Wrongful Fraternization as an Offense under the Uniform Code of Military Justice

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WRONGFUL FRATERNIZATION AS AN OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE*

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I. INTRODUCTION

Order¹ and discipline² are important to the military services during both peace and war.³ As a result, the services prohibit various kinds

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² Military discipline is an individual standard of conduct impressed upon service members to enable them to perform their military duties effectively. It involves obedience to orders without freedom to determine an individual course of action. See Westmoreland & Prugh, supra note 1, at 48-49.

³ See Brown v. Glines, 444 U.S. 348 (1980)(Air Force regulation requiring a soldier to obtain commander's approval before circulating petitions on base protected governmental interest in discipline and did not violate first amendment); Greer v. Spock, 424 U.S. 828
of conduct based upon the belief that the proscribed behavior harms order and discipline. The Uniform Code of Military Justice (UCMJ) and the military justice system play significant roles in this process. The UCMJ defines, among other wrongs, many disciplinary offenses. The Supreme Court refers to the purpose to ensure order and discipline by the term military necessity. See, e.g., Parker, 417 U.S. at 758. For a recent discussion showing how several former high ranking military leaders think the military justice system should effectuate this purpose, see Westmoreland & Prugh, supra note 1, at 40-50. The authors, a former Army Chief of Staff and a former Judge Advocate General of the Army, argue that the structure of the current system and many military court decisions conflict with the requirements of order and discipline.


The military justice system is the legal system of the military services. It governs most conduct of military personnel during active duty service in peace or war. For a more detailed discussion of its structure, see H. Moyer, JUSTICE AND THE MILITARY (1972). See also E. Byrne, MILITARY LAW (3d ed. 1981)(comprehensive military law source); D. Schlueter, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (1982)(periodically updated guide to military law).

The UCMJ contains general and specific disciplinary offenses. Articles 92 and 134 are examples of general disciplinary offenses. Article 92, 10 U.S.C. § 892 (1982), provides in pertinent part:

Any person subject to this chapter who -
military justice system prosecutes violations of these offenses and thereby enforces underlying disciplinary policies, regulations, and customs.⁹

1) violates or fails to obey any lawful general order or regulation; [or]
2) having knowledge of any other lawful order issued by a member of
the armed forces, which it is his duty to obey, fails to obey the order; or

shall be punished as a court-martial may direct.

Article 134, U.S.C. § 934 (1982), provides:

Though not specifically mentioned in this chapter, all disorders and neglects to
the prejudice of good order and discipline in the armed forces, all conduct of a
nature to bring discredit upon the armed forces, and crimes and offenses not capi-
tal, of which persons subject to this chapter may be guilty, shall be taken cogni-
zance of by a general, special, or summary court-martial, according to the nature
and degree of the offense, and shall be punished at the direction of that court.

These articles serve as the basis for the general disciplinary offenses because they do not
prohibit specific acts. Instead, Article 92 prohibits violations of any lawful order or regula-
tion and applies to many different kinds of conduct. Similarly, Article 134 prohibits all
conduct which prejudices military order and discipline and does not violate a specific disci-
plinary article in the Code. Although this article also prohibits other actions unrelated to
discipline and order by its discrediting clause, this Note does not discuss this aspect.

Specific disciplinary offenses are exemplified by Article 86, 10 U.S.C. § 886 (1982), which
provides:

Any member of the armed forces who, without authority -
1) fails to go to his appointed place of duty at the time prescribed;
2) goes from that place; or
3) absents himself or remains absent from his unit, organization, or
place of duty at which he is required to be at the time prescribed;
shall be punished as a court-martial may direct.

These offenses ban limited kinds of activities.

When allegations that a soldier has violated a provision of the UCMJ arise, his or her
commander initially determines the seriousness of the soldier's conduct and whether legal
sanctions should be imposed. The actual process by which the commander determines the
appropriate legal sanction is beyond the scope of this Note. For an examination of this
process, see D. SCHLUETER, supra note 6, at 155-204. Among the methods available to prose-
cute a violation, the commander has the option to impose nonjudicial punishment under
Article 15 of the UCMJ, 10 U.S.C. § 815 (1982). Article 15 authorizes an administrative
proceeding presided over by the commander who can “in addition to or in lieu of admoni-
tion or reprimand, impose [various] disciplinary punishments for minor offenses without the
intervention of a court-martial.” Id. If the allegations of misconduct are serious, the com-
mander may recommend a court-martial; the type of processing depends upon the offense
involved, the possible punishment, and the rank of the offender.

The three types of courts-martial are the general, special, and summary courts-martial.
The general court-martial has jurisdiction to try persons subject to the UCMJ for any of-
fense under the Code. It has the power to adjudge any punishment which the UCMJ does
not prohibit, including the death penalty if authorized. Article 18, 10 U.S.C. § 818 (1982).
The special court-martial has jurisdiction to try persons subject to the UCMJ for both non-
capital Code offenses and for capital offenses under regulations promulgated by the Presi-
dent. It has the power to impose any punishment which the UCMJ does not prohibit “ex-
cept death, dishonorable discharge, confinement for more than six months, hard labor
without confinement for more than three months, forfeiture of pay exceeding two-thirds pay
per month, or forfeiture of pay for more than six months.” Article 19, 10 U.S.C. § 819
(1982).
Fraternization is one of these military disciplinary offenses. The term generally refers to an intimate, but not necessarily sexual, relationship by an officer or noncommissioned officer (NCO) and a lower ranking enlisted person. The relationship is described as wrongful fraternization when it is perceived to be harmful to discipline and order. The harm to discipline allegedly results because military subordinates do not respect the fraternizing officer or NCO. Injury to military order occurs

The summary court-martial, unlike special and general courts-martial, only has jurisdiction over enlisted personnel for noncapital offenses under the UCMJ. It has the power to impose any punishment under the Code “except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard-labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month’s pay.” Article 20, 10 U.S.C. § 820 (1982). If the soldier objects to trial before summary court-martial, trial may be ordered by special or general court-martial if appropriate.

The regulation of undue familiarity is not unique to the military. Government employees and judges have traditionally been subject to limitations on association intended to avoid actual or perceived conflicts of interest. E.g., Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965)(civil service employee of the Department of Army dismissed because, among other acts of misconduct, he was unduly familiar with government contractors). School districts have discouraged association among married and unmarried high school students by prohibiting participation by married students in extracurricular activities. E.g., Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1971)(such a restriction violated the equal protection guarantee). Private employers have imposed rules prohibiting fraternization among groups of employees. E.g., Chem Fab Corp., 257 N.L.R.B. 996 (1981)(rule prohibiting fraternization between workers at two plants during working hours was not unlawful in and of itself), enforced, 691 F.2d 1252 (8th Cir. 1982).

In the only civilian case involving review of a fraternization conviction, the district court approved of the following definition:

By “fraternize” as used in these instructions, is meant to associate with another or others on intimate terms. Not all associations by a military superior with a subordinate are wrongful. It is the appropriateness of the time, place, circumstances, and conduct which is the determinant. To be wrongful, the fraternization must be of such a nature as to demean the military superior, to detract from the respect and regard for authority inherent in the superior-subordinate relationship.

