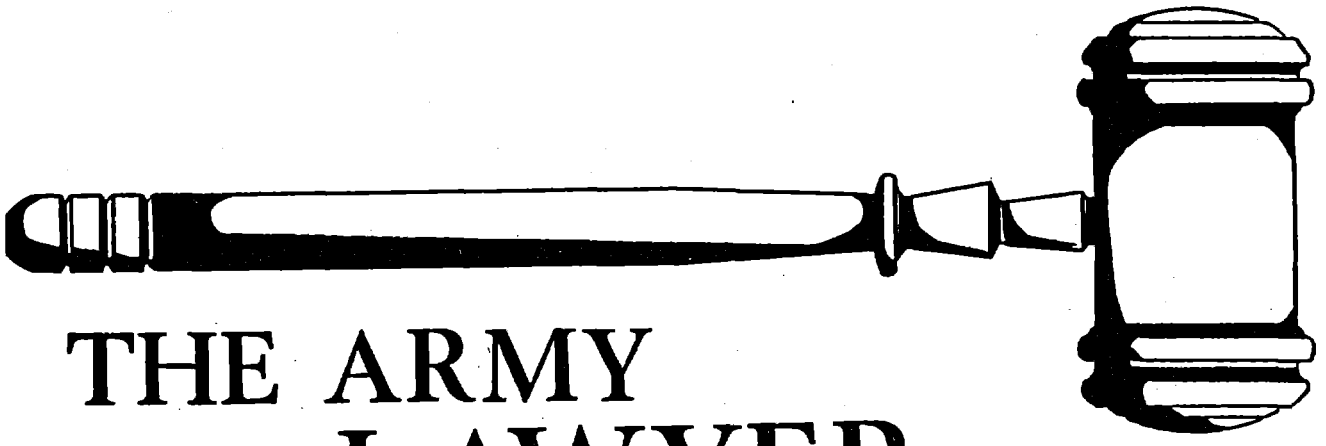

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The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights"?

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Every summer when it rains
I smell the jungle, I hear the planes
Can't tell no one, I feel ashamed
Afraid someday I'll go insane

. . . .

Cause I'm still in Saigon . . . in my mind.

"Still in Saigon"[1]

I. Introduction

Early one May morning in 1978, John R. Coughlin carried a sawed-off shotgun to Mt. Wollaston Cemetery. Bellowing, "The gooks are everywhere, the gooks are here! Kill them! Kill them!" he methodically began an assault on the Quincy police station. Although physically present in Massachusetts, Coughlin had mentally reverted to a 1967 Vietnam firefight. He was only persuaded to surrender his weapon when police convinced him that they were not Viet Cong but members of his own platoon. Coughlin had been awarded a Bronze Star for valor and

[1]The Charlie Daniels Band, *Windows.*

three Purple Hearts while serving in Vietnam. Two of his fellow marines were buried in the cemetery.[2]

On September 26, 1980, a champagne party was held to celebrate Michael Tindall's acquittal on drug-smuggling charges. Tindall, who had received thirty-two air medals and two Bronze Stars while serving in Vietnam as a helicopter pilot, had been charged with importing hashish from Morocco to Gloucester, Massachusetts over a six month period. He claimed that his "was the only choice I had at the time to let out some of the rage against the government that had built up inside me."[3] Tindall's other activities included sky diving, exploring underwater caves, and "flying at treetop level through the Everglades."[4]

These two cases define the battleground of this article. Both involve a mental condition identified by experts as "Post-Traumatic Stress Disorder"[5] (PTSD) and known by the public as the "Vietnam Syndrome,"[6] which occurs in some veterans as a result of their Vietnam experiences. As the director of the Mental Health and Behavioral Sciences Service of the Veterans Administration noted, "Post-Traumatic Stress Disorder has been used in pleas for persons accused of a variety of crimes . . . [m]ost of them

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[2]Boston Globe, Jan. 23, 1981, at 18.

[3]Boston Globe, Sept. 20, 1980, at 10.

[4]*Id.* at Tindall's trial there was testimony that he

> started to do what he called crazy things, . . . he would take LSD and jump into water, into the rivers and underground caves and would fly over the Everglades at a very low altitude to see if he could get what he called a rush or thrill . . . [B]ut he said that he never flew while he was intoxicated because he took a great deal of pride in his flying and didn't want to endanger himself in any way.

United States v. Tindall, No 79-376-T 07 (D. Mass. Sept. 19, 1980). *quoted in* Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 New Eng. L. Rev. 91, 112 n. 127 (1981).

[5]Other names used include "delayed stress syndrome," "postcombat syndrome," "post-traumatic stress syndrome," "post-traumatic neurosis," "delayed stress reaction," "gross stress reaction," "returnee's syndrome," "survivor's syndrome," and "flashback syndrome."

[6]More properly, this should be "post-Vietnam syndrome." The term "post-Vietnam syndrome" is also used to designate additional groups of Vietnam veterans with mental problems, and the name as used in various publications covers:

a. Post-traumatic stress neuroses (or disorder)

b. Those without neurosis who have "dropped out" and become alienated from civilian society.

c. Those veterans with both (a) and (b).

d. Those with (a) and (b) plus alcohol or other drug abuse.

e. Those veterans developing an acute psychosis-schizophrenia, manic-depressive or depressive psychosis.

Post-Traumatic Stress Syndrome, Veterans Administration White Paper 5-6 (Oct. 1981). The term was *apparently* used as earily as 1972, when Mr. Jack McCloskey "attended Antioch West College in San Francisco, completing a degree in psychology called 'Post Vietnam Syndrome,' the only one in existence," Reser, *Coping with Post Vietnam Syndrome*, California Living, Aug. 24, 1980.

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some type of violent crime, or drug running."[7] Coughlin's flashback in May 1978 was apparently the first time PTSD had been brought to the attention of the general public as a legal issue, although insanity previously had been used as a defense by Vietnam veterans.[8] In fact, mental problems among service members returning from Vietnam was so widespread that ninety-one counseling centers were established across the country under Operation Outreach in October 1979.[9] In 1980, the American Psychiatric Association recognized PTSD as a specific condition[10] and the disorder was pled successfully as a defense in California and Pennsylvania trials.[11]

1980 also saw a remarkable change in the type of cases which attempted to utilize a PTSD-type defense. Defense counsel began arguing that post-combat disorders could result in *non-violent, premeditated* crimes in addition to unpremeditated, violent crimes.[12] In view of this expansion, serious questions must be asked. One professional, for example, claims the number of PTSD-affected service members is over 420,000,[13] while a veterans counselor has estimated that forty percent of *all* prisoners nationally are Vietnam-era veterans.[14] These figures are, of course, open to question, but the potential damage which could result from a judicially-enacted "G.I. Bill of Criminal Rights" is frightening. The purpose of this article, therefore, is to provide a rudimentary psychological explanation of PTSD-type defenses, to survey some of the major cases in which these have been argued, and, finally, to consider the problems inherent in such defenses for jurisprudence as a whole.

II. Post-Traumatic Stress Disorder as a Mental Problem

Compiling a psychological profile of PTSD is not easy. At least one social worker has noted: "Many psychiatric professionals are completely failing to identify the Vietnam experience in their patients."[15] While similar problems were

[7]Letter from Dr. Jack R. Ewalt (Veterans Adminstration) to S.P. Menefee, Nov. 3, 1981.

[8]Blackwell v. State, 257 So. 2d. 855 (Miss. 1972). *See* Commonwealth v. Williams, 379 Mass. 600, 399 N.E.2d 1074 (1980); Allen v. VanCanfort, 316 F. Supp. 222 (D. Maine 1970) (insanity defense on appeal by a convicted soldier; but deals primarily with effective assistance of counsel under the sixth amendment). *See also* Shatan, *The Grief of Soldiers: Vietnam Combat Veterans' Self-Help Movement*, 43 Am. J. Orthopsychiatry 640, 643-44 (1973), which notes "[t]he first public acknowledgment of a Post-Vietnam Syndrome emerged obliquely in the tragic death of Medal of Honor winner, Sgt. Dwight Johnson, killed in a Detroit robbery attempt."

[9]Currently there are 140 centers. Millstein & Snyder, *PTSD, The War Is Over, The Battles Go On*, 19 Trial 86 (1983).

[10]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 236-39 (3d ed. 1980) [hereinafter cited as DSM III]. Prior to DSM III, combat-related stress has been included under "gross stress reaction" (DSM I (1952)) and had subsequently been deleted (Sm 11-1968). *See* Goodwin, *The Etiology of Combat-Related Post-Traumatic Stress Disorders, printed in* T. Williams, Post-Traumatic Stress Disorders of the Vietnam Veteran 4-6 (1980).

[11]Reported by the Boston Globe, July 16, 1980.

[12]*See, e.g.*, United States v. Oldham, No. 1P-81-28 (S.D. Ind. Dec. 1981) (Vietnam veteran not guilty of filing fraudulent tax returns by reason of insanity).

[13]Dr. John P. Wilson, Professor of Psychology at Cleveland State University estimated that as many as 60% of the estimated 700,000 Vietnam combat veterans suffer from the disorder. Boston Globe, July 16, 1980. The estimated number of Vietnam veterans suffering from psychiatric disorders ranges from 250,000 to 1.7 million. *See, e.g.*, Boston Globe, Nov. 23, 1980, at 42 (1.5 million) (quoting Dr. Chaim Shatan, New York University); Boston Globe, Feb. 11, 1979, at A6 (1.7 million) (quoting the Veterans Administration); Scharr, *Vietnam Vets Still Fighting for Mental Health Services*, 10 Am. Psychiatric Assoc. Monitor 1 (1979) (up to 924,000 face serious readjustment problems; up to 550,000 have serious psychological problems); Walter, *Viet Nam Combat Veterans With Legal Difficulties: A Psychiatric Problem?*, 138 Am. J. Psychiatry 1384, 1385 (1981) (500,000-700,000, citing Dr. Wilson's estimate). During the first five months of Operation Outreach, approximately 20,000 veterans were counseled. Boston Globe, July 27, 1981, at D1. By July 1981, they claimed to have helped over 67,000 veterans. Time, July 13, 1981, 18, at 21.

[14]Statement attributed to Gary Souza, Brockton Vietnam-Era Vet Center by the Boston Globe, Aug. 17, 1980, at 25. A Department of Justice estimate suggests that the majority of the 58,000 veterans in prison in 1978 served in Vietnam. Reinhold, *Mentally Wounded Are Rare, But Not Nearly Rare Enough*, N.Y. Times, Apr. 15, 1979.

[15]Statement by Sarah Haley, a social worker at the Boston Veterans Administration Hospital. Boston Globe, Nov. 23, 1980, at 42.

recognized after other wars, *e.g.*, combat fatigue after World War II,[16] some psychologists have noted that

> the Vietnam War was different from those of the past in several significant ways. In brief, the lack of a strong moral and political idealogical justification for the war, coupled with its guerilla nature in which it was difficult to discern friend from foe, led to a psychological situation that made it difficult for the soldier to maintain a healthy sense of control and predictability over the events occurring around him.[17]

Typically, the individual affected with PTSD experiences several of the following symptoms: "anger, apathy, anxiety, alienation, cynicism, denial, depression, defensiveness, emotional numbness [psychic numbing], fear, 'flashbacks,' guilt, impatience, insomnia, inability to concentrate, lethargy, mistrust, repression, regression, recurring dreams and nightmares, repetition compulsion or repetitive tendencies, psychological statis, sleep disorders, social inversion, and withdrawal."[18]

Dr. John Wilson of Cleveland State University argues that stress-producing events "can lead to retrogressive ego-integration or dissolution" [*very* roughly, causing a person to act immaturely], can "intensify the predominant psychosocial crisis of a person . . . usually identity versus role confusion" [*roughly* hindering psychological development], or can "lead to psychosocial acceleration or progression" [maturation].[19] Traditionally, "traumatic war neurosis" has been linked to retrogression, but Dr. Wilson sees differences in the experiences of most Vietnam veterans with post-Vietnam syndrome:

> [I]ntensification of the age-related psychosocial stage of maturation differs from traumatic war neurosis and retrogression in several important respects. First, there is an absence of debilitating neurotic symptoms . . . . Second, there tends to be less 'acting-out' of traumatic conflicts. Although the individual may have nightmares, 'flashback' images, or thoughts of a hostile, aggressive, and retaliatory nature, they rarely get externalized into overt action. Third, there is a somewhat cyclical nature to the appearance of acute symptoms . . . . Fourth, while there is a general reluctance to freely discuss the war experience, he will do so with a compassionate, empathetic, and accepting per-

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[16] *See* Goodwin, *supra* note 10, at 3-4 and 17 New Eng. L. Rev., *supra* note 4, at 92-98 for a summary of combat-related mental disorders. *See also* J. Smith, *A Review of One Hundred and Twenty Years of the Psychological Literature on Reactions to Combat from the Civil War through the Vietnam War: 1860-1980* (Duke University Ph.D. Candidate, Feb. 1981).

[17] Wilson, *Conflict, Stress, and Growth: The Effects of War on Psychosocial Development Among Vietnam Veterans, in* C. Figley & S. Leventman, Strangers At Home: Vietnam Veterans Since the War 134-35 (1980). Dr. Wilson noted the following aspects of the Vietnam conflict separating it from "other 20th Century American Wars": (1) its length, (2) its guerilla nature, (3) its controversial nature, (4) the lack of national commitment to the war effort, (5) the use of sophisticated weapons, (6) lack of an "overarching ideological justification," (7) the fluid nature of the fighting, (8) difficult geographical conditions, (9) unpredictability of enemy attacks, (10) a "survivor mentality" among the soldiers, (11) morale problems, (12) the short tour of duty, (13) lack of unit cohesiveness, (14) quick transition to and from combat with no "decompression," (15) lack of homecoming welcome and stigmatization, and (16) difficulty in reentering "the mainstream of society." Testimony By Dr. John P. Wilson Before U.S. Senate Subcommittee on Veteran Affairs (May 21, 1980). A good discussion of the differences separating the Vietnam War from its predecessors is found in Goodwin, *supra* note 10, at 6-10; Hanson, *Mental Scars of Vietnam Still Mark Many Veterans*, Wash. Star, Mar. 8, 1979 (noting that the veteran could not talk about his war experiences upon his return home). *See also* Horowitz & Solomon, *A Prediction of Delayed Stress Response Syndromes in Vietnam Veterans*, 31 J. Soc. Issues 67, 69-71 (1975). This view of uniqueness has been held by psychiatrists in prior American wars. *See* 17 New Eng. L. Rev, *supra* note 4, at 915 (quoting P. Bourne, Men, Stress and Vietnam 14 (1970) to the effect that "[a]t the start of World War II some psychiatrists believed that the data collected in the previous wars 'would have no applicability in a new mechanical era, where a new warfare was to be waged.' Many . . . expected a unique combat disorder to appear." There is continuing debate as to what extent veterans' emotional problems were due to the War, and to what extent, to prior maladjustment).

[18] Wilson, *supra* note 17, at 142.

[19] *Id.* at 135.

son . . . . Fifth, supportive group discussions ('rap sessions') with other veterans . . . are often sufficient to . . . produce a general cathartic and therapeutic effect . . . . Sixth, the dominant attributes or symptoms of psychosocial intensification are stage-related rather than predominantly regressive or the result of preidentity infantile fixations. The most pressing conflicts tend to be age-specific, developmental concerns that are overlayed by the characteristics of the post-Vietnam syndrome. Clearly, this would seem to imply that the individual is attempting to assimilate unresolved conflicts, moral dilemmas, or value-conflicts into his current life-structure.[20]

Dr. Chaim Shatan has identified five major characteristics of the post-Vietnam syndrome: guilt ("because the veteran survived the war while others did not"), feelings of exploitation ("the veteran was made to fight a meaningless war"), anger ("because of public disapproval"), a feeling of separation from society, and doubt ("about his ability to love and to trust, and about his own value as a human being").[21] Other traits which have been associated with the disorder include masochistic impulses, aggressive impulses, fantasies, psychic numbing, mistrust, and difficulties in close, personal relationships.[22] One major problem is the difficulty in drawing a line between ordinary and extraordinary behavior. Additionally, the Disabled American Veterans and others point out that post-traumatic stress disorder is *not* a mental illness but rather a reaction to stress.[23]

Perhaps, in the final analysis, the best guide to PTSD is the diagnostic criteria offered by the American Psychiatric Association:

A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.

B. Reexperiencing of the trauma of evidenced by at least one of the following:

(1) recurrent and intrusive recollections of the event
(2) recurrent dreams of the event
(3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus

C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

(1) markedly diminished interest in one or more significant activities
(2) feeling of detachment or estrangement from others
(3) constricted affect

D. At least two of the following symptoms that were not present before the trauma:

(1) hyperalertness or exaggerated startle response
(2) sleep disturbance
(3) guilt about surviving when others have not, or about behavior required for survival
(4) memory impairment or trouble concentrating
(5) avoidance of activities that arouse recollection of the traumatic event
(6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic events.[24]

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[20]Id. at 142, 145. Elsewhere, Dr. Wilson notes that individuals with PTSD have on occasion been misdiagnosed as having "character disorders (sociopathic) or being psychotic," Testimony By Dr. John P. Wilson Before U.S. Senate Subcommittee On Veterans Affairs (May 21, 1980) (also gives a list of traits differentiating PTSD from other disorders).

[21]Boston Globe, Nov. 23, 1980, at 42. Shatan, *supra* note 8, at 646-48; *see also* Veterans Administration White Paper, *supra* note 6, at 8-9.

[22]Wilson, *supra* note 17, at 144-45.

[23]Disabled American Veterans, *Forgotten Warriors: America's Vietnam Era Veterans* (Jan. 1980); Schaar, *supra* note 13; Veterans Administration White Paper, *supra* note 6, at 11.

[24]DSM III 238.

III. Post-Traumatic Stress Disorder as a Defense to Unpremeditated, Violent Crimes

The commission of so many crimes of violence by Vietnam veterans is in surprising contrast to the relative infrequency of PTSD-style defenses.[25] In the *Coughlin* case, because of the state's medical diagnosis of "traumatic war neurosis," the district attorney asked that the charge against Coughlin be dropped as Coughlin could not be held criminally responsible for his conduct. The judge agreed "that the charge of owning a sawed-off shotgun would be dismissed after two years, provided Coughlin behaved and continued to respond to the drug abuse treatment that commenced soon after his arrest."[26] After successfully completing a Veterans Administration psychiatric treatment and counseling program, the charges against him were dismissed in January 1981.[27] *Time* noted that "the Coughlin case now demonstrates that in a criminal proceeding, the psychological disorders specifically attributable to Viet Nam combat experience can result in the dismissal of charges. This move could have far-reaching effects."[28]

In another early case, a former Marine charged with rape and murder in Queens, New York, was found not guilty by reason of insanity:

> Both the defense and prosecution psychiatrists testified that on the morning of the crime the veteran went into a dissociative mental state in which he was out of contact with reality; he was back in Vietnam. In part, seeing deteriorated buildings, abandoned excavation holes, and dirt piles reminiscent of the landscape of Vietnam triggered that dissociative state. The veteran was committed to a maximum security state psychiatric facility, but by 1981 had been released.[29]

Another violent crime involved a Vietnam veteran arrested in a bank robbery and kidnapping incident in Washington, D.C.. Stephen W. Gregory, an ex-Marine corporal, "had a

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[25]As of May 1980, only 24 cases had used the disorder "to seek acquittals or reduced sentences." Time, May 26, 1980, at 59. To some degree this is due to the confrontational nature of such acts, which often precludes subsequent judicial determinations. A veteran in Rochester, New York, for example, was killed after assaulting his parents and a workman at the family home, taking eight hostages at a bank, and shooting one after presenting a typewritten statement requesting that he be killed by 2 p.m.. Daily Progress (Charlottesville, Va.), June 18, 1981, at A1; Time, July 13, 1981, 18, at 21. Another veteran in Columbus, Ohio, who was suffering from depressions and flashbacks, killed his wife with a shotgun and then committed suicide. Caputo, *The Unreturning Army*, Playboy, Jan. 1982, at 106, 118. On other occasions, the disorder may not have been demonstrably responsible for the crime. Many crimes by Vietnam veterans are attributed to drug addiction, family problems, alcoholism, or unemployment rather than PTSD. *See, e.g.*, Disabled American Veterans, *Forgotten Warriors: American's Vietnam Era Veterans* (Jan. 1980); C. Figley & S. Leventman, Strangers At Home: Vietnam Veterans Since The War III (1980); Parsons, *For Some Veterans, Viet War Goes On*, Denver Post, Mar. 25, 1979, at 1; Reser, *supra* note 6. Veterans under 35 also have a suicide rate 23% higher than the norm. Disabled American Veterans, *Forgotten Warriors: America's Vietnam Era Veterans* (Jan. 1980); *Hanson, supra* note 17 (same rate for veterans under 34); Reser, *supra* note 6 (24% higher for veterans under 34). Dr. Wilson thinks that the rate may now be 33% above the national average. *Forgotten Warriors: America's Vietnam Era Veterans, supra*. Although Joseph Brandt claimed that the torching of his estranged wife was inspired by the NBC movie "The Burning Bed," he was described in Newsweek, Oct. 22, 1984, at 37, as a Vietnam veteran "dressed for combat in fatigues and a mud-smeared face." For the case of a veteran allegedly killed because of an emotional outburst over the war, *see* Behre, *Slain Vet's Kin Angry With Systems Despite Sentences*, Times Picayune/States-Item, Aug. 5, 1983.

[26]Time, Feb. 18, 1979, at 23; Boston Globe, Jan. 23, 1981, at 18. Kirby had this to say about the disorder—"If the damn thing is there . . . let's admit it, not tag it with "cowardice' or put it in the closet and pretend it doesn't exist." Judge Thomas E. Dwyer notes, "[S]ince I am a trial judge on circuit, I have no records that I could consult. . . . I have a vague memory that the issue of post-Vietnam Syndrome came up on the question of disposition and sentence, and if that is so, there is no judgment that I can refer you to." Letter from Judge Thomas E. Dwyer to S.P. Menefee, Nov. 5, 1981. Mr. James A. Carr, Jr. adds "[T]here is nothing within the files of this office that indicate what referred Judge Dwyer in making the deposition." Letter from Mr. James A. Carr, Jr., (Chief Probation Officer, Norfolk Co. Superior Court) to S.P. Menefee, Dec. 16, 1981.

[27]Boston Globe, Jan. 23, 1981, at 18.

[28]Time, Feb. 18, 1979, at 23.

[29]Millstein & Snyder, *supra* note 9, at 88, *citing* the unreported case of *People v. Kahan* (July 26, 1978).

history of running away from home as a youth and had personality problems before he went to Vietnam."[30] While in the combat zone, Gregory saw his best friend "virtually disintegrate" when hit by shells, and was himself wounded in the head by shrapnel; "'I never felt like myself again.'"[31]

On February 9, 1977, Gregory entered a Silver Spring, Maryland, bank, "attired in a suit and cufflinks and . . . carrying his war ribbons in his pocket."[32] He also had two rifles—with which he took eight people hostage. In the bank, Gregory fired about 250 rounds of ammunition into the walls and ceiling. He twice put his rifle to the head of a female employee of the bank and then, just before pulling the trigger, fired at the wall. Gregory also threatened to shoot anyone who came near the bank. He eventually released all the hostages unharmed and gave himself up to the police.[33]

In 1978, Gregory was convicted and sentenced to sixteen years imprisonment. This conviction was overturned on appeal and, faced with a retrial, Gregory pled guilty to the same charges in return for the prosecution's agreement to recommend a six-year sentence.[34]

In a hearing on Gregory's appeal for probation (in order that he might undergo intensive psychotherapy), Dr. Sonnenberg, of Howard University School of Medicine and Psychiatry, testified that "[w]hen he entered the bank, Gregory was once again trying to commit suicide" and that "[i]n the bank, Gregory viewed his hostages as members of his squad [in Vietnam]."[35] Dr. John P. Wilson also testified on Gregory's behalf that "Gregory seemed to be fulfilling some sort of death wish at the bank."[36] Gregory himself took the stand and

> said that in taking the hostages he was merely trying to show that he needed help. He said that he needed help. He said that several times while he was in the bank he did not know what he was doing or else he felt "I was in the Nam."
>
> He said he often fantasizes about how he might have done things differently while he was in Vietnam and that he frequently has flashbacks of his experiences.
>
> He would often associate his supervisors at work . . . with commanding officers he had known in Vietnam. But "it didn't have to be a person (to cause a flashback). . . . It could be a wall that would take me back and I'd relive it all. . . . It can just be the tone of somebody's voice."[37]

Ruling that the delayed psychological trauma of the war prompted the veteran's action, the

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[30]Wash. Post, Mar. 3, 1979, at 1. Dr. Stephen Sonnenberg claimed that this "disturbed childhood merely predisposed Gregory to the survival syndrome and it was the traumatic events he witnessed in Vietnam that led to his violent, hostile acts following his return." *Id.*

[31]*Id.*

[32]*Id.* The bank raid appears to have been one of a series of incidents occurring during the eight-year period after his return from Vietnam that was marked by marital, parental and employment problems. He was charged with a series of offenses during this time ranging from assaulting a man who called him "soldier boy" to breaking into a hotel in Ocean City. He tried commiting suicide three times. *Id.*

[33]*Id.* Time, May 26, 1980, at 59, adds that Gregory yelled: "This is not a stickup," and held his hostages for 6½ hours.

[34]Wash. Post, Mar. 3, 1979, at 1. *See also* Millstein & Snyder, *supra* note 9, at 87.

[35]Wash. Post, Mar. 3, 1979, at 1. Gregory was apparently represented by attorneys from the National Veterans Law Center, American University, and was supported by Rep. David Bonior, an ex-veteran, who noted "'He needs the care of a psychiatric hospital, not the punishment of a prison.'" McCarthy, "Survivor's Syndrome," Wash. Post, Mar. 14, 1979. According to Time, May 26, 1980, at 59, Gregory's attorney argued "that Gregory was reliving a wartime event in which his best friend was killed, the policeman outside the bank became the Viet Cong in Gregory's mind, while the hostages were the comrades he sought to lead to safety."

[36]*Id.* Dr. Wilson has testified at several such trials, including prosecutions in Boston, MA, Shreveport, LA, Philadelphia, PA, Coloma, MI, and San Diego, CA. *Cf.* letter from Dr. John P. Wilson to S. P. Menefee, rec'd Nov. 21, 1981, listing lawyers in these locales as individuals with whom he has worked.

