve a joint trial of co-defendants, the Court, nevertheless, again noted that the hearsay evidence in question was not "crucial" or "devastating." In our view these references to "crucial" and "devastating" imply that the underlying commitment to truth embodied in the Sixth Amendment requires analysis of the significance of the specific hearsay evidence offered. When the evidence is significant to the resolution of the issues in the case, the degree of reliability required for admissibility must be proportionally higher.[184]

The Air Force Court of Military Review found Pasetti's statements "important" but not "crucial" or "devastating." His own admissions that he took pictures of and had intercourse with the victim who had not acknowledged his presence and with whom he had no prior intimate relationship were the primary evidence against him.

This "devastation" analysis is hard to find in the other military cases involving statements against penal interest. Generally, the military courts look for indications of the statement's reliability. A typical example of the Court of Military Appeals' approach is found in *United States v. Dill*.[185] Dill was tried before a general court-martial on charges of receiving and selling stolen grenades. His co-accused's pretrial confession was introduced against Dill at trial pursuant to Military Rule of Evidence 804(b)(3). No reliability analysis of the statement was undertaken.

Judge Cox, writing for the majority, stated the requirements for admission of hearsay evidence when the accused has no opportunity to cross-examine the declarant: "We have emphasized than an accused ordinarily has a right under the Sixth Amendment to the Constitution 'to be confronted with the witnesses against him.' The prerequisites for admissibility without such confrontation are (1) unavailability and (2) reliability."[186]

Nowhere in *Dill* does one find any discussion of the devastating effect of the hearsay evidence. The *Dill* court acknowledged that statements against penal interest traditionally have been considered inherently suspect because they are not "firmly rooted" exceptions to the hearsay rule.[187] The court found nothing to overcome this

[184] *Id.* at 602 (citations omitted) (quoting Parker v. Randolph).
[185] 24 M.J. 386 (**C.M.A.** 1987).
[186] *Id.* at 387 (citations omitted).
[187] *Id.* at 387-88. However, given the Court's recent discussion of this issue in United States v. Wind, the validity of this underlying assumption is now suspect in the military court system. ***See*** *infra* notes **257-60** and accompanying text.

presumption of unreliability and, because the government failed to offer the co-accused testimonial immunity to appear and testify. found the statement inadmissible.[188]

Dill was based solely on the presumed unreliability of the statement; there was no discussion about the impact the admission of the statement had on the defendant's case. Certainly, such a discussion would have been in order. As Judge Sullivan pointed out in his dissent,[189] the accused's confession was admitted properly against him at trial. A full-blown "devastation" analysis, similar to that found in *Crux*, would have been helpful and might have resulted in the admission of the statement. Unfortunately, Judge Sullivan merely made reference to *Cruz* in his one sentence dissent.

In a joint trial, the government may make use of the co-accused's statement against the co-accused, even if the statement is inadmissible against the defendant. While *Bruton* teaches that jury instructions cannot cure the deprivation of the defendant's confrontation clause rights if the statement is used, it does not hold that the statement, in a redacted form, is inadmissible. The Court of Military Appeals commented on the use of a redacted statement in *United States v. Green*.[190] Green and two others were tried jointly for rape. The Court of Military Appeals held that because the specifications listed all of the defendants and a copy of these charges was in possession of the court members in the deliberation room, the "redaction" of one of Green's co-accused's confessions by lining out Green's name was ineffective to secure Green's confrontation clause rights.

The Supreme Court reached a contrary decision in *Richardson v. Marsh*,[191] a case in which the co-accused's statement was redacted not just by blacking out the defendant's name, but by eliminating any reference to her existence. Thus, language such as "the three of us," which was used in *Green*,[192] is unacceptable. The Supreme Court, however, held that properly redacted statements may be used in a joint trial with proper limiting instructions.

B. THE RELIABILITY ANALYSIS

In analyzing the reliability of a statement against penal interest, military courts have focused on the circumstances surrounding the making of the statement. In *United States v. Garrett*[193] (hereinafter ***Robert** Garrett)*, the Navy-Marine Corps Court of Military Review ex-

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[188] *Dill*, **24** M.J. at 387-88.
[189] *Id.* at 389 (Sullivan. J.. dissenting).
[190] 3 M.J. 320 **(C.M.A.** 1977).
[191] 481 U.S. 200 (1987); *see supra* notes 167-171 and accompanying text
[192] *Green*, *3* M.J. at 323.
[193] 16 M.J. 941 (N.M.C.M.R. 1985).

amined the in-court witness's motive to fabricate as justification for prohibiting the use of the statement at trial.

Robert Garrett was tried before a court-martial on charges of attempted robbery, conspiracy to commit robbery, unpremeditated murder, and felony murder. On the evening of the incident, Garrett was involved in a confrontation with the victim, Corporal Murphy, outside a bar in Japan. After the confrontation, Garrett and his three co-accuseds left the scene together, and Murphy returned to the bar. Later that evening, Murphy left the bar, looking for Garrett and the others. A couple of hours later, Murphy was found dead of stab wounds. His empty wallet, which had been full of cash earlier, was found near his body. There were no witnesses to the murder and no weapon was found.

Over defense objection, Private Weaver, an inmate in the brig with Garrett and his co-accuseds, testified about a conversation he heard there between two of the co-accuseds, Lance Corporal Chupp and Private First Class Dodson. According to Weaver, Chupp told Dodson: "Hey you better keep quiet about that or we're going to get in trouble."[194] Dodson then replied: "F____ that swine, I'm glad we did it. He shouldn't have been f_____g around with Garrett."[195]

The Navy-Marine Corps Court of Military Review first extended the corroborating circumstances requirement for exculpatory statements against penal interest to inculpatory statements as well.[196] Then it examined the trustworthiness of the in-court witness, Weaver. The court examined the evidence and found that Weaver had a motive to fabricate his testimony. Weaver told another inmate, Private Harris, that he wanted to "get" the people who had murdered his friend, Murphy.[197] When Harris asked Weaver if he knew whether Garrett, Dodson, or Chupp killed Murphy, Weaver replied: "No, but they have to have something on them if they have them in the brig, because they wouldn't put just anyone in the brig for murder."[198] Private Harris also testified that "he (Private Weaver) told me he didn't like the brig and wanted to get out anyways (sic) and when I was in seg (sic) and we talked to NIS, NIS told us they could help us if we got anything on Garrett, Chupp or Dodson."[199]

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[194] *Id.* at **943.**

[195] *Id.*

[196] *Id.* at **946.** ***See*** *infra* text accompanying notes 225-82 for **a** fuller discussion of this issue.

[197] ***Robert*** *Garrett,* 16 M.J. at 947.

[198] *Id.*

[199] *Id.*

The Navy-Marine Corps Court of Military Review held that Weaver's testimony about the statement was not admissible. The Court noted that Weaver was not reliable because he had a strong motive to fabricate his testimony. In effect, the court substituted its own assessment of Weaver's credibility for that of the court-martial members who had actually seen and heard him. The court justified this trespass into what traditionally has been the province of the factfinder with an explanation that can be described as, at best, incomprehensible:

> When determining whether to admit an in-court witness' testimony concerning a statement against penal interest, if the military judge concludes from the evidence before him that there is a high likelihood that the statement was not actually made, he must determine whether such evidence affects the reliability of the truth of the matter asserted.[200]

The trial court acted correctly in *Robert Garrett*. Because Weaver was at the trial and subject to cross-examination, the defense had ample opportunity to point out the flaws in his testimony and to argue that he was unbelievable. No other military case has been decided in this fashion.[201]

The Air Force Court of Military Review focused on the content of the statement against penal interest in *United States v. Garrett* (hereinafter *Damon Garrett*).[202] Garrett was tried before a court-martial with members on charges of adultery and indecent assault. Garrett and Staff Sergeant V went to a party in the victim's barracks room. Garrett testified that he heard V talking with the victim, after which V called him over to the sleeping area. Garrett saw the victim on her bed with no clothes on and, believing that she desired sexual relations with him, engaged in foreplay and intercourse with her. The victim claimed that she was asleep and gave no consent to any of these acts. She testified that she awoke from a dream in which she was engaging in intercourse with her boyfriend to find she was engaging in intercourse with Garrett.

At trial, after both sides had rested, the members of the court requested that V testify. When V testified that he did not remember the offenses and wished to blot them from his mind, the trial judge admitted a statement given by V under oath to investigators. The Air Force Court of Military Review commented on the statement: "V had been advised that he was suspected of rape, attempted sodomy, indecent exposure, conspiracy to commit rape and attemp-

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[200] *Id.*

[201] *Robert Garrett* was criticized on this basis in United States v. Nutter, 22 M.J. 727, 730 n.2 (A.C.M.R. 1986).

[202] 17 M.J. 907 (A.F.C.M.R. 1984).

ted battery; he admitted, at most, to indecent exposure, and did not in any way, inculpate himself in any of the relatively more serious offenses."[203]

In rejecting the statement and setting aside the conviction, the court stated:

> It has been consistently held that a statement given by a suspect after advisement of rights wherein he seeks to describe the events in such a manner so as to minimize his criminal involvement and, at the same time, inculpate the accused, does not possess that degree of reliability necessary to satisfy the requirements of the Sixth Amendment.[204]

So long as the declarant takes the witness stand at trial, *California v. Green*[205] holds that there is no constitutional error in using his out-of-court statement. In *California v. Green* the declarant gave a pretrial statement to investigators in which he said that Green had given him drugs. At trial, the declarant took the witness stand and testified that he was under the influence of LSD at the time of the crime and did not recall anything about it. The Supreme Court held that because he was present at trial and subject to cross-examination, there was no confrontation clause violation.

The Air Force Court of Military Review's opinion in *Damon Garrett* found V's statement so self-serving that it did not possess that degree of reliability necessary to satisfy the requirements of the sixth amendment. Because V appeared at trial and testified to a lack of memory in the same manner as the witness in *Green,* however, no confrontation clause violation could have occurred. Thus, the Air Force Court of Military Review decided the case on the wrong basis, and the court lost the opportunity to explain the basic reliability requirements of Military Rule of Evidence 804(b)(3) without the additional complexities imposed by the confrontation clause.

In *United States v. Wind*[206] the Court of Military Appeals determined that a statement was not really against the declarant's penal

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[203] *Id.* at 910. The court commented on the content of the statement:

> Our review of V's statement reveals that he swore: that he and the accused had been drinking; they went to the barracks; they came upon a sign on one of the doors stating "come in, party in here;" they entered the room and saw that the lights were on and the victim was in her bed apparently asleep; he exposed his penis; he shook the victim a few times, after which he (V) went around a partition out of sight of the victim and the accused, and, when he looked back around the partition he observed the accused and the victim engaged in sexual intercourse.

Id. at 910.

[204] *Id.* at 911 (citations omitted).

[205] 399 U.S. 149 (1970); *see supra* notes 76-82 and accompanying text.

[206] 28 M.J. 381 (C.M.A. 1989).

interest and was therefore inadmissible. In that case, the accused was tried before a special court-martial on two specifications of distributing methamphetamines. Wind asserted the defense of entrapment, claiming that the government's informant pressured him into selling the drugs. Wind claimed that during his naval career he never had used drugs and that he had no contact with any type of drug transactions except for the two for which he had been charged.

To rebut Wind's defense and to impeach his credibility, the government introduced the statement Campbell gave to Naval Investigative Service agents. Campbell claimed that Wind was one of at least five persons to whom Campbell had sold methamphetamines. Campbell was absent without leave at the time of trial and was, therefore, unavailable to testify. At the time Campbell made this statement, he also was under investigation for drug offenses. The defense argued that Campbell made his statement to an interrogator hoping that he might receive better treatment if he supplied the names of his drug customers.[207] Wind argued that admission of Campbell's statement violated Wind's confrontation clause rights. The Court of Military Appeals stated:

> [W]e have been concerned about reception in evidence of statements that, if viewed technically, incriminated the declarant but which, in practical effect, probably benefited him. A good example of this is where one co-accused makes statements which acknowledge the declarant's criminal liability but which make the other co-accused seem much more culpable.[208]

Finding that the government had failed to carry its burden to prove that Campbell's statement was against his own perceived self-interest, the Court of Military Appeals remanded the case to the Navy-Marine Corps Court of Military Review to determine if the error was harmless.

Judge Everett's opinion in ***Wind*** indicates that for a statement to be admissible as a declaration against interest, the declarant must have perceived that it would be against his interest at the time he made it. "[I]t does not suffice for admissibility that, at a later time, a judge can conjure up some esoteric theory as to how in some way a statement made by an absent witness was contrary to his penal or pecuniary interest."[209] Judge Cox disagreed with Judge Everett and would have adopted an objective test.[210] This issue has yet to be determined, but Judge Everett's subjective test seems to be more logical.

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[207] *Id.* at 385.
[208] *Id.* at 384 (citations omitted).
[209] *Id.* at **384.**
[210] *Id.* at 386 (Cox, J., concurring).

If we accept that, a person does not make a false statement against his penal interest, it follows that he must perceive that his statement is, in fact, against his interest. If, for example, he does not understand the significance of what he is saying, the logical underpinnings supporting his statement's reliability do not exist. Conversely, if he makes **a** statement that, because of a mistake of law, he incorrectly thinks incriminates him, logic dictates that his statement is worthy of belief.

Certainly, Judge Cox's objective test is easier for a trial court to use. It simplifies the process of appellate review because it avoids a factual inquiry into the state of the declarant's mind. That inquiry, however, almost always will be part of a larger examination of the facts surrounding the statement. This could be done by the trial judge in an article 39a evidentiary hearing before the judge determines the statement's admissibility. The difficulty of applying Judge Everett's test is relatively minor, and the test reveals the declarant's state of mind to give an accurate picture of whether he really thought he was harming himself. Thus, it should be adopted.

Baran[211] provides a model reliability analysis. Airman Pasetti made statements to Airman Gomez in the hallway of the victim's dormitory indicating that the victim of a sexual assault was too intoxicated to know what was going on. The statement was offered to rebut Baran's claim of consent.

When the Air Force Court of Military Review examined the admissibility of Airman Pasetti's statements, it discussed a number of factors that tended to support their reliability. First, Pasetti's statements were made at the time and place of the crime; he was not in a custodial setting. The content of the statements gave no indication that he was trying to shift blame to Baran. Second, the statements were actually against Pasetti's penal interest. Third, Pasetti had personal knowledge of the events he was describing. Fourth, the nature of the statements negated the possibility that they were tainted by faulty recollection. Fifth, the defense's cross-examination of Gomez, who testified as to what Pasetti said, provided ample information from which the factfinder could evaluate Pasetti's ability to observe and relate the events to which his statements made reference. Sixth, Pasetti's statements were corroborated by the victim's testimony and by that of Gomez.[212]

How the statement was obtained can bear directly on its reliability. Statements given to investigators may be suspect even when the declarant is not under investigation and when his statement is not

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[211] 19 M.J. 595 **(A.F.C.M.R.** 1984); ***see*** *supra* notes 181-184 and accompanying **text.**
[212] *Baran*, 19 M.J. at 602.

against his penal interest. An example of such a situation can be found in *United States v. Hines*.[213] The defendant was tried before a general court-martial for numerous sexual offenses against his stepdaughters. Hines' wife and stepdaughters refused to testify against him, so the government offered as evidence their statements in which they described Hines' offenses in detail to investigators.[214] The Court of Military Appeals was concerned about whether such statements given to investigators were obtained in such a way that the purposes of cross-examination were served.[215] The Court of Military Appeals found that the trial court's admission of the stepdaughter's statements pursuant to Military Rule of Evidence 804(b)(5)'s residual hearsay exception was error. The court stated:

> Since McNeal's (the investigator) questioning is proffered as a replacement for cross-examination, was it equivalent to cross-examination? In other words, was McNeal as zealous at uncovering the weaknesses in the prosecution's case . . . as defense counsel would have been? Was he intent on exploring all possibilities of reasonable doubt as to guilt, or was he, in effect, content with making out a *prima facie* case?[216]

Hines was not a case involving a statement against penal interest. Thus, its concerns might not apply with equal force in such a case when it might be argued that such a statement, by its very nature, is reliable enough to be an adequate substitute for cross-examination. Its concern about whether an investigator's questioning is an adequate substitute for cross-examination,[217] however, is not unique. A technique in which the investigator paraphrased an ex parte statement was found unacceptable in *United States v. Cordero*.[218]

Finally, the Army Court of Military Review examined the indicia of reliability surrounding the taking of a statement by an investigator in *United States v. Belfield*.[219] Belfield was tried before a general court-martial on a charge of rape. He and four other soldiers were involved in the incident with PVT H, the victim.

One of the co-accuseds, SP4 Wood, was interviewed by investigators after he waived his rights. He gave a sworn statement in which he incriminated himself and Belfield in the rape of PVT H. Although

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[213] 23 M.J. 125 (C.M.A. 1986).
[214] *Id.* at 126.
[215] *Id.* at 137.
[216] *Id.*
[217] The *Hines* court felt that the investigative process is not normally the equivalent to the judicial process and was not expected to be so. *Id.*
[218] 22 M.J. 216 (C.M.A. 1986). Again, however, the statement was not one against penal interest. Further, in view of the other evidence in the case, the admission of the statement was ruled harmless error.
[219] 24 M.J. 619 (A.C.M.R. 1987).

the Army Court of Military Review's opinion does not detail most of the facts in the incident, the court held that Wood's statement was consistent with that of the victim and of the only eyewitness. Certain additional damaging information was contained in Wood's statement, such as that Belfield's zipper was unfastened and that Belfield's erect penis was exposed immediately before Belfield assumed a horizontal position over the victim. Wood's statement went on to explain that he assumed that Belfield had accomplished penetration because Belfield later said he needed to wash his penis.[220]

Because Wood's trial was pending, he refused to testify against Belfield. The Army Court of Military Review examined the factors that it thought established the reliability of Wood's statement. The court rejected the government's argument that Wood's statement possessed indicia of trustworthiness merely because it was sworn, written, and voluntary. The court required "an independent showing of the trustworthiness of the specific allegations against [Belfield]."[221] The court also noted that the trial judge made his decision about the admissibility of the statement at the end of the government's case-in-chief. Thus, the trial judge had before him "[a]ll of the evidence that could have independently demonstrated or contradicted the trustworthiness of **SP4** Wood's statement."[222]

The appellate court observed that Wood's statement was not the product of an investigatory "technique" and that the investigator did not suggest a theory of what happened; rather, Wood made his statement "right off the top."[223] Further, the appellate court did not believe that Wood's statement tried to minimize Wood's culpability at Belfield's expense. Indeed, Wood's statement exonerated one of the other co-accuseds. Of course, although the appellate court did not mention it, Wood's statement described events he actually saw, and was not a recitation of second-hand knowledge.

While the analyses in these cases might appear dissimilar, they have much in common. In determining the statement's admissibility, these cases focus on the facts surrounding the making of the statement against penal interest and on the statement itself. In doing so, they lead the trial court to invade areas, such as the assessment of the credibility of witnesses and the weight of the evidence, that traditionally have been the province of the factfinder. This is more obvious in ***Robert Garrett,*** a case in which the appellate court substituted its judgment for that of the factfinder in determining the credibility of a witness. It is also true in *Damon* ***Garrett*** and *Wind,* how-

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[220] *Id. at* 620-21.
[221] *Id.* at 621.
[222] *Id.*
[223] *Id.* at 621-22.

ever, cases in which the court substituted its judgment for that of the factfinder in determining the believability of a statement. In *Hines* and *Belfield* the appellate courts examined the investigatory "technique" involved in taking the statements. Arguably, all of this evidence is well within the ability of most factfinders to evaluate.

These analyses are not necessarily wrong. If the courts were performing the devastation analysis discussed above,[224] however, they would also have to focus on other facts that would not merely corroborate the believability of the statement against penal interest, but that would tend to prove independently what the statement asserts. Obviously, if independent evidence tends to prove the same facts alleged in the statement against penal interest, the devastation to the defendant probably will be minimal and the admission of the statement will not violate his confrontation clause rights. Further, it would strengthen the statement's reliability. Ironically, Military Rule of Evidence 804(b)(3) requires such corroborating circumstances when an exculpatory statement against penal interest is offered in evidence.

C. THE REQUIREMENT OF CORROBORATION

Military Rule of Evidence 804(b)(3) provides that "[a] statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[225] An examination of the legislative history reveals that this corroboration requirement was a creature of political necessity.[226] There is no logical reason to explain why the government's witnesses should be considered more reliable than those of the defense. Indeed, the government has many more ways to induce persons to testify falsely than does the defense.

Some courts have grafted a corroboration requirement onto the rule for inculpatory as well as exculpatory statements against penal interest. Perhaps the most well-known case is *United States v. Alvarez*.[227]

The *Alvarez* court conceded that no express provision of the federal rule[228] requires corroboration of inculpatory statements against penal

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[224] *See* supra notes 177-92 and accompanying text.
[225] Mil. R. Evid. 804(b)(3).
[226] *See* supra notes 110-20 and accompanying text.
[227] 584 F.2d 694 (5th Cir. 1978).
[228] Fed. R. Evid. 804(b)(3) is similar to Mil. R. Evid. 804(b)(3). ***See*** *supra* note 3 and accompanying text.

interest, but cited the legislative and case-law history as support for its conclusion that such statements also must be corroborated.[229] The court relied on the Senate report's language indicating the Senate's desire to avoid codifying the constitutional principles found in *Bruton*[230] as evidence that Congress intended the courts to define the limits of Federal Rule of Evidence 804(b)(3).