Id. at 506.

The loss of respect results, according to an Army general, because:

Experience and human nature show that [discipline] cannot be readily attained when there is undue familiarity between the officer and those under his command . . . . Now and then we see officers who are inclined to neglect or ignore the distinction that prevails in all armies between officers and men. Soldiers understand and appreciate the reasons and the necessities which prevent undue familiarity between officers and their subordinates. They have a thorough contempt for the officer who forgets his place and his duties and who neglects the requirements of order and regulations.

since subordinates believe that the superior will not treat them fairly and their morale decreases. However the UCMJ does not express this definition or rationale because wrongful fraternization is not a specific offense under the Code. Instead, the definition and its basis arises from the type of conduct labeled as fraternization and prosecuted by the military justice system.

Although wrongful fraternization is not a substantive disciplinary offense under the UCMJ, as is being absent without leave or disrespect toward an officer, it is prosecuted by the military justice system. This prosecution may occur under three different articles of the UCMJ. Wrongful fraternization may be charged as a violation of Article 134, the general disciplinary article, because it violates the military custom against fraternization and prejudices order and discipline. A military commander or convening authority may also charge that the conduct violated Article 133 because the fraternization was conduct unbecoming an officer. In services that have promulgated punitive fraternization regulations, the conduct may also be charged under Article 92 as a violation of an existing regulation. If the fraternization charges are not serious, prosecution under these various articles may be in the form of an administrative proceeding authorized by Article 15. When the charges are serious,
prosecution will be by court-martial. This Note focuses on the treatment of fraternization by court-martial, a judicial proceeding, rather than by administrative action.

The generality of the fraternization offense and the lack of clear guidelines indicating under which article fraternization should be prosecuted have created numerous problems.22 The problems include the following. There are continued allegations by service members that since the services do not have precise fraternization policies or regulations,23 there are constitutional deficiencies in the prohibition.24 In addition, under certain circumstances, the members of the court-martial, or the military judge if sitting alone, may be forced to rely on their own subjective belief that the conduct impaired discipline and order.25 Furthermore, continued prosecu-

for 'other than honorable discharges' is found in SecNav Notice 1920 of March 1982, which lists the following as one reason to discharge someone for cause: 'disregard by a superior of customary superior-subordinate relationships.' "Id.

22 For a recent examination of these problems, see H. Mover, supra note 6, §§ 4-405 to -406; D. Schlueter, supra note 6, at 56-57; Flatten, supra note 13.

23 Army Regulation 600-20, para. 5-7f (Oct. 15, 1980)[hereinafter cited as AR 600-20] is the current Army fraternization regulation. It provides:

Relationships between service members of different rank which involve (or give the appearance of) partiality, preferential treatment or improper use of rank or position for personal gain, are prejudicial to good order, discipline and high unit morale. Such relationships will be avoided. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between Service members of different rank -

(1) Cause actual or perceived partiality or unfairness,
(2) Involve the improper use of rank or position for personal gain, or
(3) Can otherwise reasonably be expected to undermine discipline, authority, or morale.

Although the regulation does not expressly refer to fraternization, the Army refers to it as its fraternization policy. See Women in the Military: Hearings Before the House Military Personnel Subcommittee on Armed Services, 96th Cong., 1st Sess. 118 (1979)[hereinafter cited as Women in the Military Hearings].

The Air Force regulation on officer-enlisted association, Air Force Regulation 30-1, para. 4-b (Sept. 30, 1977)[hereinafter cited as AFR 30-1] provides:

OFFICER AND ENLISTED RELATIONSHIP. Two important characteristics of the officer and enlisted relationship are loyalty and mutual respect . . . We are all professionals and as such we must treat each other with dignity and respect. Since we live and work in a very close environment and endure common hardships, officers and enlisted personnel frequently develop close personal friendships. However, friendships must not interfere with judgment or duty performance.

As of late 1983, the Navy and Marine Corps did not have fraternization regulations. Navy Times, Dec. 19, 1983, at 26, col. 2.


25 For instance, one military appellate court stated that in certain situations, the trial
tion of fraternization under Article 133 may conflict with the disciplinary basis of the prohibition and judicial precedent. 26

The following factors increase the significance of these problems. A finding by a court-martial that fraternization violates the UCMJ carries serious consequences. Depending on the type of court-martial, the service member could receive a less than honorable discharge, accompanying loss of service benefits, confinement at hard labor, or loss of pay and allowances. 27 The expanded number of women in the military since the mid 1970's 28 and the changing nature of military services 29 are likely to increase the chance of fraternization. Finally, whether these last two factors caused the increase in the incidence of fraternization, there has been such an increase. 30

Although only the Army and Air Force have attempted to remedy the problems arising from the lack of clear legal guidelines, all four services continue prosecution of the offense. 31 Furthermore, although several of the Courts of Military Review have recently restricted the application of the prohibition, these courts as well as the highest military appellate court, the Court of Military Appeals, continue to recognize the validity of fraternization offenses under Articles 92, 133, or 134. 32 In view of the de-

counsel (prosecution) does not have to introduce any evidence that the fraternizing superior's conduct prejudiced good order and discipline. United States v. Cooper, No. CM4038790, slip op. at 3-4 (A.C.M.R. Aug. 11, 1980). This rule forces the trier of fact, whether the military judge or members of a court-martial, to rely exclusively on their own experience in determining the existence of prejudicial effect.

26 See infra notes 157-72 and accompanying text.
27 The service-wide Manual for Courts-Martial provides the maximum punishments which can be imposed upon a service member if he or she is convicted of fraternization under Articles 92, 133, or 134. U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984, 16e, 83e [hereinafter cited as MCM].
28 In 1980, the military services predicted the following increases in the number of women. The Army indicated an increase from over 98,000 in 1979-80 to almost 162,000 by 1985. The Navy planned to increase from over 29,000 in 1979-80 to 45,000 by 1985. The Marine Corps expected to increase eventually from almost 6,000 women in 1979-80 to 10,000. By 1980, there were approximately 51,500 women in the Air Force with a predicted increase to 97,000 by 1985. See Women in the Military Hearings, supra note 23, at 55, 89, 113-14, 144, 149. In recent years, the military has backed away from this planned expansion but still intends to recruit approximately 40,000 women per year. J. HOLM, WOMEN IN THE MILITARY 387-88 (1982).
29 For a discussion of the increasing civilianization of the military, see Sherman, Military Justice Without Military Control, 82 YALE L.J. 1398, 1401-02 (1973). But cf. Westmoreland & Prugh, supra note 1 (arguing that civilianization of the military is largely a product of military courts).
30 Women in the Military Hearings, supra note 23, at 118. See also Flattén, supra note 13, at 114 (describing numerous incidents observed by the author).
32 Although two fraternization convictions were recently reversed by military appellate
sire of the services to continue to prosecute fraternization and continued judicial sanctioning, this Note undertakes an analysis of the fraternization prohibition in order to illustrate the current problems. The first part of this Note proposes that the evolution of the prohibition demonstrates that fraternization has become exclusively a disciplinary offense. The development of the offense over the years also shows that the failure of the military to define the offense precisely by regulation or article allowed military courts to construct varying and confusing definitions. The second part of the Note analyzes the validity of fraternization convictions under UCMJ Articles 92, 133, and 134. Part three recommends that each of the military services issue detailed fraternization regulations. These regulations should satisfy the requirements of prohibitiveness and punitiveness so that they can serve as the basis of an Article 92 conviction. They should also contain features that will decrease the chances of arbitrary application and lack of notice to the service member. The conclusion suggests that unless such guidelines are formulated, the significant problems with the current offense will increase leading to additional service member and public dissatisfaction.