[37]Wash. Post, Mar. 3, 1979, at 1.

judge ordered Gregory to undergo intensive psychological therapy at a Veterans Administration hospital instead of serving a prison term.[38] Mr. Cheve Champlin, of the Council of Vietnam Veterans, called this ruling "significant because it shows that the courts are beginning to recognize that 'the solution is not incarceration.' "[39]

Increasingly, PTSD-type defenses are being accepted by courts in cases of unpremeditated, violent actions. An armed veteran in Cleveland, Ohio, angered by his employer's failure to provide G.I. benefits, seized hostages at the firm's corporate office and released them only after he was promised an opportunity to air his grievances on television. At his subsequent trial, the jury accepted his "diminished capacity" defense based on traumas caused by his service in Vietnam.[40] In Birmingham, Alabama, another jury found Lewis Lowe III, not guilty of armed robbery, based in part on psychiatric testimony that the crimes "unconsciously 'were designed to put him in a situation in which he would get caught or shot.' "[41]

In Oregon, a Vietnam veteran named Pard was acquitted of charges resulting from a car chase of his ex-wife, during he fired at her for forty minutes with a shotgun and a pistol. At the trial, it was learned that the event that precipitated the onset of the disorder was his ex-wife kidnapping their child. The trial transcript indicated that the act [of kidnapping] destroyed [the defendant] and triggered the syndrome. It was also learned at trial that in Vietnam, Pard had brutally murdered three small Vietnamese children. This led to recurring nightmares that he had really killed his own daughter. When his daughter was taken away from him, those feelings of loss were reawakened, triggering his violent outburst.[42]

In *State v. Mann*,[43] a veteran took an entire church congregation hostage and demanded live radio and televison coverage. After three and one-half hours he released everyone unharmed. Asserting a PTSD defense, Mann was sentenced to five years probation on condition that he undergo psychiatric treatment at a VA hospital for eight months.[44]

Wayne Robert Felde, an ex-soldier, was convicted of killing two individuals in unrelated incidents.[45] On November 28, 1972, in Prince Georges County, Maryland, Felde, who had returned from a tour in Vietnam in 1969, grabbed an M-1 rifle and dispatched ex-convict William "Butch" Blackwell with one shot to the head at

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[38]Courier-News (Bridgewater, N.J.), Mar. 26, 1979, at A6. The hospital is variously identified as Piney Point (Wash. Post, Mar. 3, 1979 at 1) or Perry Point (Hanson, *supra* note 17). The ruling was in accordance with Wilson's and Sonnenberg's recommendations that Gregory be put in a hospital "to be in group therapy with other veterans." Wash. Post, Mar. 3, 1979, at 1. Probation was conditioned upon him staying in treatment for as long as the VA deemed necessary, Millstein & Snyder, *supra* note 9, at 87. However, "the program then available at the Perry Point, Maryland, VA facility did not meet his needs. He was sent to the Cleveland VA Medical Center and was discharged earlier than promised. His attempts to re-enter a VA hospital were thwarted, and he was subsequently convicted of another offense." *Id.* at 89.

[39]Wash. Post, Mar. 3, 1979, at 1. He also noted that "the fact that a representative of the Veterans Administration testified in Gregory's behalf is a sign that the government—and the country—are now willing to deal with those problems."

[40]Wash. Star, Mar. 8, 1979.

[41]*War Echoes in the Courts*, Newsweek, Nov. 23, 1981, at 103. *See also* Millstein & Snyder, *supra* note 9, at 89 (expert testimony that Lowe was trying to commit suicide when he robbed two fast food restaurants).

[42]17 New Eng. L. Rev., *supra* note 4, at 110-11 and nn. 108-13, *citing* State v. Pard, No. 25975 (Deschutes Co. Cir. Ct., Or. Mar. 18, 1980); transcript of NBC Magazine (aired Dec. 5, 1980); transcript of ABC's 20/20 (aired Nov. 13, 1980). In this caes, a videotaped session between the defendant and psychiatrist was shown to the jury and it was pointed out that no loss of life occurred although Pard was an excellent marksman. 17 New Eng. L. Rev., *supra* note 4, at 111.

[43]No. 80-F-75 (Kanawha Co. Ct., Charleston, W. Va. Apr. 2, 1981).

[44]17 New Eng. L. Rev., *supra* note 4, at 111 and nn. 114-18.

[45]*State v. Felde*, 422 So. 2d 370 (La. 1982), *cert. denied*, 461 U.S. 918 (1983).

close range.[46] Six years later on October 20, 1978, in Shreveport, Louisiana, he murdered rookie Patrolman Thomas Thompkins.

The road which led to Felde's conviction for first-degree murder in the Thompkins killing illustrates the effects of combat stress on one individual.[47] Felde's father, who had served as a medic in the South Pacific, committed suicide when the boy was thirteen. Felde volunteered for the Army and was assigned as a machine gunner to Fire Base Polly Ann, near Kontum, where he saw his first fire fight almost immediately.

> Come daylight, the fighting was over. We had to pick up pieces of our guys to send home. Arms and legs and three quarters of a whole person. . . . I thought about their moms and about my mom, and someone offered me a little reefer. I'd never smoked it before, but I smoked it from then on.[48]

He saw one wounded U.S. soldier shot by his own comrades to end his misery and another blown up by a land mine; he tried and failed to save a disemboweled soldier—"[his insides] just slid through my hands, and the guy died."[49] Writing home, he referred to the elephant grass surrounding the fire base as "the jungle of the dead."[50] Then there was the "massacre" in response to some small arms fire from a village.

> There was nobody in charge and everyone was shouting and shouting, shouting, "Shoot this, shoot that," and I went into a hut that was filled with people and sprayed it. We wasted everyone and everything in that village. We wasted the women and the kids and the old men and the dogs. I swear to God, the dogs looked like V.C. to me, the dogs had slanted eyes. Then we burned the village to the ground. It was the most awful thing, and I still dream about it. Listen man, *I dream this . . . almost every night.* I see the flashes and hear the gunfire and the explosions, like the Fourth of July, and when I wake up, I don't know where . . . I am, I don't talk to anyone for hours, days sometimes. I try to block it out of my mind, but I can't.[51]

Upon returning from Vietnam, Felde hitchhiked to his new post at Fort Dix. "A car stopped. Felde, in uniform, ran up and stuck his head in the window; the driver called him a killer and sprayed him in the face with a portable fire extinguisher."

> I heard that all the time. I couldn't wear my uniform on the street without being called a baby killer, a woman killer, but I'd shrink away, because I knew it was true. It was true, but you had to do it. It was a survival thing and you had to live with it.[52]

After receiving an honorable discharge in 1970, Felde's life began to unravel. He went to college and technical school but quit both. He held a series of jobs. He married, but it fell apart. "[H]e became withdrawn and angry, drank heavily, got into fights, had nightmares about the butchery in the village."[53] His mother urged him to seek psychiatric help, but he refused. On November 28, 1972, Felde and Blackwell, a fellow carpenter, had a few beers when an argument started.

> Felde recalls the argument . . . and he recalls Blackwell's punching him in the head. He doesn't remember much after that, just an exploding sound inside his

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[46]Caputo, *supra* note 25, at 268; *Shots Keep Police at Bay in Slaying*, Evening Star and Daily News (Wash. D.C.), Nov. 29, 1972, at B-8.

[47]*See* Caputo, *supra* note 25, for a discussion of the circumstances surrounding these murders.

[48]*Id.* at 268.

[49]*Id.*

[50]*Id.* at 118.

[51]*Id.* at 268.

[52]*Id.*

[53]*Id.* "Before his service he was a jovial, happy-go-lucky kid. Afterward, he was moody, depressed, and irritable, with erratic sleeping habits and a low tolerance for alcohol." 422 So. 2d at 376-77.

> skull when Blackwell hit him, and that inner detonation setting off a succession of others, *boom-boom-boom*, like grenades, just like grenades, and he was *there* again, in that village. He was "reexperiencing." . . . [H]e and Blackwell struggled for the carbine. Felde got hold of it and sprayed the apartment. . . . Blackwell lay dead on the floor, a bullet through one eye. Neighbors called the police. Felde barricaded himself in the apartment and fired several shots over their heads when they arrived. Screaming, "Vietnam! Vietnam!" and making sounds his mother later described as "sounds like an animal would make." Felde held the police at bay for an hour, until his mother was able to talk him into dropping the weapon and coming out. Even then he dared, no, begged the police to kill him. . . .[54]

Felde was convicted of murder, but the conviction was reversed on appeal. On retrial, he pled guilty to one count of manslaughter and three counts of assault by firing over the heads of the police and was sentenced to twelve years imprisonment.[55] Denied parole in 1976, he escaped from his minimum-security prison and drifted to Louisiana.[56]

On October 13, 1978, Felde's mother died of cancer, and within a week he learned that police were looking for him. He made plans to leave Louisiana and bought a gun.[57] On the night of October 20th, Felde was observed with a gun in the men's room of the Dragon Lounge in Shreveport, drunk and apparently attempting to commit suicide. The police were called. A quick search failed to reveal the weapon, and Felde was arrested for drunkeness and put in the back of Patrolman Thompkins' car.[58] On the way to jail Felde pulled his gun.[59] Apparently this was observed by Thompkins, and four shots were fired in the resulting struggle. One richocheted off a spring, hitting Thompkins, who bled to death.[60] Felde escaped the car and remained free for an hour; he was cornered in a backyard, shot, and taken into custody. Almost two years later, still only partially recovered from his wounds, Felde was tried for first degree murder.

In an unusual move, the Louisiana Supreme Court ordered Felde's trial removed from Shreveport to a district court in Alexandria, Louisiana, "because pretrial publicity might prejudice jurors."[61] According to *The* (Shreveport-Bossier) *Times*, the state was informed on July 31, 1980 "that part of Felde's defense would concern mental defects caused by a Vietnam delayed-stress syndrome and also possibly

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[54]Caupto, *supra* note 25, at 270. A contemporaneous newspaper account differed in several details: it identified Felde and Blackwell as mechanics; it does not mention any drinking before the consumption of alcohol at Felde's apartment; Felde's wife is said to have seen the two men struggling on the floor of the bedroom and then run out of the apartment; Blackwell's body is said to have been found in the bedroom closet, "[o]ne policeman who was on the stairs approaching the apartment said the suspect kept daring the police to break the door down. 'He said to come on through and it would be just like Vietnam,'"; and the shots fired at the police were aimed through the door. *Shots Keep Police at Bay in Slaying, supra* note 46.

[55]Caputo, *supra* note 25, at 270. Farrar, *"Save the plot next to Mother's for me,"* Times (Shreveport-Bossier), Aug. 20, 1980, at 15-A notes that "Felde said he felt he was convicted because he used intoxication as a defense, and refused to tell psychiatrists about the nightmares and flashbacks of his Vietnam experience."

[56]*See also* State v. Felde, 422 So. 2d at 375.

[57]Caputo, *supra* note 25, at 270.

[58]*Id.*

[59]*Id.* at 270-71. According to Dr. John P. Wilson, this was an attempt to commit suicide. Farrar, *Witness Says Felde Intended To Kill Self*, Times (Shreveport-Bossier), Aug. 19, 1980, at 1-A. *But see infra* note 69, which claims he did so to further his escape; Farrar, *supra* note 55, at 1-A, which notes: "To Nesbitt's question about why the revolver had five bullets, Felde answered, 'How can I answer that?' 'I don't think you have to,' Nesbitt replied."

[60]422 So. 2d at 375.

[61]State v. Felde, 382 So. 2d 1384, 1388 (La. 1980). *See Trial Moved*, Alexandria Daily Town Talk (Alexandria, La.), Apr. 17, 1980, which notes that this "was the first trial ever moved from the Caddo Parish court system and the first change of venue ever ordered by Louisiana's highest court."

caused by Felde's exposure to . . . Agent Orange."[62] The trial opened in August 1980 with Felde and Mr. Graves Thomas of Shreveport acting as co-counsel.

In his opening statement, Mr. Thomas argued that Felde suffered personality changes from wading through and drinking water contaminated with the controversial herbicide Agent Orange. Thomas further claimed that Felde suffered the stress reaction as a result of his service in Vietnam and that Felde was unable to drink as much as normal men because of liver and kidney damage from Agent Orange.[63] The trial judge granted a state motion for an independent mental examination of the defendant over defense objection "that the request for the hearing was filed late in the trial schedule and . . . the strain of the trial and the medical examination might be too much for Felde."[64] The Louisiana Supreme Court granted Felde's appeal to this ruling holding that the state could not claim to have been surprised by Felde's claim of a mental disorder and had waived its right to ask for an examination by waiting until the third day of trial to make the request.[65]

A controversy also arose over a defense-initiated sanity examination of Felde by Dr. Fred Marceau. *Inter alia*, Dr. Marceau testified that Felde seemed in control of himself, was cooperative during the interview, and that Felde's statements seemed to be truthful. On cross-examination, the prosecutor attempted to elicit exactly what Felde told Dr. Marceau during the interview. The defense objected to this cross-examination on the basis of the physician-patient privilege and the fifth amendment. The judge ruled that Dr. Marceau could not testify about the statements Felde made during the examination. According to Dr. Marceau's report, which was lying open on the prosecutor's table, Felde said that after he was placed in the patrol car, he told Thompkins he had a gun and to pull the car over and let him out; as the car was leaving the road, it hit a guard rail and the gun went off.[66]

Subsequent expert testimony at Felde's trial indicated that Felde suffered from post-traumatic stress syndrome "in a chronic form."[67] Dr. John Wilson testified that the prior Maryland killing confirmed his diagnosis of Felde, but Wilson was unable to explain on cross-examination why Felde did not flee the scene of the crime in Maryland but did so in Shreveport.[68] Dr. Wilson also testified that Felde could be treated and that he needed long-term group psychotherapy with other Vietnam veterans and long-term individual psychotherapy. When asked why Felde pulled a gun, Dr. Wilson said, "If he pulls a gun, it means he wants to kill himself. . . . It is a security piece, his last bit of security." He also said many Vietnam veterans still carry guns.[69] Dr. Wilson also

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[62]Farrar, *Judge Orders Independent Mental Exam for Felde*, Times (Shreveport-Bossier), Aug. 14, 1980, at 1-A.

[63]*Prosecution May Wind Up Case Against Vietnam Vet*, Alexandria Daily Town Talk (Alexandria, La.), Aug. 14. 1980, at D-4.

[64]Farrar, *supra* note 62, at 1-A.

[65]Farrar, *High Court Bars Testing of Felde*, Times (Shreveport-Bossier), Aug. 17, 1980, at 1-A.

[66]Durusau, *Supreme Court Blocks Planned Test for Felde*, Shreveport J., Aug. 16, 1980, at 8-A.

[67]Durusau, *Felde Said Vietnam Stress Victim*, Shreveport J., Aug. 18. 1980, at 1-A. *See also* State v. Felde, 422 So. 2d at 377-78, 382-83.

[68]Durusau, *Felde Takes Stand in Own Defense*, Shreveport J., Aug. 19, 1980, at 6-A.

[69]Farrar, *supra* note 59, at 2-A; State v. Felde, 422 So. 2d at 378. According to Dr. Wilson's testimony, Felde stated:

> [T]hey [the police] asked me where, where I had the, where the gun was, then they handcuffed me and put me in the police car. I was in the back of the car and I thought I'd blow my brains out. I tried to turn the barrel around towards my face. I remember the jerk going forward then I saw flashes, flashes like incoming round hits, like firecrackers, hearing machine guns, I heard rifle fire, I heard more explosions and I couldn't move. I was happy because I knew I was going to die.

State v. Felde, 422 So. 2d at 378. Dr. Wilson admitted, however, "that Felde's reloading of the gun was inconsistent with his desire to kill himself. He also admitted it was possible Felde shot Thompkins simply because he didn't want a return to prison". *Id.* Figley and Hayes also believed that Felde bought the gun under a suicidal impulse. *Id.*

testified that he believes Felde equated buying a weapon with defense against an impending threat. "He was scared. The police were tracking him down. I think he felt the same helplessness that a person walking through fields with land mines in Vietnam must of [sic] felt, never knowing where the danger would come from."[70]

During the part of Dr. Wilson's testimony dealing with the experiences of soldiers in Vietnam and the possible psychological side effects, "Felde sat with his head in his arms, crying"; at another point in the proceedings, "his eyes closed and hands covering his ears, [he] refused to watch an Army training film."[71] When some of the mental health experts were on the stand, they requested that Felde be removed from the courtroom because of the nature of their testimony about him. Felde had to remain in the courtroom because it was a capital case, but he stuffed cotton in his ears to keep from hearing the witnesses' testimony.

In connection with the Maryland slaying, Mr. Thomas introduced evidence from several sources to show that Felde could not distinguish what he remembered from what had been told to him. Mr. Thomas contended that during the Maryland incident, Felde was so disoriented that he believed he was in a combat situation such as Vietnam and was shooting at an unknown enemy.[72]

The *Shreveport Journal* of August 20, 1980, reported that "[t]he prosecutor is seeking the death penalty, which would require a unanimous verdict on a first-degree murder charge. If Felde is found guilty as charged, a second hearing will be held to determine whether he should receive life imprisonment or the death penalty."[73] Ironically, it seems that the defendant too was seeking death: "[w]hen [the] prosecutor asked Felde about the gun Tuesday, the defendant also said, 'If you'll load that gun now, Mr. Nesbitt, I'll blow my brains out right here.'"[74] The defense, in closing argument, told the jury, "The best thing you can do for him is to give him first-degree with the death penalty if you can't find him not guilty by reason of insanity."[75] The prosecutor, on the other hand, said:

> I don't argue for a moment that he . . . doesn't have a form of post-traumatic stress disorder, like thousands of others. He may very well have. But to the extent that he doesn't know right from wrong?
>
> . . . That man pulled the trigger four times because that man didn't want to go back to prison.
>
> Holding up a photograph of Thompkins' patrol car, Nesbitt asked the jury, "Does

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[70]Durusau, *supra* note 68, at 6-A.

[71]*Id.* at 1-A.

[72]Farrar, *Mother's Affidavit Read At Felde Trial,* Times (Shreveport-Bossier), Aug. 18, 1980, at 1-A, 13-A. *See also* 422 F.2d at 377, 381. According to a Maryland confession (which was not introduced into evidence), however, Felde had stated: "We were wrestling over my rifle and I told him to leave my home and he got shot. He would not leave so he got shot." *Id.* at 381. Felde's sister subsequently stated that she did not recall him saying, "You don't have to worry about him, I blew his head off, he's in my bedroom closet." *Id.* According to Dr. Wilson, "Felde's Maryland killing sounded like a classic dissociative reaction in which a person uses survival contact tactics because he is not fully aware of what is happening." *Id.* at 377. A transcript of the testimony of the (recently deceased) Mrs. Felde was read, causing the defendant to break down in tears—"He grabbed a yellow pad and pen and began writing frantically as if to keep from listening," Farrar, *supra* 72 at 13-A. Felde's mother stated that her son "looked like a wild man" after the Maryland killing, "just staring, looking and not seeing anything" and that when he talked "[a]ll I heard was some mumbling that sounded more like an animal." *Id.* His sister testified "that Felde was moody and depressed after the war, and that she saw him toss his medals in a trash can." She said he was like a clock, "fine one minute, and then he'd go off. You couldn't explain it." *Id.* Dr. Guillermo Olivos, who had treated Felde for several months, noted his difficulty in distinguishing memories from outside information. "[H]e said he believed Felde's emotional problems were alcohol-related . . . that alcohol seemed to be a 'trigger mechanism' for him." Durusau, *supra* note 68, at 10-A.

[73]Durusau, *Felde Trial Expected to Go to Jury Today,* Shreveport J., Aug. 20, 1980, at 10-A.

[74]*Id.* at 1-A, 10-A.

[75]Farrar, *Wayne Felde Found Guilty: Jury Returns Death Penalty,* Times (Shreveport-Bossier) Aug. 20, 1980, at 11-A; State v. Felde, 422 So. 2d at 393.

that look like a fox hole or a cave? Or does that look like a ride back to the penitentiary?"[76]

In discussing Felde's threats of suicide, Nesbitt asked the jurors if they had heard any testimony of any actual attempts at suicide. He answered his own question, "No, and there still isn't any."[77]

On August 10, 1980, Felde was convicted of first degree murder. In testimony to the jury concerning imposition of the death penalty, Felde said, "I think other deaths would occur and it would be on your conscience. . . . I don't want to put you in a bad position, but you're taking other lives as well as mine in your hands. I'd advise you to do it."[78] Mr. Thomas said, "I keep thinking there's some reason I should ask you to spare this man, but there's not—not for him to keep experiencing what he's been experiencing."[79] After deliberating thirty minutes, the jury returned the death penalty. In a statement they noted:

> We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.
>
> . . . .
>
> This trial will forever remain indelibly imprinted upon our minds, hearts, and consciences.
>
> Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.[80]

Felde's response was, "I just hope they didn't think we were lying about all that stuff about Vietnam and guys who are suffering from this thing."[81]

Mr. Thomas unsuccessfully sought a new trial for Felde because, *inter alia*, he had received the names and addresses of three soldiers from Felde's company only after the termination of the trial: "[t]hey would have corroborated Felde's nightmarish combat experiences and Agent Orange exposure in Vietnam."[82] Additionally, he pointed out "that the jurors, after returning the verdict, made a public statement in the courtroom that they believed Felde was suffering from Post Traumatic Stress disorder."[83] On Sunday, February 1, 1981, only a few days after the return of the Iranian hostages, Felde attempted suicide. He was found in his cell, wrists slit with a razor blade, and "WHITE COLLAR HERO'S" dabbed in blood on

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[76]The full text of the prosecutor's argument at this point went:

> Does this look like a foxhole or a cave, or does that look like the ride back at the penitentiary [sic]?
>
> Does this look like a war scene at night or does that look like a police car with a siren on top on a four lane highway in Shreveport, Louisiana? That's a ride back to the penitentiary.
>
> Does this look like anything you see in Vietnam. Or does that look like a ride back to the penitentiary.
>
> . . . .
>
> You show me something that looks like Vietnam in this picture. You decide whether this looks like Vietnam or this looks like a ride back to the penitentiary and you decide if that man did not intend to kill.

State v. Felde, 422 So. 2d at 388.

[77]Farrar, *supra* note 75.

[78]State v. Felde, 422 So. 2d at 394.

[79]Durusau, *Felde: "Reversible Error" Claimed*, Shreveport J., Aug. 21, 1980, at 1-A.

[80]422 So. 2d at 380 n.9.

[81]Durusau, *supra* note 79, at 9-A.

[82]*Hearing Ordered On Murder Convict's Request*, Morning Advocate (Baton Rouge), Nov. 22, 1980, at 4-E. *See also* State v. Felde, 422 So. 2d at 396.

[83]Farrar, *Retrial Bid Stalls Felde Sentencing*, Times (Shreveport-Bossier), Nov. 22, 1980, at 10-A.

the wall.[84] In a note to his attorney, Felde wrote,

> Just to let you know that I could not handle the nightmares and depression no more.
>
> The Hostage's [sic] from Iran are the Heros [sic] so I give up . . .
>
> To [sic] bad the VietNam Vets didn't meet the Iran hostages the second day with trash, bottles, spit, etc.; and let them know the real welcome we got, but they were White Collar and we were the poor. Makes a difference don't it."[85]

On February 13, 1981, wearing a fatigue-green ribbon pinned to his shirt "as a reminder of Vietnam veterans," Felde was sentenced to death. In a statement to the court, Felde noted,

> Regardless of what happens in my case from on out, I will continue to publicize the bad mental and emotional problems thousands of Vietnam combat veterans still have. Maybe this will prevent some other Nam vets from having happen to them what has happened to me and to many others.
>
> . . . .
>
> My record speaks for itself. I know the two charges I have had in the last ten years are very serious; this too I must live with for now. But I am not a criminal, but a troubled and wrecked man. Like many other vets, *I know what Vietnam did to me*. . . . Critical wounds do not always pierce the skin, but enter the hearts and minds and dreams that are only begging for help so badly needed.[86]

Another Shreveport, Louisiana case involved Vietnam veteran Charles Heads, who arrived at the house of his brother-in-law, Ray Lejay, in pursuit of his absconded wife. In the somewhat colorful re-creation by *Newsweek*,

> The fog rolled in over the field . . . [l]ike a smoking cloud of naplam. The tall grass slumped lazily in a Mekong funk. The humidity squeezed a grunt's temples and wouldn't let go. Charles Heads watched the tree line silhouetted against the sky and without warning, was tragically transformed. . . . Heads was back in Vietnam, a marine ready for combat. The man before him wasn't Lejay, his brother-in-law, but a dangerous Viet Cong. Heads pulled a rifle from his car, shot Lejay through the eye and then maniacally stalked the ranch house as though it were a straw hooch. When the police arrived, they found him standing silently, slowly coming out of his trance, unable and unwilling to resist.[87]

In the resulting murder trial, Heads pled that he was insane and had acted in the heat of passion, but was nonetheless convicted of murder.[88] This verdict was subsequently reversed and the case remanded by the United States Supreme Court.[89] In Heads' second trial, he was successfully depicted as unable to distinguish right from wrong: "It was like I was being controlled . . . I was on; I could not have stopped."[90] The jury voted unanimously for an

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[84]Durusau, *Hero's Welcome for Hostages Spurs Felde Suicide Attempt*, Shreveport J., Feb. 9, 1981, at 1-A. *See also* Farrar, *Felde Attempted Suicide in Rapides Jail Cell*, Times (Shreveport-Bossier), Feb. 5, 1981, at 3-A.

[85]Durusau, *supra* note 84, at 1-A. *See also Hostage Cheers Blamed for Vet's Suicide Attempt*, Dallas Times Herald, Feb. 11, 1981, at 12-A.

[86]Citizen Soldier No. 2 (1981) (quoting excerpt of Wayne Felde's statement to the court on the day of sentencing, Feb. 13, 1981). Felde's death sentence was affirmed by the Louisiana Supreme Court on Oct. 18, 1982, in State v. Felde, 422 So. 2d 370.

[87]*War Echoes in the Courts*, Newsweek, Nov. 23, 1981, at 103. *See* State v. Heads, 385 So. 2d 230, 231-32 (La. 1980), for a more complete statement of the facts of the case.

[88]385 So. 2d at 232.

[89]444 U.S. 1008 (1980).

[90]*War Echoes in the Courts, supra* note 87. Heads was nine years old when he saw his father kill his mother. In Vietnam he survived 38 reconnaissance missions and killed seven people. In a striking example of life imitating art, he had scrawled across his photograph, "Kill all of the bastards."

acquittal.[91] This case was apparently the first time a PTSD defense had been successfully employed in a capital case.[92]

In *New Jersey v. Cocuzza*,[93] Cocuzza, a Vietnam veteran, assaulted a group of police officers in a park, carrying a large log as if it was a rifle. Cocuzza

> was, at the time of the incident, engulfed in a delusional flashback in which he genuinely believed he was once again in the jungles of Vietnam and perceived the police officers to be enemy soldiers who were following him. It appeared that the defendant was vaguely re-experiencing an incident in which his patrol had been ambushed and a friend killed.[94]

Cocuzza had a post-military history of job-related difficulties and marital discord. His wife related that he had begun within the last few years to suffer from periods of depression which were usually punctuated by episodes of excessive drinking, explosive violence, and recurrent nightmares.