The court then reviewed the case law to decide that the mission of the confrontation clause is to "advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.'"[231] Citing *United States v. Barrett*[232] and *United States v. Hoyos*,[233] the court held that the standard for inculpatory statements requires "clear" corroboration.[234] Finding none, and finding the prohibited evidence "crucial" to the government and "devastating" to Alvarez,[235] the court reversed his conviction.

The Navy-Marine Corps Court of Military Review followed the lead of *Alvarez* in *Robert Garrett*.[236] The *Robert Garrett* court also examined the legislative history of Military Rule of Evidence 804(b)(3). It held:

> The fact of legislative omission of a parallel test must be filled by this court to equate with the holdings of the Supreme Court in *Chambers* v. *Mississippi* and *Dutton* that the statement must possess "indicia of reliability" prior to admission. We therefore hold that the admissibility of *inculpatory* statements against penal interest under Mil. R. Evid. 804(b)(3) requires corroborating circumstances that clearly indicate the trustworthiness of the statement.[237]

Similar holdings can be found by one panel of the Army Court of Military Review in *United States v. Robinson*[238] and *United States v. Vasquez*.[239]

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[229] *Alvarez*, 584 F.2d at 700.
[230] *See supra* note 124 and accompanying text.
[231] 584 F.2d at 700.
[232] 539 F.2d 244, *253* (1st Cir. 1976).
[233] 573 F.2d 1111, 1116 (9th Cir. 1978).
[234] *Alvarez*, 584 F.2d at **702.**
[235] *Id.* at 702 n.10.
[236] *Robert Garrett*, 16 M.J. at 946; *see supra* notes 193-201 and accompanying **text.**
[237] *Robert Garrett*, 16 M.J. at 946 (emphasis in original) (citations omitted).
[238] 16 M.J. 766 (A.C.M.R. 1983).
[239] 18 M.J. 668 (A.C.M.R. 1984).

Another panel of the Army Court of Military Review took the opposite view in *United States* v. *Nutter*.[240] The issue in that case was the admissibility of a statement against penal interest to a fellow inmate by one of Nutter's co-actors in crime. The co-actor claimed that he and Nutter had committed a homosexual assault and rape in the United States Disciplinary Barracks. The statement was used to corroborate Nutter's own confession to the same inmate. Because the perpetrators wore masks, these statements were the primary evidence against Nutter.[241]

The Army Court of Military Review reasoned that any hearsay statement must bear adequate indicia of reliability to be admissible at trial, so some corroboration is always needed:

> We agree that statements against penal interest which are offered to inculpate an accused must be accompanied by circumstances which indicate the trustworthiness of the statement, but only because the Constitution requires indications of the trustworthiness of *any* statement which is offered against an accused without affording him an opportunity to confront the declarant.[242]

The court then held that "firmly rooted" hearsay exceptions ipso facto bear such adequate indicia of reliability.[243] While the Court acknowledged that the penal interest exception is regarded by many as a rule of recent origin, it held that this is an historic "anomaly" and that it should be regarded as "firmly rooted."[244] Thus, because the statement was against the co-actor's penal interest, "it's admission was not dependent on the availability of additional corroboration, independent or otherwise."[245]

In *Belfield*[246] the Army Court of Military Review seemed to step back from its sweeping assertion that all statements against penal interest automatically pass constitutional muster:

> While such a statement is categorized as a declaration against penal interest for hearsay purposes *(see* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804(b)(3)), the Supreme Court has rejected this categorization as overbroad for Confrontation Clause purposes. Accordingly, we likewise "decide this case as involving a confession by an accomplice which incriminates a criminal defendant."[247]

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[240] 22 M.J. 727 (A.C.M.R. 1986).
[241] *Id.* at 729.
[242] *Id.* at 731 (emphasis in the original).
[243] *Id.* (citing Roberts, 448 U.S. 56).
[244] *Id.*
[245] *Id.*
[246] 24 M.J. 619 (A.C.M.R. 1987); see *supra* notes 219-23 and accompanying text.
[247] 24 M.J. 619, 620 n.2 (A.C.M.R. 1987) (quoting Lee v. Illinois, 476 U.S. 530 (1986)).

The court, however, did not reject the reasoning of ***Nutter.***

The Court of Military Appeals seemed to settle the issue of corroboration in *Dill*.[248] The accused was tried before a court-martial on charges of receiving stolen rifle ammunition and receiving stolen grenades. The accused's co-actor gave a confession to authorities, and the government introduced it into evidence without any reliability analysis by the trial court.[249]

The Court of Military Appeals discussed the use of statements against penal interest by the government as a "rather new phenomenon as such have traditionally been held inadmissible."[250] Quoting from *Bruton*,[251] the court stated:

> [T]he post-arrest statements of a codefendant have traditionally been ***viewed with special suspicion.*** Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are ***less credible than*** *ordinary* ***hearsay*** *evidence.*[252]

The Court of Military Appeals went on to hold that because a co-accused's statements against penal interest are "presumptively suspect,"[253] they do not rest upon the solid foundations envisioned in ***Ohio v. Roberts.***[254] That case held "firmly rooted" hearsay exceptions to be admissible without other indicia of reliability. The *Dill* court held that statements against penal interest are "of recent derivation and are not 'firmly rooted' exceptions to the hearsay rule."[255] After ***Dill*** it seemed clear that military courts would have to begin the analysis of whether a statement against penal interest is admissible from the premise that it is presumptively unreliable and that special guarantees of trustworthiness by way of corroboration would be required.

The premises that seemed settled by ***Dill*** were called into question by the Court of Military Appeal's recent decision in *Wind*.[256] In that case, the statement of a drug dealer—who was under investigation himself—that he had sold drugs to Wind was admitted at trial to rebut Wind's assertion that he never used drugs other than during the incident for which he was charged.

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[248]24 M.J. 386 (C.M.A. 1987).

[249]*Id.* at 387. Given the Army Court of Military Review's position discussed in Nutter, this is not surprising.

[250]*Id.*

[251]391 U.S. 123 (1968).

[252]22 M.J. at 387 (emphasis added by the court).

[253]*Id.* (citing Lee, 476 U.S. 530).

[254]448 U.S. 56 (1980).

[255]22 M.J. at 387-88.

[256]28 M.J. 381 (C.M.A. 1989).

Judge Everett, writing for the majority for the Court of Military Appeals, held that evidence such as former testimony, which fits into a "well established" hearsay exception, usually is admissible without corroboration or any specific demonstration of trustworthiness.[257] He recognized that, at common law, a statement against penal interest was inadmissible. Citing *Chambers v. Mississippi*,[258] he declared that the rule that allowed a statement against pecuniary interest to be admissible while prohibiting a statement against penal interest had been criticized severely. He then wrote:

> In our view, the rationale for admitting the declaration against penal interest is at least as strong as that for admitting a declaration against pecuniary interest. Therefore, we shall treat such declarations as coming within a "well established exception"; and such declarations may be admitted in evidence without the Government's offering corroboration or independent evidence as to the reliability of the declaration.[259]

This post hoc revision of the common law runs afoul of Supreme Court precedent and creates problems. It is a measure of the weakness of Judge Everett's opinion that he cites *Chambers* for the proposition that the prohibition of the use of statements against penal interest was criticized severely. *Chambers* involved the use by the defendant of an *exculpatory* statement against penal interest. *Chambers* presented none of the confrontation clause problems that were discussed in *Bruton*. Rather, it dealt with a defendant's due process right to present evidence in his own behalf.

Judge Everett's opinion wishes into existence what the common law did not create. He sweeps away nearly a century of case law with the statement that, in the court's view, the rationale for admitting statements against penal interest is at least as strong as that for admitting statements against pecuniary interest. This reasoning is contrary to the analyses in *Lee v. Illinois*[260] and *Crux v. New York*,[261] which assumed that statements against penal interest are presumptively unreliable and which discussed what would be sufficient "indicia of reliability" for their admission.

It also ignores the theoretical underpinnings of *Ohio v. Roberts*.[262] "Firmly rooted" hearsay exceptions are admissible over confrontation clause objections because they were part of the common law

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[257] *Id.* at 385.
[258] 410 U.S. 284 (1973); *see supra* notes 97-100 and accompanying text
[259] *Wind*, 28 M.J. at 385.
[260] 476 U.S. 530 (1986).
[261] 481 U.S. 186 (1987).
[262] 448 U.S. 56 (1980).

when the constitution was created and it is assumed that the framers had no intent to eliminate them. Further, the courts have had experience with them, and they have a history of reliability. That is not the case with statements against penal interest. The Supreme Court emphasized their inherent unreliability in ***Bruton*** and ***Lee*** when it could have found them "firmly rooted."[263]

In his concurring opinion in ***Wind,*** Judge Cox does not go as far as Judge Everett. Judge Cox wished to make it clear that a hearsay statement must be reliable to be admissible over a confrontation clause objection.[264] He cited *Crux* for the proposition that "[m]erely labelling a statement as a 'declaration against penal interest' is not enough. This is particularly true of confessions of co-adventurers."[265] Thus, it seems that Judge Cox would require the reliability analysis that Judge Everett finds unnecessary. Judge Sullivan has shown little inclination to get involved in this area,[266] so the issue of whether inculpatory statements against penal interest require corroboration will remain unsettled until further Supreme Court guidance or until someone on the Court of Military Appeals changes his mind.

The Air Force Court of Military Review examined an exculpatory statement against penal interest in ***United*** *States v. Warner.*[267] Warner was tried before a general court-martial for wrongful use of cocaine. At trial, Warner testified that he had visited a civilian friend named Johnnie Anderson before each of two times that he had submitted urine samples that tested positive for cocaine. Warner denied using cocaine, but thought that his friend might have placed some of the drug in drinks consumed by Warner.

Warner offered the purported affidavit of Anderson, which supported Warner's conjecture that Anderson had placed cocaine in Warner'sdrinks. Warner offered the affidavit as residual hearsay pursuant to Military Rule of Evidence 803(24) or as a statement against penal interest pursuant to Military Rule of Evidence 804(b)(3), but the trial court sustained the government's objections to it,

In affirming the trial court's decision, the Air Force Court of Military Review cited *Dill*[268] for the proposition that a statement against penal interest is presumptively suspect and is not ipso facto

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[263] *See supra* notes 69-72, 158 and accompanying text.
[264] *Wind,* 28 M.J. at 385 [Cox, J., concurring).
[265] *Id.* at 386 [citing *Cruz,* 481 U.S. 186).
[266] Judge Sullivan's opinions in *Dill* and ***Wind*** tended to view this problem **as** harmless error. ***See*** *Dill,* 24 M.J. at 389 (Sullivan, J., concurring); *Wind,* 28 M.J. at 386 [Sullivan, J., concurring).
[267] 25 M.J. 738 (A.F.C.M.R. 1987).
[268] 24 M.J. ***386*** **(C.M.A.** 1987).

vested with guarantees of reliability.[269] Thus, the rule requires corroborating circumstances of trustworthiness for the statement's admission. The Air Force Court of Military Review observed that the affidavit lacked any factors clearly indicating its trustworthiness. It bore the signature of a notary public in Wayne County, Michigan. far removed from Anderson's supposed residence in Washington, D.C. Anderson's and the notary's signature appeared above a page and a quarter of text addressed "To Whom It May Concern,'' and the document was otherwise unsigned and undated.[270] Obviously, the statement was highly suspect.

The Air Force Court of Military Review was careful to acknowledge that ''[t]he government's ability to confront potential defense witnesses probably does not raise an issue of similar Constitutional dimension to the ability of an accused to confront his accusers.''[271] The court declared, however, that "basic standards of reliability concerning declarations by those not present in court must be observed.''[272]

Warner highlights what could be a problem for defendants who wish to present exculpatory statements against penal interest. *Robert Garrett* and *Robinson* adopted a corroboration requirement for inculpatory statements on the basis that the confrontation clause requires this for hearsay exceptions that are not "firmly rooted." *Dill* called these statements "inherently suspect.'' *Warner*, however, required corroboration for an exculpatory statement against penal interest, not because of any constitutional directive, but because of the requirements of the evidentiary rule. Thus, the reasons for corroborating exculpatory statements are not necessarily the same as the reasons for corroborating inculpatory statements. Logically, the corroboration required for inculpatory statements should be the stronger of the two, because it will have to pass the more rigorous standards of the confrontation clause.

Unfortunately, the Court of Military Appeals' decision in *United States v. Koistinen*[273] stands this analysis on its head. In that case, Koistinen was tried before a special court-martial for wrongful use of LSD. During the investigation of the offense, Koistinen waived his rights and confessed, orally and in writing, to using drugs with Amaro, one of his civilian co-workers. Amaro confessed to providing drugs to Koistinen. Koistinen's conviction was affirmed on the basis that the two confessions ''interlocked.''[274]

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[269] *Warner*, 25 M.J. at 740.
[270] *Id.* at 740.
[271] *Id.* at 741.
[272] *Id.*
[273] 27 M.J. 279 (C.M.A. 1988).
[274] For a further discussion of "interlocking" confessions, *see infra* notes 283-91 and accompanying text.

Dicta in *Koistinen* leaves the impression that the Court of Military Appeals is undecided about whether to require corroboration of an inculpatory statement against penal interest, although the court will require such corroboration for an exculpatory statement.[275] Judge Cox's opinion in *Koistinen* adverts to the recognition by the drafters of the rule of the potential for fraud in exculpatory statements against penal interest and acknowledges that some courts have adopted a corroboration requirement for inculpatory statements. Judge Cox went on to note: "Even if that be the law, (referring to the corroboration requirement for inculpatory statements against penal interest) appellant's confession here abundantly satisfied such requirement."[276]

Judge Cox's dicta in *Koistinen* is a step back from his opinion in *Dill*. In discussing the reliability of a post-arrest confession by a co-accused, Judge Cox wrote in *Dill:*

> The reason for these precautions is that "the post-arrest statements of a codefendant have traditionally been *viewed with special suspicion.* Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are *less credible than ordinary hearsay evidence.*"[277]

It is difficult to reconcile this language with that written by Judge Cox a mere fifteen months later in *Koistinen.* Quoting from *Hines*,[278] he wrote:

> For confrontation purposes, the statement must be "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " Similarly, "[t]he rationale of the [statement against interest] rule is that people are reluctant to say things against their self-interest unless those things happen to be the truth." Hence such statements provide a "guarantee of trustworthiness."[279]

Because the inculpatory statements against penal interest in both *Dill* and *Koistinen* were given by co-actors to law enforcement authorities who were investigating the crimes, one is left wondering why Judge Cox's view of such statements seems to have changed so dramatically or how the cases can be reconciled.

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[275] *Koistinen*, 27 M.J. at 281.

[276] *Id.*

[277] 24 M.J. 386, 387 (C.M.A. 1987) (quoting *Lee,* 476 US. 530) (emphasis in Judge **Cox's** opinion).

[278] 23 M.J. 125 (C.M.A. 1987).

[279] *Koistinen, 27* M.J. at 281 (citations omitted) (quoting S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 681 (2d ed. 1986)).

The latest opinion in this area comes from Judge Everett in *Wind*.[280] He wrote:

> In our view, the rationale for admitting the declaration against penal interest is at least as strong as that for admitting a declaration against pecuniary interest. Therefore, we shall treat such declarations as coming within a "well established exception"; and such declarations may be admitted in evidence without the Government's offering corroboration or independent evidence as to the reliability of the declaration.[281]

As in *Dill* and *Koistinen*, the statement in *Wind* was given by a co-actor in crime with the accused. The *Wind* statement was given by a service member who admitted to authorities that he had sold methamphetamines to Wind on several occasions. The *Wind* court rejected the co-actor's statement on the basis that it was not truly against his penal interest.[282] Thus, the Court of Military Appeals seems to be of the opinion that if a statement is truly against the declarant's interest, it is admissible without corroboration.

D. "INTERLOCKING" CONFESSIONS

Parker v. Randolph[283] established a rule that when a defendant has confessed, the admission of his co-accused's confession or statement against penal interest in a joint trial with the accused is not constitutional error so long as the trial court gives appropriate limiting instructions to the jury that they cannot consider the co-accused's confession as evidence of the accused's guilt. The Supreme Court reasoned that because the defendant also had confessed, his co-accused's confession was not "devastating" or "crucial" enough to warrant its prohibition.

Cruz v. New York[284] reversed the holding in *Parker*. *Cruz* held that the more the two confessions coincide, the more devastating the admission of the co-defendant's statement that was not subject to cross-examination. The *Cruz* court held that the "interlocking" nature of the confessions may bear on whether the co-defendant's confession is reliable enough to be admitted as evidence directly against the defendant. The mere fact that the statements might "interlock," however, does not negate the necessity of a devastation analysis. Justice Scalia, writing for the majority, said that interlocking bears an inverse relationship to devastation.[285]

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[280] 28 **M.J.** 381 (C.M.A. 1989).
[281] *Id.* at 385.
[282] *Id.*
[283] 442 U.S. 62 (1979); ***see*** *supra* notes 137-39 and accompanying text.
[284] 481 U.S. 186 (1987); ***see*** *supra* notes 161-66 and accompanying text
[285] *Id.* at 192; ***see*** *supra* note 165 (Justice Scalia's exact language).

Nineteen months after ***Crux,*** the Court of Military Appeals decided *Koistinen*.[286] As noted above,[287] Koistinen was tried before an Air Force special court-martial on a charge of use of LSD. When questioned by an investigator, Koistinen waived his rights and confessed to using drugs with Amaro, one of his civilian co-workers. When Amaro was questioned, he confessed to providing drugs to Koistinen.

At Koistinen's trial, Amaro refused to testify, invoking his privilege against self-incrimination. Because he was a civilian, the military had no authority to grant him testimonial immunity, and the local United States Attorney's office refused to do so. Over Koistinen's objection, the trial court then admitted into evidence Amaro's confession. The prosecution's case essentially consisted of the two confessions.[288]

The Court of Military Appeals noted that the trial court judge held an evidentiary hearing into the circumstances surrounding both statements and made specific findings supporting his decision that Amaro's statement was reliable enough to pass constitutional muster. The Court of Military Appeals further found Amaro's statement reliable because it "interlocked" with Koistinen's confession.

The Court of Military Appeals did not explicitly perform any devastation analysis. The court, however, stated:

> Moreover, "appellant's confession . . . changes the complexion of the case to a considerable degree," in that "the 'constitutional right of cross-examination' . . . has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[289]

It was particularly disheartening to see the Court of Military Appeals' reference to this language from ***Parker*** because this view was rejected explicitly by the Supreme Court in ***Crux.*** Indeed, the ***Crux*** majority found that interlocking bears an inverse relationship to devastation.

Remember that ***Crux*** involved a joint trial in which the co-defendant's statement was inadmissible against Cruz. The issue there was whether jury instructions adequately protected Cruz from the jury drawing an adverse inference against him because of his co-

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[286] 27 M.J. 279 (C.M.A. 1988).
[287] *See* supra notes 273-77 and accompanying text.
[288] 27 M.J. at 280.
[289] *Id.* at 282 (quoting *Parker*, 442 U.S. at 73) (citations omitted).

defendant's confession. *Koistinen* was not such a joint trial. Amaro's statement was admitted against Koistinen for all purposes on the basis of reasoning that was rejected by the Supreme Court in *Cruz*. *Crux* assumed devastation in an "interlocking" confession case. Conversely, *Koistinen* found no devastation on the basis of the "reduced value" of cross-examination.

The Court of Military Appeals appears to be on tenuous legal ground in *Koistinen*. No Supreme Court case yet has allowed an inculpatory statement against penal interest into evidence. The Supreme Court views them as inherently unreliable; the Court of Military Appeals calls them "firmly rooted" exceptions to the hearsay rule that are so reliable they need not be corroborated.

If the Court of Military Appeals' approach were correct, ***Lee*** and *Cruz* would have been unnecessary. In ***Lee*** the defendant's boyfriend's confession implicating her also implicated him and, using the Military Court of Appeals' approach, should have been admissible against her without any corroboration as a "firmly rooted" exception to the hearsay rule. One could argue that the confession in ***Lee*** was supposed to be admissible only against the boyfriend, and the trial court erroneously used it against Lee. The Supreme Court, however, found constitutional error in its use for any purpose and specifically declined to allow its admission as a simple statement against penal interest: "That concept defines too large a class for meaningful Confrontation Clause analysis."[290]

In *Cruz* the Court of Military Appeals' approach again would have found no error because the eo-actor's statement "interlocked" with the defendant's. Further, it would have followed ***Parker*** and ruled that the value of cross-examining the statement was diminished so by Cruz's confession that there was no error in admitting it.

E. THE REQUIREMENT OF UNAVAILABILITY

For any statement against penal interest to be admissible, its maker must be unavailable as defined in Military Rule of Evidence 804(a).[291] The declarant may be unavailable under Military Rule of Evidence 804(a)(1) when he has been exempted from testifying by the military judge on the ground of privilege. This does not mean that the declarant simply may exercise his rights under the fifth amendment and refuse to testify. The Court of Military Appeals expects the government to make every effort to secure the declarant's testimony. Thus, in *Dill*[292] the Court of Military Appeals held that, absent a

[290] *Lee*, 476 U.S. at 544 n.5; ***see*** *supra* note 159 and accompanying text.
[291] *See supra* note 1 (Mil. R. Evid. 804(a)'s definition of unavailability).
[292] 24 M.J. 386 (C.M.A. 1987): *see supra* notes 185-89 and accompanying text.

showing by the government why it could not grant the declarant testimonial immunity, it was error for the trial court to admit the statement.[293] Of course, when this is impossible, as it was in *Koistinen*,[294] when the declarant was a civilian and the United States Attorney's office refused to grant testimonial immunity, the Court of Military Appeals has held that the witness was unavailable. Even in *Koistinen*, however, the court noted that the government had contacted the United States Attorney's office to inquire about testimonial immunity.[295]

Military Rule of Evidence 804(a)(2) provides that a person is unavailable if he persists in refusing to testify despite an order of the military judge to do so. An example of this can be found in *Hines*,[296] discussed above.[297]

Military Rule of Evidence 804(a)(3) provides that a person is unavailable if he testifies that he does not remember the subject matter of his statement. Such a memory lapse was found in *Damon Garrett*,[298] also discussed above.[299]

Military Rule of Evidence 804(a)(4) provides that a person is unavailable if he or she is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. No military cases have been decided under this rule.