II. HISTORICAL DEVELOPMENT OF THE MILITARY PROHIBITION AGAINST FRATERNIZATION

A. Early British Military Law

British military law which provided the original pattern for United States military law partially supplied the roots from which the fraternization offense grew. It furnished the antecedent to the general disciplinary article of the UCMJ, Article 134. British military law also contributed the predecessor to the UCMJ article governing officers' conduct, Article

courts, the Army and Air Force Courts of Military Review indicated that intimate association between officers or NCOs and enlisted members continues, under certain circumstances, to be a violation of the UCMJ. See United States v. Stocken, 17 M.J. 826, 828-30 (A.C.M.R. 1984); Johanns, 17 M.J. at 868.

Challenges to the validity of the fraternization offense have mainly occurred in the military appellate courts. The structure of the military appellate system is as follows. The initial appellate court, the service Court of Military Review, reviews all court-martial convictions from a particular service where the approved sentence "affects a general or flag officer or extends to death [or involves] dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." Article 66, 10 U.S.C. § 866(b)(1982). The highest military appellate court, the Court of Military Appeals, reviews all cases where the sentence affirmed by the Court of Military Review involves a general or flag officer or the death penalty. It also reviews cases that the service Judge Advocate General orders sent to the court for review or upon petition of the accused and good cause shown. Article 67, 10 U.S.C. § 867(b)(1982).

W. Winthrop, supra note 7, at 18-21.

See infra notes 51-52 and accompanying text.
133. The manner in which fraternization was prosecuted under these historical antecedents to American military law provided the early basis for American treatment of the offense.

One of the primary sources of British military law was the Articles of Gustavus Adolphus of Sweden. Although the Articles of Gustavus Adolphus did not expressly forbid any social association between the ranks of the army, they did prohibit certain types of contact between officers and their soldiers. Article 116 of the Articles prohibited any conduct "repugnant to Military Discipline." Article 133 barred indiscriminate lending by officers to their subordinates.

Drawing upon the Articles of Gustavus Adolphus, the British issued the first Articles of War in the 1600's. One of these early British Articles prohibited any disorderly conduct which was not barred by the other Articles. By the mid 1700's, the development of the original Articles had resulted in a general disciplinary article and an article prohibiting scandalous and infamous conduct by an officer. The purposes of these two articles differed. The general disciplinary article was intended to apply to offenses against discipline which were not expressly recognized by the other British Articles. The article governing officers' conduct pertained only to officers whose dishonorable conduct was scandalous and infamous. Although British military authorities do not appear to have tried

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35 W. Winthrop, supra note 7, at 931-46.
36 See infra notes 57-60 and accompanying text.
37 Gustavus Adolphus (1594-1632) led the Swedish army and defeated numerous other armies. As a means to govern his soldiers' conduct he created a military code, the Articles of Gustavus Adolphus, in 1621. Numerous British officers and soldiers serving in his army relied on their experience with this code when formulating the British Articles of War. W. Winthrop, supra note 7, at 19 & n.15.
38 Id. at 907-18.
39 Id. at 914. The full text of Article 116 is quoted at supra note 7.
40 The Article provided that "if any Captain lends money unto his soldiery which he desires should be paid againe, that must be done in the presence of the Muster-masters [a combination personnel, finance, and supply officer], that our service be in no way hindered or neglected." Id. at 915.
41 Id. at 19.
42 Article LXIV of the English Military Discipline of James II in 1686 provided that "faults, misdemeanors, and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial." Id. at 928.
43 Article XXIII, Section XV of the British Articles of War of 1765, prohibited "scandalous infamous [behavior], such as is unbecoming the character of an officer" and provided for dismissal. Id. at 945.
44 Article III, Section XX, its general disciplinary article, prohibited "all Disorders or Neglects, which officers and soldiers may be guilty of, to the prejudice of good Order and Military Discipline." Id. at 946.
45 Id. at 719.
46 Id. For a discussion of the concern for the honor of the British officer corps, see Note, The Discredit Clause of the UCMJ: An Unrestricted Anachronism, 18 UCLA L. REV. 820, 825-26 (1971). The author contends that the British antecedent to our Article 133 was a
many cases of fraternization, at the time the American Articles of War originated, prosecution, occurred only under the article governing officers’ conduct.46

B. American Articles of War

The American Articles of War provided the American antecedents to the general disciplinary article, Article 134, and the article governing officers’ conduct, Article 133, of the UCMJ.47 The judicial interpretation of these American Articles and their application to particular kinds of fraternization initially paralleled prior British application and interpretation.48 Later application and interpretation, however, differed and provided part of the foundation for current prosecution and judicial analysis of the fraternization offense under the Code.49

When the Second Continental Congress adopted the Articles of War for its newly-formed army in 1775, two of the Articles were a general disciplinary article and an article governing officers’ conduct.50 These articles corresponded to their British counterparts pertaining to disciplinary offenses and officers’ behavior.51 The amendment of these original American Articles of War later in 1775 retained the two designated articles but also added the only American article in either the Articles of War or the later Code that expressly prohibited social association by an officer.52

status-based offense intended to preserve the social status of the British officer corps. He suggests that British officers, after purchasing their commissions, valued their high social status as military officers in British society. The British Article governing officers’ conduct provided for the discharge of officers whose actions tended to degrade this status.

46 W. HOUGH, MILITARY LAW AUTHORITIES 199 (1839). In his compilation of judicial precedent under the British Articles of War, this commentator on British military law indicated that officers who drank liquor with NCOs and enlisted men violated the article governing officers’ conduct.

47 W. WINTHROP, supra note 7, at 957.

48 Id. at 716 & n.44.


50 W. WINTHROP, supra note 7, at 953-59. These articles were Articles XLVII and L. Article XLVII provided: “Whatsoever commissioned officer shall be convicted before a general court-martial of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.” Id. at 957. Article L provided:

All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion.

51 Id. at 931-46. Their British counterparts were Article XXIII, Section XV and Article III, Section XX of the British Articles of War of 1765.

52 W. WINTHROP, supra note 7, at 959.
This latter article, retained among the American Articles until Congress enacted the UCMJ, prohibited military officers from associating with officers dismissed for cowardice or fraud. Although the first two early American Articles were applied to fraternization, the associational article apparently was rarely, if ever, used.