> [T]he medical experts were able to testify that although it was clear that he "knew the nature and quality of his acts" in the sense that he knew he was attacking someone, it was equally clear that he "did not know that those acts were wrong" since, in his mind, he was not attacking police officers but rather was attacking enemy soldiers. The defendant was accordingly found to be not guilty by reason of insanity.[95]

In a May 1982 trial in Illinois, Jearl Wood, who shot his foreman at a Ford assembly plant, was found not guilty for a similar reason. The shooting took place on a very hot, humid night—conditions similar to those the veteran experienced in Vietnam where he served at a forward artillery base. Defense counsel also noted that the flooring at the plant was like the metal matting on the ground at the artillery base. The weapon used, a .45 caliber pistol, was the same type the veteran carried in Vietnam. When the veteran fired at his foreman, he had "reverted to the combat state."[96]

The defense of Michael Mann, charged with three counts of attempted murder, shows how the use of the PTSD defense in violent crimes has evolved.[97] Mann claimed that the victims were strangers, and he had gone to their house for a party. Attempting to sell his .357 magnum revolver, Mann claimed he had fetched the gun and argued with Robert Freed over its price outside the house. As he turned to leave, he felt a blow to the back of his head. All he could remember was falling, and then he remembered having this vision or dream of being back in Vietnam. Freed countered with a different story: he asked Mann to leave the party after Mann insulted his wife; he was seeing Mann out when the shooting began. He could not remem-

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[91]This case has been identified as No. 106-126 (1st Jud. D.C. La.). Conversation with Ms. Wilson (Jack, Jack, Cary & Cary), May 28, 1982.

[92]*War Echoes in the Courts, supra* note 87. Unfortunately:

> In the *Heads* case, following the jury verdict of not guilty by reason of insanity, the judge was not willing to release the veteran to a VA facility without some assurance that he would remain under custody. The VA would not provide that assurance. According to the VA's General Counsel, "only when there is no obligation placed on the VA to exercise custodial restraint, or assure the return of the veteran to custody upon completion of treatment" will a VA medical center accept persons held in the custody of civil authorities.

Millstein & Snyder, *supra* note 9, at 89 (quoting from a letter from Mr. John Murphy (VA General Counsel), Dec. 22, 1981).

[93]No. 1484-79 (N.J. Super. Ct. 1981).

[94]Ford, *In Defense of the Defenders: The Vietnam Vet Syndrome*, 19 Crim. L. Bull. 434, 440 (1983) (citing *New Jersey v. Cocuzza*).

[95]*Id.* at 439-40.

[96]Millstein & Snyder, *supra* note 9, at 88 (citing *State v. Wood* (Cir. Ct. Cook Co., Ill. May 4, 1982)).

[97]The facts and circumstances surrounding the case are taken from Millstein, *War Is Hell: It's Also A Good Defense*, Am. Law., Oct. 1983, at 100.

ber hitting Mann or having any conversation about buying a gun. Mann was found competent to stand trial but was also diagnosed as suffering from PTSD. Conversations with Mann's family and friends yielded a profile similar to the textbook definition of the disorder.[98] Subsequently, Mann's attorney sent copies of his client's military record along with a description of his background and accounts of the shooting incident to about fifteen nationally-known PTSD experts. He received responses from eight, each of whom indicated that Mann exhibited the symptoms of the disorder. The attorney also managed to track down Mann's commanding officers, two of whom came to testify at the trial, although he could never locate Mann's platoon buddies.

In choosing the jury, the defense counsel looked for individuals who had strong feelings, either pro or con, about Vietnam. Some of these individuals were familiar with at least the rudiments of the Vietnam Syndrome defense. "[t]he one Vietnam veteran on the jury told Mann's defense attorney during voir dire that he didn't put much stock in PTSD, particularly when used as a criminal defense."[99] On the other side, the prosecutor noted that "the war makes what is generally an incredible defense far more credible even before anyone even opens their mouth on the stand."[100] The prosecutor had initially tried to settle the case, and subsequently had two psychiatrists examine Mann; both diagnosed PTSD.

Because of pre-trial publicity, the trial was moved from Marinette to Sturgeon Bay, Wisconsin. One week before trial, Mann pled guilty to the facts of the crime. Under the Wisconsin system, this allowed him to continue to maintain his innocence as to the charge (first-degree attempted murder) because of his mental condition and gave the defense the opportunity to begin with the insanity hearing.

The defense proceeded according to its plan to focus on medical testimony about PTSD and testimony about Mann's life by his military superior, friends, and family. On the first day, there was psychiatric testimony about Mann's mental condition. Subsequently, his friends and relatives were called to sketch his life story. On the third day, the Freeds were called in the morning by the defense to testify and Mann testified in the afternoon.

> Mann testified from his wheelchair. He talked about how it felt to shoot and kill people at close range in Vietnam, and what it was like to have to pick up the pieces of dismembered children's body [sic]. He told the jury about his return from Vietnam, and how he felt when he learned from the cabdriver who drove him from the airport in Green Bay that his best friend, another local boy, had just been killed in the war.
>
> . . . .
>
> Mann's testimony culminated with his account of his flashback. "It was like an explosion went off in my mind, I was back in Vietnam," he told the jury. "I was looking at my legs. I was losing my legs all over again."[101]

Mann's two commanding officers testified and, at least according to one juror, demonstrated the connection between the defendant's ordeal and the shooting with which he was charged.[102] Dr. Kasper testified last for the defense:

> He testified that on the night of the shooting, it was the blow that Mann says he received on the back of the head that triggered his dissociative reaction. "The psychological makeup of Mr. Mann allows

[98] *Id.* During combat in Vietnam, Mann lost both legs to an anti-tank land mine. After returning to the US, he drifted through jobs and made over 20 moves. He had nightmares about the war and lied about his injury. Prior to the incident in question, Mann was having financial problems and "he spent most of his time in the week before the shooting watching violent movies on cable television. He says he considered suicide but never could carry it out." *Id.*

[99] *Id.* at 100.

[100] *Id.* at 102.

[101] *Id.* at 102-03.

[102] *Id.* at 103.

> him to deal with a violent situation in only one place—Vietnam," Kasper testified. With the stimuli of violence, he returns to Vietnam where the firing of a weapon is not only permissible, but ordered. It is what you're praised for doing. When Mann pulled the trigger six times in rapid succession, "he was back in Vietnam fighting a firefight," Kasper explained. "He did not have the capacity to distinguish right from wrong."[103]

The state, in its one day rebuttal, called no expert witnesses, conceding the presence of PTSD. Rather, the prosecutor chose to concentrate on the facts of the assault. Unfortunately for the prosecution, several of its witnesses admitted that they had been too drunk to remember much of what had happened and did not make a positive impression on the jury. Further, in the words of one juror, "[e]verybody was waiting for another couple of psychiatrists or a couple of psychologists to contradict the opinions of the defense witnesses . . . . They never showed up."[104] It took the jurors less than ten minutes to decide that Mann was suffering from a mental disease that made him incapable of conforming his behavior to the law; he was acquitted.

Other defendants have been less fortunate. In *State v. Sharp*,[105] a conviction for the first degree murder of the defendant's uncle was upheld by the Louisiana Supreme Court. Sharp, a Vietnam veteran, was convicted despite pleading not guilty by reason of insanity from Vietnam Syndrome. According to the Louisiana Supreme Court, the record left little doubt that this young conscript infantry soldier was indelibly scarred psychologically by his confrontations with death and destruction.[106] Whether those "psychological scars" rendered him incapable of distinguishing right from wrong when faced with a physical assault ten years later was the crucial issue for the jury at his trial. The court determined that the jury had properly resolved the conflicting testimony by rejecting the defense's expert testimony that Sharp was "temporarily insane" when he killed his two victims.[107]

In *State v. Serrato*,[108] the defendant, a helicopter pilot and Vietnam veteran, was leaving his house with his young daughter to pick up a paycheck in another town. As Serrato was leaving, his wife hollered at him not to "stay down there all damn day long. . . . [W]hy don't you just get the hell out of here. Those people down there mean more to you than I do."[109] Serrato next remembered finding himself on his bed, trembling, with his wife's body sprawled by his side. She had been strangled with a piece of cloth. Serrato was convicted of second degree murder and sentenced to life imprisonment.[110] As part of his appeal to the Louisiana Supreme Court, the defendant contended that he should

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[103] *Id.* at 103-04.

[104] *Id.* at 104.

[105] 418 So. 2d 1344, 1345 (La. 1982). The defendant's aunt was also killed and a young cousin injured.

[106] *Id.* at 1346.

[107] *Id.* at 1348. The experts for the defense testified that Sharp was suffering from PTSD; additionally, one of the psychiatrists and the psychologist stated that the defendant had paranoid schizophrenia. "The thrust of the testimony of the defense experts was that defendant, when confronted with the stress of being rejected by his wife and then being assaulted by her relatives, in effect acted in a 'state of primitive rage' based on a 'survival instinct.'" *Id.* at 1347. As all acknowledged that the defendant was probably sane both before and after the accident, "the jury was in effect presented with a temporary insanity defense." *Id.* The state called a psychiatrist in rebuttal who:

> described defendant as having an "explosive personality disorder." He opined that defendant was nervous and had problems with his temper that worsened after his Vietnam experiences. He was convinced, however, that defendant was able to control his temper to a great extent, confining his temper displays to his wife and family. The doctor was satisfied from his evaluation that defendant was not schizophrenic and was aware of the difference between right and wrong at the time of his knife attack. . . .

Id.

[108] 424 So. 2d 214 (La. 1982).

[109] *Id.* at 220.

[110] *Id.*

have been granted a new trial and that new evidence showed that he was suffering from post-traumatic stress disorder resulting from his service as a helicopter pilot in Vietnam. The trial court had denied Serrato's motion for three reasons: he failed to exercise due diligence in obtaining evidence of the defense; in assessing the medical testimony, it did not appear that it would have changed the verdict; and because defendant had not asserted a plea of guilty by reason of insanity, the medical testimony could not have been admitted into evidence.[111]

Serrato had been examined by two psychiatrists. Prior to the trial, one psychiatrist suspected that Serrato was suffering from post-traumatic stress disorder, but because he denied any symptoms associated with that disorder, the psychiatrist was unable to make that diagnosis at that time. Instead, he diagnosed Serrato as suffering from a severe depressive neurosis.[112] Subsequent to his conviction, Serrato was examined by a second psychiatrist who confirmed the first psychiatrist's earlier suspicion of PTSD.

The Louisiana Supreme Court affirmed Serrato's conviction, noting that "the failure of the defendant to assert his defense at trial was due to both the failure of [the first psychiatrist] to properly diagnose Serrato as suffering from post-traumatic stress disorder and defendant's lack of due diligence in seeking further psychiatric evaluation or follow-up."[113] The court also felt that the medical testimony would not have changed the verdict below because other than Serrato's recollections, there was no independent verification that he suffered any trauma in Vietnam; the first psychiatrist testified that immediately before his wife's death, Serrato was able to differentiate between right and wrong; and the second psychiatrist testified that Serrato did not possess all the symptoms associated with PTSD, *i.e.*, there was no indication of any memory impairment or trouble concentrating, avoidance of activities that allow recollection of the traumatic event, or intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.[114]

Finally, there is the case of *United States v. Crosby*.[115] On January 31, 1982, Crosby borrowed a shotgun from a friend, ostensibly to go hunting. Instead, he drove to the New Orleans VA Hospital, took six hostages and, brandishing his weapon, "began using profane language, generally voicing his dissatisfaction with the Veterans Adminsitration and the way it had treated him."[116] He released all but one of the hostages and after three hours of negotiating with the New Orleans Police Department, Crosby released his last captive unharmed and surrendered. At trial, Crosby's defense was that he was suffering from PTSD at the time of the incident as a result of his combat experiences in Vietnam.

A psychiatrist who examined Crosby shortly after the incident testified for the government that in his opinion Crosby could appreciate the wrongfulness of his conduct and he had detected nothing in his examination to indicate that Crosby was suffering from PTSD. Rather, the psychiatrist felt that Crosby's problems resulted from an "anti-social" personality and a serious drug problem.[117] Another psychiatrist for the government held the same opinion. Two psychiatrists testified on behalf of Crosby and said that Crosby had experienced a dissociative reaction caused by PTSD and was, therefore, not criminally responsible for his conduct.[118]

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[111] *Id.* at 222.

[112] *Id.* The "withheld information included Serrato's 'continuous difficulty with rememberances of his war trauma, his experiences in Viet Nam, flash-backs and dreams, startled responses, [and] his alienation from the majority of the society that he functioned in prior to the war. . . .'" *Id.* at 223 n.9.

[113] *Id.* at 223.

[114] *Id.* at 224.

[115] 713 F.2d 1066 (5th Cir.), *cert. denied*, 104 S. Ct. 506 (1983).

[116] 713 F.2d at 1069.

[117] *Id.* at 1069-70.

[118] *Id.*

After a seven day trial, Crosby was convicted of kidnapping and assault with a dangerous weapon and sentenced to ten years imprisonment, along with four five-year sentences, three of which were to run concurrently.[119]

Crosby appealed alleging, *inter alia*, that the court abused its discretion by excluding his notes and journals and certain records maintained by the Veterans Outreach Center which would have supported his contention that he suffered from PTSD.[120] The Fifth Circuit affirmed Crosby's conviction and held that these items were at best cumulative with other testimony and that their exclusion was within the trial court's discretion.[121] Additionally, Crosby objected to the trial court's failure to qualify a counselor of the Veterans Outreach Center as an expert in diagnosing PTSD in Vietnam combat veterans. Noting that the trial judge had considerable discretion in this matter, the Fifth Circuit determined that the trial court properly refused to classify the counselor as an expert on the ground that only physicians could qualify as diagnostic experts concerning this medical condition.[122]

In leaving this battleground of unpremeditated, violent crimes, we should heed the warning of Dr. Donald T. Apostle, a Clinical Instructor at the University of California at San Francisco. Summarizing an early California case involving a veteran charged with assault with a deadly weapon who used the defense of "unconsciousness," Apostle noted: "It was argued that the patient acted without awareness during the assault . . . . It was further stated that the situation . . . recreated the state of helplessness and rage which the patient felt in Vietnam. The jury did find the patient to be not guilty by reason of unconsciousness."[123] While the

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[119]The five year sentences were suspended on condition that Crosby be placed on probation for that period of time after his release from confinement. *Id.* at 1070.

[120]*Id.* at 1071-73.

[121]*Id.* at 1072-73. The government had also objected to Crosby's notes and journals on the basis that "the statements were merely a selected compilation of prose writings and poetry which could not purport to be an accurate, chronological recitation of past events. Additionally, the writings were incomplete, and were perhaps affected by Crosby's admitted drug and alcohol problems. . . ." *Id.* at 1072. The Veterans Outreach Center records were objected to "on the grounds that the material contained opinions about PTSD which the Vet Center counselors, who had no training in psychiatry, were unqualified to give." *Id.*

[122]*Id.* at 1076-77.

[123]Apostle, *The Unconsciousness Defense as Applied to Post-Traumatic Stress Disorder in a Vietnam Veteran*, 8 Bull. Am. Acad. Psychiatry & L. 426, 428 (1980). This case was *In re* Charles Pettibone, No. 9632-C (Sonoma Co. Super. Ct., Cal. Feb. 29, 1980). Letter from Dr. Donald T. Apostle to S.P. Menefee, Dec. 9, 1981, and conversation with Ms. Connie Garber (Sonoma Co. Super Ct.) May 21, 1982. Plagued in school by a reading problem and conflicts with authority, Pettibone served for eleven months in the DMZ, where he was exposed to Agent Orange, saw many of his friends killed, and witnessed several atrocities. He feared others in his company whom he claimed were irrational at times; at one point "he threatened 'to blow them all away.' He was subdued with an injection and was soon evacuated." Apostle, *supra*, at 427. Upon his return to the US, his family noted a personality change; the ex-soldier was admitted to the Veterans Hospital on at least 20 occasions where doctors were unable to help him. He managed, through Congressman Clausen, to have his disability rating increased from 10% to 100%, subsequently married, and had two children. *Id.* at 427-28.

Immediately prior to the attack, Pettibone's wife obtained a divorce, gaining custody of the children. Visiting privileges were granted only if he had a suitable place to live—which he didn't (he had been living in the back of his truck, which broke down on the way to court). He was told a loan to purchase land for a trailer might take six months. The VA office could not tell him why he was not receiving full disability checks. In despair, he went to visit his congressional friend, only to find that the congressman was out. Pettibone held a security guard at Congressman Clausen's office at knifepoint for two hours.

> At that time, witnesses described him as very highly agitated with a glazed look in his eye and alternating between states of bravado and tearfulness. He threatened on occasion "to blow everybody away" and threatened to kill himself as well. He remembers "bits and pieces" of this episode vaguely and remembers "waking up" in jail the next day.

Id. at 428. After five days in jail, Pettibone was hospitalized for 3½ weeks and then treated as an outpatient. *Id.* From the symptoms exhibited,

> [o]ur impression was that the diagnosis of post-traumatic stress disorder was most appropriate and that the behavior and feelings in the congressman's office following the loss of his children were similar to the feelings of helplessness and rage that he felt in Vietnam in that all of his alternatives were exhausted.

Id. at 429.

defense of unconsciousness need *not* presume insanity, it "should not be used casually or indiscriminately, [but] should [only] be considered . . . when there is appropriate treatment, support, and supervision present, as well as a strong conviction that the warrior is no longer dangerous to society."[124]

IV. Post-Traumatic Stress Disorder as a Defense for Premeditated, Nonviolent Crimes

The first apparent use of a PTSD defense for a *premeditated, nonviolent* crime took place in the trial of Peter L. Krutschewski, who was indicted for being the organizer, supervisor, and manager of a continuing criminal enterprise, *i.e.*, a drug-smuggling operation.[125] The judge decided that the jurors would first determine whether the defendant had committed the crime and, if so, they would then hear separate evidence on the insanity issue to decide if Krutschewski would nonetheless be absolved of guilt.[126]

The defense counsel was quoted in the *Boston Globe* as saying that Dr. John Wilson, who had testified about the stress disorder in more than ten similar cases, would appear on behalf of Krutschewski and that the doctor estimated that as many as sixty percent of the 700,000-odd Vietnam combat veterans suffered from the disease.[127] The newspaper went on to state that "[t]he disorder reportedly produces symptoms which can emerge years after the initial trauma and create the need in victims to do risky things to feel alive."[128] In a subsequent interview with the paper, Krutschewski said that if he was found guilty on any of the five counts against him, he would plead insanity and contend that he became a smuggler because he suffered from Vietnam Syndrome.[129] The judge issued a gag order for this "unusual situation," noting that "most cases [of this type] deal with loud-mouth prosecutors. I don't recall a situation where a defendant has undertaken to unburden himself to the press."[130] Subsequently, Krutschewski was found guilty on four lesser counts. Conflicting expert testimony was then heard on the insanity defense, with one psychiatrist, Dr. Tanay, testifying that Krutschewski's illness rendered him unable to form the necessary criminal intent.[131] Dr. Tanay's opinion was not changed by the fact that Krutschewski collected $500,000 from his marijuana smuggling enterprise. A. psychiatrist testifying for the prosecution, Dr. Apostle, contradicted Dr. Tanay and said his examination of the defendant revealed "no evidence of mental illness of such a degree to imply a Vietnam insanity defense."[132] Dr. Wilson, who had been listed as a

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[124]*Id.* at 430. The doctor concludes: "I feel that this particular defense is most appropriate in those cases where brief (minutes or hours), repetitive, stereotyped behavior occurs, directly stimulated by either emotions or environmental characteristics simliar to those that the warrior had in Vietnam, with evidence of lack of awareness." *Id.* at 429. *See also infra* the discussion of *United States v. Tindall.*

[125]United States v. Krutschewski, No. 80-00135-01-S (D. Mass. Oct. 8, 1980).

[126]Boston Globe, Aug 27, 1980, at 1. The charges had been originally filed before Judge Joseph L. Tauro, but when a new indictment was obtained from Judge Walter J. Skinner, the original charges were dropped. The Boston Globe noted that "[a]lthough Skinner usually imposes heavier sentences than Tauro, Assistant U.S. Atty. Walter B. Prince denied he was 'judge shopping' in seeking the new indictment." *Id.*

[127]*Id.*

[128]*Id.*

[129]*Id.*

[130]*Id.* According to *the Boston Globe*, the judge also criticized the defense counsel's discussion of the PTSD defense on an evening news program. Boston Globe, Aug. 28, 1980.

[131]Boston Globe, Sept. 10, 1980, at 28. Dr. Tanay also testified in the court-martial of Marine PFC Robert R. Garwood, charged with collaborating with the enemy and mistreating fellow prisoners. "Pvt. Garwood didn't have the capacity to appreciate the criminality of his conduct and had no capacity to conform his conduct because he was reduced to a child-like state," Tanay noted. Emotionally, he was "run over by a truck and then the truck backed over him." Boston Globe, Feb. 4, 1981, at 8. When asked about the Krutschewski trial and post-Vietnam syndrome, Dr. Tanay replied, "I have testified in many such cases. The courts do not view this as Post Vietnam Syndrome, but simply as mental illness. The newspapers distort the account of such trials." Letter from Dr. Emanuel Tanay to S.P. Menefee, Nov. 2, 1981.

[132]Boston Globe, Sept. 10, 1980, at 28. Dr. Apostle added, "My contention was that he did not suffer from any degree

defense witness, was unable to give testimony due to a scheduling conflict; in fact, he was three floors below, testifying in the trial of Michael Tindall.

Krustchewski was found to be legally sane and was sentenced to ten years imprisonment and a $60,000 fine.[133] The trial judge was quoted as doubting that the Vietnam syndrome from which Krutschewski suffered "had a great deal to do with this crime"; he did not believe the ailment was a "controlling or even a significant factor."[134]

The same defense was used with the opposite result in the trial of Michael Tindall on a drug-smuggling charge.[135] The defendant and Krutschewski were, in fact, co-pilots in Vietnam and Tindall's trial took place before the trial judge originally designated to preside at Krutschewski's trial. In this case, the defense attorney claimed that his client "was dehumanized by his experiences in Vietnam" and planned "to show the jurors film clips from Apocalypse Now and The Deer Hunter" to convince them of his client's insanity.[136] Dr. Wilson testified on Tindall's behalf that the boat trip from Morocco to Gloucester "represented just another combat mission" to Tindall. He said that Tindall was compelled by the mental disease to participate: "He had a need to release this pent-up rage and anger over the futility of the war and the horror of his experiences as a helicopter pilot. He was all bottled up in an explosive kind of way. . . ."[137]

> "In some sense, . . . he was recreating the same situation he was able to cope with and master in Vietnam. He needed it to feel alive. The excitement, the thrill, the risk . . . paralleled his experience in Vietnam," Wilson testified.
>
> Initially when Tindall went to Vietnam in 1970 he was enthusiastic about the war, Wilson testified. But Tindall turned against the war when "he realized he was slaughtering innocent civilians and the war had no justification." . . .
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> Wilson said during his interviews with Tindall, the defendant described in outrage how his helicopter unit had killed a 9-year-old girl and a 6-year-old boy with helicopter rockets.
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> Near the end of his one year tour of duty in Vietnam, Tindall, although outraged at what he was doing, still felt exhilarated by flying the helicopter into combat daily. "I craved it. I was like a zombie. I really needed it," Wilson quoted Tindall as saying. A "triggering event" which touched off his participating in the smuggling venture was the refusal of the FAA to license him to operate an air taxi service, Wilson said.
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> During the 1974 smuggling episode, Tindall "lacked the capacity to conform his

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of mental illness that would have precluded his knowledge of right and wrong or his ability to control his behavior." Letter from Dr. Donald T. Apostle to S.P. Menefee, Nov. 17, 1981.

[133]Boston Globe, Oct. 9, 1980, at 3. The maximum sentence on the four counts was 20 years in prison. At the time of sentencing, Mr. Craig, counsel for the defendant, "urged that his client be allowed to perform alternate service instead of serving a prison sentence. But the judge said he would not even consider an alternate sentence unless Krutschewski gave 'all the fruits of his crime'—an estimated $5,000,000—to 'a public purpose'." *Id.* A subsequent motion to reduce the sentence by substituting an alternative sentence involving community service and the establishment of a charitable trust was rejected by Judge Skinner as lacking a sufficiently strong general deterrent effect and because of the long-term and speculative level of the payments. United States v. Krutschewski, 509 F. Supp. 1186 (D. Mass. 1981).

[134]Boston Globe, Oct. 9, 1980, at 3.

[135]United States v. Tindall, No. 79-376-T 07 (D. Mass. Sept. 19, 1980). This was the first successful utilization of a PTSD defense in connection with a non-violent crime. *See* Schine, *The Drug Dealers' Defender*, Am. Law., Oct. 1983, at 112.

[136]Boston Globe, Sept. 3, 1980. While there is no indication whether or not this was done, the Boston newspapers report that pictures and letters from Tindall to his family were entered into evidence "to portray the horrors of war." *Id.* Sept. 16, 1980, at 18; *id.* Sept. 20, 1980, at 10.

[137]Boston Globe, Sept. 10, 1980, at 28.

behavior to the strict rule of law," according to the psychologist.[138]

Subsequently, two other psychologists also testified that Tindall was legally insane and could not form the criminal intent necessary to commit the crime because of his Vietnam experiences and his inability to adjust after the war. Nonetheless, the doctors claimed the disorder did not affect Tindall's ability to work or to carry on his daily activities.[139]

The prosecution attempted to rebut this defense with the testimony of a California psychiatrist who said that Tindall was legally sane during his smuggling venture.[140] In his summation to the jury, the prosecutor urged them to use common sense and stressed the premeditated aspect of the smuggling venture and the length of time between the trip and Tindall's discharge from the Army. After eleven hours of deliberation, the jury returned a verdict of not guilty.[141]

Tindall's own reactions to the proceedings are intresting. He did not testify at trial, he said, so as not to implicate his friends: "I was gagged by my own conscience."[142] Apparently, however, he was initially reluctant for the PTSD defense to be used. According to one of his attorneys, "Tindall . . . frowned on it and was reluctant to visit psychiatrists. He said it didn't make sense. He kept saying, 'I'm not crazy, I'm not crazy.'"[143] After the trial, however, the defendant commented that "he considered the verdict official recognition that the US government drove boys crazy in Vietnam in an immoral war. The verdict lifted a weight from me and from thousands of other Vietnam veterans. I no longer have a rage or a fury for the government that would force me to such a point of insanity that I felt I had to get revenge."[144]

Others have attempted to use PTSD as a mitigating circumstance in non-violent cases.[145] Thomas Burgess, a Vietnam veteran, was convicted of selling eleven pounds of cocaine to US undercover agents in May 1980—charges which could have resulted in $55,000 in fines and thirty-five years in prison.[146] During the course of his jury trial, Burgess' lawyers never contested the facts of the case but pictured him "as being emotionally disturbed by his war experiences and feeling self-destructive because of guilt over surviving the war when others did not."[147]

The defense case-in-chief consisted of the testimony of two medical experts. One testified to a wide range of circumstantial matters that led him to conclude that Burgess suffered from PTSD and was legally insane.[148] The second

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[138]*Id.*

[139]Boston Globe, Sept. 11, 1980, at 21.