Military Rule of Evidence 804(a)(5) provides that the declarant is unavailable when the proponent of the statement has been unable to procure the declarant's appearance or testimony at trial by process or other reasonable means. The Court of Military Appeals discussed this issue in *Wind*.[300] The declarant in *Wind* was absent without leave, and the government showed that military personnel had called local hospitals, law enforcement agencies, and the coroner's office. They had not called the declarant's home of record, which was some distance away.

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[293] *Dill*, 24 M.J. at 389; *accord* United States v. Valente, 17 M.J. 1087 (A.F.C.M.R. 1984).
[294] 27 M.J. 279 (C.M.A. 1988); ***see*** *supra* notes 273-77 and accompanying text.
[295] *Id.* at 280.
[296] 23 M.J. 125 (C.M.A. 1986).
[297] *See supra* notes 213-17 and accompanying text.
[298] 17 M.J. 907 (A.F.C.M.R. 1984).
[299] *See supra* notes 202-05 and accompanying text.
[300] 28 M.J. 381 (C.M.A. 1989); ***see*** *supra* notes 202-204 and accompanying text.

The *Wind* court made reference to *United States v. Douglas*,[301] in which the court held that a service member who is absent without leave is unavailable as a witness, and to *United States v. Lisotto*,[302] in which that court held that a fugitive from justice is unavailable. In dicta the *Wind* court stated:

> [I]t appears from the military judge's comments that he too may have been applying a *per se* rule that an unauthorized absentee or a fugitive from justice may be deemed "unavailable," without any effort to locate him.
>
> Perhaps such a rule suffices insofar as a hearsay objection is concerned; but it is more questionable with respect to an accused's right of confrontation. . . .[303]

Thus, vigorous, good-faith efforts must be made by the government to locate and immunize the declarant, if necessary. Only if these efforts fail may the government use the declarant's out-of-court inculpatory statement against penal interest. Astute defense counsel will argue that the *Wind* court's dicta requires the defendant to show only that the declarant is absent without leave in order to use an exculpatory statement and that the extensive efforts required of the government to satisfy the requirements of the confrontation clause are not required of the defendant.

Finally, Military Rule of Evidence 804(a)(6) provides that a person is unavailable for purposes of the rule when he or she is unavailable pursuant to article 49(d)(2).[304] Generally, this type of absence is due to military exigencies. The Court of Military Appeals had an occasion to discuss this aspect of the rule in *United States v. Vanderwier*.[305]

In that case, the defendant was tried before a general court-martial on three specifications of sodomy. At the government's request, a videotaped deposition of one of its witnesses was taken before trial. The government showed that the witness was an executive officer on a ship that would be at sea on maneuvers at the time of trial; his presence on the ship was considered essential.[306]

In holding the trial court's use of the deposition to be an abuse of discretion, the Court of Military Appeals noted that the ship's training had been scheduled for months and was known well in advance of trial. Nevertheless, there appeared to have been no accommoda-

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[301] 1 M.J. 354 (C.M.A. 1976).
[302] 722 F.2d 85 (4th Cir. 1983), ***cert. denied,*** 466 U.S. 905 (1984).
[303] 28 M.J. at **383.**
[304] UCMJ art. 49.
[305] 25 M.J. 263 (C.M.A. 1987).
[306] *Id.* at 264.

tion made in setting the date of the trial so the witness could testify.[307] Certainly, this could have been done; the trial on the merits ended two days before the end of the ship's maneuvers.[308] Citing *United States v. Davis*,[309] the Court of Military Appeals also rejected the so-called 100-mile rule as the sole justification for unavailability, because it could result in the routine use of depositions in derogation of the normal preference for live testimony.[310]

While *Vanderwier* was not a statement-against-penal-interest case, it, along with the other cases decided under Military Rule of Evidence 804, shows a strong preference in the military courts for live witness testimony. The tenor of all of these cases suggests that the government will have to show extraordinary circumstances to obtain a ruling that the declarant of its proposed statement is unavailable.

VI. CONCLUSION

To the extent it purports to deal with an inculpatory statement against penal interest, Military Rule of Evidence 804(b)(3), as written, cannot be reconciled with present Supreme Court analysis of the requirements of the confrontation clause. At best, it can be said that the rule is an authorization for the use of such a statement so long as the statement and the facts of the case in which it is to be used qualify under case law. Unfortunately, because the rule appears to stand on its own, lawyers and judges who work with it may be misled into believing that the rule provides all of the requirements for admissibility.

A proponent of a statement against penal interest must show that the declarant of the statement is truly unavailable, that the statement is supported by special guarantees of trustworthiness, and that its use in the case will not have a "devastating effect" or add "substantial weight" to the government's case. These factors must be proved because the Supreme Court traditionally has preferred face-to-face confrontation and has viewed statements against penal interest as being inherently suspect and unreliable. This is not surprising given the motives any declarant might have to make such statements, such as to curry favor with authorities, share the blame, or obtain revenge against the defendant.

While one might argue that this traditional view about statements against penal interest was not part of the common law at the time

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[307] *Id.* at 267.
[308] *Id.*
[309] 41 C.M.R. 217 (C.M.A. 1970).
[310] *Vanderwier*, **25** M.J. at 266.

that the sixth amendment was adopted, this view became part of the common law in Great Britain and the United States by the end of the nineteenth century. Until the adoption of the Federal Rules of Evidence in 1975, the Supreme Court simply assumed that these statements were not admissible in a criminal trial. In *Delli Paoli* the Supreme Court allowed the use of these statements in a criminal trial provided the jury was told that it could not be used against anyone but its maker. The Supreme Court in *Bruton* saw such a great danger that the jury could not follow this instruction that it prohibited the use of such a statement altogether.

If it is argued that the *Bruton* court did not purport to deal with recognized exceptions to the hearsay rule, it must be remembered that the court did not see any such exception when it was dealing with a statement against penal interest. The Supreme Court continues to hold to the view that statements against penal interest are not "firmly rooted" exceptions to the hearsay rule, and the Court has passed up opportunities to give them that status. To do otherwise would be to concede that Congress can change by legislative fiat those protections that the Supreme Court has said are guaranteed by the Constitution.

Even if one could argue seriously that Congress legislatively can change Supreme Court precedent, one cannot call the heavy-handed way Senator McClellan forced the Advisory Committee to change its views "a careful and studied approach to the problem." The Advisory Committee had developed the view that inculpatory statements against penal interest are prohibited in criminal trials after years of scholarly study; Senator McClellan's views apparently were developed in ignorance of controlling precedent after conversations with Justice Department officials. Thus, it is not surprising that the Supreme Court continues to decide confrontation clause cases as though the Federal Rules of Evidence do not exist.

The judge and the lawyers who are involved in a case in which the government attempts to use an inculpatory statement against the declarant's interest must carefully analyze the statement, its reliability, the circumstances surrounding its making, and the effect it will have on the weight of the case against the defendant. The analysis must start with the assumption that statements against penal interest are presumptively unreliable and must look for particular guarantees of trustworthiness that overcome that presumption. It must also examine whether the statement is truly against the declarant's penal interest or whether it is self-serving or blame-shifting.

Because the statement against penal interest must be examined in light of other evidence at trial, a military judge should consider deferring the ruling on the statement's admissibility to the end of the government's case. Because the effect of the improper introduction of such a statement is highly prejudicial, the military judge is in a better position to avoid a mistrial or reversal if he can rely on all of the evidence in the government's case-in-chief to make specific findings of fact that support the judge's views on the admissibility of the statement.

Trial counsel who plan to use such a statement should not forget that they must first use the various testimonial immunity tools available. The Court of Military Appeals has shown a strong preference for live testimony and requires vigorous governmental efforts to obtain it. Without such efforts, the trial court might not rule the declarant to be "unavailable" for the purposes of the rule. Trial counsel no longer can rely with confidence on the ''interlockingconfessions'' doctrine; counsel must be certain that every statement against penal interest that he or she plans to use is supported by guarantees of trustworthiness. Ideally, that would include evidence showing the circumstances in which the statement was made, the lack of a motive on the part of the declarant to lie, and corroborating evidence, if possible.

Defense counsel would be well-advised to object to the admission of virtually every statement against penal interest given the present Supreme Court attitude towards them. Defense counsel must try to show the court that the statement is not really against the declarant's interest. Defense counsel must be vigilant in making sure the declarant really is unavailable and that testimonial immunity has been offered. Defense counsel also must place as much evidence as possible before the military judge to show why the declarant had motives to fabricate or that the witness's memory was faulty. When a redacted statement is used, defense counsel should review ***Richardson v. Marsh.*** Counsel should make sure the redaction is not a simple line-through or one that leaves references to other unnamed individuals; it must completely eradicate any reference to the defendant. Finally, even if the statement is admitted, defense counsel can still argue to the members that the statement is unreliable and should not be used against the defendant without the benefit of cross-examination

SCIENTIFIC EVIDENCE IN COURTS-MARTIAL: FROM THE GENERAL ACCEPTANCE STANDARD TO THE RELEVANCY APPROACH

by Major Michael N. Schmitt* and Captain Steven A. Hatfield**

I. INTRODUCTION

In courts-martial today, the use of a wide variety of scientific evidence has become routine. Counsel for either side may offer fingerprint or blood type evidence to indicate identity. Trial counsel use chemical analysis of blood or urine to prove recent drug use or intoxication![1] Behavioral analysis of victims is presented routinely as evidence of rape trauma or battered child syndrome.[2] Truthfulness, or the lack thereof, theoretically can be demonstrated by polygraph examinations.[3]

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[1] United States v. Ford, 16 C.M.R. 185 (C.M.A. 1954). Analysis of blood and urine only detects recent drug abuse because chemical evidence of drugs and alcohol in bodily fluids dissipates rather rapidly depending on the drug, the amount used, and the metabolism of the individual.

[2] *E.g.*, United States v. Carter, 26 M.J. 428 (C.M.A. 1988); United States v. White, 23 M.J. 84 (C.M.A. 1986).

[3] *See, e.g.*, United States v. Gipson, 24 M.J. 246 (C.M.A. 1987); United States v. Abeyta, 25 M.J. 97 (1987). Assuming the polygraph examination was administered by a Department of Defense or similarly-certified polygrapher, the questions asked at the examination were relevant, and the subject of the test testifies at trial, theoretically no barrier should exist to the admissibility of the polygrapher's testimony.

The use of other newer types of scientific evidence someday may become just as routine.[4] Apparently, scientists can now prove identity to nearly a mathematical certainty using DNA analysis.[5] The use of radioimmunoassay analysis of hair suggests that drug usage can be detected for months, even years, after ingestion.[6] As science advances, ever more creative means of producing evidence undoubtedly will be developed.

In recent years the standard for the admissibility of scientific evidence in courts-martial has undergone significant change. This change can be described as the replacement of the general acceptance standard with the relevancy approach. The purpose of this article is to examine the development and acceptance of the relevancy approach in the federal and military courts, analyze its meaning, and attempt to provide a working model for its application in courts-martial. However, before turning to that approach, an understanding of its predecessor, the general acceptance standard, is necessary. The underlying rationale for the general acceptance theory remains a consideration under the relevancy approach.

II. THE GENERAL ACCEPTANCE TEST

Since **1923,** the admissibility of novel scientific evidence in federal, state, and military courts has been governed almost exclusively by the rule articulated in *Frye v. United States.*[7] In that case, the Federal District Court for the District of Columbia considered the admissibility of evidence derived from a crude forerunner of the polygraph. Whereas the modern polygraph measures several different physiologi-

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[4]Evidence derived from scientific techniques that are neither judicially noticed as a matter of course nor rejected out of hand as unreliable, are deemed "novel."

[5]For a discussion of DNA evidence in the military context, see Schmitt and Crocker, DNA Typing: Novel Scientific Evidence in the Military Courts, 32 **A.F.L.** Rev. 227 (1990). Much of the substance of the instant piece results from research and writing accomplished while producing that article. For an interesting article arguing that DNA profiling is currently scientifically unreliable, see Hoeffel, *The* ***Dark Side of DNA*** *Profiling: Unreliable Scientific* ***Evidence Meets the Criminal*** *Defendant*, **42** Stan. **L.** Rev. **465** (1990).

[6]Drug analysis of hair has been used in the following cases: ***People*** *v.* ***Robert*** *Korner.* No. **154558,** Santa Barbara Superior Court, **1985,** and *People v.* ***Mart*** *Miel*, No. **804003,** Los Angeles Superior Court, 1985. The authors are unaware of any appellate case that has reviewed this type of evidence, The technique used in the analysis of hair—radioimmunoassay—is nearly identical to the technique used in urinalysis The underlying theory is that as the blood circulates through the body the metabolites, or by-products created when the body breaks down a particular drug, are stored in the hairs of the body. **As** the hair grows, the chemical evidence remains within. Thus, depending on the length of the hair being analyzed, a record of drug ingestion may be determined that covers several months or even longer.

[7]293 F. 1013 (D.C. Cir. **1923).**

cal responses of the subject being tested, the device under scrutiny in *Frye* was a "monograph," which measured only blood pressure. Finding the test to be a novel scientific technique, the court enunciated a standard of admissibility in a brief, two-page opinion that would provide a basic framework for the analysis of scientific evidence in the courts of the United States for the next sixty years. That standard was announced as follows:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone, the evidential force of the principle must be recognized and while the courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.[8]

The court then held that the evidence in question was inadmissible because the "lie detector" that was employed had "not yet gained such standing and scientific recognition among physiological and psychological authorities."[9] The *Frye* court did not cite authority for the general acceptance standard, nor did the court set forth a rationale for it. Despite that fact, it was accepted initially without question. Only years later, when the standard was questioned, did courts began to defend its application in any comprehensive manner.[10] Several arguments in support of general acceptance were offered repeatedly. The most common basis for the test was the need to ensure the reliability of evidence upon which a jury based its decision. The issue of reliability was, and still is, seen as especially important in the area of scientific evidence. Although the judge or jury may have some innate ability to evaluate the testimony of lay witnesses, they probably do not have commensurate ability with regard to the complexities of science. This relative inability to assess critically scientific evidence is compounded by a concern that science in the twentieth century, albeit ever more incomprehensible to the layman, has taken on an aura of "mystic infallibility."[11]

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[8] *Id.* at 1014 (emphasis added).

[9] *Id.*

[10] *See, e.g.*, United States v. Addison, 498 F.2d 741 (D.C. Cir. 1971).

[11] In the words of the D.C. Circuit, "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of layman. . . ." *Id.* at 744. This paternalistic attitude toward the jury is an aspect of the *Frye* test that has been attacked by opponents. *See infra* note **51.**

Thus, the primary reason for requiring general acceptance by experts in the particular field to which the evidence belongs is to address the potential for confusion in the face of seemingly infallible scientific evidence and to provide a method for determining its reliability. What the general acceptance standard does is supplant judges and lay juries with a "scientific jury" when issues of scientific reliability arise.[12] This approach is premised on the view that scientists are best able to assess science. Assuming the particular evidence passes muster in the scientific community, the fact finder need only determine the appropriate weight to give the evidence.[13] Weight issues fall within the natural purview of the fact finder because they center on concepts as credibility, and they depend—as do most factual matters—on the effectiveness of litigators. Thus, asking jurors to handle such issues is consistent with all the other tasks the judicial system demands of them. Additional justifications for the *Frye* test include ensuring the existence of a "reserve of experts . . . who can critically examine the validity of a scientific determination in a particular case"[14] and promoting "uniformity of decision."[15]

The *Frye* standard received almost universal acceptance, although application of the standard is not without problems. For instance, some scientific evidence cannot be ascribed conveniently to a particular field of study to determine acceptance because the evidence may be the product of an interdisciplinary approach. Must such evidence be accepted generally by all scientific fields that contributed to its existence?[16]

Perhaps an even more troubling issue raised by the general acceptance approach is whether it is the principle or the technique

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[12]*See* Black, *A Unified Theory of Scientific Evidence*, 66 Fordham L. Rev. 595, 636-637 (1988).

[13]Despite concerns about the "mystic infallibility" of scientific evidence, the jury is free to assign whatever weight it feels is appropriate to any piece of evidence. Indeed, the jury is even free to disregard it completely. That scientific evidence often is disregarded, or at least not completely relied upon, should be clear to any counsel who has participated in a urinalysis case that resulted in acquittal. Arguably, "mystic infallibility" could pose a greater danger in the military because of the educational background of the court members. In that virtually all officers have college degrees, court members are likely to have been exposed to the "potential of science." Thus. though science will not seem as mystic, it may seem more infallible. The contrary might be true of individuals who lack the education of the average military court member.

[14]*Addison*, 498 F.2d at 744.

[15]People v. Kelly, 17 Cal. 3d 24, **31,** 549 P.2d 1240, 1245 (1976).

[16]One court using the *Frye* standard to analyze voiceprint evidence noted that "[c]ommunication by speech does not fall within any one established category of science. Its understanding requires a knowledge of anatomy, physiology, physics, psychology. and linguistics." People v. King, 266 Cal. App. 437, 456, 72 Cal. Rptr. 478, 490 (1968).

employed in the creation of the scientific evidence that must be accepted generally.[17] A review of the *Frye* decision reveals that the court was concerned almost exclusively with the principle involved. Specifically, it found no generally accepted nexus between variations in blood pressure and deception.[18] In subsequent years, however, many courts deviated from the precise holding in *Frye* and required general acceptance of the technique employing the principle.[19] Other controversies arising as a result of the failure of the *Frye* court to provide a comprehensive analytical framework include the definition of the term "acceptance,"[20] how narrowly or broadly the relevant field from which general acceptance is sought is to be defined,[21] what is necessary to qualify as an expert,[22] and how general acceptance is to be proven.[23]

III. *FRYE* RECONSIDERED

As previously noted, *Frye* was accepted initially without question. As time passed, however, the general acceptance standard came

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[17]The term "principle" applies to the scientific rules or theories relied upon by scientists in developing the evidence. The term "technique" refers to the means by which the principle is applied. For instance, polygraphy is based on the principle that conscious deception causes physiological stress that can be measured. The actual measurement of the physiological changes by the polygraph itself, and the formulation of an opinion by the examiner, is the technique by which the principle is applied.

[18]*See generally Frye,* 293 F. 1013. Of course, this point begs the question of whether the court would have inquired subsequently into the reliability of the technique if the principle involved had been deemed generally accepted.

[19]Seattle v. Peterson, 39 Wash. App. 524, 693 P.2d 757 (1985). In this case the court specifically noted that the principle underlying the Doppler radar speed detector was not at issue. Instead, the issue was whether the machine itself and the results it produced were reliable.

[20]*Compare* United States v. Gould, 741 F.2d 45, 49 (4th Cir. 1984) (court reauired "substantial acceptance") *with* People v. Guerra, 37 Cal. 3d 385, 690 P.2d 636, 656 (1984) ("clear majority" was needed). One thing is certain: general acceptance requires more than a single individual. "You cannot accept a technique simply because the Nobel Prize winner takes the stand and testifies, 'I have verified this theory to my satisfaction, and I stake my professional credentials on the theory."' Imwinkelried, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology,* 100 Mil. L. Rev. 99, 104 (1983).

[21]In considering scientific evidence using the *Frye* test, this issue is critical. Defining the field too narrowly could result in an insufficient number of experts to convince a court that general acceptance existed. For example, in assessing DNA evidence, should the field be defined as genetics, population genetics, or forensic DNA analysis?

[22]A major issue is whether technicians should be able to testify as well as scientists. Some courts recognize that technicians may be in the best position to determine the reliability of the technique involved in the creation of scientific evidence while other courts have taken a more restrictive view. *Compare* People v. Young, 391 N.W.2d 270 (Mich. 1986) *with* People v. Reilly, 196 Cal. App. 3d 1127 (1987).

[23]The three generally accepted methods of proof are expert testimony, scientific and legal writings, and judicial opinions. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later,* 80 Colum. L. Rev. 1197, 1215 (1980).

under greater scrutiny. In part, this was attributable to the increasingly important role that scientific evidence assumed in recent years.[24] As the raw number of cases involving such evidence grew, it was inevitable that pitfalls in the standard would become more apparent. Nevertheless, despite a trend towards rejecting the seeming "mystic infallibility" of *Frye* itself, the general acceptance standard remains the standard of admissibility in a majority of jurisdiction~.~~

An opportunity to reassess the standard presented itself in the guise of the Federal Rules of Evidence,[26] signed by President Ford on January 2, 1975. Specifically, Federal Rule of Evidence 702 (Testimony by Experts)[27] was to open the door to a new approach. Though the general acceptance standard had been dogma for fifty-two years, inclusion of the standard or any clearly analogous counterpart was conspicuous by its absence. Indeed, despite the established position of **Frye** as the lead case in the area of novel scientific evidence, it was not mentioned at all in the analysis of the rule.[28]

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[24]The emergence of scientific evidence in criminal trials has been, according to some, the indirect result of cases like United States v. Wade, 388 U.S. 218 (1967), and Miranda v. Arizona, 384 U.S. 436 (1966). Those cases restricted the methods that police traditionally used to obtain evidence, such as interrogations and line-ups. Giannelli, *supra* note 23, at 1199. These judicially-created restrictions on police activity forced law enforcement officials to seek out new means of establishing guilt. Scientific evidence became popular because it generally can be obtained with far less intrusion on personal privacy than those methods found unconstitutional by the Supreme Court.