The wording of the articles concerning general disciplinary offenses and officers' demeanor remained virtually unchanged throughout the existence of the American Articles of War. However, their application to fraternizing conduct by officers and NCOs changed dramatically during the life of the American Articles. Initially, military commanders prosecuted fraternization almost exclusively under the article governing officers' conduct. By the latter days of the American Articles, prosecution concentrated primarily on the general disciplinary article.

During the 1800's and the early years of the American Articles, the primary basis for prosecutions was the antecedent to the present Article 133. Under that Article, officers who drank, caroused, gambled, were unbecomingly familiar with, or conducted themselves indecently in the presence of military inferiors were court-martialed for its violation and discharged. This Article, intended to preserve the status of officers, was applied to this conduct because the officers' actions involving subordinates were considered to be demeaning to that status. The punishment, dismissal from military service, protected that status by removing offending officers.

Although prosecution for fraternization transpired predominately under the article governing officers' conduct during this period, some associational offenses were pursued under the general disciplinary article. For example, the Article was applied to gambling between NCOs and their subordinates. The disciplinary article, rather than the officers' article, pertained because an NCO by definition is not an officer, and his

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53 Id. Additional Article 4 provided:

In all cases where a commissioned officer is dismissed for cowardice or fraud, it be added in punishment, that the crime, name, place of abode, and punishment of [this officer] be published in the newspapers, in and about the camp, and of that colony from which the offender came, or usually resided, after which it shall be deemed scandalous in any officer to associate with him.

Id.

54 Winthrop, a noted commentator on United States military law, does not indicate any court-martial decisions involving this associational article. Id. at 534-772.

55 Compare American Articles XLVII and L, id. at 957, with American Articles 95 and 96 quoted at infra note 66.

56 See infra notes 65-75 and accompanying text.

57 W. Winthrop, supra note 7, at 716 & n.44.

58 Id.

59 See Note, supra note 45, at 825-26.

60 W. Winthrop, supra note 7, at 957, 969, 974, 983, 991.

61 Id. at 727 & n.11.

62 Id. at 730 & n.68.
conduct could not demean the status of an officer although it could adversely affect discipline. Surprisingly, the early disciplinary article was also applied to some types of gambling between officers and their enlisted men. This indicated that under certain circumstances even early military commanders believed that some kinds of fraternizing activity by an officer did not demean status but did offend discipline.

This belief became the dominant theme of fraternization prosecutions during the remaining existence of the American Articles of War. This litigation, involving officers for the most part, took the following form under the article relating to officers' behavior and the general disciplinary article, at this point numbered Articles 95 and 96 respectively. The court-martial convening authority would charge the fraternizing activity, usually involving drinking liquor with enlisted subordinates or soliciting and pursuing the company and association of enlisted men, under Article 95 governing officers' behavior. If the court-martial convicted the officer under the Article, upon appellate review by the Judge Advocate General Board of Review, this finding would often be reversed. The Board of Review generally held that the evidence sustained a conviction only under

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63 See id. at 719. The early American disciplinary article, like its British predecessor, was intended to ensure punishment of disciplinary offenses which were not expressly listed in the American Articles of War.

64 Id. at 727 & n.11.

65 During and after World War II, fraternization prosecutions also involved purely social or more intimate association between American soldiers and Germans during the occupation of Germany. See, e.g., United States v. Wilson, 30 B.R. (ETO) 75 (A.B.R. 1945); United States v. Flackman, 10 B.R. (ETO) 255 (A.B.R. 1945). This Note does not examine this type of fraternization.

66 Article 95 provided: "CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN. Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service." Act of June 4, 1920, ch. 227, 41 Stat. 759, 806 (repealed 1950).

Article 96 provided:

GENERAL ARTICLE: Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty of, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. 41 Stat. at 806-07 (repealed 1950).


the general disciplinary article, Article 96. Its rationale was that the officers' conduct did not disgrace or dishonor him within the meaning of Article 95. The conduct, however, did violate the military custom against social fraternization between officers and enlisted men.

The Board of Review's analysis of the offense during this period provided that almost any social association between an officer and enlisted person violated the military prohibition against fraternization. Despite sometimes disavowing that effect, the Board of Review sustained convictions under Article 96 merely because association had occurred. It did not extensively discuss whether the officers' conduct injured disci-

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12 The Board of Review in United States v. Patterson, 41 B.R. 365 (A.B.R. 1944), stated: "Social fraternization between officers and enlisted personnel is prohibited by military custom and not by any specific provision of the Articles of War. The basis of the custom is military discipline." Id. at 368.

13 See Epperson, 58 B.R. at 326. Although the Board considered an officer's act of taking one or two drinks with enlisted men in a bar as "trivial," it affirmed his conviction under Article 96.

14 See Bunker, 27 B.R. at 389.

15 The Army Board of Review decision in United States v. Hart, 60 B.R. 247 (A.B.R. 1946), provides an interesting contrast. The Board reversed a court-martial finding that the officer violated Article 96 by drinking in a hotel with an enlisted man. It found that there was insufficient evidence to show an adverse impact upon discipline because the officer did not become drunk or create a disturbance. Id. at 255-56. It also reversed a finding that the officer violated Articles 95 and 96 by seeking the same enlisted man's company. Although the accused and the man had dinner and took several trips, the Board found insufficient evidence to establish that the officer schemed to enjoy his company. Since the man willingly accepted the officer's invitations, the court again found no adverse impact upon discipline. Id. at 256-57.

The Hart decision may have been influenced by the findings of the post World War II Doolittle Commission which had studied officer-enlisted relationships. This commission composed of officers and enlisted men recommended that "all statutes, regulations, customs, and traditions which discourage or forbid social association of soldiers . . . because of military rank" be abolished. Report on the Secretary of War's Board on Officer — Enlisted Man Relationships, S. Doc. No. 196, 79th Cong., 2d Sess. 22 (1946). It issued its report in 1946, the year of the Hart decision.
pline or order because it was assumed that it did. Although later military courts would hold that not all social association between officers or NCOs and enlisted personnel violated the general disciplinary article, the actual prejudicial effect of fraternization was usually beyond question.

C. The Uniform Code of Military Justice

The enactment of the UCMJ in 1950 brought the three articles under which the fraternization offense is currently prosecuted. Two of the three articles, Articles 133 and 134, retained wording similar to that of their predecessors in the American Articles of War. Article 92 had no antecedent in the American Articles. The substantial similarity between two of three UCMJ articles under which fraternization is now prosecuted and the two American Articles which previously applied to the conduct should require a continuity between prosecution under the American Articles and the UCMJ. Yet, the judicial definition of fraternization and the conduct to which it applied differed significantly between the Articles and the Code. Nevertheless, even with differing judicial interpretations of the offense under the UCMJ, fraternization continued to be a disciplinary offense rather than a status-based offense.

A change in the judicial definition of the offense was perceived within three years of the enactment of the Code. During this period, the military


[The Board of Review] had no difficulty in deciding that the accused's actions did support a violation of Article of War 96 (the equivalent of our current UCMJ, Article 134, conduct prejudicial to good order and discipline). The reason it had no difficulty in proclaiming the accused guilty of this latter offense, was because in 1944, it was perfectly clear to the Board that any officer who engaged in this type of social intercourse with enlisted personnel was per se violating the then existent military custom against fraternization . . . .