[140]Boston Globe, Sept. 20, 1980, at 10.

[141]*Id.*

[142]*Id.*

[143]*Id.*

[144]*Id.*

[145]*See, e.g.*, United States v. Oldham, 1P-81-28 (S.D. Ind. Dec. 1981) (defendant was found not guilty by reason of insanity of charges resulting from his filing of fraudulent tax returns); Millstein & Snyder, *supra* note 9, at 112 n.5.

[146]United States v. Burgess, No. 81-00129-A (E.D. Va. Oct. 30, 1981), *aff'd*, 691 F.2d 1146 (4th Cir. 1982) (possession of cocaine with intent to distribute under 21 U.S.C. §841(a)(1) and 18 U.S.C. §2; use of telephone to facilitate distribution under 21 U.S.C. §843 (b); and conspiracy under 18 U.S.C. §846).

[147]United States v. Burgess, 691 F.2d at 1147; Wash. Post, Nov. 30, 1981, at B2.

[148]According to the doctor:

> There were two major traumas, three let's say minor ones. One major one was the combat that took place in the Plain of Reeds where Mr. Burgess was pinned down behind a tombstone in a graveyard. He had no water, he had no ammunition, and he was there for about 48 hours. He saw seven of his comrades killed and thirteen wounded . . . He witnesses [sic] bodies being mutilated, dead bodies being mutilated by continuing enemy gunfire.
>
> He also killed two people . . . in that engagement, and that as well was stressful to him.
>
> The other major stressor had to do with shooting a little girl. A little girl, who he thinks was maybe between five and eight, was walking down the road

testified as to four objective psychological tests given by him to Burgess and expressed his conclusion that the results confirmed the first expert's diagnosis.[149] In the course of his testimony, the first expert explained that the information on which he relied came not from Burgess alone but, in addition, was confirmed from other "independent" sources, *i.e.*, was not faked.[150]

In rebuttal, the government called a personal acquaintance of Burgess who testified "that Burgess himself had expressed disbelief in his own 'Vietnam Syndrome' defense and had stated that he would feign insanity at trial."[151]

Additionally, a Drug Enforcement Administration agent was called to the stand and stated that the defendant's behavior was "very cool, calm, very cautious, typical of a dope dealer."[152] A medical expert testified for the government that "the PTSD defense in general was contrived, further concluding that Burgess was not suffering from PTSD."[153]

The prosecutor called for a stiff sentence for this "professional drug dealer whose case 'cries out for incarceration.'"[154] Instead, taking the defense's claim into account, the judge sentenced Burgess to six years in a minimum security prison where psychological counseling was available.

Perhaps the most unusual PTSD defense in a drug case to date was *United States v. Lake*,[155] in which the defendant had been charged with conspiracy and possession with intent to distribute approximately 3,500 pounds of marijuana. He pled guilty to the conspiracy charge and was sentenced to four and one-half years in prison. Subsequently, he retained new counsel

> and, in November 1981, filed a motion to reduce sentence, together with a motion for psychological testing. The court denied the motion to reduce but granted the motion for testing. The psychologist filed his report in January 1982. He diagnosed defendant as suffering from Post-traumatic Stress Disorder, a psychiatric malady recognized by the American Psychiatric Association and the Veterans Administration and arising from combat service in Viet Nam. The psychologist related the psychiatric condition to defendant's participation in the marijuana conspiracy, expressing his judgment that defendant was motivated primarily by fear of losing a friend involved in the conspiracy rather than by a desire for profit.

> with a hand grenade. Now, the pin had been pulled from the hand grenade, but there was a release mechanism, a spring mechanism so that as long as you held the hand grenade in your hand it wouldn't explode. This is how he explained to me, but I have never seen this hand grenade.
>
> Now, the little girl was walking toward Mr. Burgess and two or three of his comrades. She was Vietnamese. He saw the hand grenade, he saw that the pin was removed, and he kept shouting to her to stop, he wanted her to throw it away. Of course, she didn't understand him. We will never know, he doesn't know whether she knew what she was doing, but she approached, and as she approached closer and closer Mr. Burgess felt that he had to shoot her because if he didn't—

691 F.2d at 1151-52 n.13.

[149] *Id.* at 1150. Additionally, the second expert said that:

> Burgess was predisposed to post traumatic stress disorder because of his family background. His mother was an alcoholic who abused Burgess mentally and physically . . . [a]nd Burgess was told his father had died when he was 3.
>
> . . . .
>
> When Burgess' mother died in 1979, he found out his father had lived until Burgess was 16. His father was an alcoholic who had been unable to hold jobs and had gone to prison for stealing drugs.
>
> The psychiatrist said Burgess felt angry and guilty and responded by acting like his father. He had no conscious choice but to sell drugs so he could be caught and punished.

Walker, *Drug Dealer's Conviction Disputed*, Richmond Times-Dispatch, Sept. 2, 1982, at D-12.

[150] 691 F.2d at 1150.

[151] *Id.*

[152] Id.

[153] *Id.* at 1150-51.

[154] Wash. Post, Nov. 20, 1981, at 131.

[155] 709 F.2d 43 (11th Cir. 1983).

> In May 1982, defendant, on the basis of the psychologist's report, filed the Rule 32(d) motion to withdraw his plea and requested a hearing. The court denied the motion without hearing.[156]

Even giving Lake the benefit of the doubt, the Eleventh Circuit held, would not be enough to reverse on the necessary grounds of "manifest injustice."

> Put in focus, defendant simply says that he discovered some eight months after entering his plea and six months after sentence that he had a defense, albeit a psychiatric-bsaed one, to the charge against him. He does not assert that the plea was invalid except as it was allegedly affected by his absence of knowledge of the alleged defense.
>
> There is no claim that the government knew of or suspected defendant's psychiatric condition or has overreached or dealt with him unfairly in any way. There is no contention that either counsel or court knew of his condition or had any reason to know of it. Defendant has merely belatedly discovered a fact asserted to be a defense. . . . We would not permit a defendant to withdraw his plea under Rule 32(d) months after sentencing on the ground he had just discovered that the bank he robbed was not insured by FDIC, or that the sawed off shotgun he carried was more than 18 inches long. This defendant's contentions are more appealing but not legally distinguishable.[157]

IV. Post-Traumatic Stress Disorder and Its Ramifications for Jurisprudence

The following comments on PTSD are those of a psychological layman. Nonetheless, the amorphous nature of the disorder and its generalized symptoms and characteristics should be worrisome to *all* lawyers concerned with such defendants and their relationships with society.

PTSD has been seen as a non-sociopathic or psychotic disorder, a reaction to great stress which differs in *degree* rather than in *kind* from that shown by the ordinary individual. This makes for problems. It seems eminently reasonable to assume that something has upset the psychological balance of a person found battling Viet Cong in a Massachusetts cemetery. In the words of one newspaper editorialist, however, "Is dealing hash a form of rage?"[158]

Closely linked to this question of degree is the ease with which certain people have been able to fake PTSD-style symptoms. In an article in *Hospital and Community Psychiatry*, Doctors Edward J. Lynn and Mark Belzer present the cases of seven men who were admitted to the Reno VAMC claiming PTSD symptomatology despite never having been involved in combat or having been to Vietnam.[159]

> With so many veterans suffering from PTSD, the media detailing their plight . . ., and vet centers documenting their significance readjustment problems . . ., the symptoms and characteristics of PTSD became widely publicized. A related group of veterans, heretofore unrecognized in most psychiatric circles, consists of individuals who present PTSD symptoms but who did not participate actively in actual liabilities and, indeed, who generally had never been stationed in Vietnam. These veterans present at Veterans Administration medical centers (VAMCs) with simulated symptoms of PTSD or what we have since diagnosed as factitious PTSD. In doing so, they pose yet another form of clinical

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[156] *Id.* at 44-45.

[157] *Id.*

[158] Boston Globe, Sept. 28, 1980, at A6.

[159] Lynn & Belza, *Factitious Posttraumatic Stress Disorder: The Veteran Who Never Got to Vietnam*, 35 Hosp. & Community Psychiatry 697 (1984):

> During the five months when these cases were collected, our 20-bed unit treated a total of 125 patients and had an average daily census of only 14. The discovery of seven cases of factitious PTSD suggests that this entity is more common than has been assumed. Conversations with othe VAMC's have corroborated this point. Sparr and Pankrutz . . . have reviewed five similar cases that occurred in Oregon.

> deception to experienced as well as unwary clinicians.[160]

In such cases, note the doctors, "underlying psychopathology is invariably involved, suggesting either factitious syndromes, such as Munchausen's, or malingering. . . . So adept are factitious PTSD patients at their deception that even the most experienced physicians can find themselves fooled by the presenting complaints."[161]

In military tribunals, the use of a PTSD-type defense has not played a significant role in cases to date. While the U.S. Court of Military Appeals adopted the American Law Institute test of insanity in *United States v. Frederick*, holding that an accused is not responsible for criminal conduct if "he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the qruiements of law,"[162] it has *not* included any "abnormality manifested only by repeated criminal or otherwise antisocial conduct."[163] The court has also left the term "mental disease" largely undefined. As *United States v. George* makes clear, "no definitional change concerning mental disease" from the Manual for Courts-Martial test was contemplated by the court in *Frederick*.[164] Rather, the emphasis appears to have been on the "substantial capacity" requirement. This indicates that "*mere defect of character, will power, or behavior*, as manifested by one or more offenses, ungovernable passion, or otherwise, *does not necessarily indicate insanity*, even though it may demonstrate a diminution or impairment in ability to adhere to the right with respect to the act charged."[165] This suggests that by their very definition, many PTSD-type disorders would not meet the criteria for insanity in the military justice system. Additionally, one might question the success which such a defense would meet, even in the scrupulously fair military justice system, when argued by and presented to individuals who have been placed in similar situations without succumbing to stress.

In civilian courts, a major problem with PTSD has been its *overwhelming* linkage with Vietnam. White the Vietnam War *was* different from other conflicts, it is also true that *every* war is different. One can quarrel with those who see Vietnam's uniqueness in the fact that the conflict lacked "a strong moral and political idealogical justification"[166]—certainly a value-biased assumption, while the guerrilla nature of the conflict is paralleled elsewhere. (One could speculate, for instance, about the occurrence of PTSD among the Soviet veterans of Afghanistan.) The close connection of the syndrome with Vietnam brings with it an unfortunate amount of emotional baggage. It may be argued

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[160]*Id.* at 701. *See also* Sparr & Pankrutz, *Factitious Posttraumatic Stress Disorder*, 140 Am. J. Psychiatry 1016-18 (1983).

[161]Lynn & Belza, *supra* note 159, at 700. According to Sparr & Pankrutz:

> Factitious disorders of all types are best discovered by careful clinical evaluation that includes verification of patient-supplied information . . . . Frequently a simple phone call can clarify issues; for example, all VA medical centers and regional offices have a national prisoner of war register. Typically, these patients will not have had contact with Vet Centers, where they are more likely to be exposed. Instead, they seek medical or surgical services where clinicians may be less familiar with the symptomatology.
>
> Guilt or indifference about our treatment of Viet Nam veterans should not prevent clinical objectivity and reasonable confrontation of a patient's fabricated histories and factitious symptoms. It is not necessary to be suspicious of everyone, but a brief military history should be taken on all veterans to look for service related stressors.

Sparr & Pankrutz, *supra* note 159, at 1019.

[162]United States v. Frederick, 3 M.J. 230, 234, 238 (C.M.A. 1977).

[163]United States v. Chapman, 5 M.J. 901, 902 (A.C.M.R. 1977) (Jones, S.J., concurring).

[164]United States v. George, 6 M.J. 880, 882 n.8 (A.C.M.R. 1979).

[165]*Id.* at 882, *quoting* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 120*b* (emphasis added in decision).

[166]Wilson, *supra* note 17, at 134.

that to some extent public guilt about the conflict is putting certain ex-soldiers above the law, or to some extent PTSD may be operating as a "ritualized absolution" for those who were "crazy" enough to fight in Vietnam in the first place.[167] This problem is hardly new; it existed in ancient Rome. What was to be done with a hero such as Publius Horatius, who killed the three Curiatii in single combat, only to dispatch his sister when she grieved for the dead upon his triumphant return to the City?[168] What room is there for gratitude—or guilt? The problem is also *immediate*; Dr. Wilson estimates that "the incident of delayed war-related stress relations will peak in 1985—a time when these vets will be reaching their forties."[169]

According to one national magazine, "[p]rosecutors . . . are not worried that the courts will be inundated by veterans claiming a license for mayhem: 'I take comfort in the good sense that juries have to weed out the contrived defense,' says one."[170] Looking back at some of the verdicts, however, one might wonder. In any case,

> lawyers on both sides do fear that P-TDS cases could become litmus tests of attitudes about the war and the warriors. Veterans often assume civilians will not understand their experiences, and jurors may worry that a guilty verdict proves they are ungrateful to the soldiers.[171]

The politicized comments of certain defendants and their expert witnesses give one further pause.[172] While one cannot impugn the motives

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[167] *See, e.g.*, Tindall's comment at *supra* text accompanying note 144 which can be compared to that part of Dr. Wilson's Senate testimony beginning, "If you were demonic and powerful enough to want to make someone 'crazy' following a war like Vietnam how would you do it?". Testimony By Dr. John P. Wilson Before U.S. Senate Subcommittee On Veterans Affairs (May 21, 1980).

[168] 1 Livy, The Early History of Rome 42-47 (Penguin ed. reprint 1969). Convicted of the capital crime of treason by the Duumvirs, Horatius appealed to the people. Though he was legally guilty, popular admiration of his quality obtained his acquittal.

[169] Schaar, *supra* note 13. Already, several articles have appeared presenting what amount to "how-to" tips to aspiring defense lawyers in PTSD cases. *See, e.g.*, Jack, *The Vietnam Connection: Charles Head's Verdict*, 9 Crim. Def., Jan./Feb. 1982; Millstein & Snyder, *supra* note 9; Ford, *supra* note 194.

[170] *War Echoes in the Courts*, Newsweek, Nov. 23, 1981, at 103. *See also* National Veterans Law Center, The Veteran's Self-Help Guide on Stress Disorder 3 (1981) (quoting A. Egendorf, Legacies of Vietnam: "It's one thing for a vet to speak up about real troubles. It's another thing when guys make themselves out to be sickies to avoid responsibilities to themselves, to people who love them, or to Society. Veterans should be warned that fake claims don't work in the long run"). *See also* Millstein & Snyder, *supra* note 9, at 101 (quoting Mr. David Addlestone (Co-director, National Veteran's Law Center) to the effect that, "'If you have a gruesome, bloody murder or sex crime, the jury's not going to let the guy back on the street no matter what's wrong with him'"). *But see Pleading PTSD*, Time, May 26, 1980, at 59: [M]any prosecutors fear that PTSD may become a common, and successful, defense for crimes."

[171] *War Echoes in the Courts*, Newsweek, Nov. 23, 1981, at 103, which notes "[a]fter finding a veteran guilty of murder, one Louisiana jury issued a statement that its verdict should not reflect on other vets." *See also* Millstein & Snyder, *supra* note 9, at 101: "It's a dream defense," says Boston lawyer Joseph Oteri . . . . "you play off the collective guilt of the country over Vietnam. And it works everywhere . . . . In the rural, red-neck areas, people are patriotic. And in the urban areas, they are guilt-ridden over the war."

[172] *See* Shatan, *Through the Membrane of Reality: "Impacted Grief" and Perceptual Dissonance in Vietnam Combat Veterans*, 11 Psychiatric Opinion 6, at 14, which notes in connection with veterans' problems that,

> [t]his is one of the rare occasions in United States history in which a small group of the victimizers has broken away from the mass of the persecutors and allied itself with those whom it has victimized. Despite a generation of almost unbroken basic combat training, a few men are dealing with their survivor feelings by attempting restitution—independently of government—towards the victims both at home and abroad.

See also Shatan, *Bogus Manhood, Bogus Honor: Surrender and Transfiguration in the United States Marine Corps, reprinted in* D. Goldman & D. Milman, Psychoanalytic Perspectives on Aggression 77, 80-81 (1978), who, in addition to a novel view of Marine boot camp, notes that "[t]he issue becomes, then, one of accepting or rejecting the need to produce soldiers, and especially suicide squads. The mental health professional who aligns himself with this aim (to produce soldiers) cannot dissociate himself from responsibility for its dehumanizing techniques and for its potential ramifications in civilian society." Shatan also notes at *supra* note 8, at 640, that "[a]trocities perpetrated upon the Vietnamese while saving them from Communism are now almost as well known as those of Hitler's extermination camps."

of those who have defined PTSD, its fuzziness and the emotional baggage which it will carry for many suggest that courts would be wise to examine such defenses with care.

The use of PTSD in marginal cases, particularly those involving nonviolent, premeditated crimes committed by Vietnam veterans, could well come back to haunt the American judicial system. The defense as now utilized represents a sociological toe-hold in the insanity plea which could ultimately be expanded in a number of grotesque ways. Take, for example, Dr. Shatan's five characteristics of PTSD,[173] only apply them to a street survivor from Spanish Harlem:

1. Guilt ("because I survived and my friends in the gang did not").

2. Feelings of exploitation ("the Man uses us").

3. Anger (against Society, the police, *etc.*).

4. A feeling of separation from society (cultural pride; the gang).

5. Doubt ("about his ability to love and to trust and about his own value as a human being").

For that matter, apply the same test to a North Carolina textile worker, or a Lao refugee, or a convict in the federal penitentiary.[174] Once the problem ceases merely to be "stress" and becomes "the American G.I.," or, more specifically "the Vietnam veteran," we are venturing into our own *sociological* quagmire. Careful attention must be given to PTSD to insure that while environmental attributes are taken into account, they remain *subsidiary* in any determination of "sanity" or guilt. While using any standard in a legal determintion of sanity is difficult, often yielding inconsistent or unfair results, this is no excuse to complicate the matter by considering heredity, poverty, or cultural deprivation, traits which Dr. A. L. Halpern has pointed out as being potentially as exculpatory as mental defects.[175]

For these more marginal cases, therefore, great care should be taken to focus on the psychological rather than the sociological aspects of the disorder. Judges should be aware of the danger that careless interpretation of PTSD could result in a "G.I. Bill of Criminal Rights" and, if taken to its logical conclusion, could well become the cornerstone of a new series of sociologically-oriented insanity defenses.[176] The

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[173]*See supra* text accompanying note 24.

[174]*Cf.* Shatan, *supra* note 172, at 11, who in discussing veteran problems suggests a link with prisoners when he claims "[t]he prison slang of the military is no accident."

[175]Halpern, *The Insanity Defense: A Judicial Anachronism* 7 Psychiatric Annals No. 8 (1977) (reprint). Dr. Halpern notes, "There is no morally sound basis to select a mental disease or defect as a justification for exculpability while excluding other behavioral determinants, such as heredity, proverty, family environment, and cultural deprivation." *Id.* He adds, however, in a letter, "Being strongly in favor of the complete abolition of the insanity defense, I am hardly disposed to support the motion of the 'sociological insanity defense.' On the other hand, I do see a place for the 'justly acquitted doctrine.'" Letter from Dr. A.L. Halpern to S.P. Menefee, Oct. 23, 1981.

[176]*Cf.* Veteran's Self-Help Guide, *supra* note 170, at 5-6 which discusses problems encountered by the veteran in using PTSD as an insanity plea or to negate intent.

> The difficulty is that judges and juries are skeptical about insanity defenses because it is almost impossible to provide that the defense wasn't made up . . . . The greatest risk . . . is that instead of believing that the defendant should be found not guilty, the judge will instead believe that he is extremely dangerous and should be imprisoned for the maximum term.
>
> Even when a defendant is found not guilty by reason of insanity, the court almost always commits the defendant to a maximum security mental institution until he is found to no longer be a danger to the community. Because these institutions typically are not equipped to treat Stress Disorder the results can be a longer incarceration than would have occurred if the insanity defense had not been raised. These institutions are often worse than prisons and offer fewer opportunities for release than the parole system. Considering these risks, in most states an insanity defense makes sense only for a person charged with a very serious offense.

This guide is the best nuts and bolts account of the relationship between PTSD and the legal system; it covers not only insanity defenses, but the disorder's role in decisions not to prosecute and in securing a sentence involving treatment rather than incarceration. For those already convicted, it indicates the syndrome's import for sentence reduction, withdrawal of a guilty plea, motion for a new trial, or seeking earlier parole. *Id.* at 6.

Boston Globe, in a remarkably perceptive editorial went to the heart of this problem:

> The Tindall verdict—and his words—make you wonder if we aren't tripping over our own war guilt still, giving up on men who've been through hell, making it easier for them to give up on themselves. Some veterans lose their minds and some lose the ability to distinguish right from wrong. Some veterans live with nightmares. And some seek psychiatric help. Some act out and some exercise control. Some go to jail and some mow lawns, pay bills, have kids and carry on.
>
> The jury found that Vietnam haunted Tindall and that may be. But does trauma always lead to premeditated crime? . . . [W]hat of those who follow dictates of conscience, who live their lives as lawful men despite the anguish of the past. The line between one kind of craziness and another is fine and there has to be a reason for every crime.
>
> Some are simple—anger, jealousy, greed—some are more complex. But every reason isn't an excuse.[177]

[177]Boston Globe, Sept. 28, 1980, at A6.

Automation Is Not Automatic

CW2 Roger A. Schill
Legal Administrator, OSJA, USMA

Office automation requires determination! As with any worthwhile project, the path from recognizing the need for automated legal research to successfully installing and using a state-of-the-art system can be a long and rocky fiscal road. Nevertheless, with a little exploration and a lot of perseverance, it can be accomplished.

The letter, JALS-IRM, 17 February 1984, subject: West Law and LEXIS Automated Legal Research Services, rekindled this office's previous interest in obtaining LEXIS as a primary source of automated legal research. To insure success in obtaining this resource, efforts were made to locate other potential users. The aim of this effort was to demonstrate a need to the command and thereby win necessary fiscal support. It was quickly recognized that the OSJA was not the only organization at West Point with a need for speedy and accurate research. Two other organizations were equally interested in having this research tool available—the Department of Law and the United States Military Academy Library. The library, although interested in LEXIS, had a deeper need for NEXIS. A planning/coordination meeting was held and it was agreed that a single organization, the Office of the Staff Judge Advocate, would spearhead the project, including acquiring the necessary hardware/software and funding for the hourly connect time charges and other related service fees.

To further insure and expedite the acquisition, liaison was established with the Installation Automation Officer for guidance and technical assistance. Moreover, coordination was also made with the Directorate of Resource Management and the Directorate of Personnel and Community Activities (DPCA) Budget office. It so happened that initiation of this project coincided with preparation of the projected FY 85 budget. An amount which would cover both the hourly service charge and rental of vendor-supplied equipment was submitted as an unfinanced requirement. Thereafter, funding approval from DPCA was obtained.

At this point, a formal request was submitted to the Directorate of Automation and Audiovisual Systems (DAAS) for approval to install the LEXIS equipment. During the review and evaluation of our request, it was discovered that the moratorium on rental/lease of ADP equipment applied to the LEXIS terminals. Thus, we found ourselves facing an unexpected

impediment. To bypass this obstacle, various alternatives were explored.

Initially, attempts were made to access the LEXIS/NEXIS service through existing equipment in the office. The systems we evaluated included an NBI System "8" word processing system, a TI 820 hard copy terminal, and a Lanier SOL II No Problem word processor. The purpose of this action was to limit costs involved in purchasing new hardware. Although the System "8" and the TI 820 were linked with the USMA main frame computers, they were not compatible with the LEXIS/NEXIS requirements, nor were modifications possible. Still determined, we went back to the drawing board and decided to obtain Quick Return Investment Program Funds (QRIP) to purchase an IBM PC and related hardware and software.

Upon contacting the DPCA budget office, we were informed that there was already a lengthy list of approved QRIP acquisitions and limited funds would probably preclude the project from being funded. However, we were advised that QRIP funding possibly might be available through the Directorate of Automation and Audiovisual Systems (DAAS). We contacted that organization and the results were quickly forthcoming. Based on our input, DAAS submitted a QRIP package and obtained the funding necessary for purchasing the required equipment.

The support provided by DAAS was exemplary. One of their missions is automation of USMA and they are staffed with specialists who are familiar with the intricate workings of the procurement processes which apply to obtaining automatic data processing equipment, as well as experts in the latest technological aspects of the computerized operations. As for funding, the DPCA budget office came through with a reduced amount of the unfinanced requirement for services, but it was enough, coupled with the QRIP purchased equipment, to get the project off the ground and on-line.

As noted in the title, automation is not automatic. It requires the determination and ability to explore all potential sources for assistance in obtaining both funding and equipment. Consolidating resources should be strongly considered when a common need is present. Aggressive pursuit is the key to success in automation endeavors—and no potential source should be overlooked. An important fact to keep in mind it that if your office does not already have compatible equipment on hand, and if your own fiscal circumstances will not permit the purchase of support hardware, look for another organization on post with similar needs and resources which would be willing to obtain the necessary equipment and share user time.

The Advocacy Section

TRIAL COUNSEL FORUM

The Advocacy Section

Trial Counsel Assistance Program, USALSA

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Use of *Modus Operandi* Evidence in Sex Offense Cases

Captain Michael S. Child
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Last month's Forum section featured an article analyzing the many difficult issues raised by the use of uncharged misconduct evidence. This article is a continuation of that theme and will concentrate on trial counsel's use of *modus operandi*[1] evidence in sex offense cases. *Modus operandi* evidence presents a particularly troubling problem because it is often evident in sex offense cases, yet it is not specifically listed as a basis for admission under Military Rule of Evidence 404(b).[2]. This article will present the various alternative arguments for admission of *modus operandi* evidence under Rule 404(b). To do so, it is helpful to look at the facts of a hypothetical rape case which is a composite of reported opinions and cases upon which TCAP has recently advised trial counsel.

The victim has alleged that an NCO she was drinking with at the NCO club raped her. She stated that after she made it clear that she was going home by herself, she made a quick visit to the bathroom. At the same time, the accused slipped out and had his car at the entrance with the passenger door open as she departed the club. The accused called her over and told her he would give her a ride to her barracks. When she declined, the accused shouted at her to get in while grabbing her wrist. The victim did as she was told.

The accused then drove past her barracks and proceeded off post. When the victim pointed

[1]*Modus operandi* is defined in Websters Third New International Dictionary as: "A distinct pattern or method of procedure thought to be characteristic of an individual criminal and habitually followed by him."

[2]Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 404(b) [hereinafter cites as Mil. R. Evid. in footnotes and Rule in text].

out the error, the accused said he had to get something at the store. The accused then reached over and pulled off the passenger door handle and parked on a deserted street. He then put his hand at the back of her neck and began to choke her as he said in a low and menacing voice, "Let's have a good time or you're going to be very sorry." While the victim pleaded with him not to rape her, she did not physically resist his advances. Afterwards, the accused revealed his name and unit to the victim and said he had a good time. He also said he would like to see her again. The victim did not report the incident until six days later.