[25]There are numerous federal cases adhering to the *Frye* standard. ***See,*** *e.g.*, Barrel of Fun, Inc. v. State Farm and Fire Casualty Co., 739 F.2d 1028 (5th Cir. 1984); United States v. Distler, 671 F.2d 954 (6th Cir.), *cert.* ***denied,*** 454 U.S. 827 (1981); United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981); United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976). In ***United*** *States v. McBride*, 786 F.2d 45 (2d Cir. 1986), the ***Frye*** standard was used to overturn a lower court's ruling that had excluded scientific evidence. In that case, the trial judge did not allow psychiatric testimony that, due to a brain injury, the defendant could not have formed the requisite specific intent to commit the crime. Apparently, the trial judge determined that the type of evidence proffered had not gained general acceptance; he noted that "psychiatry was still in its infancy." *McBride*, 786 F.2d at 50. The appellate court disagreed and overturned the decision. This case raises the issue of whether an appellate court should overturn a trial court's decision on general acceptance when, as a result of further testing and experience, scientific evidence actually does become generally accepted in the interval between the decisions of the trial court and the appellate court. Because a district court judge has broad discretion with regard to the admissibility of expert testimony, an appellate court presumably would base its decision only on the degree of acceptance that existed at the time of the trial judge's decision, even if the scientific evidence had gained more acceptance by the time it made its decision. If law is a search for truth, this is probably an unacceptable result.

[26]Pub. L. **No.** 93-595, 88 Stat. 1926-49 (1975).

[27]Fed. R. Evid. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training or education. may testify thereto in the form of an opinion or otherwise."

[28]Drafters' Analysis, Fed. R. Evid.

To compound this lack of guidance, the Advisory Committee's Notes did not address the issue of whether the general acceptance standard survived promulgation of the rules.[29] The significance of these omissions would soon become apparent to scholars and practitioners alike. Was the standard so accepted as to be assumed part and parcel of Federal Rule of Evidence 702,[30] or did the omission indicate that the judicial standard set forth had been overruled legislatively?[31] The foundation was laid for a schism in evidentiary law that continues today.

In light of the theoretical and practical problems that had plagued the general acceptance standard, a number of jurisdictions chose to

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[29]Advisory Committee Notes, Fed. R. Evid.

[30]Though Professors Saltzburg and Redden note that "[i]t would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence as lie detectors without explicitly stating so," S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 633 (4th ed. 1986), it would be equally odd if the Committee and Congress intended to retain such a well-established standard without mentioning it or the case upon which it was based. By 1975, the general acceptance standard had been articulated well and frequently. An assertion that the standard set forth in Federal Rule of Evidence 702 was an attempt on the part of the drafters to codify existing case law may be a bit hard to swallow. An early case that struggled with the competing concerns about ***Frye*** is United States v. Brown, 557 F.2d 541 (6th Cir. 1977). Ultimately, the Sixth Circuit would elect to retain the general acceptance standard. At issue in ***Brown*** was the attempted admission of evidence based on ion microprobic analysis—a process that measures the element content of hair samples. Specifically, testimony relating to the source of three hairs found on a bottleneck at the site of a firebombing was challenged. The court began its analysis by noting the trend towards relaxed admission since the promulgation of Federal Rule of Evidence 702. It further noted that general acceptance in the relevant scientific community is not a prerequisite to admissibility. The court, however, then went on to address the countervailing right of the defendant to a fair trial: "[t]he fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness,' although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has to yet gain general acceptance in its field." ***Id.*** at 556. Given this analysis, would the court have reached the same decision if the evidence had been offered to exonerate the accused? If the goal is protection of the accused, maybe the best approach is to tie the threshold degree of acceptance or reliability to the side that is offering the evidence; that is, granting the defense in a criminal trial a more relaxed standard. ***See infra*** note 152.

[31]Professor Imwinkelried makes an interesting point in this regard by focusing on the language of Federal Rule of Evidence 402: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Pointing out that "case law" is not one of the exceptions listed, he notes that the failure to mention the ***Frye*** standard in the text of 702 indicates the standard no longer exists. This result derives from application of basic rules of statutory construction and interpretation. Imwinkelried, *supra* note 20, at 105. Such an approach, however, very well might trivialize the role of precedent in our judicial system, as well as assume omniscience on the part of the drafters of the Federal Rules of Evidence.

reject it in favor of a less demanding approach.[32] That approach has come to be known as the "relevancy test." In essence, the test does away with the treatment of novel scientific evidence as a separate evidential category by treating it in much the same fashion as other expert testimony.[33] Therefore, the emergence of the relevancy standard marked a retreat to the pre-*Frye* era of admissibility. Relevancy was a return to basics—arguably, a return of fact-finding to the fact finder.[34] Core evidentiary concepts such as probative value, prejudicial effect, and reliability[35] would now serve to shape the admissibility inquiry.[36] This is not to suggest that these concepts played no role in the general acceptance analysis. However, they were now to emerge from the background to supplant the nonlegalistic inquiries of the "scientific jury."[37]

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[32]Though the relevancy standard is less demanding in terms of admissibility. it is certainly more demanding in terms of litigation. General acceptance requires little more than determining the make-up of your scientificjury and then polling it. Relevancy, as we shall see. involves the complex task of litigating the synergistic effect of multiple rules.

[33]For example, consider the Fourth Circuit's approval of admission of spectrographic voice analysis evidence in United States v. Baller, 519 F.2d 463 (4th Cir.), *cert. denied*, **423** U.S. 1019(1975). Addressing the standard of admissibility. the Fourth Circuit held that "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury. it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." *Id.* at 466.

"General acceptance allows the scientific community to determine reliability and thereby keep unreliable evidence from the jury. In contrast, the relevancy approach. with its lower standard of admissibility. permits the jury to hear evidence that the general acceptance standard would preclude and to make its own determination concerning reliability. This broadening of jury responsibility arguably results in a corresponding return of law to the "law finder"; that is, the judge. The judge now is deemed responsible for making the **sort** of relevancy decisions familiar to him beyond the realm of novel scientific evidence. The sophisticated nose counting called for under the general acceptance standard becomes only a peripheral activity for the judiciary.

[35]These and other questions are the basis of the relevancy rules of evidence, Federal and Military Rules of Evidence 401-403. Such questions are also the basis of thr "helpfulnessstandard" found in the expert testimony rule. Fed. R. Evid 702 and Mil. R. Evid. 70%For a decision focusing on the degree of "help" evidence offers the fact finder, see United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986). The court held that the seminal issue was whether the jury could receive "appreciable help" from the evidence. *Id.* at 1381.

[36]In United States v. Williams. 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979), the court noted that "probativeness, materiality, and reliability of the evidence on one side, and any tendency to mislead, prejudice. or confuse the jury on the other, must be the focal points of inquiry."*Id.* at 1198. Spectrographic evidence was held to have been admitted properly.

[37]The Second Circuit succinctly noted the shift in approach: "In testing for admissibility of a particular type of scientific evidence, whatever the scientific 'voting' pattern may be, the courts cannot, . . surrender to the scientists the responsibility for determining the reliability of that evidence." *Id.*

United States v. *Downing*[38] would quickly become the lead case cited by relevancy advocates. The fact pattern of *Downing* is fascinating. At issue in this fraud case was whether the defendant was a con man who had called himself "Reverend Claymore." Twelve eyewitnesses testified that the defendant and Reverend Claymore were one and the same. The defense called an expert witness on the unreliability of eyewitness testimony. Relying on the "helpfulness" standard of Federal Rule of Evidence 702,[39] the Third Circuit refused to permit the defense expert to take the stand.

A review of *Downing* indicates that the court was primed to reject *Frye* by relying on the text of the Federal Rules. As the *Downing* court recognized, the eight years since the promulgation of those rules had witnessed a plethora of suggestions on how novel scientific evidence should be treated. Among the possible approaches circulating at the time were the following: reasonable scientific acceptance;[40] a preponderance standard for criminal defendants with a beyond a reasonable doubt standard for prosecutors;[41] established and recognized accuracy and reliability;[42] and a relevancy/prejudice approach that shifts the inquiry to weight once relevancy is established.[43] Rather than adopting one of the new approaches that had become the focus of attention, however, the court chose to fashion its own analysis of the rules.[44] This is not to suggest that the court rejected the various alternatives out of hand. Instead, it noted the underlying considerations of those approaches and then looked to the Federal Rules of Evidence for resolution of the dispute. Indeed, even the *Frye* standard played some role in the court's new approach.

For the Third Circuit, the derivation of an appropriate standard necessarily was rooted in the broadness of the relevancy rules—Federal Rules of Evidence 401-403. Under the rules, essentially all evidence is admissible unless it is irrelevant, unduly prejudicial, or

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[38]753 F.2d 1224 (3d Cir. 1985).
[39]*Id.* at 1226.
[40]S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 452 (3d ed. 1982).
[41]Giannelli, *supra* note 23, at 1249-50.
[42]State v. Temple, 302 N.C. 1, *273* S.E.2d *273* (1981).
[43]Unites States v. Williams, 583 F.2d 1194 (2d Cir. 1978), *cert. denied,* 439 U.S. 1117 (1979); State v. Hall, 297 N.W.2d 80 (Iowa 1980).
[44]*Downing*, 753 F.2d at 1232-35.

otherwise specifically excluded.[45] By contrast, evidence evaluated using the *Frye* standard could be excluded even if it was both relevant and not prejudicial. This would occur in situations in which the scientific community had not yet passed collectivejudgement on the process involved. Reduced to basics, the two approaches represent an inherent conflict between the search for truth and the goal of fairness in our legal system. If the goal is truth, then evidence having any bearing on the fact in issue should be admissible, so long as it is not so unreliable as to grossly mislead the fact finders. The broadness of the relevancy rules clearly fosters this goal. Justice is safeguarded through litigation as to the appropriate weight to be given the evidence. On the other hand, the *Frye* approach searches for fairness. Using the *Frye* approach, courts are willing to sacrifice evidence that might be dispositive so as to preclude any possibility that unfair—i.e., scientifically unreliable—evidence might come before the fact finders. The safeguard is to be found in science, not law. As a result, the scientific jury takes center stage, and litigation focuses on admissibility. Thus, a natural conflict exists between the central premise of the relevancy rules and that of *Frye*.[46]

Interestingly, the court could have avoided the apparent conflict between relevancy and *Frye* simply by holding that, given the failure of the Federal Rule of Evidence drafters to "overrule" specifically the general acceptance standard, Federal Rule of Evidence 702 incorporated *Frye*. Again, this would have been inconsistent with the

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[45]Fed. R. Evid. 401: "Relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Fed. R. Evid. **402:** "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."

Fed. R. Evid. **403:** "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay. waste of time. or needless presentation of cumulative evidence."

[46]The fairness/truth distinction is characterized best by differences between the common law (e.g., United States, Great Britain and Australia) and the civil law (e.g., continental Europe) systems. The common law system, often deemed accusatorial in nature, places a great deal of emphasis on procedural and evidentiary law. By contrast, in civil law countries the judge, rather than the attorney, guides the inquiry and does so unhindered by complex rules of evidence or procedure. Thus, the system often is labeled inquisitorial. The distinction might best be illustrated by the comment, "He got a fair trial." Such a comment, commonplace in the United States, would seem out of place in France or Germany. For the French or Germans, a fair trial is simply one in which guilty defendants are convicted and innocent ones are acquitted. This attitude also is reflected in the nature of appeals. In common law countries, appeals generally are limited to issues of law. Civil law jurisdictions generally permit at least one appeal on factual findings.

broad nature of Federal Rules of Evidence 401-403. However, the drafters arguably contemplated this inconsistency by noting that evidence admissible under the relevancy rules nevertheless may be excluded by the terms of other rules of evidence.[47] In light of the asserted dangers of "mystic infallibility" posed by novel scientific evidence, a detour from the principle favoring admissibility might have been justified. After all, truth is most often the victim of unfairness. Thus, the broadness of relevancy logically did not demand the death of ***Frye.***

Rather than arguing that ***Frye*** had been rejected outright, the ***Downing*** court took a unique approach by concluding that, although the codification of evidence rules "may counsel in favor of a reexamination of the general acceptance standard,"[48] Federal Rule of Evidence 702 neither incorporated nor repudiated ***Frye.*** This very unusual analysis was based on the theory that because the drafters must have been aware that ***Frye*** was a judicial creation, the failure to condemn "such interstitial judicial rule-making"[49] in the rules was to be read as a mere invitation to reconsider the standard.[50] In other words, the Third Circuit was suggesting that drafters intended the courts to address the issue in a case-by-case fashion. The flaw in this analysis lies in the nature of the drafters' task. If they had been in the process of drafting nonbinding rules, deferring decision on particular issues to the courts of differing jurisdictions might have made more sense. However, the drafters were developing binding rules for an integrated system of courts. Nevertheless, the ***Downing*** court seemed to be suggesting that the drafters of the Federal Rules of Evidence were willing to countenance splits among federal courts in their approaches to novel scientific evidence. If the development of rules of evidence was to be left to the judiciary, one must wonder why the drafters bothered to take on their task in the first place. Was piecemeal uniformity satisfactory to them? Surely, this would represent an unusual method of codification. Arguably, the *Downing* court was inviting reconsideration—not the drafters. Nevertheless, given the court's interpretation of the omissions, the issue of *Frye's* survival entered the realm of judicial policymaking.

With policy concerns now the focus of attention, the court began its inquiry into the relative merits of maintaining the ***Frye*** standard.

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[47] Fed. R. Evid. **402;** ***see*** *supra* note **45.**

[48] 753 F.2d at 1235.

[49] *Id.*

[50] *Id.* For a discussion of the background underlying the effort to produce a uniform set of evidentiary guidelines, see S. Saltzburg and K. Redden, *supra* note ***30,*** §§ 1-6.

On the positive side, *Frye* provides a methodology by which novel scientific evidence may be assessed; that is, "the scientific jury." Theoretically, this method would result in like decisions in like cases and therefore serve the goal of uniformity of judgment. At the same time, general acceptance also protects criminal defendants from unreliable evidence presented by the prosecution to a jury potentially in awe of science.[51]

Counterbalancing these advantages are two significant potential dangers. The first is "vagueness." As the court pointed out, the general acceptance standard is vague because the terms ''scientific community" and ''generalacceptance" are ill-defined.[52] Even if the courts could reach a consensus as to the composition of the "relevant community" regarding a particular form of scientific evidence, the lengthy and divisive process of reaching consensus would be revisited each time a new scientific process was developed. At the same time, the subjectivity inherent in the term "general acceptance" precludes any quantification of the standard.

The second danger cited by the court is "conservatism." **As** the court perceptively pointed out, the standard is conservative in the sense that it might preclude the admission of probative and reliable evidence.[53] Because of the lag time between the development of a new type of scientific evidence and its general acceptance by the scientific community, *Frye* clearly has the potential of excluding evidence that subsequently is determined to be completely reliable. Arguably, this is a neutral flaw; that is, one that might assist the guilty defendant to keep inculpatory evidence out and assist the government to exclude evidence of an exculpatory nature.[54] Neutral or not, however, if trials are forums in which truth is sought, that purpose

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[51]*Downing*, 753 F.2d at **1235.** One of Professor Imwinkelried's arguments against the **Frye** standard concerned this paternalistic attitude toward the jury. Imwinkelried. *supra* note 20, at **113.** He concludes that the assumption that jurors are unable to assign appropriate weight to scientific evidence, one of the primary rationales for the existence of the **Frye** standard, simply is unwarranted. He cites studies conducted in civilian forums that establish just the opposite—that lay jurors are able to evaluate critically scientific evidence. Finally, he mentions that his conclusion has special significance for courts-martial because jurors there are generally more sophisticated and better educated than their civilian counterparts. If civilian jurors can handle scientific evidence, surely military jurors can. *Id.* at 117. But **see** *supra* note **13.**

[52]753 F.2d at **1236;** *see supra* text accompanying notes 20-22.

[53]753 F.2d at **1236.**

[54]This argument is unsatisfactory because it fails to recognize that the goal of a judicial system is not a balance between the government and the defense in the system *generally*, but rather fairness in a particular trial. The exclusion of reliable but not generally accepted exculpatory evidence in a particular trial is hardly a neutral flaw for the now-convicted defendant

will be hindered.[55] These two concerns—vagueness and conservatism—led the court to reject ***Frye*** as "an independent controlling standard of admissibility."[56] Instead, general acceptance was viewed as but one of potentially many indicators of reliability.[57]

In what has become the accepted approach by courts rejecting ***Frye,*** including the military courts, the Third Circuit set forth its method of determining whether evidence is admissible under Federal Rule of Evidence 702. The key was the term "helpfulness" in the rule. For the court, an assessment of whether novel scientific evidence is helpful depends on three factors: 1)the soundness and reliability of the process or technique used in generating the evidence; 2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury; and 3) the proffered connection between the scientific research or test result to be presented, and the particular disputed factual issues in the case.[58]

The similarity between this three-tiered query and the relevancy rules leaves one with the impression that the court has done more than reject ***Frye.*** Arguably, the court has defined Federal Rule of Evidence 702 as a restatement of the relevancy rules. For example, with regard to the first component of the test, would evidence resulting from an unreliable or unsound technique or process make a fact in issue more or less probable under Federal Rule of Evidence 401? Clearly, it would not. One possible resolution of this quandary is an argument that the question in Federal Rule of Evidence 401 is not whether the process or technique is unreliable, but simply whether the result that is generated makes the fact in issue more or less probable. In other words, accurate, albeit unreliable, evidence that makes **a** fact in issue more or less likely is admissible under Federal Rule of Evidence 401—period (unless outweighed by Federal Rule of Evidence 403 concerns). Absent Federal Rule of Evidence 702, reliability of the process or technique then would become only

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[55]*See Downing*, 753 F.2d at 1236-37. The court cites United States v. Sample, 378 F. Supp. 44 (E.D. Pa 1974), as an example of a case in which a court expresses concern over the exclusion of relevant evidence. United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974), is cited as representing the opposite view.

[56]753 F.2d at 1237.

[57]"[G]eneral acceptance in the particular field. . .should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that **a** particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based on the technique." ***Id.***

[58]*Id.*

an issue of weight, not admissibility. If this were the approach taken, Federal Rule of Evidence *702* would have meaning independent of Federal Rule of Evidence 401. The *Downing* court itself, however, defeats this argument by noting that the "logical relevance" of Federal Rules of Evidence 401-403 does, in fact, involve reliability.[59]

Any number of additional examples could be cited in the characterization of Federal Rule of Evidence *702* as a relevancy restatement. For example, would not unreliability under Federal Rule of Evidence *702* also necessarily serve to confuse or to mislead the jury under Federal Rule of Evidence 403? Similarly, the second component of the *Downing* helpfulness test is, arguably, nothing more than Federal Rule of Evidence 403 revisited. Indeed, the textual similarities would suggest Federal Rule of Evidence 403 served as the model in drafting the decision. Finally, the third component essentially poses the question of whether the evidence in issue is relevant, i.e., it is a Federal Rule of Evidence 401 inquiry.

The Third Circuit clearly was sensitive to the possibility that its interpretation of Federal Rule of Evidence *702* was illogical in light of the Federal Rules of Evidence 401-403 relevancy standards. It therefore went to some effort to distinguish the Federal Rule of Evidence *702* requirements. The court started by construing the term "helpfulness" (Federal Rule of Evidence *702* standard) as necessarily implying a quantum of reliability "beyond that required to meet a standard of bare logical relevance (Federal Rule of Evidence 401)."[60] Unfortunately, in the absence of quantification or examples, this clarification does little other than muddy the water. Indeed, it smacks of meaningless judicial draftsmanship.[61] In a like manner, the court acknowledged that the Federal Rule of Evidence *702* concern about confusing, misleading, or overwhelming evidence might mirror Federal Rule of Evidence 403 to some extent. The court posits evidence, however, that could meet the Federal Rule of Evidence 702 requirements, but fail under a balancing test pursuant to Federal Rule of Evidence 403. As an example, the court suggests that a Federal Rule of Evidence 403 prohibition on waste of time or confusion of the issues might operate to exclude evidence admissible under Federal Rule of Evidence 702 if additional evidence of guilt existed.[62]

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[59] *Id.* at 1235.

[60] *Id.*

[61] There is a notable absence of effort to make the distinction in subsequent cases. Because the Rule 702 standard is theoretically higher, courts can be expected generally to base their opinions on that rule, using language that will sound identical to a Rule 401 ruling. *See, e.g.*, United States v. Howard, 24 M.J. 897 (C.G.C.M.R. 1987).

[62] 753 F.2d at 1242-43.