Rodriquez, slip op. at 5.

75 See, e.g., United States v. Cooper, No. CM438700, slip op. at 4 (A.C.M.R. Aug. 11, 1980)(direct testimony or judicial notice of sources that would show fraternizing activities prejudiced order and discipline not required in Article 134 court-martial proceeding).


77 Compare Article 95 and 96 quoted supra note 66 with Article 133, supra note 19, and Article 134, supra note 8.

78 See infra notes 79-106 and accompanying text.
courts considered a series of cases where the wrongful conduct, although not always expressly termed fraternization, involved association between superior and subordinate which blurred distinction between the ranks. The charged conduct involved officers who borrowed money from enlisted subordinates and officers who sought and obtained enlisted men's company. These charges, like the others described in this section, were brought under Article 134, the general disciplinary article.

In 1952 and 1953, the Army Board of Review considered the cases involving borrowing from enlisted subordinates. United States v. St. Ours illustrated the rationale which the Board employed in subsequent borrowing cases. Indicating that borrowing money from an enlisted man is not a violation per se of Article 134, the Board analyzed the circumstances in which borrowing occurred. If the officer obtained money under circumstances which made it likely that his act prejudiced order and discipline, there was a violation of the general article. In St. Ours, the Board found that the officer's act of borrowing prejudiced order and discipline because of the command relationship that had existed between the borrower and the lender and the officer's failure to repay his debt. However, a failure to repay the debt was not necessary for a violation of the Article. Considering a case in which an officer became indebted to his subordinates but promptly paid that debt, the Board in United States v. Galloway found a violation of the general article. The mere act of borrowing when there was a command relationship between the lender and the debtor was conduct prejudicial to good order and discipline. Injury to order and discipline resulted because such acts weakened enlisted subordinates' respect for their superior with financial difficulties.

The analysis by the Army Board in these borrowing cases demonstrated a focus on the existence of a command relationship between the fraternizing officer and the lending subordinate which continued in vary-

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81 See authorities cited supra notes 79 & 80.
83 Id. at 185.
84 Id.
85 Id.
87 Id. at 327.
88 Id.
ing degree in later fraternization cases. The Board's discussion also showed a continued assumption that fraternization was automatically conduct prejudicial to good order and discipline. The Board did not require evidence that the officers' conduct in fact caused disorder or loss of discipline. Instead, proof of the fraternizing act despite conflicting evidence of its prejudicial effect was sufficient to establish a violation of Article 134.

During the same period, the Army and Navy Boards of Review also considered a different set of fraternization charges. These cases involved officers who wrongfully sought relationships with enlisted men. In Livingston, the Army Board consistently applied a rule which it had earlier articulated in United States v. Patterson that any social association between officers and enlisted men violates Article 134. However, the Navy Board in United States v. Free pursued a different path which would later guide the highest military court, the Court of Military Appeals.

In United States v. Livingston, the Army Board of Review considered whether an officer who invited an enlisted subordinate into his tent on numerous occasions to drink and talk violated the general disciplinary article. Expressly relying on Patterson, the Board held that the officer's acts of social association constituted wrongful fraternization in violation of Article 134. The analysis by the Navy Board of Review in United States v. Free during the next year was in sharp contrast. In Free, the officer had invited an enlisted man to dinner, paid for his meal, and allowed him to stay overnight in the officer's quarters. Failing to employ the Patterson rule that all social association between officers and enlisted

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**Note:**

See infra notes 101-05 and accompanying text.

This reasoning by assumption is viable even today. See, e.g., United States v. Cooper, No. CM438700, slip op. at 3-4 (A.C.M.R. Aug. 11, 1980). The Army Court of Military Review, analyzing whether there was sufficient evidence to support a finding that the fraternization was prejudicial to good order and discipline, stated:

Trial defense counsel elicited from each of [the enlisted women that the officer was accused of fraternizing with] statements that they were not the [officer's] subordinates at the time of their sexual liaisons in that the [officer] was no longer their company commander. Each also stated that they had not lost respect for him. Notwithstanding such assertions, there can be no doubt that sexual liaisons conducted on post in officer's BOQ room between that officer and enlisted personnel of his battalion are prejudicial to good order and discipline.

Id. at 4 (emphasis added).


8 C.M.R. at 210.

14 C.M.R. 466, 468 (N.B.R. 1953).

8 C.M.R. at 210.

Id.

14 C.M.R. 466 (N.B.R. 1953).

Id. at 468.
men violated Article 134, the Navy Board held that only particular kinds of fraternization violate the Article. A violation of Article 134 occurred if the fraternization was not "innocent acts of comradeship and normal social intercourse between members of a democratic military force." The Board in Free, in contrast to the Army Board of Review, thereby indicated that "normal" association was not conduct prejudicial to order and discipline and did not violate the general article. Since the Navy Board strongly suggested there was homosexual conduct involved in Free, it found abnormal association and wrongful fraternization.

From 1957 to 1968, the successor to the Army Board of Review, the Army Court of Military Review, resumed analysis of cases of fraternization involving borrowing money from enlisted personnel. In these cases concerning NCOs who borrowed from lower ranking enlisted men, the court, like its predecessor in the St. Ours series of cases, noted that borrowing between ranks does not necessarily violate Article 134. The court focused on the presence or absence of coercion on the part of the debtor and on the existence of a command relationship between the lender and the debtor. If the NCO's act of borrowing from an enlisted man involved coercive conduct, the act was prohibited by Article 134, regardless if there was a command relationship between the debtor and lender. Lending was forced, when the NCO promised to reward or threatened an enlisted man, thereby inducing a loan or a failure to demand prompt repayment. However, even if an actual abuse of authority had not occurred, when an NCO borrows from enlisted men within his chain of command, an unacceptable risk of abuse was created. Thus, borrowing money under either of these two circumstances prejudiced good order and discipline in violation of Article 134. If the NCO borrowed from men outside of his chain of command, unless coercion occurred, the court found an insufficient risk of an abuse of authority and held that no violation existed. Although military courts never expressly applied this definition of wrongful fraternization outside of the borrowing context, the

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99 Id. at 468-72. The Board's decision impliedly approved less intimate relationships because a contrary holding provided that officers and enlisted personnel were separate classes and could not associate.


101 E.g., Calderon, 24 C.M.R. at 340.

102 Id. at 339-40.

103 Id. at 340.

104 Id.
services would later incorporate it into their fraternization regulations.\textsuperscript{106}

By the 1970's, with the varying definitions and tests of wrongful fraternization, the stage was set for resolution by the Court of Military Appeals. The court, upon review of \textit{United States v. Lovejoy}\textsuperscript{107} and \textit{United States v. Pitasi},\textsuperscript{108} adopted the current definition of fraternization. In \textit{Lovejoy} and \textit{Pitasi}, the Navy had charged two male naval officers with sexual offenses and fraternizing with enlisted men. Reviewing their court-martial convictions under Article 134, the court followed the standard of wrongful fraternization espoused earlier by the Navy Board of Review in \textit{United States v. Free}.\textsuperscript{109} The court held that the alleged sexual relationships between the male officers and enlisted men did not involve normal "social intercourse" or "innocent" acts of comradeship and violated the custom against fraternization.\textsuperscript{110} The decisions implied, however, that some kinds of association were permitted under the Code.