Your file includes two other instances of apparent rapes committed by the accused. In both instances, the accused had been drinking and socializing with the alleged victims. In both instances, he also offered the victim a ride home. One of these other victims was a civilian, the second was a fellow soldier. The female soldier accepted the accused's offer of a ride. Just as in the charged offense, the accused drove from the NCO club and proceeded past her barracks and off post. Likewise, he advised this victim that he had to get something at the store, but instead, drove to a deserted street where he parked the car and began to choke her. The accused told her they were going to have a good time. She did not resist his physical advances which resulted in intercourse. Afterwards, the accused gave her his name and unit and returned her to her barracks. Just as in the present case, the victim delayed reporting the rape for one week, and when she was examined the doctor found no marks upon her neck or any other signs of violence. The accused was not prosecuted for this offense.

The civilian victim met the accused at an off-post bar and they had a few drinks together. When she got up to leave, the accused followed her to the parking lot and offered her a ride home. When she declined, the accused suddenly began to choke her and told her to get in his car and not make any noise. He then drove her to a deserted street; on the way, he reached over and pulled off the passenger door handle. When they stopped, he again choked her and said he expected a good time or she would be very sorry. She did not resist his physical advances which culminated in intercourse. Once again, the victim delayed in reporting the offense and the accused was acquitted.[3]

What is your assessment of the admissibility of these prior acts of misconduct.[4] Your first reaction is probably that an obvious pattern of sexual misconduct is highly relevant to a charge of rape and should be clearly admissible. Yet, as last month's survey article in the Forum section made clear, the question of admissibility of "other crimes" evidence is not a simple matter.[5]

It is important to understand that the list of factors in Rule 404(b) justifying admission is not exhaustive.[6] The factors listed in paragraph 138*g* of the 1969 Manual for Courts-Martial, the predecessor of Rule 404(b), are also available, as are any other factors which you can show are relevant to any specific issue in the case.[7] What

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[3]A prior dismissal or acquittal should not bar use of uncharged misconduct as the standard for admission is less than "beyond a reasonable doubt." J. Weinstein & M. Berger, Weinstein's Evidence 404-58 (1982). There is a split of authority in the federal circuits on this issue: the Second and D.C. Circuits oppose admission (*see* United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); United Sates v. Day, 591 F.2d 861 (D.C. Cir. 1979)); the Ninth and Tenth Circuits allow admission (*see* United States v. Van Cleave, 599 F.2d 954 (10th Cir. 1979); United States v. Rocha, 553 F.2d 615 (9th Cir. 1977)). Furthermore, military bars to prosecution will not prevent use (*e.g.*, statute of limitations or misconduct in a prior enlistment), *see* United States v. Barus, 16 M.J. 624 (A.F.C.M.R. 1983).

[4]Misconduct, if relevant, is admissible whether it occurred before or after the charged offense. *See* United States v. Colon-Angueira, 16 M.J. 20, 25 (C.M.A. 1983) (statements of prosecutrix showing bias); United States v. Hall, 13 M.J. 948 (A.F.C.M.R. 1982).

[5]*See, e.g.*, United States v. Brannan, 18 M.J. 181, 184 (C.M.A. 1984); United States v. Stokes, 12 M.J. 229, 238 (C.M.A. 1982); United States v. Dicupe, 14 M.J. 915 (A.F.C.M.R. 1982), *petition granted*, 16 M.J. 102 (C.M.A. 1983); United States v. Borland, 12 M.J. 855, 856 n.2 (A.F.C.M.R. 1981); E. Imwinkelried, Uncharged Misconduct Evidence § 2:23 (1984) [hereinafter cited as Imwinkelried].

[6]Indeed it may be offered for "*any* logically relevant purpose. Imwinkelried, *supra* note 5, at § 3:01.

[7]*Id.*

will not justify admission is disposition evidence alone. The rule expressly forbids disposition or propensity evidence.[8] In this case, the prior rapes are clearly evidence of the accused's disposition to commit rape, but if you can also demonstrate that it is relevant to a specific issue, it is admissible.

Modus Operandi for Identification

Your first thought about a basis for admissibility might be on the question of identity.[9] Although it is not explicitly listed as a basis for admission under Rule 404(b), *modus operandi* usually is a means of establishing the accused's identity. Where prior acts are introduced to show a *modus operandi* and thus identity, they must be so similar as to be "like a signature."[10] In your case, the prior rapes are strikingly similar. So much so that you could probably meet that standard if identity were in fact an issue.

Is identity an issue? Probably not. The accused and victim met and drank with one another at the NCO club, and the accused gave her his name. Under the Rules for Courts-Martial (R.C.M.) of the 1984 Manual for Courts-Martial, however, you no longer need to speculate. R.C.M. 701(b)(1) requires the defense to provide notice of an alibi defense, which is another way of saying the accused was misidentified as the wrongdoer. In this case, you have not received such notice. Remember, however, that until the defense actually concedes the issue of identity, the uncharged misconduct is relevant. For example, the defense may waive opening statement and wait to see if you can put on a sufficient case to withstand a motion for a finding of not guilty.[11] If the defense has not conceded the issue of identity, you can offer the *modus operandi* evidence as identity evidence in your case-in-chief. This should force the defense to either stipulate that the accused had intercourse with the victim on the night of the alleged rape or suffer the consequences of the admission of the uncharged misconduct. If not offered to prove identity, you will need to consider alternative bases for admission.

Modus Operandi for Consent

In a rape case like this, you can probably assume that consent will be the defense theory. If so, is not the fact of prior rapes clearly relevant to the issue of the victim's consent? That may seem logical, but the prevailing view is that evidence showing the accused raped one woman has "no tendency to prove that another woman did not consent."[12] Consequently, you cannot introduce these prior rapes to "infer the victim's state of mind from the defendant's behavior."[13] You have better arguments than this. Not only is the evidence less relevant where it concerns a different person, but it is really predisposition evidence when introduced merely to show the victim's lack of consent.

However, if the victim was aware of the accused's prior violent sexual assaults of women, knowledge of these acts would be admissible. The knowledge would be admissible to demonstrate lack of consent and to explain why the victim did not offer physical resistance.[14]

Modus Operandi for Corroboration

Another basis used by some courts to allow prior sexual misconduct in a rape case is corroboration. The prior acts are admitted to cor-

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[8]Furthermore, Professor Imwinkelried explains that the use of this basis is contrary to the express prohibiton of Rule 404(b), *i.e.*, you are offering propensity evidence to bolster her story. Sanctioning a "corroboration exception" to the "exclusionary rule . . . would swallow the rule." Imwinkelried, *supra* note 5, at § 6:05.

[9]*Id.* ch 3.

[10]*Id.*

[11]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 917.

[12]United States v. Woolery, 5 M.J. 31, 33 (C.M.A. 1978).

[13]People v. Tassell, 36 Cal.3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984). State decisions are cited as authority in this article because there are few federal decisions involving sex offenses and most states have provisions highly similar to or identical with Mil. R. Evid. 404(b). California, however, is one which does *not*. Shortly before *Tassel* was decided, the California voters passed Propositon 8, a constitutional amendment eliminating barriers to prior crime evidence.

[14]Imwinkelried, *supra* note 5, at §§ 6:03; 6:08.

roborate the victim's version of the facts and thereby bolster her claim of nonconsent. There are no military cases addressing this question. The few courts which have sanctioned this basis have done so only where the charged rape occurred in such an unusual way as to make the victim's claim improbable, or in cases of familial child sex abuse where experience shows the child-victim has a difficult time convincing others of the abuse.[15] In these cases, the evidence would also be admissible to prove intent or plan.[16]

Do not lose sight of the fact that Rule 404b problems occur only with extrinsic acts which show character or conduct. In our hypothetical case, you should be able to call each of the two witnesses previously assaulted by the accused to testify about those facts which corroborate the victim but which do not amount to misconduct. Then, while avoiding testimony about the culminating rapes the witnesses could testify concerning the accused's previous noncriminal conduct: he drove a certain type of car; the car had a loose front door handle; he spoke in a certain fashion; he dressed in similar fashion to that described by the victim. Even if identity is not an issue, pulling off the door handle is noncriminal conduct corroborative of a crucial aspect of the victim's story.

Modus Operandi for Intent

What about the accused's intent? Are not these prior rapes clearly relevent to the accused's intent? The traditional view again is no[17] because rape is a general intent crime, and it is unnecessary to prove that the accused had the intent to rape to prove him guilty of rape. Under this view, it has been held that government need only show that the accused used violence or the threat of violence to obtain intercourse without the victim's consent; the law will presume he intended to rape the victim.

However, an emerging trend rejects this flawed view.[18] For these courts, whether the crime is a general or a specific intent crime, the government must prove intent beyond a reasonable doubt. Consequently, under this view, the evidence of other criminal acts or conduct is relevant to prove the accused's general intent.[19] After all, Rule 404b does not distinguish between relevant evidence showing specific intent and relevant evidence showing general intent.

In two instances, the accused's intent may be an issue without regard to these distinctions. The first situation can be established by you; the second depends upon the defense presentation. When the accused forced the victim into the car and then drove to another location to commit rape, he may have committed the crime of kidnapping. Thus, in the first instance, if you charge the accused with kidnapping under Article 134, of the Uniform Code of Military Justice, the accused's specific intent at the time he grabbed the victim's wrist and coerced her into his car will then be a fact to be proved. Consequently, evidence of the forceful abductions of the prior rape victims would be especially relevant.[20]

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[15]People v. Fuller, 454 N.E.2d 334, 342 (Ill. App. 1983) ("evidence of other crimes have been permitted where necessary to explain the circumstances of a crime which would otherwise be unclear or improbable"). Commonwealth v. King, 441 N.E.2d 248, 253 (Mass. 1982) (in familial sex abuse case, evidence of similar acts was admissible, in part, because it "corroborated the victim's testimony and rendered not improbable that the acts charged might have occurred"); State v. Pignolet, 465 A.2d 176, 183 (R.I. 1983) (in familial sex abuse, evidence of a sibling similarly abused was admissible as "corroborative evidence"); Hendrickson v. State, 212 N.W.2d 481 (Wis. 1984).

[16]*Id.*

[17]Imwinkelried, *supra* note 5, at § 5:09.

[18]*Id.*

[19]United States v. Vilches, 17 M.J. 851, 854 (N.M.C.M.R. 1984); Imwinkelried, *supra* note 5, at § 5:09.

[20]United States v. Link, 728 F.2d 1170 (8th Cir. 1984); United States v. Winters, 727 F.2d 602 (9th Cir. 1984) (prior beatings and rapes of other women admissible to prove the appellant's intent to coerce a woman into prostitution, a violation of the Mann Act (*i.e.*, transporting a woman in interstate commerce for immoral purposes)); United States v. Perkins, 6 M.J. 602, 603 (A.C.M.R. 1978) (where kidnapping charged prior acts of abduction which ended in rape, admissible to prove the appellant's specific intent to rape at the time he abducted the charged victim).

The second instance would arise if the defense raises the defense of mistake of fact. The Court of Military Appeals has sanctioned mistake of fact as a defense to a rape charge.[21] Suppose, for example, the accused testifies that he knew the victim before the night of the alleged rape and also had heard of her reputation for desiring physically aggressive sexual partners. The defense theory would be that the accused throught the victim appreciated his forceful behavior and consented to the intercourse. The prior rapes should then be admissible to rebut the mistake of fact defense. This defense shifts the focus from the rape victim's state of mind to the accused's state of mind because the accused must convince the court that he sincerely and reasonably believed that the victim consented. Evidence that he raped other women would then be highly relevant on the question of the sincerity of his belief.[22]

Modus Operandi for Plan

Another potential basis for admissibility is plan, a factor also specifically listed under Rule 404(b). The theory is that the accused's actions are so similar that they appear to be part of a plan to take physical advantage of women who have let their guard down after drinking with him. The common law precursor to Rule 404(b) recognized the admissibility of uncharged misconduct which demonstrated a common scheme as well as a plan. In the hearings on the Federal Rules of Evidence, the Department of Justice proposed that Rule 404(b) also include common scheme as a factor, but Congress rejected that proposal.[23] Nevertheless, the "lower federal courts continue to use the 'plan' and 'common scheme' expressions interchangeably."[24] Why is this distinction important? "Plan" has been interpreted to include a much smaller category of cases.[25] "Plan" refers to evidence which is shown to be part of one overall objective. Professor Imwinkelried provides as an example a series of murders which are connected by the fact that each victim is related to the accused. These prior murders, according to Professor Imwinkelried, are admissible against the accused because the murder victim named in the charge was also related to the accused and each of the victims stood to gain a share of an inheritance soon to be distributed. The prior killings demonstrate that the charged murder was committed to gain the overall objective of an undivided inheritance.[26] This strict definition of plan would probably not cover the facts in your case because the individual prior rapes do not present evidence of a larger objective.[27]

The strict application of this definition of plan would also exclude any other uncharged misconduct in a rape case that did not directly relate to the charged rape. For example, burglary or trespass offenses would be admissible if introduced to show that the accused had stalk-

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[21]*See* United States v. Carr, 18 M.J. 297, 301-02 (C.M.A. 1984); United States v. Elvine, 16 M.J. 14, 19 (C.M.A. 1983) (Everett, C.J., concurring).

[22]*Tassel*, 201 Cal. Rptr. at 573 n.7; State v. Harris, 677 P.2d 202, 205 (Wash. App. 1984); Imwinkelried, *supra* note 5, at § 5:30.

[23]Imwinkelried, *supra* note 5, at § 3:20.

[24]*Id.*

[25]An example of the application of the strict definition of plan is found in State v. Harris, 677 P.2d 202 (Wash. App. 1984), where the court refused to sanction the admission of two prior similar rapes which had occurred within two and one-half weeks of the charged rape. To meet the definition of plan, the court held that the government had to show "more than the doing of similar acts . . . as the object is not merely to negative an innocent intent, but to prove the existence of a definite project directed toward completion of the crime in question." *Id.* at 205. The two prior rapes did not "qualify as links in a chain forming a common design, scheme or plan. At most, they show[ed] only a propensity . . . . to commit rape [which] is explicitly prohibited . . . ." *Id.* at 206. *See also* Bigames v. State, 440 So. 2d 1231, 1233-34 (Ala. App. 1983); State v. Ashelman, 671 P.2d 901 (Ariz. 1983); People v. Fuller, 454 N.E.2d 334 (Ill. App. Ct. 1983); Commonwealth v. King, 441 N.E.2d 248 (Mass. 1982); People v. Dalton, 587 S.W.2d 644 (Mo. App. 1979); Henderson v. State, 212 N.W. 2d 481, 482-84 (Wis. 1984); Elliot v. State, 600 P.2d 1044, 1047 (Wyo. 1979) ("Our analysis of cases of other jurisdictions leads to the conclusion that in recent years . . . courts have sustained the admissibility of [uncharged sexual misconduct] in cases involving sexual offenses . . . to show . . . plan.").

[26]Imwinkelried, *supra* note 5, at § 3:20, at 50.

[27]*Id.* § 3:23.

ed the charged victim to learn her domestic routine and thereby calculate the best time to attack her, but such evidence relating to a different victim might be inadmissible.

Although you would be unable to comply with the strict definition of plan, some courts have been willing to expand the definition of plan when the crime is a sexual offense.[28] One fact pattern involving rape which could justify the application of the expanded definition of plan, arguably present in this case, is "date rape." "Date rape" has been so coined because the rapist befriends the victim and may even go out with her on a few dates before he suddenly changes his entire demeanor and obtains sexual gratification through force or threat of force. Such calculated behavior makes it extremely difficult to prosecute the accused since many victims refuse to report the offense for fear of not being believed by the police. This is the result planned by the "date rapist."

For example, in *Oliphant v. Koehler*,[29] the accused befriended a college coed and convinced her to go out with him for drinks and dancing. Later, while in search of a place to dance, the accused's demeanor changed and through threats he was able to rape the victim. The accused told the victim his name, returned her to the college, and then immediately went to the local police station and advised the police that a complaint of rape might come in because after engaging in sexual intercourse with his date, he told her she had offensive body odor and she became angry. Identity was not an issue because the accused gave the victim his name and admitted sexual intercourse to the police. The Michigan Supreme Court sanctioned the trial court's admission of similar rape incidents orchestrated in the same way by the accused, some of which had resulted in acquittals or dismissed complaints. Under these circumstances, the "logical relevancy of evidence tending to show a plan or scheme to make it appear as if consent was given is plain."[30]

Recently, the Court of Military Appeals also addressed an expanded definition of plan as a basis for admissibility under Rule 404(b). In *United States v. Brannan*,[31] the court considered the admission of uncharged misconduct in a drug distribution case. *Brannan* involved several charged and uncharged drug transactions that were separate and distinct from one another aside from the common thread of the accused's interest in obtaining periodic illegal profits. The court's review of the plan exception seems to accept the expanded definition. The court made no mention of the requirement that the prior acts all point to the attainment of one overall objective. In this case, however, the court reasoned that plan had not been demonstrated because there had been an insufficient showing of similarity, and concluded that the facts revealed "no more than a collection of disparate acts . . . only having marijuana as the single feature in common."[32] This conclusion suggests that the plan exception could have been used if the acts were substantially similar.

In the hypothetical rape case, the prior acts are virtually identical. Yet, seemingly, each rape is connected only by the accused's interest in obtaining periodic, unlawful sexual gratification. As the court's rationale in *Brannan* was based only on the lack of similarity of the charged and uncharged misconduct and not the narrow interpretation of plan, this possible basis for introducing evidence of the prior rapes is clearly open to the trial advocate. The peculiar facts suggesting a calculated plan to make it appear as if consent was given gives you a stronger basis for arguing plan as a theory of admissibility of the prior rapes.

Modus Operandi for Specific Rebuttal of Defense Theories

Two other bases for admitting these prior acts could arise during the cross-examination of the victim or the testimony of the accused, if he exercises that option. Again, you can assume that the accused will defend on the issue of consent.

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[28] *Id.* § 3:22.

[29] 250 N.W.2d 443 (Mich. 1976).

[30] *Id.* at 449.

[31] 18 M.J. 181 (C.M.A. 1984).

[32] *Id.* at 184.

What if the defense counsel's cross-examination of the victim implies that it is absurd that the accused would rape someone to whom he had given his name and unit? Add the accused's testimony to the same effect: "Who would be so stupid to rape a woman he was drinking with at the NCO club, and to whom he had given his name? If I was going to rape her, I wouldn't have let anyone see me with her. She's just bitter because I loved and left her." At this point, the government would have a basis for introducing the prior acts to rebut this specific defense assertion.[33]

Second, what if the accused testifies: "Listen, I've got all kinds of girl friends. I'm a lover, not a fighter. I don't need to beat up on a woman to have sex." Again, the defense may have opened the door to specific rebuttal of these assertions.

Nexus Requirements

You have now considered several bases for introducing the two prior acts of rape and you are confident you can establish by "plain, clear, and conclusive" evidence that the accused committed these acts. *United States v. Janis*[34] also requires the proponent of the uncharged misconduct to demonstrate a connection in "time, place, and circumstance" between it and the charged offense.[35] Even so, the court made it clear that the more striking the similarity between the charged and uncharged misconduct, the greater the allowance will be for a substantial break in time between incidents.[36] Thus, the court in *Janis* sustained the admission of an incident three years before the charged offense where the incident was substantially similar to the charged offense.[37]

In your case, assume the two prior rapes occurred twelve and nine months before the charged rape. Because they are so strikingly similar in place and circumstance (*e.g.*, single woman at a bar, abduction by car to a deserted street, choking as the force used), the time interval should not present a problem.

Balancing Prejudice Under Military Rule of Evidence 403

The final hurdle you face is withstanding a challenge under Rule 403. Even if you show that the prior rapes are relevant to a specific issue, they may still be excluded if the military judge determines that the potential for prejudice substantially outweighs the probative value of the prior rapes. There are two points to remember in this regard. First, if you have demonstrated their relevance to a specific issue, you have done your part. Second, the defense then has the burden of persuading the military judge to exclude the evidence because Rule 404(b) is a rule of inclusion. To prevent introduction of the evidence, the defense counsel must persuade the military judge of a *substantial* imbalance. If the defense counsel can show only that the potential for prejudice equals the probative value of the prior misconduct, Rule 403 will not bar introduction of the prior rapes.[38] You must not allow the defense or the military judge to return the defense burden of persuasion to you. The Eleventh Circuit recent-

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[33]*See* United States v. Link, 728 F.2d 1170 (8th Cir. 1984) (evidence of prior abductions admissible to rebut defense theoty that victim voluntarily got into the car); United States v. Williams, 17 M.J. 548 (A.C.M.R. 1983) (evidence of prior robbery admissible to rebut defense theory that appellant was mistakenly identified as the perpetrator rather than a passive observer); United States v. Dicupe, 14 M.J. 915 (A.F.C.M.R. 1982). *pet. granted*, 16 M.J. 102 (C.M.A. 1983) (prior loss of money admissible to rebut defense testimony that appellant was an excellent night manager); United States v. Ali, 12 M.J. 1018 (A.C.M.R. 1982) (prior acts of sodomy admissible to rebut defense theory that the victim was the instigator of the charged offense).

[34]1 M.J. 395 (C.M.A. 1976).

[35]*Id.* at 397.

[36]*Id. See People v. Tassel.*

[37]United States v. Brannan, 18 M.J. 181, 182 (C.M.A. 2984); *see also* United States v. Lambert, 17 M.J. 600, 603 (N.M.C.M.R. 1983). The Senate Judiciary Committee notes stated that "with respect to permissible uses for [uncharged misconduct], the trial judge may exclude it only on the basis of those considerations set forth in Rule 403 . . . ." Federal Rules Criminal Procedure Evidence, Appellate Procedure 209 (West Publishing Co. 1984).

[38]K. Redden & B. Saltzburg, Federal Rules of Evidence Manual 126 (3d. ed. 1982).

ly reiterated the proper view: "Exclusion of relevant evidence pursuant to Rule 403 is an extraordinary remedy to be used sparingly where the danger of unfair prejudice substantially outweighs the probative value."[39]

Unfortunately, several military opinions have improperly returned the burden to the government and have neglected to apply the word "substantially" in their analysis.[40] These courts have sustained the admission of uncharged misconduct only where the government demonstrated that the probative value outweighed the prejudicial effect.

Conclusion

Three considerations arising from the application of Mil. R. Evid. 403 should influence the way in which you present and when you present Mil. R. Evid. 404(b) evidence. First, unless your charged offense is a specific intent crime or some crime which clearly makes the misconduct relevant at the outset, you can improve your position by waiting for the defense presentation to know exactly upon what basis your uncharged misconduct evidence is relevant. Of course, the defense counsel's opening statement, voir dire, or cross-examination of your witnesses may forecast the area of relevancy of this evidence and provide a basis for determining whether it is admissible in your case-in-chief or in rebuttal.

Second, upon whatever basis you attempt to introduce Rule 404(b) evidence, use only that specific basis which justifies its admission. If there is more than one basis, use more than one, but do not offer additional bases which are not clearly justifiable. Where there is an improper basis, even among several proper bases, the potential for prejudice may result in reversal.[41]

Finally, upon whatever basis you persuade the military judge to admit uncharged misconduct evidence, make sure he or she gives a proper limiting instruction to the court members. This instruction should clearly advise the members that they may consider the evidence only for the limited purpose for which it is offered. In close cases, appellate courts have sustained admission because a limiting instruction was given and theoretically lessened any prejudice.[42]

In this case, because you are certain that identity will not be an issue, you can be fairly certain that consent will be. If you charged kidnapping as well as rape, you have a good basis to introduce the evidence during the case-in-chief upon the issue of intent. Certain other bases for admissibility could arise depending upon the defense presentation. Conceivably, you could also introduce the prior rapes on the basis of plan and in specific rebuttal to defense assertions. For tactical reasons, you may want to risk delaying your attempt to introduce the prior rapes until after the defense has rested. In this way, you would have several alternative bases upon which to argue for admissibility rather than merely specific intent for kidnapping or general intent for rape.

By saving your evidence, you may lull the accused into a false sense of security; he may then be less cautious about his testimony and make assertions which would justify admission on the basis of specific rebuttal.

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[39]United States v. Plotke, 725 F.2d 1303, 1308 (11th Cir. 1984).

[40]*See* United States v. Barus, 16 M.J. 624, 627 (A.F.C.M.R. 1983) ("if . . . the probative value *outweighs* the prejudicial effect, it is admissible . . .). United States v. Williams, 17 M.J. 548 (A.C.M.R. 1983) ("probative impact must outweigh its potential unfair prejudicial impact"); United States v. Dicupe, 14 M.J. 915, 917 (A.F.C.M.R. 1982), *petition granted*, 16 M.J. 102 (C.M.A. 1983) (probative value must outweigh the danger of unfair prejudice). The proper view was reinterated by the Court of Military Appeals in United States v. Brannan, 18 M.J. at 185 ("we must address whether the probative value . . . was substantially outweighed by the undue prejudicial tendencies of this evidence.").

[41]United States v. Shackleford, 738 F.2d 776, 780 (7th Cir. 1984). Upon whatever basis you attempt to introduce the misconduct, make the connection between the misconduct and your theory of admission clear: "for a trial counsel to merely allege that evidence of other crimes is being offered to show a plan or scheme is not enough; he must *establish* how the uncharged misconduct exhibited a *modus operandi* or plan." United States v. Logan, 18 M.J. 606, 608 (A.F.C.M.R. 1984).

[42]*See* United States v. Vilches, 17 M.J. 851 (N.M.C.M.R. 1984); United States v. Dicupe, 14 M.J. at 917; United States v. Ali, 12 M.J. 1018, 1021 (A.C.M.R. 1982).

The foregoing analysis should make it clear that admission of uncharged misconduct evidence requires careful consideration. Your focus should include the charging stage where alternative pleading may make Rule 404(b) evidence more easily admissible. Also, you must anticipate defense strategies which can foreclose the admissibility of uncharged misconduct evidence on a particular basis. For example, by stipulating to identity but raising an affirmative defense, the defense can foreclose admissibility on the basis of identity.[43] Finally, you must always be aware of protecting the admission from an appellate attack by articulating the exact basis or bases for admission and then insuring that the military judge instructs upon that basis or bases.

[43]Imwinkelried, *supra* note 5, at § 8:11.

Rule 302: Countering the Defense of Insanity

One of the thorniest problems facing trial counsel in a case involving an insanity defense is preparing for the cross-examination of the defense psychiatrist. Cross-examining witnesses, especially experts, is a formidable task under any circumstance. Under certain circumstances, Rule 302[1] makes the task of preparing and conducting the cross-examination of a defense psychiatrist even more formidable. Rule 302 creates a privilege for an accused which prevents direct or derivative use of any admissions made by the accused to a psychiatrist as the result of being ordered to submit to a mental examination. Two recent opinions by the Air Force Court of Military Review, soon to be published, highlight the pitfalls that face trial counsel in this area.