The problem with this analysis is that the real question is whether evidence that passed a Federal Rule of Evidence 403 review ever would fail a Federal Rule of Evidence 702 confusing, misleading, or overwhelming test—not vice versa. If so, that component of the Federal Rule of Evidence 702 test would have independent meaning. If not, it is nothing more than a Federal Rule of Evidence 403 retest. Most likely, the latter is the case, at least for practical purposes.

Whether the *Downing* court did anything beyond simply rejecting ***Frye*** and requiring that novel scientific evidence meet the basic standards set forth in Federal Rules of Evidence 401 through 403 remains unclear; as a result the case is intellectually troubling. Nevertheless, the *Downing* case **has** come to represent an approach that increasingly is being adopted by jurisdictions throughout the United States. On this tenth anniversary of the Military Rules of Evidence, we turn to one of those jurisdictions—the military justice system,

IV. EVOLUTION OF THE MILITARY APPROACH TO NOVEL SCIENTIFIC EVIDENCE

Despite adoption of the Military Rules of Evidence on 12 March 1980,[63] the military courts continued to employ the ***Frye*** test in generally the same manner as their civilian counterparts.[64] As the Federal Rules of Evidence did in federal courts, however, the Military Rules of Evidence eventually would provide the impetus for a complete revision in the admissibility standards applicable to novel scientific evidence. This should not be surprising, given the clear goal of the drafters of the military rules to mirror the federal rules to the extent possible.[65] As a result of that intent, the rules relevant to this

[63] Exec. Order No. 12198 (1980).

[64] *See, e.g.*, United States v. Hulen, 3 M.J. 275 (C.M.A. 1977); United States v. Ford, 16 C.M.R. 185 (C.M.A. 1954). The *Ford* case, which involved urinalysis, was the first military case to endorse the general acceptance standard. In 1967, in United States v. Wright. 87 C.M.R. 447 (C.M.A. 1967), the Court of Military Appeals became the first appellate tribunal to uphold the admissibility of voiceprint evidence despite the fact that research had not established general acceptance of the technique. According to Judge Ferguson, who dissented, this signified an abandonment of the general acceptance standard and adoption of much more lenient standard against which even polygraph evidence would be admissible. ***Id.*** at 454 (Ferguson, J., dissenting). This was not to be because ten years later the *Hulen* case firmly reconfirmed the general acceptance standard first announced in *Ford.* 3 M.J. at 275-77.

[65] S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 1 (2d ed. 1986).

inquiry, Military Rules of Evidence 401-403 and 702, are nearly identical to their federal rules counterparts.[66]

The possibility that *Frye* had not survived the promulgation of the rules was not considered in earnest until the Army Court of Military Review's decision in *United States v. Bothwell*.[67] *Bothwell* involved the attempted admission of a psychological stress evaluation (PSE). The examination, designed to assess veracity, is based on the theory that deception causes psychological effects, which in turn result in variations in voice modulation.[68] The court began, in much the same fashion as the *Downing* court would two years later, by taking note of the dispute over the continued viability of the *Frye* standard, specifically in the federal circuits. It accurately attributed this dispute to the failure of the draftsmen to include any mention of the general acceptance standard in the Federal Rules.[69] Because the military had adopted the Federal Rules almost verbatim, the debate was particularly relevant to military practice. Nevertheless, the court stated

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[66]Military Rules of Evidence 401, 403, and 702 are identical to their federal counterparts. *See supra* notes 27, 45. Military Rule of Evidence 402 is identical to Federal Rule of Evidence **402** in intent and effect, but includes as limitations sources of law unique to the military. "All relevant evidence is admissible. except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual or any Act of Congress applicable to members **of** the armed forces. Evidence which is not relevant is not admissible." Mil. R. Evid. 402.

[67]17 M.J. 684 (A.C.M.R. 1983). Prior to *Bothwell*, there existed some inkling of the debate that would emerge in the military courts. In United States v. Martin. 13 M.J. 66, 68 n.4 (C.M.A. 1982), the Court of Military Appeals noted that Military Rule of Evidence 702 might broaden *Frye.* It did not have to address the issue, however, because Military Rule of Evidence 702 was not in effect at the time of trial. Additionally. the evidence was found to be generally accepted and, thus. would have passed muster even under the forthcoming relevancy test. *Id.* at 67-68. Later, Judge Everett, in dicta, found in his dissenting opinion in United States v. Moore, 15 M.J. **354.** 372 **(C.M.A.** 1983) (Everett, J., dissenting). that "the **Frye** test still has vitality." This was not an issue, however, because, as with *Martin*, the trial predated the rules.

[68]Though not directly relevant to this discussion, the ultimate decision of the court is interesting. The trial judge refused to permit the defense to lay a foundation for the PSE. In other words, he did not permit testimony on the reliability or general acceptance of the test. On appeal, this was found to be error. Rather than remanding, however, the court looked at state and federal cases. as well as several articles, and concluded that it was "unable to imagine anything which [the expert] could have said that might have led the military judge to conclude that PSE enjoys general acceptance in the scientific community." Thus, the error was harmless. 17 M.J. at 688. Two problems with this result exist. If it was so clear that the proffered evidence was unreliable that the appellate court could reject it out of hand, then why was the trial court wrong to do likewise? Certainly, not all evidence merits an admissibility hearing. Evidence based on astrology or voodoo probably could be rejected without a hearing. Additionally, the court claimed PSE was in the "experimental rather then the demonstrable stage.'' *Id.* at 688. To support this claim. it cited cases, House Committee hearings, and articles as aged as nine years old. *Id.* Though it very well may be the case that PSE was still in the experimental stage in 1983, to cite nine-year-old scientific support is questionable.

[69]*Id.* at 686-87.

that "in the absence of any definitive authority to the contrary, [it was] unwilling to abandon a rule that has been applied in the military for almost thirty years."[70] Presumably, the appropriate authority would be a decision by the Court of Military Appeals.

The *Bothwell* court was obviously uncomfortable with the "it's always been done that way" justification it had enunciated. In an effort to bolster its holding, the court turned to the "mystic infallibility" rationale set forth nine years earlier by the D.C. Circuit Court in *United States v. Addison*.[71] In other words, the *Bothwell* court was expressing concern that lay members very well might be overwhelmed by the scientific nature of the evidence and that unfairness would result. At the same time, the court very perceptively realized that critics might allege that the danger of misleading or overwhelming the jury already was taken care of by the Military Rule of Evidence 403 balancing test. Therefore, its interpretation of Military Rule of Evidence 702 as incorporating *Frye* to avoid such dangers would clearly be subject to attack. To preempt that criticism, the court declared the *Frye* protection to be greater than that of Military Rule of Evidence 403 and based its argument on the words "substantially outweighed" in the rule.[72] Clearly, in retrospect the apparent hidden agenda of the *Bothwell* court was to invite others to join the affray.[73] Until that occurred, however, the *Bothwell* court was unwilling to explore new ground. Thus, *Frye* would remain the accepted standard.

That was soon to change as military courts began to question the survival of *Frye* and rule in favor of an expansive view of Military Rule of Evidence 702. In *United States v. Snipes* the Court of Military Appeals held that the intent of Military Rule of Evidence 702 was to "broaden the admissibility of expert testimony."[74] Upholding the

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[70] *Id.*

[71] *Id.* at 687 (citing ***Addison,*** 498 F.2d 741, 744 (D.C. Cir. 1971)).

[72] *Id.* Does this suggest that the court defines Military Rule of Evidence 702 as meaning that anytime the judge finds the probative value outweighed by the prejudicial effect, no matter how slightly so, the evidence should be deemed inadmissible? Such an interpretation would vest enormous discretion in trial judges handling this inherently subjective issue.

[73] In other cases, the question was avoided when possible. For example, in United States v. Lusk, 21 M.J. 695 (A.C.M.R. 1985), the issue was the admissibility of a Becton-Dickinson Duquenois test for the presence of marijuana. Although the court noted that the new Military Rules of Evidence cast doubt on Frye, this particular test was accepted generally. *Id.* at 699. As a result, the court did not have to address the problem of a test that was not generally accepted, but might, nevertheless, meet a lower standard (if one existed).

[74] 18 M.J. 172, 178 (C.M.A. 1984). The court went on to note that "the essential limiting parameter is whether the testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.*

admission of rebuttal evidence by a child psychiatrist concerning sexual abuse, the court noted the existence of "a sufficient body of 'specializedknowledge' as to the typical behavior of sexually abused children and their families to permit certain conclusions to be drawn by an expert."[75] Though such verbiage resembles general acceptance, that standard was not discussed by the court. This fact, combined with the earlier comment on admissibility, indicated the court was moving slowly in the direction of the relevancy approach.

Not long after *Snipes*, the Court of Military Appeals moved even closer to adoption of the relevancy approach in *United States v. Mustafa*.[76] *Mustafa* was a rape-murder case in which the government called an Army Criminal Investigation Command (CID) agent to testify concerning blood flight analysis. The defense objected on the grounds that blood flight analysis was not generally accepted.[77] Without addressing the issue directly, the court found the existence of "a body of specialized knowledge which would permit a properly trained person to draw conclusions as to the source of the blood."[78] The court, discussing the effect on ***Frye*** and the general acceptance standard only peripherally, found that the existence of this body of specialized knowledge meant the evidence was "helpful, i.e., relevant."[79] Thus, it was admissible.[80] Though certiorari was denied on

[75] *Id.* at 179.

[76] 22 M.J. 165 (C.M.A.), ***cert. denied,*** 479 U.S. 953 (1986).

[77] *Id.* at 167. A second objection was that the CID agent was not a qualified expert. This issue is related to the general acceptance issue because it likewise turns on a determination of how broad Military Rule of Evidence 702 was meant to be. The CID agent had attended a five-day course by one of the preeminent practitioners in the field and received other unspecified training, but was not a chemist, nor had he written on the subject. Additionally this was only his second case involving the technique. The court found that he was an expert. *Id.* at 168. In a beautiful piece of judicial draftsmanship, it noted that "[g]iven the broad language of Military Rule of Evidence 702, we have no doubt that Sherlock Holmes could be eminently qualified as an expert in this field." *Id.* at 168 n.6. This decision is indicative of the court's new approach to admissibility and previewed how the broader approach would affect the ***Frye*** standard

[78] *Id.* at 168. The court did not address the term "general acceptance." Instead, its finding that **a** body of "specialized knowledge" existed was based on three factors: 1) state courts had accepted similar evidence; 2) the technique was based on established laws of physics and common sense; and 3) the process was capable of quantification. *Id.* Clearly, the court was looking to the issue of reliability, but not depending on a "scientific vote" in doing so.

[79] *Id.*

[80] By labeling the expert testimony "helpful, i.e., relevant", it is unclear whether the court is using Military Rule of Evidence 702 or Military Rules of Evidence 401 and 402 as the standard. Rule 702 deals with helpfulness, whereas Rules 401 and 402 involve relevancy. The wording of the decision would suggest the terms are synonymous. Further, the decision mentions all three rules without ever clearly distinguishing among them. This type of imprecision reappears in subsequent decisions such as United States v. Gipson, 24 M.J. 246 (C.M.A. 1987). The result is that it becomes extremely difficult for trial practitioners to deal with novel scientific evidence in **a** systematic way.

appeal to the Supreme Court, Justices White and Brennan would have granted it to resolve the issue of whether the rules incorporated the *Frye* standard.[81]

Though *Mustafa* was clearly a rejection of the stringent standards of the general acceptance test, it failed to replace that test with any definitive analytical framework for use in evaluating the admissibility of novel scientific evidence. Nevertheless, the Court of Military Appeals clearly was moving in the direction of relevancy. Emphasis on terms like "helpful and relevant," in light of the debate then occurring in the federal circuits, could mean nothing else. The chronology of the cases cited makes clear where the court was going: *Bothwell*,[82] December 1983; *Snipes*,[83] July 1984; *Mustafa*,[84] June 1986; *Mustafa*, certiorari denied, November 1986.[85] After Justice White argued that resolution of the conflict was required, the military's adoption of relevancy seemed inevitable. It also should have been apparent that the military would adopt the *Downing* approach, given Justice White's selection of a single case to cite as representative of the "flexible standard of admissibility"--*Downing*.[86] Just over eight months later, the court would do exactly that in *United States* v. *Gipson*.[87]

In *Gipson* the appellant had made a motion in limine to admit evidence of an exculpatory polygraph.[88] Refusing to allow a defense

[81] 93 L. Ed. 2d at 393 (White, J., and Brennan, J., dissenting). Such a ruling, whether finding incorporation or not, obviously would have had enormous impact in the federal courts, as well as the military courts.

[82] 17 M.J. **684.**

[83] 18 M.J. **172.**

[84] 22 M.J. 165.

[85] 93 L. Ed. 2d at **392.**

[86] *Id.* at **393.**

[87] 24 M.J. **246** (C.M.A. **1987).** Interestingly, *Gipson* generally is characterized as an important case because of the issue of polygraph admissibility. Actually, that is not the reason *Gipson* is a seminal case for the military practitioner. Instead, its importance lies in the fact that it overruled prior military case law that employed the ***Frye*** standard in assessing novel scientific evidence. The case could have involved any novel scientific technique or process and would have had precisely the same effect on the admissibility of polygraphs.

[88] A motion in limine would be an appropriate way to raise the issue of the admissibility of novel scientific evidence. In making the tactical choice of when and whether to make the motion, litigators should remember that the burden of persuasion is generally on the party making the motion or raising the objection. ***See*** MCM, **1984,** Rules for Courts-Martial 801(e)(4),(5) and 801(g) [hereinafter R.C.M.]. Additionally, if the motion has resulted in the preclusion of novel scientific evidence, the proponent should insure the trial judge's essential findings (R.C.M. 905(d)) are **as** complete **as** possible. At minimum, the proponent should address all components of both the relevancy rules and Military Rule of Evidence **702.** To the extent the findings on the record are incomplete, the judge should be asked to fill in the gaps. Similarly, if the proponent senses that the trial judge misunderstands the legal standard, he or she should ensure the misunderstanding is placed on the record. Doing so not only will preserve the issue for appeal, but also will give appellate litigators the material they

attempt to lay a foundation for admissibility, the trial judge ruled that polygraphy was not "accepted that well in the scientific community or the judicial community.... "[89] **At** the appellate level, therefore, the granted issue was the appropriateness of that refusal. To assess whether the defense should have been granted the opportunity to lay a foundation, the requisite foundation had to be ascertained. This question opened the door to relevancy in the military courts.

The court relied heavily on the reasoning of the Third Circuit in *Downing*.[90] Indeed, the published opinion is very much the *Downing* decision reissued in the military context. As a prelude to its adoption of relevancy, the court first discussed the pros and cons of the *Frye* standard,[91] as well as the dispute then occurring in the federal system over continued adherence to the standard in light of the Federal Rules.[92] The chief concern expressed by the court was "that too much good evidence went by the boards during the 'lag time' inherent in the scientific 'nose-counting' process."[93]

The groundwork laid, the court went on to analyze the Military Rules of Evidence. Given the near verbatim adoption of the Federal Rules by the military, that the court's analysis tracked *Douning* precisely is not surprising. Additionally, the court completely adopted the *Downing* understanding of Federal Rule of Evidence 702 in its own analysis of Military Rule of Evidence 702.[94] Henceforth, Military Rule of Evidence 702 would require an inquiry into the three *Down-*

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need to work with. This is particularly important with regard to novel scientific evidence because, as advances in forensic science are made, the ability of appellate level courts to declare "harmless error" will diminish. For a brief, but extremely helpful, guide to motion practice in the military, see American Bar Association, Military Motions: A Handbook for Lawyers (1986).

[89] 24 M.J. at **247.** An interesting question is why the defense was not permitted to attempt to lay a foundation even if the general acceptance standard was being used by the judge. Essentially, the judge was holding that the evidence was not generally accepted without taking evidence on that issue. This is similar to what happened in *Bothwell.* 17 M.J. at 684. If this practice was followed regularly, one must query how a technique or process that at one time might have been unreliable, but which subsequently was improved, ever would get into court. The trial judge in *Gipson* did note that the government was offering a potentially inculpatory polygraph. **24** M.J. at 247. Presumably, two different results was an indication of the general unreliability of polygraphs. Without taking evidence, however, how could the judge possibly have known whether the difference was the result of factors that would relate to admissibility or only of factors concerned with the appropriate weight to be afforded the seemingly divergent results?

[90] 753 F.2d 1224 (9d Cir. 1985).

[91] 24 M.J. at 250.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 250-51.

ing criteria: 1)soundness and reliability of the process or technique; 2) the possibility of overwhelming, confusing, or misleading the jury; and **3)** the proffered connection with the disputed factual issue.[95]

In its adoption of the *Downing* approach to relevancy, the court considered two additional factors unique to military consideration of Rule 702. First, the drafters of the military rules had noted in their analysis that Military Rule of Evidence 702 might ''be broader and [might] supersede *Frye*.''[96] Thus, their rejection of **Frye** was technically on firmer ground than that of the Third Circuit. In addition, the 1969 Manual for Courts-Martial had stated that polygraph results were inadmissible.[97] In the Military Rules of Evidence, however, this evidentiary exclusion had been omitted.[98] Arguably, both of these were factors indicating the drafters intended to expand the standards for admissibility beyond the narrow confines of **Frye.** Indeed, how could the specific mention of **Frye** be read as anything other than an invitation for the courts to reject this judicially created norm?[99] Similarly, to the extent that polygraphs no longer were singled out for exclusion, in the absence of new information on their reliability, the standard must have changed.[100] Therefore, the court, relying on the *Downing* rationale combined with a focus on the text of the new rules and their analysis, found **Frye** to have been superseded by the relevancy approach.[101]

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[95]*Id.* at 251; see *supra* text accompanying note 58.

[96]24 M.J. at 251.

[97]Manual for Courts-Martial, United States, 1969, para. 142e (Rev. ed.).

[98]*Gipson*, 24 M.J. at 250.

[99]It could be read as an indication that the drafters, who were writing the new rules as the Federal Rule of Evidence 702 debate was occurring, were unsure of what standard to adopt and, therefore, were leaving it up to the courts. Arguably, the use of the word "may" was an indication that the military drafters felt it appropriate to retain **Frye,** but, given the current debate, were unwilling to do so until the issue was resolved as to Federal Rule of Evidence 702.

[100]*See Cipson*, 24 M.J. at 250-51. With regard to the failure to mention polygraphs, the drafters may have felt that it was poor draftsmanship to single out any one form of novel scientific evidence. Additionally, the omission may have been an indication of their belief that it would be inappropriate to exclude a category of evidence that might, over time and with advances in science, become generally accepted. This is of course speculation, but probably no more so than the court's own analysis of the deletion. The Drafters' Analysis sheds no light on this specific issue.

[101]Though concurring, Judge Everett seemed to have mixed emotions. He noted that "at the very least, the expert witness should be able to relate his theories to scientific principles having a substantial body of adherents." ***Id.*** at 255 (Everett, J., concurring).

V. THE RELEVANCY APPROACH UNDER *GIPSON*

Based upon the holding in *Cipson,* military courts currently consider four evidentiary rules prior to admission of novel scientific evidence—Military Rules of Evidence 401, 402, 403, and 702.[102] Basically, three broad requirements exist: 1)the evidence is relevant and admissible under 401 and 402; 2) the evidence is helpful to the fact finders under 702; and 3) the probative value outweighs any dangers posed by the evidence under 403.[103]

Though the Court of Military Appeals did not label their new approach to novel scientific evidence, the requirements listed above are nearly identical to those set forth by commentators and courts advocating what has become known as the "relevancy" test.[104] In its pure form, the relevancy approach treats novel scientific evidence as any other type of evidence by asking whether the evidence is probative and, if so, whether its probative value outweighs the dangers posed by admission.[105] Arguably, both *Downing* and *Cipson* require further evaluation of the evidence using the expert testimony rule, Federal Rule of Evidence 702, or Military Rule of Evidence 702. As discussed earlier,[106] some question exists as to whether those rules are simply restatements of the relevancy rules or whether they are qualitatively different. Regardless of the academic exercise of dif-

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[102]*Id.* at 251-52.

[103]*See Gipson,* 24 M.J. 246; ***see*** *also* United States v. Abeyta, 25 M.J. 97 (C.M.A. 1987): United States v. Dozier, 28 M.J. 550, 551 (A.C.M.R.1989). *Abeyta* excluded polygraph evidence on the grounds that the accused did not testify, and therefore. it was not relevant. *25* M.J. at 98. *Dozier* held the trial court's exclusion of a speech pathologist's testimony to be error. 28 M.J. at *5.52.* The pathologist would have testified that the accused did not make certain phone calls based on a phonetic transcription of the his voice. *Dozier* is an important case because the court noted that the technique offered would have met the *Frye* test. *Id.* This illustrates that the test still may be used to meet the requirements of *Gipson.* **As** the *Gipson* court noted, in evaluating probativeness and helpfulness, "one of the most useful tools is that very degree of acceptance in the scientific community we just rejected as the be-all-end-all standard." **24** M.J. at 252.

[104]For an excellent discussion of the "relevancy test." see P. Giannelli & E. Imwinkelried. Scientific Evidence (1986). They note that the relevancy test has three steps: 1) identify the probative value of the evidence; 2) identify any countervailing dangers or considerations inherent in admission; and 3) balance the probative value against the dangers posed. In terms of probative value, when dealing with scientific evidence the focus should be on the reliability factor. P. Giannelli & E. Imwinkelried. Scientific Evidence §§ 1-6(A)-(C). Cases discussing the probative value issue include United States v. DeBetham, 348 F. Supp. 1377 (S.D. Cal 1972). *aff'd, 4i0* F.2d. 1397 (9th Cir. 1972), ***cert. denied,*** 412 U.S. 707 (1973). and United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972). On the other hand, one of the major countervailing dangers is that of "mystic infallibility." ***See*** *supra* note 11 and accompanying text.