With the adoption of this standard of wrongful fraternization, the struggle throughout the 1970's and 1980's has been to determine the difference between normal association and wrongful fraternization. In the 1970's, the Army and Air Force sought to provide clarification by issuing regulations containing guidelines on prohibited fraternization.\textsuperscript{111} The 1977 Air Force regulation focused on associations which interfered with judgment or duty performance.\textsuperscript{112} The 1978 Army regulation centered on preferential treatment and improper use of rank or position for personal gain.\textsuperscript{113} Lower level Army commanders put forth additional fraternization

\textsuperscript{107} 20 C.M.A. 18, 42 C.M.R. 210 (1970)(naval officer shared apartment with a sailor).
\textsuperscript{109} 14 C.M.R. 466 (N.B.R. 1953).
\textsuperscript{110} \textit{Pitasi}, 20 C.M.A. at 606-08, 44 C.M.R. at 36-38; \textit{Lovejoy}, 20 C.M.A. at 20-21, 42 C.M.R. at 212-13.
\textsuperscript{111} See supra note 23. The Air Force had also issued earlier guidance in the form of an opinion letter by its Judge Advocate General. The opinion stated in pertinent part:
2. Social contact between officers and enlisted men is limited only to the extent that the contact would undermine the mission and operational effectiveness of the Air Force. There is a custom in the military service, one of long standing and well recognized as such, and fulfilling all the requirements set forth in the Manual for Courts-Martial for its breach to be an offense under UCMJ, Article 134, that officers shall not fraternize [or] associate with enlisted men . . . [These] guidelines are provided . . . recognizing that in any effective supervisory situation, whether it be civil or military, there must be present in the relationship some degree of authority, respect, discipline, and morale. Without these elements the job simply cannot be accomplished in a safe and efficient manner.

\textsuperscript{112} See \textit{ARF} 30-1, supra note 23.
\textsuperscript{113} See \textit{AR} 600-20, supra note 23.
regulations prohibiting all social fraternization among certain classes of soldiers, such as basic trainees and their leaders.\textsuperscript{114} The gender neutrality of these regulations and actual prosecution of fraternization between opposite sexes indicate that what is ordinarily "normal" is not normal association in the fraternization context.\textsuperscript{115} In addition, these regulations imply and recent court-martial cases demonstrate that wrongful fraternization may even include relationships between any two service members, although neither member is an NCO or an officer.\textsuperscript{116}

The next section of this Note analyzes more recent cases on fraternization involving Articles 92, 133, and 134 in an attempt to resolve the following: whether a fraternization conviction based on an existing service or local command regulation under Article 92 should be sustained; whether wrongful fraternization as currently defined violates Article 133; and the extent of the military custom against fraternization under Article 134.

III. FRATERNIZATION AS A VIOLATION OF ARTICLES 92, 133, AND 134 OF THE UCMJ

A. Article 92

1. The Service Fraternization Regulations, AR 600-20, paragraph 5-7f and AFR 30-1, paragraph 4-b as the Bases for an Article 92 Violation

A service member violates Article 92 by disobeying a lawful regulation issued by a military service.\textsuperscript{117} Therefore, at least theoretically, an officer or NCO who disobeys AR 600-20 or AFR 30-1 also violates Article 92.\textsuperscript{118} However, the Courts of Military Review and Court of Military Appeals hold that only transgressions of punitive regulations violate Article 92.\textsuperscript{119} A service regulation is punitive if it contains words of prohibition and announces that its violation subjects the service member to criminal prosecution under the UCMJ.\textsuperscript{120}


\textsuperscript{115} See supra note 8 (quoting Article 92 in pertinent part).

\textsuperscript{116} AR 600-20 and AFR 30-1 are set forth supra note 23.


\textsuperscript{118} See Nagle, supra note 119, at 66-70.

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As presently worded, the service wide fraternization regulations should not serve as the basis for a conviction under Article 92. Neither AR 600-20 nor AFR 30-1 meet both judicial requirements for a punitive regulation. The regulations do contain words of prohibition. The Army guidelines state that specified kinds of fraternization "will be avoided."\(^{21}\) The Air Force standard provides that "friendships must not interfere with judgment or duty performance."\(^{22}\) Announcement of the penalty for violation is missing; neither directive indicates that violation of its provisions subjects the officer or NCO to prosecution under the UCMJ. As a result, the Army and Air Force should not charge fraternization in violation of these regulations under Article 92.\(^{23}\)

2. Local Command Directives as the Bases for Article 92 Violations

a. Punitiveness

Army commanders responded to the practical inability to prosecute fraternization under Department of Army regulations and to special disciplinary considerations.\(^{124}\) Several commanders at posts having large numbers of basic trainees issued local directives prohibiting fraternization.\(^{125}\) Unlike the service-wide fraternization regulations, these local standards are adequate punitive regulations under Article 92. They contain required words of prohibition and announce a punitive standard. An example of such a directive, a 1979 Fort Gordon Command Policy letter, prohibited

\(^{121}\) AR 600-20, \textit{supra} note 23.

\(^{122}\) AFR 30-1, \textit{supra} note 23.

\(^{123}\) So far there have not been any reported cases involving prosecution of fraternization as a violation of these regulations. In fact, an Air Force military judge expressly referred to one of the regulations, AFR 30-1, as nonpunitive. United States v. Rodriguez, No. ACM 23545, slip op. at 9 (A.F.C.M.R. Oct. 29, 1982)(Miller, J., concurring), \textit{modified on other grounds}, 18 M.J. 363 (C.M.A. 1984).

\(^{124}\) \textit{E.g.}, United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983), \textit{petition granted}, 16 M.J. 112 (C.M.A. 1983). The Fort Gordon policy letter provided in pertinent part:

1. Permanent party military personnel and civilian government employees of Fort Gordon are prohibited from engaging in relationships or associations with soldiers in a training status which are prejudicial to the order and discipline of the Armed Forces. These associations and acts will include, . . .

a. Social fraternization . . .

5. This letter is directive in nature and violations of these policies will subject offenders to punitive action under the Uniform Code of Military Justice or adverse administrative action under appropriate regulations.


\(^{125}\) These directives by issuance from an officer having general court-martial jurisdiction have the effect of regulations and can be enforced under Article 92. Nagle, \textit{supra} note 119, at 70-72.
certain military employees “from engaging in relationships or associations with soldiers in a training status.”126 The letter also stated the “violation of these policies will subject offenders to punitive action under the Uniform Code of Military Justice.”127 Accordingly, Army courts have thus far sustained these local regulations as the bases for an Article 92 violation.128

b. Overbreadth

After meeting the punitiveness requirement, local fraternization regulations must also comport with constitutional demands in order to serve as the basis of a criminal conviction under Article 92. One of the constitutional issues litigated in this context is whether local command directives concerning fraternization are overbroad and thus facially invalid under the first amendment.129 In view of the limitations of the overbreadth doctrine and Supreme Court decisions regarding its application in the military arena, current local directives as applied are not impermissibly overbroad.