In *United States v. Littlehales*,[2] the Air Force Court of Military Review held that the interview of a psychiatrist did not, *per se*, amount to discovery of derivative evidence. The court held that it was proper for trial counsel to ask the psychiatrist whether "a claim of amnesia was inconsistent with his examination of the accused."[3] In *United States v. Bledsoe*,[4] the court dealt with the possible disqualification of a trial counsel who gained inadvertent access to "ostensibly privileged" statements from a psychiatrist who had interviewed the accused pursuant to an ordered mental evaluation. This was a case of first impression, and the court held that the trial counsel's breach of Rule 302 amounted to "harmless error."[5] Great emphasis was accorded trial counsel's assurances that he had not used the evidence in any way. Even though *Bledsoe* was affirmed, the court was given pause by the trial counsel's failure to disclose his knowledge until the rebuttal phase of the trial.[6]

While the *Bledsoe* opinion addressed other novel issues concerning Rule 302,[7] it avoided a substantial issue which still needs to be resolved: whether the predicate for a defense psychiatrist's opinion may be examined when it is based on statements made by an accused ordered to submit to a mental examination. This latter issue is solvable through logic and common sense and there is some case law which may be helpful in this regard. For example, in *United States v. Walker*,[8] the accused, charged

[1][hereinafter cited in text as Rule and in footnotes as Mil. R. Evid.]

[2]CM 24113 (A.F.C.M.R. 24 Sept. 1984).

[3]*Id.* slip. op. at 5.

[4]CM23926 (A.F.C.M.R. 26 Oct. 1984).

[5]*Id.* slip. op. at 6.

[6]*Id.* slip. op. at 7.

[7]*E.g.*, the trial counsel put on psychiatric evidence before the accused did.

[8]14 M.J. 824 (A.C.M.R. 1982).

with killing his wife and stepson, asserted the defense of insanity. During cross-examination of the defense psychiatrist, trial counsel was able to develop that the accused had told the psychiatrist that he had killed his wife following the discovery that she killed his stepson. The basis for the psychiatrist's opinion concerning the accused's mental status was the accused's version of the facts. Neither the trial nor the appellate court accepted this version and the accused was convicted of both murders. Had the basis for the psychiatric opinion not been fully explored, the result might well have been different. In the case of *United States v. Parker*,[9] the Court of Military Appeals held that no error was committed when trial counsel cross-examined the defense psychiatrist regarding admissions made to him by the accused following a compulsory mental examination. The court reasoned that the challenged questions by the trial counsel "arose in the context of attacking the credibility of the civilian psychiatrist by revealing the underlying basis for his opinion. . . ."[10] *Parker* was decided before Rule 302 became effective but still sheds considerable light into the murky corners of the dilemma "inherent in the 'tension' between the accused's right against self-incrimination and the prosecution's ability to have fair 'access to the only reliable means of ascertaining the truth concerning a defendant's sanity'."[11]

While the *Littlehales* and *Bledsoe* opinions illustrate the cautionary aspects of Rule 302, trial counsel must be alert to the implications of Rule 302. For example, Rule 302 does not create the same privileges for an accused who voluntarily submits to a mental examination.[12] Furthermore, Rule 302(b)(1) provides that "[t]here is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence."[13] Clearly, the privilege for the accused and the problems for the trial counsel arise when the accused is ordered to submit to a psychiatric examination. When the defense of insanity develops under this circumstance, trial counsel must be extremely careful to avoid the issue of the accused's privileged statements to the psychiatrist. However, this circumspect approch should not detract from a full evaluation of the basis for the psychiatrist's opinion at trial. There, your argument should be that the introduction of the opinion of an expert witness carries with it a *de facto* introduction of its basis, *i.e.*, the statements of the accused. The rationale of *United States v. Parker* should be of great value in assisting you with this argument.

[9]15 M.J. 146 (C.M.A. 1983)

[10]*Id.* at 153.

[11]*Id.* at 149.

[12]United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982).

[13]Mil. R. Evid. 302(b).

Child Abuse and Hearsay

The evidentiary law which has developed from the growing number of trials involving child abuse presents military prosecutors with some interesting and subtle issues. This development is best seen in the hearsay exceptions outlined in Military Rules of Evidence 803(2) (excited utterances) and 803(4) (statements made for purposes of medical diagnosis or treatment). Two recently decided cases illustrate this development.

In *United States v. White*,[14] the facts show that two sisters, ages seven and eleven, complained of being sexually molested by their mother's friend. The mother was told after the accused had a sexual encounter with the 7-year-old sister and threatened to kill her if she told her mother. One month earlier, the accused

[14]CM 444355 (A.C.M.R. 31 Oct. 1984).

had sexually assaulted the 11-year-old sister. Both girls revealed the details of the accused's sexual assaults. However, not until both girls began suffering mental distress did their mother take action. She took the girls to see a child psychologist and urged them to tell the psychologist about the accused's sexual assaults.[15] The accounts provided the psychologist became the subject of the psychologist's testimony at the accused's trial. The Army Court of Military Review, in a brief opinion, held that the testimony of the child psychologist was admissible under Military Rule of Evidence 803(4) because the victims' statements were made for purposes of medical diagnosis and treatment.

An interesting contrast to this holding is the holding by the Army Court of Military Review in *United States v. Lemere*[16] where a 3-year-old girl was the victim of a sexual assault. She was assaulted by the accused during the evening. The child's mother, suspecting that something unusual was occurring in the child's room, knocked on the door and discovered the accused in a nervous condition and the young child laying on bed with the upper portion of her panties showing above her slacks. The young child made no complaint at this time and went to sleep after the accused was escorted home. The next morning the mother asked the child what had taken place on the preceding evening. The child related that the accused had placed his mouth on her vagina. At trial, the mother was allowed, over objection, to testify regarding the child's statement made to her following the accused's sexual attack. The court held that the statement was not admissible as an excited utterance under Military Rule of Evidence 803(2) because "the statements were made some twelve to fourteen hours after the 'startling event'" and because the young child was not too young "to appreciate the nature of the (accused's) actions and to feel or exhibit the excitement or moral indignation normally expected as a result of such actions."[17]

Can the different results in these cases be summed up by concluding that statements made pursuant to medical diagnosis or treatment are more trustworthy, or is the *Lemere* case incorrect? Ultimately, in either case, the admissibility of these forms of hearsay depends upon whether the statements bear circumstantial guarantees of trustworthiness and reliability.

Under Military Rule of Evidence 803(4), statements made to medical personnel are presumed trustworthy and reliable because the declarant is thought to have a strong motive to be accurate and truthful in order to secure effective treatment. Under Rule 803(2), excited utterances are presumed to be trustworthy and reliable because it is thought that the lack of time between the event described and the statement precludes inaccurate reflection or fabrication and because the startling quality of the event is thought to evoke a more accurate statement. Do these presumptions hold true in cases involving young children?

In *People v. Ortega*,[18] the Colorado Supreme Court held that a statement by a 4-year-old boy to his mother and to a police officer one day following a sexual assault was admissible as an excited utterance. The court held that "latitude in temporal proximity in recognition of a child's tender years is acceptable as a recognition of the fact that children are not adept at reasoned reflection and concoction of fabricated stories."[19] In *Haggins v. Warden*,[20] the Sixth Circuit Court of Appeals held that physical factors such as shock, pain, and unconsciousness may prolong the period for which the risk of fabrication exists in viewing the admissibility of statements made after a startling event such as sexual assault.[21]

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[15]These accounts were furnished to the psychologist nearly six months after the alleged offenses.

[16]16 M.J. 682 (A.C.M.R. 1983).

[17]*Id.* at 687.

[18]672 P.2d 215 (Colo. App. 1983).

[19]*Id.* at 218.

[20]715 F.2d 1050 (6th Cir. 1983).

[21]*Id.* at 1058.

Not every prosecutor is fortunate enough to have a victim of child abuse diagnosed or treated by a child psychologist. Cases such as *Lemere* all too often typify the factual circumstances of child abuse cases. Yet, should the statements of a child to his or her parents complaining of a sexual attack, when delayed, be held to a lesser standard of trust and reliability than when made to medical personnel? Some commentaries suggest that the answer is no.[22]

The lesson taught by the *Ortega* and *Haggins* cases is that flexibility is required in determining the admissibility of statements of child victims to persons other than medical personnel. With sufficient corroborative evidence and a careful analysis by trial counsel, "unexcited" or "untimely" statements made by child abuse victims to parents, close relatives, or friends may be found sufficiently trustworthy and reliable to be held admissible under Rules 803(24) and 804(b)(5).

[22]J. Cotchett & A. Elkind, 22 Federal Courtroom Practice 145 (5th rev. June 1983).

The *Lemere* case was argued before the Court of Military Appeals during the second week of December 1984. The issue on appeal was whether the Army Court of Military Review erred when it held that the admission of the hearsay testimony of the victim's mother was harmless error. The Court of Military Appeals may well hold that the testimony of the mother was admissible and may clarify this important aspect of Rule 803(2) as it applies to child abuse cases. Consequently, until this issue is clarified by the Court of Military Appeals, trial counsel should concentrate their analysis of the admissibility of like evidence on the corroborative aspects of child-victim's statements and the inherent value those statements bear to the legal principles of trustworthiness and reliability which underlie Rule 803(2). In satisfying these criteria, trial counsel should be successful in gaining the admissibility of statements made by a child to his or her parents or other persons of close relation under Rules 803(24) or 804(b)(5).

Pleading Knowledge as an Element of Dereliction of Duty

Recently TCAP received a telephone call from a trial counsel who had pleaded the offense of dereliction of duty using the model specification set forth in paragraph 3-30 of the current Military Judges' Benchbook.[23] Although the trial counsel's specification followed the language of the model specification exactly, the military judge, *sua sponte*, dismissed it for failing to state an offense. In making this ruling, the judge relied upon the model specification contained in the 1984 Manual for Courts-Martial which requires that actual knowledge of the imposed duty to be pleaded.[24] Additionally, the

[23]The model specification reads as follows: In that _____ (at) (on board)_____, (from about _____ 19___ to about _____ 19___), was derelict in the performance of his/her duties in that he/she [(negligently) (willfully) failed to (inspect the report of fuel on board said ship for the twenty-four period ending on _____ (inspect the guard) (wind and compare all chronometers on board the said _____) as it was his/her duty to] [(negligently) (willfully) failed to (perform complete motor maintenance on _____ as it was his/her duty to do thereby permitting the water in the radiator to become seriously low) (inspect properly the engine on Aircraft No. _____ as it was his/her duty to do thereby clearing it for flight with a loose sparkplug) (keep properly the accounts of _____ as it was his/her duty to do by neglecting the verify the monthly bank balances for comparison with cash deposited) (_____)] [_____]. Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook, para. 3-29 (May 1982) [hereinafter cited as Benchbook].

[24]This sample specification states: In that _____, (personal jurisdiction data), (at/on board-location) (subject-matter jurisdiction data, if required), (on or about _____ 19___ to about _____ 19___), having knowledge of his/her duties, was derelict in the performance of those duties in that he/she (negligently (willfully) (by culpable inefficiency) failed to _____, as it was his/her duty to do. Manual for Courts-Martial, United States, 1984, Part IV, para. 16f(4) [hereafter cited as MCM, 1984].

military judge rejected the TCAP suggested argument that the allegations of both dereliction and willfulness clearly implied the element of actual knowledge of the duty.

Although the military judge's decision may seem to be aberration and unnecessarily formalistic, he cannot be faulted when he relies on the clear dictates of the 1984 MCM which has added the element of actual knowledge of the duty.[25] In adding this element, the Manual drafters relied on *United Staes v. Curtin*.[26] This reliance was probably misplaced. The *Curtin* decision dealt with the issue of whether one could be convicted under UCMJ art 92(2)[27] for disobedience of an order where the person did not have actual knowledge of the order. The court held he could not be so convicted and rejected the long-standing doctrine of "constructive knowledge"—*i.e.*, that the person should have known or had reasonable cause to know of the order.[28]

As to violations of general orders under UCMJ art 92(1) the court continued the doctrine of presumed knowledge enunciated earlier in *United States v. Stone*.[29] More significantly, the court did not address the issue of knowledge for dereliction of duty in violation of UCMJ art 92(3). Moreover, the court's requirement of proving actual knowledge of an order was based upon the rationale that to hold otherwise would allow someone to be convicted for *intentional* disobedience when the only misconduct was that of "*negligence* in failing to acquaint himself with the order."[30] This rationale obviously would not apply to the offense of dereliction of duty through neglect. For these reasons, neither this case's holding nor its rationale supports the requirement added by the 1984 Manual for Courts-Martial of pleading and proving the actual knowledge of the duty in a dereliction of duty case.

Similarly, the case of *United States v. Pratt*[31] does not support the proposition that actual knowledge of the duty is a required element. In *Pratt* the accused was the officer-in-charge of a Coast Guard life boat station and failed to rescue a boat in distress because he was too drunk to be made aware of the situation. The Coast Guard court held that he could not be convicted of dereliction of duty where he did not have actual knowledge of the facts giving rise to the duty to rescue. However, the court did not decide whether the accused had to have actual knowledge of the duty.

Granted, where the allegation is willful dereliction of duty, actual knowledge of the duty must be proven to prove the willfulness of the dereliction.[32] However, where the allegation is dereliction of duty through neglect or culpable inefficiency, then justice is not served by requiring proof of actual knowledge as opposed to constructive knowledge of the duty. Nonetheless, trial counsel must deal with the law as it is rather than as it should be, and take solace in the fact that actual knowledge can be proved by circumstantial evidence.[33]

The problem, however, with requiring actual knowledge to prove dereliction of duty through neglect is that all state of mind defenses apply. For example, assume the accused is a helicopter mechanic who is provided with written orders

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[25]*Compare* MCM, 1984, Part IV, para. 16c(3)(b) *with* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 171*c*.

[26]9 C.M.A. 427, 26 C.M.R. 207 (1958). *See* MCM, 1984, Part IV, para. 16 analysis.

[27]Uniform Code of Military Justice art. 92(2), 10 U.S.C. § 892(2) (1982) [hereinafter cited UCMJ].

[28]*See* 9 C.M.A. at 432, 26 C.M.R. at 212 (1958) for a detailed discussion of the doctrine of constructive knowledge and the rationale for its need in military practice. *See also* Judge Latimer's dissenting opinion in *Curtin*, 9 C.M.A. at 433, 26 CMR at 213.

[29]9 C.M.A. 191, 25 C.M.R. 453 (1957). The doctrine of presumed knowledge of a general order was extended to include the offense of dereliction of duty in United States v. Heyward, 17 M.J. 942, 945 n.3 (A.F.C.M.R. 1984).

[30]United States v. Curtin, 9 C.M.A. at 432, 26 C.M.R. at 212 [emphasis added].

[31]34 C.M.R. 731 (C.G.B.R. 1963).

[32]Indeed, the rationale of *Curtin* supports the proposition that actual knowledge of the duty is a required element of willful dereliction of duty.

[33]MCM, 1984, Part IV, para. 16c(3)(b).

to perform certain maintenance on helicopter number one. After proving your case of dereliction of duty, including the element of actual knowledge of the duty through proof of personal delivery of the written order to the accused, the accused then testifies that he misread the order and thought he was to perform maintenance on helicopter number two. Assume further that the defense surprises you by presenting corroborating witnesses who testify that appellant performed outstanding maintenance on helicopter two. This honest mistake, even though unreasonable, is a complete defense to the charge of dereliction of duty. Even worse, assume the accused in this example testifies that when he received the written order he was too drunk to read it and, consequently, failed to perform the maintenance. Again, voluntary intoxication would be a complete defense. Assume also that someone is killed in a helicopter crash as a result of appellant's failure to obtain actual knowledge of his duty to perform the maintenance.[34]

Trial counsel can avoid these problems by using the sample specifications set forth in the 1984 MCM. As to the problem of proving actual knowledge, trial counsel should consider additionally and alternatively charging dereliction of duty in the accused's failure to inform himself of his duty. If lack of knowledge of the duty by failing to inform oneself of the duty appears to be a defense, then, as a last resort,[35] trial counsel might want to charge dereliction of duty through neglect under UCMJ art 134(1), which specifically proscribes "all disorders and *neglects* to the prejudice of good order and discipline in the armed forces."[36]

Finally, trial counsel must be aware that the requirement to plead knowledge has been added by the 1984 Manual for Courts-Martial to the following offenses: disrespect, disobedience, and assault of a superior commissioned officer, warrant officer, and noncommissioned officer under UCMJ arts. 89, 90, 91, and 128;[37] assault upon a sentinel or lookout and upon a military policeman under UCMJ art 128;[38] and fleeing the scene of an accident under UCMJ art 134.[39] Trial counsel must also be prepared to confront the anomalous situation created by the new Manual where the doctrine of constructive knowledge has been eliminated and actual knowledge required as an element, but no requirement exists to plead actual knowledge under the sample specifications. These offenses include failure to repair under UCMJ art. 86,[40] and missing movement under UCMJ art. 87.[41] Additionally, UCMJ art 98, which has always required actual knowledge of a duty before someone could be convicted of the offense of unnecessary delay in disposing of the case, fails to require the pleading of actual knowledge of the duty.[42] Only under UCMJ art. 102, which proscribes the forcing of a safeguard, is the doctrine of constructive knowledge still recognized by the 1984 Manual.[43]

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[34]Under the facts of this example, however, the accused could be convicted of negligent homicide under Article 134, U.C.M.J.

[35]Therefore if trial counsel can charge failure to repair under UCMJ art. 86, negligent homicide under UCMJ art. 134, or any other offense, he or she should not resort to charging of dereliction of duty under UCMJ art. 134.

[36]UCMJ art. 134(a) [emphasis added]. Prior case law has held that the charging of dereliction of duty under UCMJ art. 134 was not fatal error. United States v. McLeod, 18 C.M.R. 814 (A.F.B.R. 1955). Indeed, under the old Articles of War, dereliction of duty was an offense charged under the general article. Moreover, Winthrop's Military Law and Precedent 726 (2d ed. 1920), specifically enumerates, under the general article, "[n]eglect to observe, or carelessness in observing, standing post orders." As a result, if this type of dereliction through neglect is no longer an offense under UCMJ art. 92(3) due to the requirement of actual knowledge, then its charging under UCMJ art. 134, would seem appropriate and should not be considered to be preempted by Article 92(3). *See generally* United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[37]MCM, 1984, Part IV, paras. 13f, 14f, 15f, and 54f(3) and (4).

[38]*Id.* at para. 54f(5) and (6).

[39]*Id.* at para. 82f.

[40]*Id.* at para. 10b(1)(b) and 10b(2)(b).

[41]*Id.* at para. 11c(5).

[42]*Id.* at para. 22b(2)(C).

[43]*Id.* at para. 26c(4).

Reader Note

Recently, a case involving assaults by a service member against his children tried at Fort Campbell, Kentucky, presented an issue involving the accused's right, as a parent, to administer reasonable and timely punishment to his children. Since the Military Judge's Benchbook provided no instruction regarding this issue, the military judge requested proposed instructions from both trial and defense counsel. After the proposed instructions were submitted, the military judge utilized, with some modifications the proposed instruction submitted by the trial counsel, Major Mike Millard. Following is the instruction given to the court members:

You are advised that the evidence in this case, with regard to Specifications 1, 2, 3, 4, and 5 of Charge I, alleging assaults, has raised the issue of a parent's right to discipline his children using corporal punishment. The right of parents to discipline their children is well-recognized by the law and is necessary to the good order of families and society. The law has, however, in regard for the safety of children, drawn bounds beyond which the parental right of discipline by physical punishment cannot be carried. A parent's unquestionable right to administer reasonable and timely punishment may not be used as a cloak for the exercise of malevolence or for the exhibition of unbridled passion, nor can the punishment go beyond what the child's reasonable welfare demands. The test to be followed in determining the limit allowed a parent in punishing his child is that he must act in good faith with parental affection, must not exceed the bounds of due moderation, must not be cruel or merciless, and that any act of punishment in excess of such limits is unlawful. Due moderation reflects that degree of physical discipline that a reasonably prudent parent might use under the same or similar circumstances. You should not find that any physical discipline Staff Sergeant _____ may have imposed on his children exceeds due moderation simply because you do not personally agree with the use of physical punishment as a disciplinary tool with children. Unless you are satisfied beyond a reasonable doubt that any physical discipline Staff Sergeant _____ may have used on his children was unreasonable and not within his legal rights as parent, Staff Sergeant _____ cannot be found guilty of assaulting his children for such physical acts of discipline. In deciding this issue, you should consider such factors as the age of the child, the physical and mental condition of the child, the child's understanding, and the manner and amount of the force applied by Staff Sergeant _____.

[TCAP NOTE: Colonel G. Russell, Chief Trial Judge, U.S. Army Judiciary, has informed TCAP that this instruction will be a subject of discussion at a judicial conference soon to be held. The issues surrounding this particular instruction are discussed in the following cases: United States v. Houghton, 31 C.M.R. 579 (A.F.B.R. 1961), aff'd, 13 C.M.A. 3, 32 C.M.R. 3 (1962); United States v. Schiefer, 28 C.M.R. 282 (A.B.R. 1958); United States v. Winkler, 5 M.J. 835 (A.C.M.R. 1978).].

THE
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Submitted by the United States Army Defense Appellate Division

Urinalysis Reexamined

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I. Introduction

Controversy continued to surround the Army's employment of widespread urine testing to identify users of marijuana and other illegal drugs.[1] Both in courts-martial and in the press,[2] questions have been raised about the accuracy of the urine tests and the technical competence of the testing laboratories. Much of this controversy stems from the report of a commission headed by Major General David W. Einsel, Deputy Assistant to the Secretary of Defense.[3] Submitted to the Surgeon General of the Army, the 140-page report evaluates the urine testing program and criticizes much of the operation of the testing laboratories. It contains considerable information of interest to defense counsel. This article will review some of that information and suggest ways in which it can be integrated into trial strategy.

II. Findings of the Einsel Commission

The Einsel Commission was formed in late 1983, after some court-martial acquittals had raised questions concerning the urine testing program. The commission was composed of experts on toxicology and drug-testing legal issues. It was given the task of reviewing laboratory procedures and resources, analyzing past urine test results to determine if they were legally sufficient for use in disciplinary actions, and formulating criteria for test results that met standards of legal sufficiency.[4] Commission members visited the four laboratories where Army urine specimens are tested: Fort Meade, Maryland; Brooks Air Base, Texas; Wiesbaden Air Base, Federal Republic of Germany; and Tripler Army Medical Center, Hawaii. The commission's report was released to the public in March 1984. Included in the report were numerous observations pertaining to specific laboratories. A legal addendum by Professor Edward Imwinkelreid, author of several works on evidence, discussed questions pertaining to the admissibility and sufficiency of urine test results. The Einsel report and Imwinkelreid's addendum are "must" reading for defense counsel fighting charges based on urinalysis.[5]

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[1]For a general discussion of the legal and scientific issues raised by urinalyais, *see* Maizel, *Urinalysis: Search and Seizure Aspects*, 14 The Advocate 402 (1982); Wiesner, *Urinalysis: Defense Approaches*, 15 The Advocate 114 (1983).

[2]*See, e.g.*, Roland, *97% Error Rate Found on Positive Urine Tests*, The Army Times, April 2, 1984, at 1, col. 2.

[3]D. Einsel, Review of Urinalysis Drug Testing Program (12 Dec. 1983).

[4]*Id.* App. A.

[5]Copies of the report can be obtained from: HQDA (DASG-AOR), Washington, D.C. 20310.

The Einsel Commission affirmed the basic soundness of Army urine testing. It concluded that a positive urine test, standing alone, is sufficient grounds for a conviction.[6] For the reasons discussed below, however, defense counsel should not concede this point. The commission, even while affirming the theory behind the urinalysis program, discovered gross deficiencies in the actual procedures. Personnel were untrained,[7] equipment was defective,[8] and quality-control was sometimes nonexistent.[9] The deficiencies were such that commission members, during their review of past test results, found many which had been reported as positive for marijuana but which did not, in fact, meet the commission's criteria of legal sufficiency. The most egregious case was found at Fort Meade, where over ninety percent of the test results were not legally or scientifically supportable.[10] These unsupportable results had nonetheless been the basis for disciplinary actions. The commission's findings broke down as follows:[11]

Laboratory	Period	Percentage of Test Results Unsupportable
Ft. Meade	Pre-November 1983	90+
Brooks AB	Post-October 1983	6
	June-October 1983	10
	January-June 1983	25
	Pre-January 1983	60
Wiesbaden AB	Post-June 1983	5
	April-June 1983	10-20
	Pre-April 1983	75
Tripler AMC	Post-August 1983	2
	July 1983	20
	May-June 1983	10

[6]D. Einsel, *supra* note 3, at 33.

[7]*See, e.g., id.* at 18. "[M]any personnel in a policy-making, technical inspecting and management role did not recognize 'good' from 'bad' or 'less desirable' [testing results]."

[8]*See, e.g., id.* App. J at 2. At Wiesbaden, commission members found the lab to be infested with mosquitoes. *Id.* at 26.

[9]*See, e.g., id.* at 26.

[10]*Id.* at 20.

[11]*Id.*

In the wake of these startling findings, some 100,000 "positive" urinalysis test results from the period before 1 November 1983 are being reviewed. Preliminary indications are that well over half of the results are legally unsupportable. Unjustly punished soldiers are being contacted and given the opportunity to apply for relief to the Army Board of Correction of Military Records. The board estimates that as many as 20,000 to 40,000 soldiers will apply for relief.[12]

III. Litigating Drug Prosecutions

Defense counsel should capitalize on the deficiencies unveiled by the Einsel Commission. Drug prosecutions arising from urinalysis results are in a class apart from other drug prosecutions. The government does not have corroborating evidence such as eyewitness testimony or seized marijuana to support its charge of drug abuse. Instead, service members are convicted and punished solely on the basis of esoteric test results. Urinalysis testing is seldom understood by attorneys, judges, and court members. In fact, they are seldom understood by the men and women who perform them.[13] Because court members cannot use everyday knowledge to evaluate urinalysis evidence, their verdict is wholly dependent upon expert testimony or upon simple faith in the accuracy of the test results.

This unusual situation calls for expert testimony on behalf of the accused.[14] Enlisting

[12]Message, HQDA, P 311930Z May 84, subject: Army/Air Force Drug Testing Program.

[13]*See, e.g.,* D. Einsel, *supra* note 3, at 22: At Fort Meade, "laboratory technicians confirmed that they did not know how to properly use [gas chromatography] and the [commission] was surprised that the civilian supervisor had been routinely signing reports which had no or inadequate standards evident, obvious coeluting peaks and very poor solvent fronts."

[14]The toxicology or pharmacology departments of a local university or hospital should be a good source for experts on urinalysis. If they prove unproductive, further assistance in locating an expert can be sought from The American Academy of Forensic Science, 225 So. Academy Blvd., Colorado Springs, CO 80910; or from The National Organization For the Reform of Marijuana Laws, 2001 S Street, N.W., Ste. 640, Washington, D.C. 20009.

an expert witness to critique particular test results or the urinalysis testing program in general can have a powerful impact at trial. Such an expert, particularly if affiliated with a university, may have better academic credentials than the government chemist.[15] He or she does not have to demolish the testing result to be effective. The defense expert can, demonstrate that honest scientists differ about the meaning of a test result simply by raising questions about test procedure or theory. This demonstration can undermine the court members' unquestioning faith in the scientific technique and create reasonable doubt about the guilt of the accused. Defense counsel must not lose sight of the fact that if the urine test is questionable, whether because of flawed procedure or dubious theory, the government literally has no case at all.