[105]*See supra* notes 35-36 and accompanying text.

[106]*See supra* notes 59-61 and accompanying text.

ferentiating between the relevancy and expert testimony rules, however, both the *Downing* and *Gipson* courts treated them as different. Therefore, any proposal of practical use will do likewise.[107]

With the adoption of the relevancy approach by the military courts, practitioners now are faced with a significantly different mode of analysis when determining the potential admissibility of scientific evidence. This article will propose an analytical framework to use with regard to that evidence. First, however, one must clearly understand the rules used in the analysis: Military Rules of Evidence 401, **402,** 403, and 702.

VI. MILITARY RULES OF EVIDENCE 401 AND 402

Federal Rule of Evidence **402** provides that all relevant evidence is admissible unless otherwise provided by the Constitution, the Manual for Courts-Martial, or Acts of Congress.[108] Therefore, one must turn to the definition of relevant evidence under Military Rule of Evidence 401 to ascertain admissibility. Basically, relevant evidence is that which has any tendency to make a fact in issue more or less probable.[109] Evidence that does so is deemed logically relevant. Determining whether or not the evidence is logically relevant is essentially a tiered inquiry consisting of materiality and probativeness. To be material, the evidence must bear on an issue in the case. If it does not, it is immaterial and, thus, cannot be relevant. Assuming the evidence in question is material, an inquiry into whether it actually makes the issue more or less probable is required. If the evidence makes the issue more probable, it is probative and the evidence is

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[107] Remember that the standard for appellate review of admissibility in the area of novel scientific evidence is "abuse of discretion." ***See*** P. Giannelli and E. Imwinkelried, *supra* note 104, § 16(c); United States v. Williams, 583 F.2d. at 1194, 1200 (2d Cir. 1978); United States v. Baller, 519 F.2d. 468, 467 (4th Cir. 1975). For error to be found, the ruling must have materially prejudiced a substantial right of a party. Mil. R. Evid. 103(a). In order for the error to be preserved, an objection must be made in a timely fashion, "stating the specific ground of objection, if the specific ground was not apparent from the context." Mil. R. Evid. 103(a)(1). Additionally, in cases excluding evidence, an offer of proof as to the excluded evidence must have been made unless contextually clear. Mil. R. Evid. 103(a)(2). Defense counsel should not rely on the plain error doctrine. Mil. R. Evid. 103(d). Particularly in the area of novel scientific evidence, plain error will be difficult to demonstrate if for no other reason than the novelty of the process. A full-blown hearing on a motion in limine should meet most of these requirements and is the recommended method for litigating the admissibility of scientific evidence. Obviously, in most cases the defense will want to address this issue prior to entering pleas, particularly if the evidence is inculpatory.

[108] Mil. R. Evid. 402; ***see*** *supra* notes 45 and 66.

[109] Mil. R. Evid. 401; ***see*** *supra* notes 45 and 66.

now relevant.[110] Ascertaining materiality with regard to novel scientific evidence presents no apparent problems beyond those of other forms of evidence. Decisions involving the admission of scientific evidence, however, do tend to pay more attention to the second part of the inquiry—the issue of probativeness.

This issue of probativeness generally is framed in terms of reliability."[111] Logic dictates that if evidence is unreliable, or more precisely if it lacks reliability, then it does not make any fact in issue more or less probable. This approach has become part and parcel of the military courts' Military Rule of Evidence 401 analysis, and, as a result, a prerequisite to the admission of novel scientific evidence.[112] The problem with the military's use of a "reliability" standard as part of a Military Rule of Evidence 401 analysis is that the term is ill-defined in military case law. *Gipson,* which expressly makes reliability under Military Rule of Evidence 401 applicable, said little to quantify reliability beyond stating that Military Rule of Evidence **702** would require a "greater quantum" of reliability than that required by the dictate of logical relevancy.[113] How much greater is not clear. At the same time, *Gipson* failed to set forth what is supposed to be reliable.[114] As a result, weight/admissibility distinctions remain blurred.

In fairness, the *Cipson* court did provide some assistance to those who would apply its new standard, although ironically in the form of ***Frye.*** Despite *Frye's* rejection as the "be-all-end-all standard," the Court of Military Appeals held that general acceptance remained a factor for consideration by courts, both as to the issue of probativeness (Rule 401) and that of helpfulness (Rule 702).[115] Therefore, if evidence passes muster under the old ***Frye*** standard, it should generally survive a *Cipson* review.[116]

Ironically, additional assistance in defining the relevancy approach as adopted by the military was provided by the Army Court of

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[110] *See* ***generally*** McCormick on Evidence 605-09 **(3d** ed. 1984).
[111] *See, e.g.,* United States v. Gipson, 24 M.J. 246. 251-52 (C.M.A. 1987).
[112] *Id.* at 251.
[113] *Id.*
[114] *See id.*
[115] *Id.* at 252.
[116] The one problem may be the Military Rule of Evidence 702 focus on overwhelming, misleading, or confusing. **As** discussed earlier, if Federal Rule of Evidence and Military Rule of Evidence 702 are to have meaning beyond their 403 counterparts, they must be more restrictive. ***See*** *supra* note 62 and accompanying text. If this is so, then evidence that survived a ***Frye*** and a Rule 403 analysis might not survive a *Gipson/Downing* 702 analysis.

Military Review in *Bothwell*.[117] Though that court retained Frye, it set forth the areas of reliability it felt Military Rule of Evidence 401 affected. In determining reliability of scientific evidence, the court suggested an inquiry into three factors: 1)the validity of the principle underlying the technique used; 2) the validity of the technique itself; and **3)** the proper application of the technique on the particular occasion that resulted in generation of the evidence.[118] As in *Gipson*, the lack of quantification is one problem posed by the suggested methodology. Additionally, remember that Bothwell is technically nothing more than persuasive authority. Nevertheless, the case does provide some semblance of methodological order for courts struggling through the imprecision of *Gipson*.

The case also can serve as a framework for developing an argument on the issue of admissibility versus weight. In that Bothwell calls for a review of the entire scientific process, from principle to application, one can argue that the admissibility/weight distinction is one of degree, not of subject matter, when considering novel scientific evidence. For example, the question is not whether concerns about a principle will fall within the purview of the judge as the finder of the law or the members as the finder of the fact. Instead, the issue is whether the concerns have reached a level at which the judge, as a matter of law, will refuse to allow the jury to consider the evidence.

The process of defining reliability in a usable way is difficult. In the effort to determine the limits of inquiry, even reliance on the well-reasoned Bothwell decision leaves one foundering, for subjectivity pervades the entire process. Though law is certainly no stranger to subjectivity, that which exists in making reliability determinations poses particular difficulty. The standard does exist, however, and the three Bothwell inquiries will assist litigators and the judiciary to address the issue with a semblance of coherence.

VII. MILITARY RULE OF EVIDENCE 702

Assuming scientific evidence meets the requirements of Military Rules of Evidence 401 and 402, it then must be analyzed against Military Rule of Evidence 702. Reliability, as with Military Rule of Evidence 401, is the key to Military Rule of Evidence 702.[119] With regard to Rule 702 reliability, however, the *Gipson* court provided

[117]17 M.J. 684 (A.C.M.R. 1983).
[118]*Id.* **at** 686.
[119]*Gipson*, **24** M.J. at 251.

a much greater indication of what it meant by the term than it had when discussing Military Rule of Evidence **401.** Basically, the test is "helpfulness" to the fact finder;[120] that is, an indication that the court logically concluded that unreliable evidence is unhelpful.[121] This assumption led to the court's articulation of three factors that must be balanced when determining helpfulness.

As noted earlier, in *Gipson* the Court of Military Appeals adopted the *Downing* court's analysis of helpfulness.[122] Military courts now will be required to evaluate the soundness and reliability of the process or technique; the possibility of misleading, overwhelming, or confusing the jury; and the extent of the connection between the evidence and the disputed factual issue.[123] Obviously, these aspects again present the problem of quantification. In other words, the imprecision in distinguishing between admissibility and weight issues remains. Unfortunately, the court did little to resolve the issue beyond noting that a greater degree of reliability will be required than in a Military Rule of Evidence 401 inquiry.[124] The weight versus admissibility issue is, therefore, both a Military Rule of Evidence 702 and a Rule **401** issue. Presumably, the trial judge will be able to decide when the controversy over reliability is severe enough to merit taking the issue from the jury entirely by ruling the evidence inadmissible.[125]

In setting forth the first tier of a Military Rule of Evidence 702 inquiry, the *Gipson* court neglected to discuss what it meant by soundness and reliability of the technique or process. Though such an omission normally would be fatal in the attempt to develop an analytical methodology, the near total reliance of the court on the *Downing*

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[120] *Id.*

[121] This is not a necessary conclusion, however. Arguably, unreliable evidence may, in fact, be valid evidence. As an extreme example, consider the ancient proposition that the earth was flat. An assertion that the earth was round, prior to the 15th century, would have been rejected out of hand not only as unreliable, but also as contrary to the scientific principles then generally accepted. Albeit extreme, this example highlights the problem implicit in a new technique, particularly when that technique is based on truly novel scientific principles. To resolve this theoretical problem would require courts to forego admissibility analysis in favor of an almost exclusively weight evaluation by the fact finder. Obviously, for policy reasons, this will not be done.

[122] *See supra* text accompanying notes 94-95.

[123] *Gipson*, 24 M.J. at 251

[124] *See* ***id.***

[125] Of course, this is also what the trial judge did under the ***F r y*** standard. The judge now has much greater leeway because, under ***Frye,*** he or she was constrained by expert testimony on whether the procedure was generally accepted. Therefore, the relevancy approach enhances the role **of** the judge. The judge not only supplants ***Frye's*** "scientific jury," but also does **so** in the absence of clear guidelines on where to draw the line distinguishing admissibility versus weight.

decision can be used to flesh out the definition. Perceiving the problems courts might encounter in assessing reliability, the Third Circuit set forth a number of factors that might be considered. First and foremost is the degree of acceptance of the technique or process.[126] In essence, this is a quasi-*Frye* analysis. Certainly, if a technique or process has gained general acceptance in the scientific community, it is probably reliable. On the other hand, the *Downing* court notes that "a known technique which has been able to attract only minimal support within the community is likely to be found unreliable."[127] The grey area between "general acceptance" and "minimal support" requires further elucidation.

To flesh out the grey area, *Downing* suggests a number of tactics. Beyond acceptance, a court may consider the uniqueness or novelty of a technique or process. In other words, given a novel scientific technique, to what extent is it based on established and well-accepted principles? Similarly, the technique or process may have been critiqued in literature from the relevant field of study. In both these cases, the key is the extent to which the "scientific basis of the new technique has been subjected to critical scientific scrutiny."[128] Other factors that might be addressed include the "qualifications and professional stature of the witnesses," the "non-judicial uses to which the scientific technique are put," "the frequency with which a technique leads to an erroneous results,"[129] and the "type of error"[130] generated. Of course, a court always could choose to take judicial notice of testimony supporting or attacking the technique in prior cases.[131]

The *Gipson* decision also provided little guidance on how to ascertain whether the evidence would overwhelm, confuse, or mislead

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[126] *Downing*, 753 F.2d at 1238. The *Gipson* court similarly retains *Frye* in this manner. 24 M.J. at 252.

[127] 753 F.2d at 1238.

[128] *Id.*

[129] As a measure of reliability, the court suggested comparing the number of times a valid result occurs to the number of times the result is erroneous. Any time the technique is more likely to produce the erroneous result, it should be deemed unreliable. *Id.* at 1239.

[130] *Id.*

[131] *Id.* at 1238-39. The court based its discussion on the work of Judge Weinstein and Professor Berger. 3 J. Weinstein and M. Berger, Weinstein's Evidence § 702 (1985). With regard to judicially noting testimony of experts in previous cases, care must be taken to ensure the state of the scientific technique has not changed. Advances in technology are inherent in novel scientific techniques because, at least until they become generally accepted, they continually are being tested and evaluated. Therefore, the procedure may have been improved or discredited because the testimony in a prior case was taken.

the members, particularly in light of the Military Rule of Evidence **403** limitations. Again by focusing on the *Downing* decision, however, one at least can sense the type of issues the courts would address. Obviously, one danger is the *Addison* "mystic infallibility''[132] concern.[133] In noting this problem, the *Downing* court clearly felt the need to address the concerns of those who opposed rejection of *Frye*. *Frye* was meant in great part to avoid the "mystic infallibility" of scientific evidence in the eyes of the layman. The *Downing* court's alteration of the standard of admissibility was no reason to assume this problem would vanish.[134] Therefore, the relevancy test does tackle the problem through a tier of the newly articulated 702 inquiry. To the extent a piece of scientific evidence will generate undue credibility and be afforded undue weight by the fact finder simply because of its scientific nature, the evidence is more likely to be deemed inadmissible when the probative versus prejudicial balancing occurs.

The irony is that this approach simply restructures the *Frye* response to the problem. Under *Frye*, those best able to assess the evidence would pass judgment on its admissibility. If less than generally accepted evidence meets the first tier of the Rule 702 analysis under *Downing/Gipson* (soundness and reliability), however, the propensity to mislead or confuse is compounded by the "mystic infallibility" phenomena because the evidence is less reliable than it would have been under *Frye*. Logically, less reliable evidence poses greater dangers of misleading, confusing, or overwhelming the fact finder. The unanswered question is, of course, how the balance plays itself out. Would more evidence be inadmissible based on lack of general acceptance under *Frye* than would be if based on confusion under the relevancy test, given the lesser degree of acceptance that test requires? That remains to be seen.

Two additional potential scenarios are singled out in *Downing* as posing particular dangers. The greater danger involves the offer of conclusions by the expert witness without a critical assessment of the underlying data.[135] In these cases, the expert serves as his own "scientific jury" and propounds his own evaluation of the accuracy of the evidence. This is problematic because, under the relevancy standard, the task of demonstrating reliability is less onerous. The

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[132]498 F.2d at 744; ***see*** *supra* note 11 and accompanying text.
[133]*Downing*, **753** F.2d. at 1239.
[134]Indeed, the absence of experts testifying that the technique is not generally accepted may exacerbate the perceived problem of "mystic infallibility"
[135]753 F.2d at 1239.

proponent no longer needs to present the "ruling" of the "scientific jury" prior to admission.[136] Instead, he need only convince the judge, a layman in the field of science.

The second problem cited in *Downing* is that of subjectivity. As the court noted, scientific evidence often is generated in raw form by mechanical devices. Then the duty of the expert is to evaluate the evidence subjectively.[137] The classic example, of course, is found in polygraphy. Again, subjectivity is a greater danger under the relevancy test than under **Frye** because the process by which the expert subjectively evaluates the data undergoes less scrutiny. Therefore, in the absence of strict scrutiny of the process, there exists a significant potential for subjectivity flaws in a relevancy approach to 702.

Once the court has considered the degree of reliability and the potential to confuse, mislead, or overwhelm, it must balance the two.[138] In *Downing* the Third Circuit purposefully declined to enunciate the foundation for doing so. It reasoned that because a balancing test that had policy implications was being employed, imposing a standard as if the process involved only fact-finding would be inappropriate. Instead, it simply would use an abuse of discretion stan-

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[136]This is a particular problem with regard to novel forensic scientific techniques. To the extent that a technique is unique to forensic science, the experts who have developed it and who will testify concerning its reliability very well may have a vested interest in its acceptance by the courts. Further, because it is a forensic technique, it may be some time before an unbiased scientific community, not involved with forensics, evaluates it.

[137]753 F.2d at 1239. The problem of bias discussed earlier is present here as well. ***See*** *supra* note 136. To the extent a private laboratory is involved in forensics, it has a vested interest in being able to generate definitive results. The problem is not so much one of producing results that a client would want, as it is of reporting a result at all when the data may not be clear enough to support one. Concerns in this area are not limited to private firms. For example, although this writer found Air Force Office of Special Investigations (AFOSI) polygraphers to be extremely fair minded and objective, a common perception exists among military defense counsel that AFOSI polygraphs are unreliable and have an undue tendency to inculpate. As part of a team designed to "catch' criminals, the belief is tha' OSI polygraphers will want to prove guilt via the polygraph examination.

[138]An example of the balancing is found in United States v. Mance, 26 M.J. 244 (C.M.A. 1988). The court refused to permit expert scientific testimony to the effect that melanin—a substance responsible for skin pigmentation and found in urine—could result in a positive urinalysis for cannabis. The court noted that the expert involved was self-taught, had no formal forensic education, and had no lab. Additionally, no tests had been done to verify the theory, and the expert was unaware of any scientist other than himself who supported the theory. Therefore, the testimony would only serve to confuse and mislead the fact finders. ***Id.*** at **247.**

dard to review the decisions of lower courts.[139] In other words, the trial judge will have to ascertain when the balance, given the particular type of evidence involved and in light of other evidence adduced at trial, will tip in favor of admissibility or in favor of exclusion. Presumably, military courts will take the same approach.

If the reliability of the evidence outweighs the potential dangers, the court must consider the final factor implicit in Military Rule of Evidence 702—the proffered connection between the offered evidence and the fact in issue.[140] This issue is reminiscent of the Military Rule of Evidence 401 requirement that the evidence render a fact of "consequence . . . more or less probable."[141] Generally, articulating the connection will not be an overly demanding task for the practitioner.[142] Further, because reliability already is described as a Rule 702 requirement, the issue actually will be one of materiality.[143] Therefore, assuming the reliability of evidence outweighs its

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[139]753 F.2d at 1240. There have been a number of military appellate cases upholding the judge's discretionary powers. In United States v. Jensen, 25 M.J. 284, 289 (C.M.A. 1987), the Court of Military Appeals, citing *Gipson*, upheld the trial judge's exclusion of an exculpatory polygraph. The great degree of discretion granted was indicated by the lack of discussion of the basis for exclusion and by the court's statement that "this is not to say that (the trial judge) would have erred by admitting (the) evidence." *Id.* An example of a case finding the trial judge to have abused his discretion is United States v. Rivera, 26 M.J. 638 (A.C.M.R. 1988). In *Rivera* the prosecution called an expert in psychology to testify about the "therapist-patient sex syndrome." Citing *Gipson* and *Snipes*, the *Rivera* court acknowledged that the rules relating to novel scientific evidence had been relaxed. However, the court went on to point out that the expert in question and his associates were about the only people doing research in this area and that the syndrome was not recognized in the Diagnostic and Scientific Manual (DSM III). *Rivera*. 26 M.J. at 641. The court then ruled that the trial judge had abused his discretion by admitting the testimony because both the technique employed and its underlying principle were very much open to question. Additionally, there was concern about the aura of "scientific legitimacy." *Id.* at 642. *Rivera* is a fascinating case because it reads very much like a case, particularly when the discussion turns to issues such as inclusion in DSM III and the number of researchers looking at the issue. Inclusion in DSM III is, in particular, a general acceptance issue. Of course, it retains value in tight of *Gipson*, but only when it serves as a standard resulting in the admission of evidence. The absence of general acceptance under *Gipson*, however, should serve only to continue the inquiry.

[140]United States v. Gipson, 24 M.J. **246,** 251 **(C.M.A.** 1987).

[141]Mil. R. Evid. 401; ***see*** *supra* notes 46 and 66.

[142]The proponent of the evidence should make an on-the-record proffer of the relationship asserted. *See* United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985).

[143]An example of a case rejecting evidence on this basis is United States v. Dibb. 26 M.J. 830 (A.C.M.R. 1988). In *Dibb* the defendant alleged that he was suffering from a transient mental disturbance caused by urea formaldehyde gas and, therefore. did not have the *mens rea* to establish the dishonorable nature of his acts; that is, issuing worthless checks. *Id.* at 831. The court rejected the evidence because the defendant made "no proffer that (he) presently suffered from such a mental disturbance. that the physiological condition caused a psychological reaction, or that the military environment in which the appellant lived and worked contained substances that would trigger the onset of the mental disturbance." *Id.* at 832.

dangers, the proponent need show only that it will help the fact finder resolve a disputed issue.[144]

VIII. MILITARY RULE OF EVIDENCE 403

The last requirement under a *Gipson* relevancy analysis is that the probative value not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by undue delay, waste of time, or needless presentation of cumulative evidence."[145] In assessing the balance, the presumption is in favor of admissibility. Furthermore, the judge will be granted a great deal of discretion in making this determination.[146] Many of the issues discussed above with regard to the Military Rule of Evidence 702 focus on these dangers are also relevant here. As pointed out above, however, Federal Rule of Evidence 403 is considered, at least in the Third Circuit, to be a stricter standard than the Rule 702 standard,[147] a precedent military courts probably will follow given the overall *Gipson* reliance on *Downing*. How and why the standard is different is not explained.[148] This imprecision is illustrated in *United States v. Howard*.[149] In that case the Coast Guard Court of Military Review considered the exclusion of polygraph results by the trial judge because the questions posed were ambiguous. It based its decision

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[144]One final consideration in a Military Rule of Evidence 702 analysis is whether the individual providing the testimony can be qualified as an expert. To be so qualified, the individual must have special knowledge, skill, experience, training, or education sufficient to make it reasonable to rely on his testimony assuming it passes muster as to the other facets of the rule. This is a very low threshold and the expert does not have to be an "outstanding practitioner" in the field. United States v. Barker, 553 F.2d 1013, 1024 (6th Cir. 1977). An oft-cited military case is United States v. Garries, 19 M.J. 845 (A.F.C.M.R 1985). In *Garries* a detective was called as a blood stain expert. He had attended a course at the University of Colorado taught by a nationally-recognized blood splatter expert and had been involved in 20-30 actual cases. The detective was held to have been qualified properly as an expert in the field. An example of a case rejecting an individual as an expert is United States v. Carter, 26 M.J. 428 (C.M.A. 1988). In *Carter* admission of a CID agent's testimony that the victim exhibited responses similar to other rape victims was held to be error because he was not properly qualified in the field of rape trauma syndrome. In other words, mere familiarity is insufficient.