A statute may be unconstitutionally overbroad if it potentially prohibits conduct protected by the first amendment.130 The overbreadth doctrine provides that if a statute arguably affects first amendment rights, a litigant whose conduct is clearly prohibited can still challenge the constitutionality of the statute under the amendment.131 If the litigant shows that the law substantially abridges the first amendment rights of third parties not before the court, the court must find a constitutional violation.132 In this way, the accused may avoid conviction under the law. The purpose of this doctrine is to facilitate voiding of the laws which by their expansive prohibitions discourage the exercise of first amendment rights.133

In Parker v. Levy,134 the Supreme Court limited the application of the overbreadth doctrine under military law. The Levy case involved an Army captain charged and convicted of violating Articles 133 and 134 after he made anti-war statements during the Vietnam war.135 Captain Levy ultimately appealed these convictions ultimately to the Supreme

126 See supra note 124.
127 Id.
128 See Moorer, 15 M.J. at 522; Hoard, 12 M.J. at 568.
129 Hoard, 12 M.J. at 566-67. Other issues raised by the appellant were whether the regulation infringed upon his right to marry and violated the equal protection guarantee. The court resolved both issues against Sergeant Hoard. Id. at 557-68.
131 Id. For a more detailed analysis of the overbreadth doctrine, see Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970).
132 Schaumberg, 444 U.S. at 634.
133 Id.
135 Id. at 736-39.
Court on several grounds, including overbreadth.\textsuperscript{136} Upon review, the Court rejected the allegation that the articles were overbroad and violated the first amendment. The Court held that the first amendment overbreadth doctrine did not apply to the military in the same way that it applies to civilian society.\textsuperscript{137} An individual in the military whose speech was clearly prohibited by the articles could not assert the first amendment rights of others. Since the Court found Captain Levy's speech to be clearly prohibited by Articles 133 and 134, he lacked standing to claim that they violated the free speech rights of other service members.\textsuperscript{138}

The Army Court of Military Review considering a local fraternization directive in \textit{United States v. Hoard},\textsuperscript{139} discussed the application of the overbreadth doctrine after Levy. Tackling a seminal question, the court concluded that a fraternization policy prohibiting socializing and unofficial personal association did not affect traditional first amendment rights.\textsuperscript{140} It considered the prohibited activities as conduct rather than speech or association of the type protected by the amendment.\textsuperscript{141} Despite this holding, the court went on to engage in overkill by evaluating the service member's first amendment overbreadth challenge. Although it had already noted that the policy did not involve first amendment rights, the court stated that, according to \textit{Parker v. Levy}, Sergeant Hoard had no standing in this Article 92 case to assert the abridgment of third parties' first amendment rights.\textsuperscript{142} This decision, coupled with the Supreme Court application of the overbreadth doctrine in court-martial cases, strongly suggests local fraternization directives do not violate the first amendment.

c. \textit{Vagueness}

Whether local fraternization regulations fulfill the notice requirements of procedural due process under the fifth amendment is more troubling. While notice requirements are litigated more frequently than overbreadth in fraternization cases, to date, military and civilian courts have found

\textsuperscript{136} At that time Supreme Court review was not the next stage of appellate review after the Court of Military Appeals. After disposition of a court-martial case by the Court of Military Appeals, the service member desiring to appeal further, had to seek collateral review by a federal district court. See D. SCHLUETER, supra note 6, § 8-19. Service members can now obtain Supreme Court review by petitioning for certiorari after their case has been decided by the Court of Military Appeals. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405-06.
\textsuperscript{137} \textit{Levy}, 417 U.S. at 758.
\textsuperscript{138} \textit{Id.} at 760-61.
\textsuperscript{140} \textit{Id.} at 566.
\textsuperscript{141} \textit{Id.} at 566-67. The right of freedom of association becomes a first amendment right only if some independent first amendment right is implicated. NAACP v. Button, 371 U.S. 415, 430 (1963).
\textsuperscript{142} \textit{Hoard}, 12 M.J. at 566-67.
adequate notice. However, an analysis of these findings reveals an unwarranted extension by the courts of the Supreme Court's decision in Parker v. Levy.

An attack upon the notice provided by a federal criminal statute assumes the form of an allegation that the law is void for vagueness and unconstitutional under the due process clause of the fifth amendment. As interpreted by the Supreme Court, the due process clause requires that criminal laws be drafted with sufficient precision so as to provide adequate notice of the prohibited conduct. The measure of sufficient notice is common understanding and practice.

The Supreme Court in Levy also considered a vagueness challenge to Articles 133 and 134. Again finding that the requirements and purposes of the military warrant different application of a constitutional doctrine, the Court held that the criminal statutes of the UCMJ do not have to be drafted with the precision required of civilian criminal laws. Even if Articles 133 and 134 were worded broadly and seemed capable of reaching constitutionally-protected conduct, the Court found sufficient notice under the fifth amendment. A reasonable service member would, by reading the Articles with awareness of their past judicial interpretation, understand the extent of the prohibited conduct.

The Army court in Hoard drew upon Levy in rejecting Sergeant Hoard's other challenge to a local fraternization policy—that the policy was void for vagueness. The local fraternization regulation in this case prohibited socializing and unofficial personal association between military personnel permanently assigned to Fort Dix and basic trainees. A special court-martial had convicted him under Article 92 after he, while permanently assigned to Fort Dix, entertained basic trainees in his quarters. Although indicating that it believed that the sergeant had actual notice that his conduct violated the directive, the court also stated that the guidelines themselves provided sufficient notice that entertain-
ing basic trainees constituted prohibited conduct.\textsuperscript{183}

This holding probably exceeded the limits of the Supreme Court's decision in \textit{Levy} that notice can be provided by the text of a statute and its judicial interpretation. In \textit{Levy}, the broadly worded prohibitions of Articles 133 and 134, conduct prejudicial to good order and military discipline and conduct unbecoming an officer, had been interpreted by the courts.\textsuperscript{184} The broadly-worded prohibition against socializing and unofficial personal association which Hoard was accused of violating had not been interpreted by a court.\textsuperscript{185} It would have been a different matter if the regulation had referred expressly to fraternization. As a federal district court in \textit{Staton v. Froehlke}\textsuperscript{186} noted, fraternization prohibitions have been interpreted by military courts. Without judicial definition, however, the broad prohibitions against socializing and unofficial personal association did not fulfill the requirements of sufficient notice of a military criminal statute under \textit{Levy}.