Even if an expert is not used, defense counsel should at least insure that the urine test documents are excluded from trial and force the government to call as witnesses the technicians and chemists who actually performed the test. Court members can have enormous confidence in the regularity of procedures upon receipt of a written report. Members should see and hear the faceless men and women upon whom their confidence is based.

To accomplish this, defense counsel should argue that given the history of pervasive laboratory incompetence revealed by the Army's own commission, urine test results do not fall under the hearsay exceptions of Military Rules of Evidence (Rule) 803(6) or 803(8). Rule 803(6) permits the admission of records produced by a "business" such as a laboratory during the course of its regular activity. The law presumes that such records will be trustworthy and accurate. The "business records" exception was created to allow their introduction at trial without the necessity of calling their maker.[16] The source of this presumption of exceptional trustworthiness is variously attributed to systematic checking, to actual business reliance on the records, or to regularity and continuity which produce habits of precision.[17] Forensic laboratory reports are specifically named by Rule 803(6) as admissible evidence.

Military Rule of Evidence 803(8) overlaps significantly with Rule 803(6), permitting the admission of records or reports prepared by a government agency and, like Rule 803(6), specifically naming forensic laboratory reports. The law presumes that public officials do their duties properly,[18] and the factors of reliability which justify Rule 803(6) also justify Rule 803(8). However, a record or report is not admissible if the source of information or other circumstances indicate a lack of trustworthiness.

Defense counsel should argue that the laboratories performing Army urinalysis testing do not deserve a presumption of regularity or trustworthiness. The laboratories were set up hastily as part of an Army-wide war on drug abuse. Laboratory personnel in fact, have not, done their duties properly or developed habits of precision. The presence of 20,000 to 40,000 unjustly punished soldiers is evidence of the government's inability to rely on records produced by the laboratories. Until the laboratories emerge from a second audit on the scale of Einsel's with a clean bill of health, there is no reason to presume that they have satisfied the trustworthiness and reliability thresholds of Rule 803(6) or (8).

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[15]In fact, much of the actual testing is conducted by GS-5/7/9 medical technologists. Information about the federal government's minimum credentials for employment as a chemist, pharmacologist, or medical technologist can be found in Handbook X-118, *Qualification Standards For Positions Under the General Schedule*, published by the Office of Personnel Management. The handbook can be found in public libraries.

[16]United States v. Strangstalien, 7 M.J. 225, 230 (C.M.A. 1979).

[17]McCormick's Handbook of the Law of Evidence 306 (E. Clearly 2d ed. 1972).

[18]Wong Wing Fee v. McGrath, 196 F.2d 120 (9th Cir. 1952); Law of Evidence, *supra* note 17, at § 315.

IV. The Basic Scientific Principles

Defense counsel must familiarize themselves with the basic principles of urine testing to sharpen their cross-examination of laboratory personnel. It will also help establish rapport with the defense expert, if used, and supply ideas for incorporating that expert's testimony into overall trial strategy.

Delta-nine-tetrahydracannabinol (THC) is the principal psychoactive ingredient in marijuana. The urine laboratories used by the Army utilize a two-step testing process to detect RHC metabolites in urine specimens. First, a radioimmunoassay (RIA) test is used to screen out negative specimens and identify presumptive positive specimens. Next, a gas-liquid chromatography (GLC) procedure is used to re-test the specimens identified by RIA as positive.[19] The Army claims that the combination of these tests provides an adequate identification of THC. But neither test—RIA or GLC—is specific for a quality unique to RHC, that is, neither identifies the specific molecular structure of THC. Both leave open the possibility of "false positives," which means there is a possibility that a "clean" urine specimen may be mistakenly labelled as positive for THC.

An immunoassay is a test based on immunological principles. It uses antibodies to measure a chemical substance such as a drug or toxin, or in this case THC. In RIA, an antibody is mixed into the unknown urine along with a radioactively-labelled sample of the drug being tested. The antibody binds with the drug and, together with any bound drug, is precipitated from the solution. The antibody-free solution is then measured for radioactivity. If another drug is present in the urine, it must compete with the labelled drug for the limited amount of antibody. Some of the labelled drug will therefore be left behind. This labelled drug shows up when the solution is measured for radioactivity. A high level of drug concentration in the original urine produces a high measure of radioactivity.[20] Urine specimens which indicate a THC metabolite level of 100 nanograms per milliliter (ng/ml) or more are presumptively identified as positive and forwarded for re-testing by GLC.[21]

The re-testing of RIA results is absolutely crucial. The presence in urine of bacterial growth, salt compounds, or other impurities can artificially inflate an RIA reading.[22] Moreover, antibodies usually cross-react with drugs similar in structure to the test substance. Cross-reactivity means that other substances will show up as if they were THC, thus causing a false positive.[23] The percentage of false positives produced by an immunoassay can be quite large. For example, Dr. John Whiting and Colonel William Manders of the Armed Forces Institute of Pathology, during their work to lay scientific foundations for the Army urinalysis program, used an enzyme-multiplied immunoassay test (EMIT) to screen urine specimens and identify presumptive positives. EMIT is based on the same principle as RIA, but uses a drug labelled with an enzyme instead of radioactivity. Some twenty-seven specimens were identified by EMIT as containing a THC level of over 75 ng/ml, which made the specimens positive for the purposes of Whiting and Manders' experiment. These twenty-seven specimens were then re-tested by mass-spectroscopy. Mass spectroscopy is a highly sensitive technique and specific for different substances; it is the method of choice for detecting drugs in body fluids.[24] Of the twenty-seven urine specimens

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[19]D. Einsel, *supra* note 3, at Tab C.

[20]2 M. Houts, R. Baselt & R. Cravey, Courtroom Toxicology Ch. 30 (1983).

[21]D. Einsel, *supra* note 3, at Tab C.

[22]Interview with Colonel William Manders, Chief of Clinical Laboratory Services, Travis Air Force Base Hospital (23 July 1984).

[23]M. Houts, *supra* note 20, at § 30.09.

[24]Whiting & Manders, *Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography*, 6 J. Analytical Toxicology 49 (Jan./Feb. 1982). Mass-spectroscopy is not universally used for urinalysis because of its high cost and need for specially trained operators.

identified as positive by EMIT, mass-spectroscopy confirmed only twenty-two.[25] This means that five of the twenty-seven specimens, or eighteen percent, were false positives. As Whiting and Manders wrote, "[A] major disadvantage of the immunological assays . . . is their lack of specificity or susceptibility to cross-reaction with endogenous or non-cannabinoid-related urine compounds, which may yield false-positive results."[26] This remains the scientific community's assessment of RIA.[27] Seen in this light, the Einsel Commission's suggestion that RIA cannot produce "any significant number of false positive results"[28] should be viewed with skepticism. Indeed, the legal addendum to the Einsel report complains of RIA's non-specificity and stresses the great need for confirmation of any RIA result.[29] For this reason, gas-liquid chromatography (GLC) is used to re-test all RIA positives.

GLC, however, cannot truly confirm another test. Unlike techniques such as mass-spectroscopy, GLC does not reach down to the molecular level and is not specific for various substances. GLC, like RIA, can produce false positive results. GLC is essentially a technique for separating mixtures into pure components. The urine specimen is mixed with a compound that will serve as an internal standard. It then undergoes a process to extract the internal standard and the most common THC metabolite, 11-nor-delta-9-THC-carboxylic acid. When this process is completed, the extract is dissolved in liquid, vaporized, then injected along with a carrier gas into the main feature of GLC, the column system. The columns, which can vary in length and diameter, are packed with solid, inert material. The various components of the vapor separate as they pass through the column system at different rates and are burned as they emerge ("elute") from the system. As a component is burned, it produces an electrical current which appears as a peak on a chart recorder. This recorder draws a figure known as a chromatogram.[30]

The components are tentatively identified by measuring their retention time, this is, the time it took them to pass through the column system. There should be two significant peaks on the chromatogram, one at the retention time of the internal standard and one at the retention time of the expected metabolite. The internal standard is used to calibrate the test. This is possible because the precise identity and quantity of the internal standard is known beforehand. Its peak can therefore serve as a marker. The actual amount of metabolite can be obtained by relating the metabolite peak to the internal standard peak.[31] Urine specimens indicating an 11-nor-delta-9-THC-carboxylic acid metabolite level of 75 ng/ml or more are regarded as confirmed by the Army.[32]

Defense counsel should realize that GLC is a method of separation, not identification. GLC is not structure specific for the substance being tested and does not yield information unique for a given drug. "The number of chemical compounds is so large that it is possible that many compounds will have the same retention time."[33] Under certain temperature conditions, for example, propoxyphrene (Darvon) and amitriptyline (Flavil) will emerge from the column system together at 7.7 minutes. A test for

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[25]*Id.* at 51.

[26]*Id.* at 49.

[27]Interview with Professor Pete Fullerton, Department of Pharmacy, Oregon State University (3 July 1984). The U.S. District Court of New Jersey recently ordered the New Jersey Department of Corrections not to use EMIT test results in prison disciplinary proceedings unless they had been confirmed by mass-spectroscopy. Denike v. Fauver, Civil Action No. 83-2737 (DRD).

[28]D. Einsel, *supra* note 3, at 5.

[29]*Id.* Legal Addendum at 16.

[30]M. Houts, *supra* note 20; *see also* D. Einsel, *supra* note 3, at 6.

[31]M. Houts, *supra* note 20, at § 22.06(3).

[32]The confirmation level cut-off is a service decision, and the level varies according to the military service organization.

[33]D. Einsel, *supra* note 3, Legal Addendum at 16.

propoxyphrene can therefore produce a false positive if amitriptyline is present in the specimen.[34] Furthermore, retention times that are not identical can nevertheless be so similar that the chemist performing the analysis errs. It is also possible for an interfering substance to be produced by contaminants or by reactions between solvents, a plastic test-tube, or other materials used. Interference can produce a peak which is confused with that of a drug with a similar retention time.[35] For these reasons, one writer asserts that "Gas chromatography has been described as one of the quickest ways to getting the wrong answer in qualitative analysis. . . . To state the conclusions straight away, we may say without qualification that retention times . . . are not proof of identification unless they are supported by other evidence."[36]

V. Evidentiary Challenges to Urinalysis Procedures

Positive RIA/GLC results are vulnerable to challenge from at least two directions. First, the tests must have been properly conducted. Deviation from correct scientific procedure can render either test forensically meaningless. Second, even flawless RIA/GLC tests are not specific for THC. This lack of specificity, coupled with the absence of other corroborating evidence, leaves the potential for reasonable doubt as to whether the accused actually used marijuana.

A. Scrutinizing the Test Procedures

Defense experts are obviously a good source of information about test procedures. They can point out problems with laboratory techniques and suggest avenues of cross-examination. The Einsel report is also a good source of information about procedures, as well as a virtual encyclopedia of things that can go wrong in a laboratory. Finally, many textbooks on law and forensic science provide checklists of technical factors for attorneys to consider.[37]

For RIA, defense counsel should, at a minimum, verify that positive standards and negative controls were run on the day of the test. Positive standards, which should contain different concentrations of RHC, are used to substantiate the 100 ng/ml cut-off limit. This cut-off data is hand-calculated in some labs and might need double-checking for error.[38] The raw reading of the negative control should be compared with that of the "positive" specimen; if the difference between them is small, something went haywire with the test. Compliance with the Einsel Commission's long list of RIA requirements should be verified.[39]

For GLC, defense counsel should insure that the chromatograms are of high quality. The Einsel report contains good information about chromatography standards and the interpretation of chromatograms.[40] Positive standards and negative controls should be run with each series of tests to guarantee that the instrument is functioning properly. Peaks, to be unambiguous, should stand out clearly from the base of the curve. There should be no interfering peaks or "shoulders" at the retention time of interest as these might indicate the presence of contaminants. Retention times should not vary significantly (*e.g.*, no more than ± 5 seconds) from specimen to specimen within a series.[41] Moreover, sensitivity samples should be run at the beginning and end of each series and show little variation.[42] Any sort of gradual change

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[34]M. Houts, *supra* note 20, at § 22.09.

[35]*Id.* § 22.09.

[36]D. Ambrose, Gas Chromatography 235 (1971).

[37]*See, e.g.*, D. Bernheim, Defense of Narcotics Cases (1983); M. Houts, R. Baselt & R. Cravey, Courtroom Toxicology (1983); F. Bailey & H. Rothblatt, Handling Narcotic & Drug Cases (1972).

[38]D. Einsel, *supra* note 3, at 4, 21, and 27.

[39]*Id.* Tab C.

[40]*Id.* Appendix I.

[41]*Id.* Appendix J.

[42]*Id.* Tab C.

within a series might indicate the need to change or repack the column. Such indicators of defective equipment can call the entire test into question.

The laboratories should be challenged to substantiate their total testing programs. The Einsel Commission, during its inspection of the laboratories, found quality control to be weak or almost non-existent.[43] Defense counsel should not leave this area unexamined. One good index of quality control is the percentage of daily RIA/GLC results that are re-tested by mass-spectroscopy. This figure should be no less than ten percent,[44] and the confirmation rate should be virtually perfect. Moreover, government experts called from the laboratories should also be asked to document the ability of their personnel to operate equipment and reproduce test results with a high degree of accuracy.[45] Finally, defense counsel should inquire whether the laboratories have undergone the annual inspection and certification that was recommended by the Einsel Commission. The certifying body should be the College of American Pathology or some other extramilitary group.[46]

B. Challenging the Test's Lack of Specificity

The reforms recommended by the Einsel Commission will slowly take effect. As they do, fewer test results will be picked apart because of faulty laboratory procedures. However, additional grounds for attack will remain. A case can be made that even perfectly performed RIA/GLC tests, because of their non-specificity, do not prove the presence of THC.

To make such a case, defense counsel should focus on the two tests considered separately, rather than on the two-step testing process as a whole. The chance of a non-THC compound yielding a false positive on both RIA and GLC seems, in the light of current knowledge, to be fairly small.[47] Examination of 2,000 randomly-selected urine specimens at the Armed Forces Institute of Pathology failed to turn up any that were positive on RIA/GLC yet negative on mass-spectroscopy, which suggest that no body secretion can fool both RIA and GLC and pass as THC.[48] This data base, however, is not enormous and the scientific record is always open to revision; but because RIA and GLC are based on different principles, they evidently have considerable clinical value when used in combination and properly performed.

In spite of their value as a diagnostic tool, the government is not putting the tests to clinical use. Different considerations apply when proof of guilt to a criminal offense is based upon test results standing alone. Accordingly, defense counsel should raise doubts about the test's legal sufficiency. Neither test is specific for THC: immunological reactions and chromatographic retention times do not reflect qualities that are unique to a compound. RIA and GLC cannot foreclose the possibility of a false positive result when the standard is proof beyond a reasonable doubt.

Defense questioning should amplify this theme of non-specificity. For example, government chemists explaining RIA should be forced to address the subject of cross-reactivity. They should be asked to name the factors that can in-

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[43]*See supra* note 9.

[44]D. Einsel, *supra* note 3, at 28; Legal Addendum at 19.

[45]D. Einsel, *supra* note 3, at 17. At Fort Meade, commission members "observed that there is no evident control over repeatability." They suggested that "each operator be immediately tasked to pass a training certification as to reproducibility by demonstrating at least ±10-15% accuracy." *Id.* Appendix C at 2.

[46]*Id.* at 16.

[47]Interview with Professor Pete Fullerton (13 July 1984). Professor Fullerton's assessment is based on the Army use of a double-antibody RIA test. An RIA/GLC procedure that used a single body RIA test would be much less accurate. Moreover, Professor Fullerton emphasizes that any type of RIA/GLC procedure would be inadequate without daily quality control tests using a high specific test such as mass-spectroscopy.

[48]Interview with Eric Jarvi, graduate student in pharmacy, Oregon State University, formerly of Armed Forces Institute of Pathology (13 July 1984).

flate an RIA test result and to describe RIA's reputation in the scientific community as an identifier of THC. They should definitely give an opinion about whether or not immunoassays can produce false positive results. Similarly, government chemists explaining GLC on cross-examination should discuss retention times and describe how retention times can be the same for different compounds. They should be asked squarely whether or not GLC can positively identify a substance. Defense questioning should clarify the nature of RIA and GLC and dispel the aura of mystery and infallibility that surrounds anything labelled "scientific." It is important for court members to see that RIA and GLC both provide likelihoods, not certitudes, and that likelihoods combined to not add up to a certitude.

Defense experts can testify that the number of chemical compounds is huge and that many compounds could theoretically produce false positives under both RIA and GLC.[49] In fact, the possibility of false positives is found within the Einsel report itself. A batch of 816 urine samples reported as positive by Fort Meade was re-tested by a civilian lab using mass spectroscopy. Only 812 were confirmed,[50] a false positive rate of .49%. This rate is perhaps negligible in the context of hundreds of tests. However, in the context of hundreds of thousands of tests, which is the context of the Army urine testing program, it translates into a significant number of false positives representing punitive actions taken against innocent soldiers.[51]

Civilian courts recognize the possibility of false positive test results. Although punishment based on uncorroborated urine tests is almost unheard of outside of military and correctional systems, there are signs of growing judicial skepticism about non-specific drug identification tests. For example, in *State v. Wind*,[52] a substance was seized by police and subjected to Duquenois-Levine and chromatography tests. The police chemist concluded that the substance was marijuana. However, the Wisconsin Supreme Court took notice of the fact that neither test was specific. It wrote that "the prosecution has the burden of proving beyond a reasonable doubt that the substance is marijuana . . . . An expert opinion that the substance is marijuana even if the test used is not exclusive [*i.e.*, not specific] is probative and admissible, *but standing alone* is not sufficient to meet the burden of proving the identity of the substance beyond a reasonable doubt."[53] An even stronger example exists in *State v. Vail*[54] where the unknown substance was subjected to a veritable battery of identification tests: Valtox, microscopic examination, Duquenois-Levine, and chromatography. All were positive for marijuana. Yet the Minnesota Supreme Court declined to overturn the conclusion of the trial judge that this non-specific evidence, standing alone, was insufficient. As the trial judge noted in his approving summary of defendant's argument, "[T]he combination of screening tests in this particular case, and the combination of screening tests in general, does not afford the kind of identification that is needed in the criminal law and does not amount to proof beyond doubt that the substance is . . . the controlled substance."[55] Further examples of judicial skepticism are revealed in *Curtis v. State*[56] (non-specific Marquis reagent test for heroin) and *Moore v. United States*[57] (non-specific Duquenois-Levine, microscopic, and chromatography tests for marijuana). In fact, the growing use of mass-spectroscopic evidence

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[49]D. Einsel, *supra* note 3, Legal Addendum at 21.

[50]*Id.* C at 3.

[51]The Army plans to test 800,000 urine specimens per year by 1985. Roland, *More Sensitive Drug-Testing Devices Ordered*, The Army Times, July 16, 1984, at 1, col. 1.

[52]208 N.W.2d (Wis. 1978).

[53]*Id.* at 361 [Emphasis added].

[54]274 N.W.2d (Minn. 1979).

[55]*Id.* at 133.

[56]548 S.W.2d 57 (Tex. Crim. App. 1977).

[57]374 A.2d 299 (D.C. 1977).

in federal drug prosecutions is probably a response to this new judicial attitude.[58]

Whether military courts will also adopt this attitude remains to be seen. In *United States v. Collins*,[59] microscopic and chemical tests that were positive for marijuana but not "100% conclusive" were held to be insufficient proof that the unknown substance was marijuana. Similarly, in *United States v. LaFontant*,[60] the results of a Becton-Dickinson test for LSD were ruled inadmissible because of the test's nonspecificity and unreliability. However, both courts were influenced by the drug testers' lack of expertise as well as the drug test's lack of specificity. Their decisions are poor predictors of future judicial behavior.

The Korean War-era urinalysis cases are equally inconclusive. The Army Board of Review held in *United States v. Ellibee*[61] that non-specific urine tests for morphine could not be "the *sole* basis for conviction of the accused." Yet less than a year later, the Court of Military Appeals distinguished *Ellibee* on narrow grounds and held in *United States v. Ford*[62] that urine tests virtually identical to those in *Ellibee* were, in fact, sufficient for conviction. The issue was never totally resolved[63] and soon died out. It has yet to be squarely faced again.

The Navy-Marine Corps Court of Military Review's recent skeptical reaction to urine testing in general can be found in *United States v. Hillman*.[64] Referring to improprieties in the urine collection procedure, the court stressed that "when the government proceeds on a charge alleging drug usage based solely upon evidence obtained by non-consensual methods a special scrutiny of that evidence . . . must be made."[65] The concurring opinion went on to add that "the stakes are too high for the service member charged with drug use when the only government evidence is an analysis report from a laboratory ranged against an accused's naked assertion that he or she is not a user of drugs. If the government cannot comply strictly with its own comprehensive and necessary procedures, then its 'evidence' should be forfeited."[66] This is an admirable and just attitude. Defense counsel must work to carry it one step further and see that it is applied to the government's every use of urine tests which, because of their nonspecificity, leave open the possibility of false positive results and consequent unjust punishment.

VI. The Advent of Mass-Spectroscopy

The Army, partially because of the considerations outlined above, is changing its urinalysis program. It is predicted that by October 1985, all urine specimens singled out by RIA will be re-tested by mass-spectroscopy, not GLC.[67] Mass-spectroscopy, unlike GLC, is a true confirmation test. It uses a process of ionization and separation to identify molecules on the basis of their mass; if performed properly, it is highly specific.[68] Mass-spectroscopy rules out issues about theoretical false positive results.

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[58]Einsel, *supra* note 3, Legal Addendum at 22.

[59]17 C.M.R. 433 (A.B.R. 1954).

[60]12 M.J. 904 (N.M.C.M.R. 1981); *aff'd*, 16 M.J. 236 (C.M.A. 1983).

[61]13 C.M.R. 416 (A.B.R. 1953).

[62]4 C.M.A. 611, 16 C.M.R. 185 (1954).

[63]*See, e.g.*, United States v. Taylor, 17 C.M.R. 753 (A.B.R. 1954); United States v. Yates, 16 C.M.R. 629 (A.B.R. 1954). The government's interpretation of precedent is that "military courts have based convictions for use of possession of drugs on extractions from the body." Raezer, *Prosecution of Drug Offenders Based on the Newly Developed Urine Test* (Part I), 1 Trial Counsel Forum, Sept. 1982, at 1. However, none of these cases, with the exceptions of *Ford* and *Ellibee*, which contradict each other involved the use of uncorroborated laboratory evidence.

[64]18 M.J. 638 (N.M.C.M.R. 1984).

[65]*Id.* at 640.

[66]*Id.* at 640 (May, J. concurring).

[67]Roland, *More Sensitive Drug-Testing Devices Ordered*, The Army Times, July 16, 1984, at 1, col. 1.

[68]M. Houts, *supra* note 20, at ch. 23.

However, there are at least two potential problems in the proposed program. First, mass-spectroscopy is a complicated process that requires a highly trained operator for accurate results.[69] The chances of mishap are high. The Einsel Commission, during its inspection of the laboratories, found the same deficiencies in the limited mass-spectroscopy programs as it did in the larger RIA and GLC programs. At Wiesbaden, "[n]o personnel [were] properly trained" in mass-spectroscopy;[70] while at Tripler, the mass-spectroscopy program was "handicapped" by the absence of proper equipment.[71] Inevitably, the laboratories' capacity for mass-spectroscopy will be strained by the impact of hundreds of thousands of new urine specimens. The technical problems that plagued RIA/GLC under similar circumstances may well be repeated with mass-spectroscopy. Defense counsel must scrutinize mass-spectroscopy test results for signs of flawed test procedure. Never will a defense expert come in handier.

The second potential deficiency in the new mass-spectroscopy program arises from the THC confirmation level. Under the new program, RIA will continue to identify all specimens with THC concentrations of 100 ng/ml or more as presumptive positives. Mass-spectroscopy, however, will now confirm as positive all specimens with THC concentrations of *20* ng/ml or more.[72] A confirmation level this low raises the possibility of "passive inhalation," *i.e.*, the possibility that THC was in the accused's urine because he or she passively inhaled someone else's marijuana smoke, not because he or she smoked a marijuana cigarette.[73] There is evidence to believe that passive inhalation can produce THC concentrations of at least 20 ng/ml.[74] Moreover, the RIA cut-off level, though high, cannot be relied upon to screen out specimens with passively inhaled THC because RIA can mismeasure THC or cross-react with non-THC compounds.

VII. Conclusion

Drug charges stemming from uncorroborated urine tests will often, by their very nature, be decided on the basis of technical disputes about test procedure and scientific adequacy. Defense counsel, to give fully effective representation, need to be acquainted with some of the technical aspects of urine testing. This article was intended to assist in that endeavor by reviewing the information contained in the Einsel report and by suggesting means with which to counter the appearance of trustworthiness of government evidence. Urinalysis test results should be routinely challenged on the basis of the laboratories' history of unreliability. Additionally, the scientific adequacy of the RIA/GLC screening tests should be disputed through the use of expert testimony. Neither the tests nor the qualifications of the technicians performing the tests should be accepted at face value. If the credibility of either is seriously called into question, the prosecution should fail due to the absence of corroborating evidence.

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[69] *Id.* § 23.08.

[70] D. Einsel, *supra* note 3.

[71] *Id.* at 24.

[72] Memorandum, Assistant Secretary of Defense [Health Affairs] 18 Oct. 1982.

[73] For a good review of the literature on passive inhalation, *see* Wiesner, *Urinalysis: Defense Approaches*, 15 *The Advocate* 114 (1983).

[74] *Id.* at 125. Researchers at the Armed Forces Institute of Pathology who developed the Army urinalysis tests regarded 50 ng/ml as the minimum cut-off level that would guard against passive inhalation. Interview with Colonel William Manders, Chief of Pathology Lab, Travis Air Force Base Hospital (23 July 1984).

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Former Spouses' Act ID Card Procedures

Pending a revision which will be issued by AR 640-3, Identification Cards, a message has been issued by DAAG-OPS on procedures for issuing identification cards to qualifying former spouses of service-members or retirees. Legal assistance officers continue to receive frequent inquiries about this subject; therefore, the message (date/time group is 192030Z Dec 84) is summarized below:

Effective 1 Jan 85, the Uniformed Services Identification and Privilege Card DD Form 1173 shall be issued to those unremarried former spouses (URFS) who qualify in the following categories:

A. The 20/20/20 URFS: An URFS of a member or former member, married to the member or former member for a period of at least 20 years, during which period the member or former member performed at least 20 years of service that is creditable in determining the member's or former member's eligibility for retired or retainer pay, or equivalent pay, and the dependents of such former spouse. Date of divorce for the 20/20/20 is no longer a criteria.