[145]Mil. R. Evid. 403; *see supra* notes 45, 66. "Probative value involves a logical process of reasoning favored by the law. Prejudicial effect means some unwelcome influence on the logical process . . . . " S. Saltzburg, L. Schinasi and D. Schlueter, *supra* note 65, at 343.

[146]United States v. Teeter, 12 M.J. 716, 725 (A.C.M.R. 1981) (citing United States v. Dennis, 625 F.2d 782 (8th Cir. 1980)).

[147]United States v. Downing, 753 F.2d 1224, 1243 (3d Cir. 1985); *see supra* text accompanying note 62.

[148]This is one excellent reason to seek special findings in all Military Rule of Evidence 403 rulings.

[149]24 M.J. 897 (C.G.C.M.R.1987).

on Military Rules of Evidence 403 and 702.[150] Given the subjective nature of the standards, future military courts are likely to follow suit.[151]

IX. AN ANALYTICAL FRAMEWORK

A *Gipson* analysis of novel scientific evidence clearly is fraught with pitfalls. The primary problem is the lack of quantification and definition of the standards. Beyond adoption of a different standard,[152] little can be done to address this particular problem because the criteria chosen by the court inherently call for subjectivity. Therefore, practitioners must rely primarily on their advocacy skills during admissibility hearings and must trust that judges will exercise their broad discretion wisely.[153]

A more approachable problem is that the standard fails to offer a point-by-point catalogue of the issues the court will address. In other words, issues tend to repeat themselves in the guise of criteria for varying rules of evidence. For example, reliability is the subject of inquiry in both a Military Rule of Evidence 401 and a Military Rule of Evidence 702 analysis. The same is true of the Military Rules of Evidence 403 and 702 confusing, misleading, or overwhelming dangers. Even accepting the court's articulated distinctions, the

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[150] *Id.* at 906.

[151] Military Rule of Evidence **403** does include mention of delay, waste of time, and needless presentation of cumulative evidence. These issues of judicial economy are not unique to novel scientific evidence, however, and their handling will mirror that involved with nonscientific evidence. Indeed, these provisions seldom are invoked in situations involving scientific evidence.

[152] In the face of an assertion that whatever standards might he chosen would, nevertheless, be incapable of quantification, the authors would suggest consideration of admissibility standards that differ based upon whether the evidence is inculpatory or exculpatory. One such approach. which would employ a beyond a reasonable doubt standard for prosecution evidence and a preponderance standard for defense evidence. has been outlined by Professor Giannelli. Giannelli, *supra* note 23, at 1249-50. Another technique might be to apply the more stringent general acceptance test for inculpatory evidence and the relevance test for exculpatory evidence. Though such approaches would not solve the problem of lack of quantification, they would, to a much greater degree, place the risk where it should lie—with the prosecution. Acceptance of differing standards would, of course, tend to result in a greater number of acquittals than would be the case if both sides were subject to the same lower standard. As a policy matter, however. we should strive for a system in which the innocent defendant could present any evidence that might demonstrate his or her innocence. Similarly, we should create stringent safeguards against admission of evidence that might wrongly convict that same defendant. To argue that both sides have an inherent right to present evidence of the same quality is to reject the adage that we would rather ten guilty defendants **go** free than convict one inoocent one.

[153] It is certainly open to question whether "abuse of discretion" is an appropriate standard to use when dealing with exculpatory evidence, particularly when the evidence is of a scientific naturr. but has not yet been generally accepted.

substantive elements of these two examples remain constant from rule to rule. Those distinctions that do exist are merely ones of degree. Nevertheless, the similarities permit proposal of a cohesive methodology for the practitioner that combines components of the various rules. Of course, combining common elements of different rules of evidence will not be responsive to the differences of degree asserted by both *Downing* and *Gipson*. However, in the absence of clear guidance concerning what those differences are, this point is, in practical terms, irrelevant. Judges will base their decisions on their own estimation of whether the standards have been met, citing the more restrictive rule in close cases. Although this analysis may sound overly cynical, actually it is simply a recognition of the existence of judicial discretion.

In the aftermath of *Downing* and *Gipson*, certain areas of inquiry emerge that cut across the somewhat hazy process that would exist in a rule by rule analysis. The analytical framework set forth below is offered to help the practitioner organize an approach to novel scientific evidence. No relevancy analysis would be complete without considering each of the following points:

1) To what extent does the witness qualify as an expert by virtue of his or her knowledge, skill, experience, training, or education (Military Rule of Evidence 702)?

2) To what extent is the offered evidence connected or material to the fact in issue (Military Rules of Evidence 401 and 702)?

3) How valid are the principles underlying the technique used to generate the evidence (Military Rules of Evidence 401 and 702)?

4) How valid is the technique or process used to generate the evidence (Military Rules of Evidence 401 and 702)?

5) To what extent was the application of the process or technique as to this particular evidence and in this particular instance proper (Military Rules of Evidence 401 and 702)?

6) To what extent will admission of the evidence overwhelm, confuse, or mislead the jury, and what is the balance between these factors and the probative[154] value of the evidence (Military Rules of Evidence 401, 403, and 702)?

[154] The term "probative" is purposefully used here in contrast to the term "material" in question two. This is to indicate that the probativeness of evidence is the combination of the response to all the inquiries set forth in the previous questions.

7) To what extent do concerns of judicial economy affect the balance in question 6) (Military Rule of Evidence 403)?

8) Can the evidence be excluded on constitutional grounds, due to the evidentiary rules, or because of other reasons?

With the exception of the final question, each inquiry requires an answer that must be placed along a continuum. This was done purposefully to emphasize the discretionary powers of the judiciary in this area. The practitioner also must realize that the answers to these questions probably will have a synergistic effect on the ultimate exercise of that discretion.[155] Regardless of the way discretion plays itself out, however, a complete analysis of proffered novel scientific evidence must respond to each of these questions. Finally, the relevancy approach provides fertile ground for argument that any problems with scientific evidence identified by the above analytical framework should go to the weight of the evidence, not to its admissibility. As mentioned previously,[156] the assumption that jurors cannot deal critically with scientific evidence may be unwarranted, especially in courts-martial. In fact, jurors in a court-martial actually may be better able than the judge to assess some types of scientific evidence. With this in mind, an advocate might argue that the relevancy approach, with its less restrictive posture towards scientific evidence, demands that the members be permitted to assign the appropriate weight to a piece of evidence, and that the judge should refuse to admit scientific evidence only under very rare circumstances.

X. CONCLUSION

From 1923 to the mid 1980's, the admissibility of scientific evidence in most courts of the United States, including courts-martial, was governed by the general acceptance standard. This standard required that the scientific principle and technique involved in the creation of a certain piece of evidence be accepted generally by the field to which the principle belonged. Recently, the relevancy approach, which appears to be far less restrictive, has been adopted by some federal courts and the military courts. Whether or not the relevancy approach actually will create a less restrictive atmosphere for the

[155] For example, a judge might admit evidence when the application is somewhat questionable, but not do so in the case of other evidence in which similar questions arise as to application, because of additional questions concerning technique and principle.

[156] *See supra* note 51.

reception of scientific evidence in courts-martial remains to be seen. In adopting the relevancy approach, the Court of Military Appeals did not articulate clear, quantifiable standards for its application. Although a degree of uncertainty exists with regard to the application of the relevancy approach, as forensic science becomes increasingly more sophisticated, the standard certainly will receive further critical attention, and clearer standards necessarily will result.

MILITARY RULE OF EVIDENCE 404 AND GOOD MILITARY CHARACTER

by Lieutenant Colonel Paul A. Capofari*

The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add?

Rule **404.** Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same; . . . .[2]

I. INTRODUCTION

Accused soldiers often use evidence of their good character as part of their defense. The soldiers believe such evidence will impress the military judge and court members. The evidence of good military character is intended to provide the basis for an inference that the accused is too professional a soldier to have committed the charged offense.

This article will examine the admissibility of general good military character. It will show that prior to the adoption of the Military Rules of Evidence, general good military character evidence was always

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[1] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Judge Learned Hand describing character evidence). This quote was also the introduction to Boller, Proof of *the Defendant's Character*, 64 Mil. L. Rev. 37 (1974). Lieutenant Colonel Boller's article is an excellent explanation of the pre-rules treatment of character evidence.

[2] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(a)(1) [hereinafter MCM, 1984, and Mil. R. Evid. 404(a)(1)].

admissible at courts-martial. Ten years after the President promulgated the Military Rules of Evidence, and despite the clear intention of the drafters to change the treatment of character evidence,[3] the Court of Military Appeals (COMA)has returned to the pre-rules practice. The court continues to require a nexus between the crime and military duties for the evidence to be admissible.[4] Now is the time for the court to abandon this pretext; good soldier evidence is pertinent and should be admissible at all courts-martial.

11. AN EXAMPLE

After the presentation of the government's case on the merits, matters look bleak for the defense. The prosecution has presented persuasive and complete evidence that the accused tested positive for cocaine during a unit urinalysis inspection. The inspection was authorized and conducted properly, and the chain of custody is intact. Now the defense will present its evidence.

The first defense witness is Sergeant Jones, the accused's supervisor in the motor pool. He testifies that the accused is the "best mechanic" in the motor pool. The defense presses forward to elicit that, in Sergeant Jones' opinion, the accused is "law-abiding" and a "good soldier." Is this evidence admissible under the Military Rules of Evidence? What relevance does the evidence have?

This example illustrates the ''goodsoldier defense." Governed by Military Rule of Evidence 404(a)(1), the evidence is aimed at creating the inference that because the accused is a person of good character and people of good character do not commit crimes, the accused must not have committed the crimes charged. In the example, the defense counsel would argue for admissibility of the good soldier evidence by showing a nexus between the crime charged and the military. Admissibility would hinge on the creativity and imagination of the defense in demonstrating this nexus.

111. CHARACTER EVIDENCE PRIOR TO THE MILITARY RULES OF EVIDENCE

Prior to the adoption of the Military Rules of Evidence, character evidence was governed by paragraph 138f of the 1969 Manual for

[3]Mil. R. Evid. 404(a)(1) analysis at A22-32.
[4]United States v. Wilson. 28 M.J. 48 (C.M.A. 1989)

Courts-Martial.[5] This paragraph basically restated the common law rule of evidence that Justice Jackson explained in the classic Supreme Court decision of *Michelson v. United States*.[6] Simply stated, the prosecution could not introduce evidence of the defendant's character to prove that the defendant is a bad person and therefore must have committed the crime charged. The defendant, however, *could* introduce evidence of good character in the hope that the inference such evidence created would convince the jury that the defendant had not committed the crime.

The military has a long history of permitting accused soldiers to show their good character as evidence that they did not commit the offense charged. The 1969 Manual provision can be traced back to the 1928 Manual for Courts-Martial and Colonel Winthrop.

In his treatise on military law, Colonel Winthrop defined relevancy and the limits of relevant evidence, and stated: "In a military case, not only is such testimony relevant as goes to the gist of the particular defence, but also such as may establish good character."[7]

The 1921 Manual for Courts-Martial was the first Manual to have rules of evidence. Previous Manuals simply stated that the rules of evidence at courts-martial would be the same as those generally followed in the federal district courts.[8] Unfortunately, the 1921 Manual had no provisions for defense character evidence.

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[5] Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter MCM, 1969]. Paragraph 138f stated:

> To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen. However, he may not, for this purpose, introduce evidence as to some specific trait of character unless evidence of that trait would have a reasonable tendency to show that it was unlikely that he committed the offense charged. For example, evidence of good character as to peaceableness would be admissible to show the probability of innocence in a prosecution for any offense involving violence, but it would not be admissible for such a purpose in a prosecution for a nonviolent theft.

[6] 335 U.S. 469 (1948).

[7] W. Winthrop, Military Law and Precedents 320 (1920 ed. reprint).

[8] John H. Wigmore is credited with the first codification of military evidence; he has the only byline to appear in a Manual for Courts-Martial. Wigmore wrote chapter XI of the 1921 Manual while on duty with The Judge Advocate General's Corps during World War I. Colonel Wigmore was already Dean of Northwestern Law School and already had authored his massive treatise on Evidence before volunteering for service during World War I. The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975, at 118.

Defense character evidence first appeared in the 1928 Manual for Courts-Martial. Paragraph 113b stated: "The accused may introduce evidence of his own good character, including evidence of his military record and standing, in order to show the probability of his innocence."[9]

The 1949 Manual expanded on this provision by stating:

> In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general reputation as a moral well-conducted person and law abiding citizen. However, if the accused desires to introduce evidence as to some specific trait of character, such evidence must have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of reputation for peacefulness would be admissible in a prosecution involving any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft.[10]

The provision in the 1951 Manual for Courts-Martial is identical to that of the 1949 Manual, except the word "reputation" in the first sentence was changed to "character."[11]

After surveying character evidence in a Military Law Review article in 1974, Lieutenant Colonel Boller concluded: "There is considerable authority supporting the proposition that character evidence is of a greater utility and probative value in the military than in the civilian community . . . . [C]haracter evidence in military trials is given a preferred position."[12]

Decisions of the Court of Military Appeals and the boards of review also illustrate the preference for character evidence.[13] Courts-martial always have been receptive to character evidence offered by the accused, and the accused always was permitted to offer general character, not only as to a specific trait, but also as to one's general good character as a soldier. Against this history, the drafters of the Military Rules of Evidence tried to change character evidence.

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[9]Manual for Courts-Martial, United States. 1928, para. 113h [hereinafter MCM. 1928].
[10]MCM, 1928, para. 125b.
[11]Manual for Courts-Martial, United States, 1951, para. 138f(2) [hereinafter MCM. 1951].
[12]Boller, *supra* note 1, at **47.**
[13]United States v. Harrell, 26 C.M.R. 59 (C.M.A. 1958); United States v. Presley, 9 C.M.R. **44** (C.M.A. 1953); United States v. Browning, **5** C.M.R. **27** (C.M.A. 1952).

IV. THE FEDERAL RULES OF EVIDENCE CHANGE "GENERAL GOOD CHARACTER"

The Federal Rules of Evidence were adopted in 1975 and served as the basis for the Military Rules of Evidence. In fact, the text of Military Rule of Evidence 404 is virtually identical to that of the federal rule.

The federal rule codified the common law as to the proper treatment of character evidence.[14] The drafters were defensive in explaining the rule; the Advisory Committee's Note states that the basis of the rule lies more in history and experience than in logic.[15] Calling the rules pertaining to the defendant's use of character "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions," the Advisory Committee concluded that any doubts about the relevancy of the evidence should be resolved in the favor of the defense. The Advisory Committee's Note explained that the rule limited character evidence to pertinent traits, rather than allowing general good character, because this limitation "is in accordance with the prevailing view."[16] The Committee cited McCormick's treatise on evidence as proof of the prevailing view.[17]

Thus, the starting point for examination of the "good soldier" defense and the military treatment of general character evidence is to realize that the framers of the federal rules were trying to change the treatment of general character evidence in the federal courts.

V. THE MILITARY RULES OF EVIDENCE

As previously stated, the military adopted the federal rule on character evidence. However, the development of character evidence in the military has hinged on the Drafters' Analysis to the rule:

> (a) ***Character evidence generally.*** Rule 404(a) replaces 1969 Manual ¶ 138*f* and is taken without substantial change from the Federal Rule. Rule 404(a) provides, subject to three exceptions, that character evidence is not admissible to show that a person acted in conformity therewith.

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[14] S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 129 (2d ed. 1977).
[15] Advisory Committee's Note, *Federal Rule of Evidence 404, reprinted in* S. Saltzburg and K. Redden, *supra* note 14, at 132.
[16] *Id.*
[17] McCormick on Evidence § 158, at 334 (2d ed. 1972).

> Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from ¶ 138*f* of the 1969 Manual which also allows evidence of "general good character" of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders . . . [18]

A detailed reading of the Drafters' Analysis demonstrates that the analysis itself sets the stage for the undermining of the ''significant change." The drafters acknowledged that limiting favorable character evidence to pertinent traits was a "significant change" from prior military practice. The only justification for the change given by the drafters was that "general good character" is not a specific trait. Then the drafters attempted to backpedal. Recognizing the long-standing use of good military character at courts-martial, the drafters stated that the committee intended to continue to permit this evidence "when that specific trait is pertinent." They then offered disobedience of orders as an example of such an offense. This example contradicted the previous analysis by referring to good military character as a specific—as opposed to a general—trait.

The drafters attempted to illustrate the proper use of good military character by providing an example of when good soldier evidence would be admissible. Unfortunately, disobedience of orders was a poor example. The prohibitions in general regulations define many crimes, and violations of these regulations are punished as disobedience. Following the drafters' example literally, a soldier who possesses drugs and is charged with disobeying the post regulation prohibiting that conduct could offer his good military character as a defense to the disobedience of orders. Apparently, this is not what the drafters really intended.

Military Rule of Evidence 404(a)(1) was immediately recognized as a departure from previous practice.

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[18] Mil. R. Evid. analysis. app. 22.

> It is envisioned that military adoption of this rule will permit general good character only when the accused is charged with a uniquely military offense (failure to repair), and the defense intends to introduce the accused's general good military character. In virtually every other circumstance, general good character will not be admissible on the merits.[19]

Many commentators criticized the drafters for the rule and the analysis. The leading treatise on the Military Rules of Evidence stated: "It might have been preferable for the drafters to amend the rule itself to reflect this result, rather than attempting to accomplish it through the non-binding Drafters' Analysis."[20]

This criticism hit the mark. The Court of Military Appeals has interpreted the rule and ignored the Drafters' Analysis by focusing on the court's interpretation of when good military character is pertinent. If the President wants to restrict the use of good military character, the restriction should have been explicit in the rule. By placing the restriction in the analysis, the drafters left the door open for the broad interpretation. This broad interpretation will be explained below.

VI. THE COURT OF MILITARY APPEALS INTERPRETS RULE 404(a)(1)

The first court-martial tried under the Military Rules of Evidence excluded evidence of good military character offered by the accused. In *United States v. Cooper*[21] the court-martial convicted Senior Airman Cooper of possessing marijuana. The Military Police found the drugs in Cooper's automobile after he consented to a search. Cooper claimed that someone placed the drugs in his car without his knowledge. The trial judge, scrupulously following Military Rule of Evidence 404(a)(1), ruled that the evidence of good military character was not relevant to the offense charged. The Air Force Court of Military Review affirmed, holding that under the new Military Rules of Evidence, the military judge must look to the nature of the charged misconduct before determining if the accused's good military character is pertinent to the determination of guilt or innocence. The appellate court interpreted the Military Rule of Evidence to limit

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[19]Schinasi, *The Military Rules of Evidence: An Advocate's Tool*, The Army Lawyer, May 1980, at 3, 6-7.

[20]S. Saltzburg, L. Schinasi and D. Schlueter, Military Rules of Evidence Manual 182 (1st ed. 1980).

[21]11 M.J. 815 (A.F.C.M.R. 1981).

good military character to exclusively military offenses. The court specifically addressed the example of disobedience of an order—the same example found in the Drafters' Analysis. The court stated that the offense of disobedience would not necessarily permit the admission of good military character. Instead, the court believed that the judge must examine the underlying misconduct.

The appellate court used the same analysis in *United States v. Belz*[22] and upheld the trial judge's exclusion of defense evidence when the charge was conduct unbecoming an officer. Rejecting the accused's claim that article 133 was an exclusively military offense, the court reemphasized that the trial judge must examine the underlying misconduct to determine if good military character is admissible.

In these cases decided by the courts of military review, the trial judges obviously were adhering strictly to the Drafters' Analysis. General character was inadmissible, and general good military character was admissible only when the crime charged was an exclusively military offense.

The Court of Military Appeals, examining the same issues, came to the opposite conclusion. In *United States v. Clemons*[23] the court overturned the conviction of Sergeant Clemons for larceny and unlawful entry because the trial judge, following Military Rule of Evidence 404(a)(1), excluded evidence that Clemons was a good soldier.

Clemons was the first opportunity for the Court of Military Appeals to examine Military Rule of Evidence 404(a)(1). All three judges found that the military judge was in error to exclude the evidence, and each judge wrote a separate opinion. The opinion of the court, written by Judge Fletcher, focused on the pertinence of the accused's traits in light of the defense theory of the case. Clemons admitted taking the television set and cassette player, but claimed that he did so during his tour of duty as charge of quarters to teach a lesson to those who left their rooms and valuables unsecured. The evidence that Clemons was a good soldier was pertinent because it tended to support this defense. Judge Fletcher cited two opinions from federal

[22] 14 M.J. 601 (A.F.C.M.R. 1982), *vacated and remanded*, 20 M.J. 33 (C.M.A. 1985), *rev'd*, 21 M.J. 765 (A.F.C.M.R. 1985).
[23] 16 M.J. 44 (1983).

courts of appeal—*United States v. Angelini*[24] and *United States* v. *Hewitt*[25]—to support his conclusion.[26]

Angelini and *Hewitt* found general good character admissible under the federal rules, but for different reasons. Both were decided by judges who had been federal judges for many years before the adoption of the Federal Rules of Evidence; both decisions reflect the sentiment that there was no need to change existing practice. In *Angelini* the court found that character as a law abiding person was a character trait as that term is used in the federal rules.[27] In *Hewitt* the court found that a general trait is no less pertinent simply because it is general.[28] Thus, the two decisions, both cited by Judge Fletcher, reached the same result, but they did so by coming from opposite directions. To one court, general character is a specific trait; to the other, general character is pertinent, regardless of how it is categorized.