B. The 20/20/15 URFS: Same as A above except that the period of overlap of marriage and the member's creditable service was at least 15 years but less than 20 years, and the final decree of divorce, dissolution, or annulment of the marriage was before April 1, 1985. If the marriage terminated on or after April 1, 1985, then entitlements shall exist for 2 years after the divorce, dissolution or annulment.

Benefits and Privileges Authorized:

A. 20/20/20 URFS: Authorized full military medical care including CHAMPUS, if not enrolled in an employer-sponsored health plan, commissary, exchange unlimited and theater.

B. 20/20/15 URFS divorced prior to 1 Apr 85: Authorized full military medical care including CHAMPUS, if not enrolled in an employer-sponsored health plan. No other benefits/privileges are to be extended.

C. 20/20/15 URFS divorced on or after 1 Apr 85: Same as B above except entitlement is limited to two years from date of divorce, dissolution or annulment.

Table B-2, Page 49, of AR 640-3 has been adjusted to read as follows, pending update change (The abbreviation "MC" means medical call in civilian facilities, "MS" means medical care in uniformed service facilities, "C" means commissary, "T" theater, and "E" exchange):

1. Unremarried Former Spouse of a member or former member, married to the member or former member for a period of at least 20 years, during which period the member or former member performed at least 20 years of service that is creditable in determining the member's or former member's eligibility for retired or retainer pay, or equivalent pay, and the dependents of such former spouse described below (Pub Law 97-252). [*NOTE: The numbers in the table refer to footnotes following Table B-2.*]

	MC	MS	C	T	E
Former Spouse:					
Unremarried, under 65	1	1	YES	YES	YES
Unremarried, over 65	1&2	1	YES	YES	YES
Children, unmarried, under 21:					
Legitimate, adopted before age 21, stepchild	YES	YES	3	4	4
Illegitimate child of male member:					
Paternity judicially determined	YES	YES	3	4	4
Paternity not judicially determined	3	3	3	4	4
Illegitimate child of record of female member	YES	YES	3	4	4
Illegitimate child of spouse of member	3	3	3	4	4
Ward	NO	NO	3	4	4

Children, unmarried, 21 & over	4&5	4&5	4&5	4&5	4&5
(If entitled above)					
Father, mother, father-in-law, mother-in-law, stepparent, parent by adoption	NO	3	3	4	4

2. Unremarried Former Spouse dsecribed in 1 above, except that the period of overlap of marriage and the member's creditable service was at least 15 years but less than 20 yars, and the final decree of divorce, dissolution, or annulment of the marriage was before April 1, 1985. If the marriage terminated on or after April 1, 1985, then entitlements shall exist for 2 years after the divorce, dissolution or annulment (Public Law 98-525).

	MC	MS	C	T	E
Former Spouse:					
Unremarried, under 65	1	1	NO	NO	NO
Unremarried, over 65	1&2	1	NO	NO	NO

To verify eligibility and issue ID card, the following steps are required:

A. URFS of active or retired Army member may only apply at an Army activity authorized to verify/issue ID cards (para 3-2, page 7, AR 640-3).

B. Initiate DD Form 1172 with sponsor information in section I and URFS information in section II. Section V, item 58 should be checked "divorced/annulled" and item 58A checked and completed. In item 60, verifying official will identify documents reviewed which establish URFS eligibility. Date of divorce decree will be noted. URFS as applicant will date and sign items 61 and 62 respectively.

C. Documents required for verification: Para 3-15B(3), page 11, AR 640-3 has been changed to read ". . . . marriage certificate; divorce dissolution, or annulment decree; statement of service reflecting 20 years of creditable service with 15 plus years occurring during the marital period; statement from former spouse confirming unremarried marital status and whether or not he/she participates in an employer-sponsored health care plan."

D. The URFS will not be required to obtain the statement of service independently. When the URFS does not have such a document the verifying official (VO) will take the following action:

1. For active duty member: VO will request a statement from member's servicing MILPO attesting to member's creditable service:

A review of the personnel file of (Rank/Name/SSN) reveals that entry on active duty date was (enter BASD) and has been continuous to this date with exception of the following breaks in service (from/to dates as appropriate). The total service that would be creditable in determining this member's retired pay is (years/months/days).

2. For retired or deceased member: VO will request a statement of service through RCPAC. A request format sample is as follows:

Commander

US Army Reserve Components Personnel and Administration Center

ATTN: DARC-PSE-VC

9700 Page Boulevard

St. Louis, MO 63132-5200

Request a statement of service for the following individual(s) for the purpose of extending benefits and privileges under the Uniformed Services Former Spouses' Protection Act, Public Law 97-252, as amended by Public Law 98-525:

Name:

SSN:

Army Serial Number (if known):

Type of retirement (RA or Reserve):

3. The sample format for the RCPAC response back to MILPO is as follows:

A review of the personnel file of (Name/Rank/SSN) reveals that entry on active duty date was (enter date) and was continuous until (enter date), with the exceptions of the following breaks in service

(from/to dates as appropriate). The total service that is creditable in determining the member's retired pay is (years/months/days).

E. The URFS will be required to complete the following statement which will be attached to the DD Form 1172:

Statement of Former Spouse Applicant—This statement must be completed and signed as part of your application for ID Card. Read carefully and make sure you understand each item prior to signing. All items must be completed.

1. I, (full name), am the former (wife/husband) of (grade/full name/SSN), and to the best of my knowledge our marriage lasted at least (number) years, during which period my spouse served at least 20 years of service creditable in determining eligibility for retired pay.

2. Marriage took place at (location) on (date) and was terminated on (date) by decree of (divorce/dissolution/annulment) issued by (identify court) at (city/state). I have never remarried.

3. I (am/am not) currently provided medical coverage under an employer-sponsored health plan.

I certify to the best of my knowledge the above information is true and correct. I understand that in the event this information is determined to be incorrect and I am found to be ineligible for benefits that my ID card will be retrieved and I am liable for full reimbursement of all medical care and will be billed accordingly. I also understand that the penalty for presenting false claims or making false statements in connection with claims is a fine of not more than $10,000 or imprisonment for not more than five years, or both (Title 18, U.S. Code 287 and 1001).

(URFS Signature) (Date)

F. The VO will conduct a careful review of each document, the statement by the URFS applicant, and the DD Form 1172. The VO will at this time make a determination as to whether or not the URFS conditionally qualifies as a 20/20/20 or 20/20/15 URFS pending confirmation by member's MILPO or RCPAC of creditable service period(s). If the applicant conditionally qualifies, a 90-day temporary card will be issued pending a final determination on the application. Upon final determination, URFS will be notified promptly, and a new ID card will be issued for the appropriate period of time IAW Appendix C, para C-2A, page 59, of AR 640-3.

New York Passes Used Car Lemon Law

The New York Legislature has approved a law which provides consumer protection for used car buyers. The statute, to be codified at N.Y. Gen. Bus. Law Sec. 198-b (Consol. 1984), is entitled, "Sale of Used Motor Vehicles."

As of November 1, 1984, no dealer is permitted to sell a used car which costs $1,500 or more without a written warranty covering the engine, transmission, drive axle, brakes, radiator, steering, alternator, generator, starter, and ignition system. The warranty period is 60 days or 3,000 miles for cars which have 36,000 miles or less, and 30 days or 1,000 miles for cars which have more than 36,000 miles.

The warranty can contain additional language excluding coverage under certain conditions. The statute provides that if a consumer is required to resort to litigation to enforce provisions of the warranty, the court may award reasonable attorney's fees to prevailing plaintiffs.

FTC Issues Final Used Car Trade Regulation Rule

On November 19, 1984, the Federal Trade Commission issued its long-delayed and controversial Used Car Trade Regulation Rule. (*See* 49 Fed. Reg. 45692 (Nov. 19, 1984)). The rule, much less restrictive on used car dealers than that originally proposed by the FTC in 1981 (*see* 46 Fed. Reg. 41628 (Aug. 14, 1981)), will be codified at 16 C.F.R. § 455 and will take effect May 9, 1985.

Basically, the rule makes it an unfair and deceptive practice under the Federal Trade

Commission Act for used car dealers to misrepresent the mechanical condition of a used vehicle, to misrepresent the terms of any warranty offered in connection with the sale of a used vehicle, or to represent that any used vehicle is sold with a warranty when the vehicle is actually sold without one.

It is also an unfair act or practice under the rule for any used vehicle dealer to fail to disclose prior to sale that the used vehicle is sold without a warranty and to fail to make available, prior to the sale, the terms of any written warranty offered in connection with the sale of a used vehicle. Legal assistance offers can advise clients who complain of such practices to file a complaint with the appropriate FTC regional office. If the complaint is found to be valid after an FTC investigation, the violator can be subjected to a consent order, which can include both relief to individual clients and, potentially, administrative fines and penalties.

The rule also requires used vehicle dealers, before offering a vehicle for sale, to fill out and display on a vehicle offered for sale a "Buyer's Guide" on a side window, which the customer is to be given upon purchasing the vehicle. The FTC grappled with the fuzzy line which often exists between express or implied promises and the "mere puffery" often associated with car sales by requiring the Buyer's Guide to contain the admonition: "Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form."

The Buyer's Guide also contains a large block for the dealer to check if the car is sold "as is" with no warranty and a separate large block to check when the car is sold with a warranty. If a warranty is provided, the dealer must specify if it is a full or limited warranty and indicate the systems covered by any warranty and the duration of the warranty on each system.

The back of the form contains a list of some major defects which may occur in fourteen different vehicle systems. A Spanish language form is provided for sales which take place in Spanish.

Under the rule, a "dealer" is a person or business which sells or offers for sale five or more used vehicles in a year, but does not include banks or financial institutions or businesses selling used vehicles to employees or lessors of vehicles selling vehicles to lessees.

States are authorized to petition the FTC for an exception to the rule if the state has in effect a similar rule which provides protection as great or greater than the FTC rule.

GM Arbitration Program Guide Compiled

With the cooperation of the Center For Auto Safety, the North Carolina Attorney General's Office, the Virginia Attorney General's Office, and the Legal Assistance Branch, TJAGSA, has compiled a guide to General Motors - Better Business Bureau Arbitration.

Legal assistance officers may have seen or may see clients who have consumer complaints concerning engine problems in certain General Motors vehicles. These complaints involve engine or transmission (powertrain) problems, and in certain cases, non-powertrain complaints.

The arbitration program is an outgrowth of a settlement of a Federal Trade Commission lawsuit against General Motors over defective components, *i.e.*, fuel injection pumps or fuel injectors in GM's 350-cubic inch diesel engine, a type-200 automatic transmission, or camshaft or valve lifters in 305 or 350-cubic inch gasoline engines made by Chevrolet (but used in cars of all GM divisions).

Limited numbers of the Guide have been published and they will not be distributed worldwide to all legal assistance offices. Interested legal assistance officers may write directly to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781 and request a copy.

Under the terms of the lawsuit ettlement, GM agreed to allow consumer complaints on described engine problems to be arbitrated regardless of the age or mileage of the vehicle and regardless of whether or not the consumer purchased the car new or used. If a client has a complaint that does not involve an engine or transmission on a GM product, GM may place a

time or mileage limitation on the program's availability.

The arbitrator chosen through BBB will not be a GM employee and in most cases will be a private citizen/consumer with no specialized knowledge of engines or transmissions. The arbitration is not binding on the consumer but is binding on General Motors. This means that if the decision of the arbitrator is adverse to the consumer, the consumer still has the right to file a lawsuit.

Information on the arbitration program can be obtained directly from GM by calling (800) 824-5109. GM is obligated to send requesters a handbook on the arbitration program pursuant to the lawsuit settlement.

Tax Credit for Owners of Diesel-Powered Vehicles

The Tax Reform Act of 1984 raised the tax on diesel fuel from nine to fifteen cents per gallon on fuel sold after 1 August 1984. Some owners of diesel-powered vehicles are given relief from the tax increase in the form of a tax credit. Persons who qualify as original purchasers of qualified diesel-powered vehicles may qualify for the one-time credit. An original purchaser is anyone who purchases a new, qualified diesel-powered vehicle after 1 January 1985 and before 1 January 1988 for use other than resale. Additionally, a person holding a qualified diesel-powered vehicle on 1 January 1985 will be entitled to a portion of the tax credit as well. To qualify for the credit, the diesel-powered vehicle must have at least four wheels, a gross vehicle weight rating of 10,000 pounds or less, a model year after 1978, and must be registered for use in the United States under the laws of any state. Note that the latter requirement would disqualify vehicles which were licensed overseas and not licensed by a state. Note also that generally the lessee of a vehicle would not be entitled to a credit unless the lease was treated as a sale for federal income tax purposes.

The amount of the credit is $102 for cars and $198 for trucks and vans. For persons holding a qualified diesel-powered vehicle on 1 January 1985, their credit will depend on the model and year of the vehicle, as shown by the chart below:

Model year of qualified diesel-powered vehicle	Amount	
	Other than truck or van	Truck/van
1984 or 1985	$102	$198
1983	85	165
1982	68	132
1981	51	99
1980	34	66
1979	17	33

A credit may be claimed only once for any qualified diesel-powered vehicle. The amount of the credit is entered on IRS Form 4136 and attached to the taxpayer's income tax return. For new vehicles, the credit is claimed on the income tax return for the taxable year during which the vehicle was purchased. For calendar year taxpayers holding a qualified vehicle on 1 January 1985, the credit is claimed on the tax return for 1984.

USAREUR Legal Assistance Information Letters

The USAREUR Legal Assistance Division publishes a regular newsletter on legal assistance which invariably contains excellent practical information on USAREUR—specific topics.

Legal Assistance Information Letter 84-4, for example, contains useful guidance for service members who hire nannies with room and board as part of the remuneration. The newsletter contains a sample written contract for hiring a nanny and sample letters (in German with English translations) for the service member-employer to send to appropriate local German agencies.

Legal assistance officers in the United States may be interested in a problem which many USAREUR service members have encountered dealing with a business entity known as "Terry Hodges Home Furnishings."

Terry Hodges Home Furnishings sold furniture almost exclusively to US Forces personnel.

The marketing plan was supposedly a "lay-away" arrangement whereby the customer would receive the purchased furniture only after the contract price had been paid in full. In US practice, a lay-away transaction usually means that the seller has the item to be purchased in stock and it is tagged with the buyer's name and held in storage until payment is completed.

Hodges' plan was different. He generally did not have the furniture in stock. Rather, he waited until the customer paid in full, usually through installments, and only then did he order the furniture from his supplier. He did not pay for the furniture until it was delivered or shortly thereafter. Instead of investing or setting aside the money he was being paid by service members, he dissipated many customers' payments (plus more) before he ordered their furniture. He now has no funds to pay his suppliers for the furniture necessary to fulfill his contractual obligations. It is estimated that he owes military customers either $115,000 in refunds or furniture with a wholesale value of approximately DM 360,000. The case is complicated because he owes money to several German furniture companies who were delivering furniture to him on credit. Hodges now has zero cash flow and no credit.

Stateside legal assistance attorneys may encounter clients who PDS'd from Germany who are either owed refunds or furniture deliveries from Hodges. The USAREUR Legal Assistance Office is attempting to work out an arrangement under which remaining furniture contract balances due and liquidated damages from customer defaults may be paid to a trustee.

When the contractual balance due (not the full contract price) has been paid by the customer, those customers who have paid the trustee an amount at least equivalent to the wholesale cost of the furniture will receive delivery. Because the wholesale cost is only about one-half the contract price, this plan should generate additional funds (*i.e.*, what would have been Hodges' profit).

Stateside legal assistance officers who would like further information on this situation may contact Major Jeff Guilford, Legal Assistance Division, HQ, USAREUR and Seventh Army, ATTN: AEAJA-LA, APO New York 09403. To share in the trust fund if a trustee is appointed, clients should provide their name and address, the original contract price, the amount they actually paid, and a copy of the contract, if possible, to MAJ Guilford.

Cumulative Listing of Legal Assistance Materials Distributed

Following is a cumulative list of all publications and materials distributed by the Legal Assistance Branch to our worldwide mailing list beginning with December 1984. The list will be updated every six months and republished in *The Army Lawyer*. Following each mailing, a separate notice will be published in *The Army Lawyer*. For TJAGSA-produced materials, the printing budget permits us to mail only one copy of each publication to offices on the mailing list. Offices which would like additional copies, however, may order them from the Defense Technical Information Center. *See* the section entitled "Current Material of Interest," published elsewhere in this issue.

Item	Source	Distribution Date
All-States Guide to State Notarial Laws	TJAGSA	December 1984
LAMP Newsletter Number 20	ABA	December 1984
Handbook on Child Support Enforcement (pamphlet)	US Dep't HHS	December 1984
All-States Income Tax Guide	Air Force	January 1985
Legal Assistance Officer's Federal Income Tax Guide	TJAGSA	January 1985

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Army National Guard Advisor to The Judge Advocate General's School

LTC Robert Doane, the Army National Guard Advisor to The Judge Advocate General's School, reviews all applications by individuals seeking a judge advocate appointment in the Army National Guard (ARNG); monitors the performance of ARNG members attending resident courses at TJAGSA or taking TJAGSA correspondence courses; responds to inquiries by ARNG judge advocates; attends on-site training sessions; coordinates and maintains liaison with the Office of the Legal Advisor, National Guard Bureau; and advises the Commandant and staff of TJAGSA on ARNG policies, procedures, and regulations which affect legal education requirements. Reservists and ARNG members having questions in these areas may contact LTC Doane at FTS 301-6121 or Commercial (804) 293-6121/6122.

Reserve Component Technical (On-Site) Training

The dates of the Columbus, Ohio, On-Site Training have been changed from 11-12 May 1985 to 4-5 May 1985.

Enlisted Update

Sergeant Major Walt Cybart

Education

Recently, a basic technical course (BTC) for MOS 71D, Legal Specialist, was approved by the Commander, US Army Soldier Support Center, Fort Benjamin Harrison. Developers for the BTC program of instruction are SFC Steve Widdis, SFC Paul Hydam, and SFC Glen Billingsley at the USA Soldier Support Institute, ATTN: ATSG-AGTS, Fort Benjamin Harrison, Indiana 46216-5530. Any suggestions from the field regarding course content will be appreciated and should be sent directly to the course developers.

This course is being directed at skill levels 2 and 3 of MOS 71D, and, if possible, will include 71Es. Some personnel at skill level a (promotable E4) will also be able to attend at a later date. Selection and attendance at BTC will be in accordance with AR 351-1. The target date for the first class is January 1986.

Also being developed are new correspondence courses for MOS 71D/71E. These courses will consist of completely new material instead of instruction modified from current courses designed for attorneys. Courses already developed by the Air Force will be considered as an interim measure. CW3 Mitchael W. Ford, Correspondence Course Officer of The Judge Advocate General's School, has identified some existing TJAGSA subcourses which would be useful to a legal specialist or court reporter, and which are available immediately. CW3 Ford will soon publish a list of these courses by message. Comments and suggested input regarding these courses should be sent directly to HQDA (DAJA-SM), WASH DC 20310-2203.

Revision of the current Legal Administrators Course, MOS 713A, is being considered by the TJAG Enlisted Education Committee, including a new course title and revised content. The course will also be made available to more personnel. Presently, we are considering making the course available to all 71D/71E in grade E5 or above with at least five years time in service.

Promotion Boards

HQDA recently announced the following dates for 1985 enlisted election boards:

a. Sergeants Major Academy

(1) Nonresident—4-8 March 1985.

(2) Resident—11-26 March 1985.

b. CSM/SGM—30 April - 22 May 1985.

c. MSG—10 July - 2 August 1985.

d. SFC—1 October - 6 November 1985.

This notice allows ample time to get your records in order for these boards; do it now!

On page 6 of the December 31, 1984 issue of the *Army Times* is an article regarding Nonresident Sergeants Major Academy applicants. All E7(P) and above should read the article and submit an application.

CLE News

1. 10th Annual Homer Ferguson Conference

The 10th Annual Homer Ferguson Conference will be held at The George Washington University Marvin Center on 13 and 14 May 1985. Those interested in details of the Conference should contact Mr. Robert V. Miele, U.S. Court of Military Appeals, 450 E Street, N.W., Washington, D.C. 20443; telephone (202) 272-1454, 5.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F—F10).

May 6-10: 2d Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop

(512-71D/71E/40/50).

June 17-28: JATT.

June 17-28: JAOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

4. Civilian Sponsored CLE Courses

May 1985

1: IICLE, Arrest, Search & Seizure, Chicago, IL.

2-4: ALIABA, Civil Practice & Litigation in Federal & State Courts, San Francisco, CA.

3: ABICLE, Evidence, Birmingham, AL.

3: IICLE, Law for the Legal Secretary, Chicago, IL.

3: TBA, Practical Considerations in Estate Planning, Cookeville, TN.

6-7: PLI, Commercial Real Estate Leases, New York, NY.

6-7: UMCC, Technology and the Law: The Impact of Telecommunications on the Courtroom, Miami, FL.

6-8: GCP, Patents and Technical Data, Washington, DC.

6-10: SBT, Advanced Real Estate, Dallas, TX.

9: IICLE, Human Resources Institute, Chicago, IL.

9-11: ABICLE, Tax 1985, Point Clear, AL.

12-18: ATLA, Basic Trial, Covington, KY.

13-17: SBT, Advanced Real Estate, Austin, TX.

14-15: IICLE, Counseling the Closely Held Business, Chicago, IL.

15-24: KCLE, Trial Advocacy—Intensive, Lexington, KY.

16-17: ATLA, Criminal Law Seminar, Houston, TX.

16-17: IICLE, Defending White Collar Crime, Chicago, IL.

21: IICLE, Property Settlement Agreements, Springfield, IL.

22: IICLE, Property Settlement Agreements, Chicago, IL.

23-30: ATLA, Basic Trial Advocacy, Washington, DC.

24: ABICLE, Oil, Gas & Mineral, Birmingham, AL.

28-30: ATLA, Women In Litigation, Washington, DC.

31: ABICLE, Evidence, Mobile, AL.

31-6/7: NCDA, Executive Prosecutor Course, Houston, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the January 1985 issue of *The Army Lawyer.*

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For address and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. Outstanding Young Military Service Lawyer Awards for 1985

The Military Service Lawyers Committee of the Young Lawyers Division of the American Bar Association is accepting nominations for the "Outstanding Young Military Service Lawyer" for each service. Separate awards will be presented to the Army, Navy, Air Force, Marine Corps, and Coast Guard "Outstanding Young Military Service Lawyer." The criteria for the awards are:

Demonstrated excellence in the delivery of legal services;

Proven qualities of leadership;

Consistent outstanding performance of all assigned duties;

Demonstrated scholarly ability;

Service to the community; and,

Under age 36 as of 1 July 1985.

Candidates may be nominated by any licensed attorney. Nominations must include a detailed description of the nominee's qualifications and may include necessary supporting documentation. In no case may the entire nomination package exceed ten pages. Three copies of the nomination should be mailed directly to: Military Service Lawyers Committee, c/o Capt. J.C. Walker, Chairman, 6736 Montour Drive, Falls Church, VA 22043

All nominations must be postmarked not later than 31 March 1985. The awards will be announced on 1 July 1985 at the American Bar Association annual meeting in Washington, D.C..

2. New Military Law Committee

The Young Lawyers Section of The Bar Association of the District of Columbia announced the formation of a Military Law Committee. Craig M. Kabatchnick has been named Chair of the Committee. The Committee will be concerned with matters of substance and procedure in the area of military law. The Committee will be sponsoring luncheons featuring speeches and discussions by prominent military judges and lawyers. Any young lawyer interested in joining the Committee should contact: Craig M. Kabatchnick, Kabatchnick & Kabatchnick, 1050 17th St., N.W., Washington, D.C., 20036, telephone (202) 872-1051. (*Reprinted from* The Daily Washington Law Reporter, Sept. 11, 1984).

3. TJAGSA Materials Available Through Defense Technical Information Center

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/ JAGS-ADC-84-2 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-84-3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-84-4 (180 pgs).
AD B086937	Criminal Law, Evidence/JAGS-ADC-84-5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/JAGS-ADC-84-6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2 (360 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS-ADA-83-1 (379 pgs).
AD B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2 (188 pgs).

AD B077738 All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900 All States Marriages & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B087847 Claims Programmed Text/JAGS-ADA-84-4 (119 pgs).
AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848 Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
AD B087774 Government Information Practices/JAGS-ADA-84-8 (301 pgs).
AD B087746 Law of Military Installations/JAGS-ADA-84-9 (268 pgs).
AD B087850 Defensive Federal Litigation/JAGS-ADA-84-10 (252 pgs).
AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations JAGS-ADA-84-12 (321 pgs).
AD B087745 Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).
AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).

Those ordering publications are reminded that they are for government use only.

4. Regulations & Pamphlets

Number	Title	Change	Date
AR 15-180	Army Discharge Review Board		15 Oct 84
AR 27-50	Status of Forces Policies, Procedures and Information		1 Dec 84
AR 600-50	Standards of Conduct for Department of the Army Personnel		20 Nov 84
AR 601-100	Appointment of Commissioned and Warrant Officers in the Regular Army	I05	10 Nov 84
AR 635-100	Personnel Separations Officer Personnel	I09	28 Nov 84
UPDATE 2	Army Functional Files System		15 Dec 84

5. Articles

Baxter & Wohl, *Wrongful Termination Lawsuits: The Employers Finally Win a Few*, 10 Employee Rel. L.J. 258 (1984).

Gately, *When Should a Taxpayer Use the Once-in-a-Lifetime Section 121 Election?*, 12 J. Real Est. Tax'n 38 (1984).

Gregory, *Conflict Between Seniority and Affirmative Action Principles in Labor Arbitration, and Consequent Problems of Juducial Review*, 57 Temp. L.Q. 47 (1984).

Honigman, *The New "Lemon Laws": Expanding UCC Remedies*, 17 U.C.C.L.J. 116 (1984).

Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law., Nov. 1984, at 1.

Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 Neb. L. Rev. 779 (1984).

Megargee, *A New Classification System for Criminal Offenders, VI: Differences Among the Types on the Adjective Checklist*, 11 Crim. Just. & Behav. 349 (1984).

Olson, *Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority*, 68 Judicature 70 (1984).

Rogers & Cavanaugh, *"Nothing But the Truth" . . . A Reexamination of Malingering*, J. Psychiatry & L., Winter 1983, at 443.

Wheeler, *The Use of Criminal Statutes to Regulate Product Safety*, 13 J. Prod. Safety 593 (1984).

Comment, *Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634 (1984).

Comment, *Political Patronage in Public Contracting*, 51 U. Chi. L. Rev. 518 (1984).

Comment, *Taking Note of Good Samaritan and Duty to Rescue Laws*, 11 J. Contemp. L. 219 (1984).

Note, *Federal Government Held Accountable for Damages on Theory of Breach of Trust*, 24 Nat. Resources J. 783 (1984).

Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129 (1984).

Paralegals, 25 L. Off. Econ. & Mgmt. 100 (1984).

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

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