Chief Judge Everett found three reasons for admitting the evidence. The first was that prohibiting the evidence would raise a "substantial constitutional issue."[29] The second was that "very little support in public policy" existed for exclusion of the evidence.[30] This rationale assumes that appellate judges, and not the President and Congress, should apply "public policy" to the rules governing the modes of proof at courts-martial.[31] Last, Chief Judge Everett, like the federal judges in *Angelini* and *Hewitt*, found little reason to split hairs, especially when the defense previously had been permitted to present character evidence.

Judge Cook also concurred, finding that the defense theory of the case placed the character of the accused in issue and that the evidence was therefore pertinent.[32]

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[24]678 F.2d 380 (1st Cir. 1982).

[25]634 F.2d 277 (5th Cir. 1981).

[26]Judge Fletcher also stated that federal precedent in interpretation of the rules of evidence was binding on military courts. *Clemons*, 16 M.J. at 46-47. The other two judges refused to join this part of Judge Fletcher's opinion. *See id.* at 49 (Everett, C.J., concurring); *id.* at 51 (Cook, J., concurring in the result); Mil. R. Evid. 101(b)(1).

[27]*Angelini*, 678 F.2d at 382.

[28]*Hewitt*, 634 F.2d at 280.

[29]16 M.J. at 49 (Everett, C.J., concurring); ***see*** *also* Advisory Committee's Note on the Federal Rules of Evidence ("In any event the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence"); *supra* note 15.

[30]*Clemons*, 16 M.J. at 50.

Wee United States **v.** McConnell, 20 M.J. 577, 589 (N.M.C.M.R. 1985) (Barr, J. concurring), *aff'd*, **24** M.J. 127 (C.M.A. 1987).

[32]*Clemons*, 16 M.J. at 51.

The next case to reach the Court of Military Appeals concerning Military Rule of Evidence 404(a)(1) also involved the performance of duty by a sergeant.[33] Sergeant Piatt was accused of ordering two trainees to assault another trainee so that the latter would "straighten up." Sergeant Piatt defended these charges by trying to offer evidence that he was a good drill instructor, thereby using the inference that a good drill instructor would not have arranged these assaults. The court once again focused on the nature of the offense, finding that it involved the performance of duties and that the character of the accused as a good drill instructor, whether construed as general character or as a specific trait, was admissible.[34]

The same day as the decision was announced in *United States v. Piatt,* the court also decided *United States v. McNeill*,[35] a case that indicates how heavily evidence of good character weighs with a military court. Sergeant McNeill was accused of sodomy with an officer candidate recruit while McNeill served as the drill instructor for the platoon of officer candidates. McNeill's defense was a general denial, which he sought to bolster with evidence of his good character. In an effort to have the evidence admitted by the military judge, McNeill sought to restrict the evidence to his character as a drill instructor. The military judge excluded the evidence, and the court convicted McNeill. McNeill's good character evidence then was offered as part of the evidence in extenuation and mitigation. After hearing this evidence, the members requested instructions on how to reconsider the findings of guilty. The military judge told the members they could reconsider the findings, but that the evidence admitted during the sentencing phase could not be considered.[36] The members did not change the findings; the Court of Military Appeals did.

Up to that point, the cases interpreting Military Rule of Evidence 404(a)(1) dealt with general good military character and offenses that involved the performance of military duties. In *United States v. Kahakauwila*[37] the Court of Military Appeals was faced for the first time with a nonduty offense—the purchase of drugs from an undercover informant.

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[33]United States v. Piatt, 17 M.J. 442 (C.M.A. 1984).
[34]*Id.* at 445-47.
[35]17 M.J. 451 (C.M.A. 1984).
[36]*Id.* at 452. MCM, 1984, Rule for Courts-Martial 924 [hereinafter R.C.M. 924] permits members to reconsider findings of guilty. ***See*** Dep't of Army, Pam. 27-173, Trial Procedure, para. 30-4 (20 Apr. 1990).
[37]19 M.J. 60 (C.M.A. 1984).

An undercover informant allegedly entered the barracks and sold marijuana to Kahakauwila. The informant was observed entering the barracks; his testimony was the only evidence that Kahakauwila purchased the marijuana. Because the case was going to be referred to a Special Court-martial that could adjudge a Bad Conduct Discharge, and not a General Court-martial in which the maximum punishment of the charged offense would matter, the charges were referred as disobedience of a lawful general regulation in violation of article 92.[38] The trial judge excluded the defense good military character evidence, and Kahakauwila was convicted.

On appeal, the Court of Military Appeals cited the Drafters' Analysis to Military Rule of Evidence 404(a)(1) and held that because Kahakauwila was charged with a military offense—violation of article 92—the evidence was admissible. The court also stated that, although Military Rule of Evidence 404 was taken from the federal rule, "the peculiar nature of the military community makes similar interpretation inappropriate."[39] Kahakauwila's inability to defend himself against charges that boiled down to a credibility contest obviously troubled the court.

The Navy-Marine Corps Court of Military Review severely criticized these decisions in *United States* v *McConnell*.[40] McConnell had been convicted of use of cocaine. The evidence at trial was a positive urinalysis test. In a lengthy and heated decision, the court challenged the logic and legitimacy of the decisions by the higher court. In unusually strong language, Judge Barr wrote a concurring opinion that was very critical of the Court of Military Appeals. Barr wrote that basing the admissibility of character evidence on the article charged was the "elevation of myth over reality in its purest form."[41]

After examining the decisions of the Court of Military Appeals, Judge Barr concluded, "if this be the law, we have already returned to the pre-Rules law, for the Court of Military Appeals evidently sees no distinction between law abidingness and general character."[42]

But not all the judges on the Navy-Marine Corps Court of Military Review were in agreement that good military character was irrelevant to drug charges. Dissenting in *United States* v. *Vandelinder*,[43]

[38]Conversation between the author and Major Thomas R. Henry, United States Marine Corps, trial counsel in United States v. Kahakauwila.
[39]*Kahakauwila*, 19 M.J. at 62.
[40]20 M.J. 577 (N.M.C.M.R. 1985), *aff'd*, **24** M.J. 127 (C.M.A. 1987).
[41]*Id.* at 586 (Barr, J., concurring).
[42]*Id.* at 387.
[43]17 M.J. 710 (N.M.C.M.R. 1983).

Senior Judge Gladis argued that a strong logical connection between the good soldier defense and innocence to drug charges existed.[44] He argued that especially in light of the campaigns by the Chief of Naval Operations and the Commandant of the Marine Corps to eradicate drug use, and the deleterious effect of drugs on the military, good military character raises a strong inference that the accused would not be involved with drugs.[45]

Four months later, the Court of Military Appeals answered the criticism contained in *McConnell* in a series of decisions.[46] Five cases, all published the same day, reemphasized that the Court of Military Appeals considered general good military character admissible.[47] However, the court announced and applied a new harmless error test for the courts of military review to use when evaluating the error of excluding character evidence. Of the five cases, the court held in four that the exclusion of character evidence was harmless; the fifth was remanded to the Air Force Court of Military Review for application of the harmless error test.[48]

In *United States v. Weeks*[49] Judge Cox offered three examples of situations when good military character evidence would have no bearing on the contested issue: 1)when the dispute is over the nature of the substance; 2) when the issue is the admissibility of the confession; and **3)** when the legality of a search is at issue.[50] Only one of these examples addresses a question of guilt or innocence. Judge Cox really was saying that he could not think of too many situations in which military character would not be admissible.

In *Vandelinder*[51] Chief Judge Everett attempted to clarify the "considerable confusion" that Rule 404(a)(1) had produced. Vandelinder was charged with transfer of drugs and was prosecuted for a violating article 92. Citing Senior Judge Gladis's dissenting opinion in the Court of Military Review, the court held that good military character was always a pertinent trait when the crime charged was possession, use, or transfer of illegal drugs.[52] The pertinence of the

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[44]*Id.* at 713 (Gladis, J. dissenting).
[45]*Id.*
[46]Trial Counsel Forum, ***COMA Returns Fire,*** The Army Lawyer, July 1985, at 35.
[47]United States v. Weeks, 20 **M.J.**22 (C.M.A. 1985); United States v. Klein, 20 M.J. 26 (C.M.A. 1985); United States v. Wilson, 20 M.J. 31 (C.M.A. 1985): United States **v.** Belz, 20 M.J. 33 (C.M.A. 1985); United States v. Traveler, 20 M.J. 35 (C.M.A. 1985).
[48]*Belz,* 20 M.J. **33.**
4920 M.J. 22 (C.M.A. 1985).
[50]*Id.* at 25 n.3.
[51]20 M.J. 41 (C.M.A. 1985).
[52]*Id.* at 44.

evidence did not depend on the article charged. Moreover, the court reasoned, an opinion about good military character was no more precise than estimations of the speed of an automobile or opinions concerning the intoxication of an individual, both of which are admissible.[53] A precise definition of "good military character" may not be available, but the members know what the witness means.

What the Court of Military Appeals is saying in these cases is, notwithstanding the *analysis* of Rule 404(a)(1), the *rule* permits "pertinent" character evidence, and it is the court that defines "pertinent." Good military character always had been admissible at courts-martial,[54] and the members properly could evaluate the weight of the evidence.[55] Often such evidence is the only defense available to the accused soldier,[56] and allowing good military character evidence does not cause enough of a delay in the proceedings to justify exclusion of the evidence.[57]

Is it appropriate for the Court of Military Appeals to interpret Rule 404(a)(1) in a manner that is at odds with the Drafters' Analysis to the rule? I believe it is. If the President intended to make a significant change in the admissibility of good military character, that change should have been placed in the rule itself, not in the nonbinding analysis.[58] The drafters should have been aware, in 1980 when they adopted the language of Federal Rule 404(a)(1), that the federal treatment of character evidence did not change in 1975 with the adoption of the Federal Rules of Evidence; federal judges continued to permit general character evidence despite the Advisory Committee's Note.[59] In a similar fashion, the Court of Military Appeals has interpreted the rule, which has resulted in the admissibility of good military character.

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[53] *Id.* at 45.
[54] *Id.* at 44.
[55] *Id.* at 45.
[56] *Kahakauwila*, 19 M.J. at 62.
[57] Speech presented by Judge Walter T. Cox III at the Ninth Criminal Law New Developments Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, Aug. 19, 1986.
[58] *See* Schinasi, supra note 19.
[59] United States v. Lechoco, 542 F.2d 84, 88 n.5 (D.C. Cir. 1976) ("Rule 404(a)(1) merely codified the then prevailing practice."); United States v. Cylkouski, 556 F.2d 799, 801 (6th Cir. 1977) ("[G]eneral good character" is admissible under rule 404(a)(1).). One year after the adoption of the Military Rules and six years after the adoption of the Federal Rules, one court, in examining Rule 404(a)(1) and the question of general character versus specific traits of character stated: "We are loath to assume that its drafters meant to overturn the narrow holding of Michelson without specifically so noting." United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981).

What can be viewed as the culmination of the debate on the "pertinence" of good military character is the decision of the Air Force Court of Military Review in *United States v. Pershing*.[60] Pershing was charged with larceny, and the trial judge, finding no nexus between the charged offense and the performance of military duties, excluded the evidence. The Air Force Court of Military Review found this to be error. "The admissibility of character evidence should not hinge on what Article of the Code an accused is tried under."[61] The opinion then cited passages from Chief Judge Everett and Judges Sullivan and Cox to conclude that evidence of good military character is always admissible.[62] Pershing was alleged to have stolen a money order while on duty at the visitor's center. The Air Force Court of Military Review did not cite the nexus between military duties and the crime charged as justification for the admissibility of the evidence. Rather, the court held that general good military character was "pertinent" and therefore admissible under Military Rule of Evidence 404(a)(1).[63]

The holding in the *Pershing* case is significant because five years earlier, the Army Court of Military Review, on similar facts and applying the same rule of evidence, came to an opposite result. In *United States* v. *Fitzgerald*[64] the larceny charged was the wrongful withholding of erroneous payments. Fitzgerald acknowledged that he had been overpaid, but defended himself by claiming that he intended to repay the money. The trial judge refused to permit Fitzgerald to present evidence that he was a good soldier. The Army Court of Military Review upheld this ruling.

What had changed in the five years? The rule of evidence is the same. What changed is that the judges on the Court of Military Appeals made it clear that good military character evidence is "pertinent" as that term is used in Military Rule of Evidence 404(a)(1) and hence admissible when offered by the defense.

VII. THE NEXUS REQUIREMENT

The Court of Military Appeals identified the definition of the word "pertinent" in Military Rule of Evidence 404(a)(1) as the "sticking point" in the controversy over good military character.[65] In *Kaha-*

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[60]28 M.J. 668 (A.F.C.M.R. 1989)
[61]*Id.* at 669.
[62]*Id.*
[63]*Id.*
[64]19 M.J. 695 (A.C.M.R. 1984)
[65]*Kahakauwila*, 19 M.J. at 61.

kauwila the court found good military character pertinent and hence admissible for two reasons: 1) Kahakauwila was charged with a violation of article 92, a military offense; and 2) the "peculiar nature of the military community" should be used to define pertinent evidence.[66]

The first reason can be termed the nexus requirement. In later cases the court identified a nexus between the crime and military duties to justify the admission of character evidence.

The second reason, "the peculiar nature of the military community," can support the pertinence of general good character at courts-martial. The nexus requirement is unnecessary and should be abandoned. Often, arguments to support the nexus between crimes and good military character are strained. In *Kahakauwila* the court looked to the article charged and ignored the underlying offense.[67] In *United States* v *Wilson*[68] the court found a nexus because the victims in a sexual abuse case were the wives of the accused's subordinates. In *United States v Hurst*[69] the nexus was the location of the offenses on base and the degrading nature of the offenses. This reasoning is strained at best; is the good military character of Major Hurst admissible because he allegedly committed the offenses on post? Would the evidence be inadmissible if the offenses were alleged to have been off post? Does Major Hurst have two characters, one on post and one off post?

What the court seems to be applying is the old service-connection test for jurisdiction. Mandated by *O'Callahan v. Parker*,[70] the prosecution was required to show that the offense was service connected to establish military jurisdiction. Service connection, as interpreted by the Court of Military Review, was not difficult for the prosecution to demonstrate. One commentator stated that the test for service connection was dependent only upon the imagination of the prosecutor.[71] In a similar fashion, the nexus required for the admission of good military character seems dependent upon only the imagination of the defense counsel.

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[66] *Id.*
[67] *Id.*
[68] 28 **M.J.** 48 **(C.M.A.** 1989).
[69] 29 **M.J.** 477 **(C.M.A.** 1990).
[70] 395 U.S. 258 (1969), *overruled* by Solorio v. United States, 483 US. 435 (1987).
[71] Tomes, *The Imagination of the Prosecution: The* Only *Limitation to Off-Post Jurisdiction* **Now,** *Fifteen Years After O'Callahan v. Parker,* **25 A.F.L.** Rev. 1 (1985).

VII. CONCLUSION

In *United States v. Wilson*[72] Judge Sullivan stated: "The well-recognized rationale for admission of evidence of good military character is that it would provide the basis for an inference that an accused was too professional a soldier to have committed offenses which would have adverse military consequences."[73]

In *Wilson* the trial judge distinguished between military offenses and civilian offenses, and he instructed the court members that they could consider evidence of good military character as part of the defense evidence for one set of charges but not for the other. The court did not discuss how a court member is supposed to go about this difficult task. Character is the complex of especially mental and emotional qualities that distinguish an individual. How are the members to turn on and turn off this characterization of the accused in their deliberations? Later in the opinion, when examining if the exclusion of the evidence was a harmless error, Judge Sullivan questioned the probative value of the evidence: "However, the persuasiveness of such evidence is not particularly great because it failed to specifically address the particular conduct at issue in the charges against him."[74]

Judge Cox, in *United States v. Court*,[75] stated:

> I further agree that the evidence of appellant's military record and military character should have been admitted. I do so without hesitation because, in my judgment, the fact that a person has given good, honorable, and decent service to his country is *always* important and relevant evidence for the triers of fact to consider. Commanders consider it not only when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense. The evidence may have little weight; indeed, it may have none. But if an individual has enjoyed a reputation for being a good officer or servicemember, that information should be allowed into evidence.[76]

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[72] 28 M.J. 48 (C.M.A. 1989).
[73] *Id.* at 49 n.1.
[74] *Id.* at 49.
[75] 24 M.J. 11 (C.M.A. 1987).
[76] *Id.* at 16 (Cox, J., concurring) (emphasis in original)

Judge Everett, concluding in *United States v. Benedict*[77] that the good character evidence had been improperly excluded, stated:

> When an accused . . . offers evidence of his good character, he is contending that . . . —as demonstrated by his good character —he would never had committed a crime . . . . How convincing this contention may be will vary with the facts of the case; but, unlike the court below, we see no reason why the evidence of good character is *per se* inadmissible.[78]

These three quotations are revealing about the judges' views on good character evidence. They share three important aspects. First, the judges are unanimous in deciding that good character, especially good military character, is not per se inadmissible at courts-martial. Second, the judges made their decisions while at the same time expressing doubts as to the probative value of such evidence. And third, while two judges continue to articulate a nexus requirement, their reasoning generally ignores the Drafters' Analysis in determining whether the evidence is admissible.

Has the Court of Military Appeals properly decided the issue of character evidence? General good military character should be admissible at all courts-martial. The court has not gone far enough; the nexus requirement should be dropped altogether.

How valid are Wigmore'shalf-century-old observations of the value of military character evidence? In an early decision, the Court of Military Appeals stated: "Wigmore goes so far as to say that evidence of good soldierly character is even stronger that the customary evidence of good general character."[79] In the passage from his treatise, Wigmore stated:

> The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors,—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his "service record," which follows him throughout his Army career and serves as the basis for the terms of his final discharge.[80]

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[77]27 M.J. 253 (C.M.A. 1988).
[78]*Id.* at 262.
[79]United States v. Browning, 5 C.M.R. 27, 29 (C.M.A. 1952)
[80]Wigmore on Evidence § 59 (3d ed. 1940).

Are these observations valid in today's Army? Do they still apply when soldiers no longer live in open bay barracks, always are permitted passes off post, and are not subject to frequent inspections?[81]

Admitting good soldier evidence at all courts-martial preserves the notion that soldierly character is of paramount importance. Just as Judge Cox argued in *Court*,[82] the court should not abandon the belief that being a good soldier has importance, that an accused should be allowed his parade of character witnesses, that life in the service is different than civilian life, and that being a "good soldier" does matter.[83] For a trial judge to instruct that good military character evidence is relevant to some charges and not others is the equivalent of ruling that a soldier has two personalities—one on duty and the other off duty.

The Supreme Court recently decided in *Solorio v. United States*[84] that court-martial jurisdiction exists over a service member off post and off duty. Military character evidence should be admissible whether the charged crime is committed off post or off duty.

The accused soldier is not the only one to benefit when good military character is admissible. The Army also has an interest in preserving the good soldier defense. When a squad leader is permitted to testify on the soldierly character of one of his subordinates, he is told that his observations and judgment are important. Restriction of character evidence may shorten trials by precluding evidence of marginal value, but this efficiency must be balanced by larger interests. A soldier is a soldier twenty-four hours a day. Soldierly values are important. Soldiers do not have a job, they are "in the service." Like Judge Cox, we should be unwilling to allow these concepts to erode. Excluding good military character as proof of innocence does just that.

Ten years have passed since the adoption of the Military Rules of Evidence. The drafters expected Rule 404(a)(1) to make a "significant change" in the admissibility of general good character evidence. They tried to do so, however, in the Analysis, leaving the rule open

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[81]*See* Thwing, *Military Character: Relevant for All Seasons?* The Army Lawyer, May 1988, at 39 (strong argument that Wigmore's observations of soldierly character are no longer accurate).

[82]24 M.J. 11.

[83]*Id.* at 17 n.2 ("I am simply unwilling to allow the concept of 'an officer and a gentleman' to erode on my watch").

[84]483 U.S. 435 (1987)(overturning the service-connection test of O'Callahan v. Parker, 395 U.S. 258 (1969)).

to interpretation by the courts. While at first, trial judges and the courts of military review attempted to apply Rule 404(a)(1) as envisioned by the drafters, the Court of Military Appeals consistently has found good military character to be admissible. The court should return good military character to its "preferred position,"[85] and the evidence always should be admissible. Military Rule of Evidence 404(a)(1), ten years after its adoption, should be interpreted so that good military character is pertinent at every court-martial. The admission of good military character evidence at all courts-martial will result in greater justice, not only to the accused soldier,[86] but also to the entire military.

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[85]Boller, *supra* **note 1, at** 47.

[86]Smith, ***Military Rule of Evidence*** *404(a)(1): An* ***Unsuccessful*** *Attempt to Limit the* ***Introduction of*** *Character* ***Evidence on the Merits, 33*** **Fed.** B. **News** & J. 429 (Dec. 1986).

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