\textbf{B. Article 133}

The lack of guidelines indicating under which article fraternization should be charged has permitted the recent conviction and attempts to convict officers under Article 133.\textsuperscript{187} Considering the disciplinary basis of the fraternization offense and the purpose of Article 133 to prohibit disgraceful or dishonorable activity by an officer, these charges were more properly brought under Article 134, the general disciplinary article.\textsuperscript{188}

The early history of the fraternization offense and judicial interpretation of Article 133 account for continued, albeit diminished, prosecution under Article 133. The history of the offense until the 1940's shows al-
most exclusive prosecution under the British and American antecedents of Article 133. During that period, the military services and courts considered social association between officers and enlisted men demeaning to the status of an officer in violation of these antecedent articles. Later, in the 1940's the services and courts shifted their view of the effect of fraternization from demeaning of an officer's status to prejudicial to unit discipline. This shift should have mandated exclusive prosecution under the general disciplinary article. However, military courts and commanders with little historical support interpreted Article 133 as having a disciplinary component allowing continued prosecution under Article 133. Although a view that an officer's disgraceful or dishonorable activity prejudices discipline as well as demeans the status of an officer is probably correct, continued prosecution of fraternization under Article 133 requires its characterization as disgraceful or dishonorable activity. This characterization conflicts with the expressed basis of the military fraternization policy which indicates that wrongful fraternization is not dishonorable or disgraceful but injures discipline by its creation of the potential for abuse of authority and unequal treatment of subordinates.

Despite the conflict, several military services continue to prosecute fraternization as a violation of Article 133. The confusion generated by this approach is illustrated by United States v. Jefferson. In Jefferson, the Army Court of Military Review considered a case involving a married male captain who had sex during duty hours with a married enlisted woman assigned to his command. A general court-martial found him guilty of fraternization and adultery in violation of Article 133 and sentenced him to be dismissed from the Army. Upon appeal, Captain Jefferson alleged that the findings of guilt as to both adultery and fraternization were multiplicitous. Although the issue of whether his

\[159\text{ See supra notes 46-60 and accompanying text.}\n\[160\text{ Note, supra note 45, at 825-26.}\n\[161\text{ See supra notes 65-70 and accompanying text.}\n\[162\text{ E.g., United States v. Coronado, 11 M.J. 522 (A.F.C.M.R. 1981), appeal denied, 18 M.J. 11 (C.M.A. 1984). Conduct within the scope of Article 133 is that "which undermines [an officer's] integrity to the degree . . . [that it] destroys or seriously impugns respect for the officer's standing as an individual, acceptance of his reliability, and obedience to his orders." 11 M.J. at 528.}\n\[163\text{ See AR 600-20, supra note 23; 1971 AF Opinion, supra note 111.}\n\[164\text{ In addition to the authorities cited at note 517 supra, the Marine Corps in 1983 charged a lieutenant with fraternizing with an enlisted woman before their marriage under Article 133. Navy Times, Dec. 19, 1983, at 26, col. 1.}\n\[165\text{ 14 M.J. 806 (A.C.M.R. 1982), petition granted, 15 M.J. 328 (C.M.A. 1983).}\n\[166\text{ Id. at 807-08.}\n\[167\text{ Id. at 807.}\n\[168\text{ Id. The doctrine of multiplicity is the military equivalent of the merger of offenses doctrine. For an analysis of the doctrine of multiplicity, see H. Moyer, supra note 6, § 2-667. Military courts have held that under some circumstances the offense of fraternization is multiplicitious with other offenses. E.g., United States v. Lovejoy, 20 C.M.A. 18, 21, 42.} \]
fraternizing conduct was properly charged under Article 133 was not raised," the court indirectly discussed the issue. Holding that adultery and fraternization were both violations of Article 133, the court indicated that fraternization was violative because it had a "demonstrable impact on the discipline, authority, and morale of his unit."\(^{170}\)

The Army Court of Military Review ruling that fraternization violates Article 133 by its adverse impact on discipline ignores a requirement of all Article 133 offenses. Even if Article 133 is read to include some disciplinary offenses, these offenses must also be disgraceful or dishonorable to be within the scope of the Article.\(^{171}\) By merely equating acts which prejudice discipline with disgraceful or dishonorable conduct, the court implied that military commanders could apply Articles 133 and 134 interchangeably to a fraternizing officer.\(^{172}\) The wording of the Articles and their interpretation by the Manual for Courts-Martial do not warrant such a result. Since Article 134 punishes disciplinary offenses, unless fraternization adversely affects discipline and disgraces or dishonors an officer, it, rather than Article 133, should apply.

C. Article 134

Association between officers or NCOs and lower ranking enlisted personnel violates Article 134 when it offends the military custom against wrongful fraternization.\(^{173}\) The current application, judicial definition, and service interpretation of this custom have created ambiguity. In view of this uncertainty, a preemptive regulatory definition becomes even more necessary.

The general disciplinary article incorporates military customs including


\(^{170}\) Jefferson, 14 M.J. at 810-11 (emphasis added).

\(^{171}\) See MCM, supra note 27, at ¶ 59c.

\(^{172}\) In its opinion, the court also referred with approval to a portion of the government's reply brief stating that fraternization is behavior that is likely to dishonor and disgrace an officer because it hampered existing rank structures. Jefferson, 14 M.J. at 810 n.3. This again confuses dishonorable and disgraceful activity with conduct that is prejudicial to discipline. Rather than dishonoring a particular officer, behavior that hampers existing rank structures affects military discipline.

\(^{173}\) See Flattan, supra note 13, at 110-11. Such association may also violate Article 134, even though it does not violate a custom against fraternization, when it otherwise constitutes conduct which prejudices order and discipline. See United States v. Stocken, 17 M.J. 826, 828-30 (A.C.M.R. 1984)(although Army custom against fraternization did not extend to NCOs, if an NCO’s relationship with enlisted members was "easily recognizable as criminal . . . [and had] a direct and immediate adverse impact on discipline," there was a violation of Article 134); see also United States v. Johanns, 17 M.J. 862, 868-69 (A.F.C.M.R. 1983)(even though a custom against fraternization could not serve as a basis for a violation of Article 133 in the Air Force, sexual relationships between officers and enlisted personnel, under certain circumstances, would still do so).
the prohibition against fraternization. 174 The incorporation results from an historical merger of military customs into the antecedents of the general disciplinary article. 175 The present Manual for Courts-Martial, in its guidelines for Article 134, recognizes the existence of this merger under the UCMJ. 176 However, the continuation of the merger requires that the custom remain consistent with existing military statutes and regulations and be currently observed. 177

At the present time, numerous commentators and service members are questioning the continued existence of a military custom against fraternization that is enforceable under Article 134. 178 This questioning arises from the conflicting characterization of the prohibition by military services, courts, and individual commanders. For example, the services' fraternization policies prohibit certain kinds of association between ranks. 179 Yet, the same services condone and even encourage the same type of association between ranks through their housing, recreation, and marriage policies. 180 Military courts add further to the confusion by defining wrongful fraternization as abnormal social intercourse. 181 Individual commanders, closest to the conduct, imply even a different definition of the custom by applying judicial sanctions only when there is a command relationship between the fraternizing service members. 182 Some observers

174 W. Winthrop, supra note 7, at 41-43.
175 Id.
176 MCM, supra note 27, at § 60c(2)(b).
177 The Manual states the requirements of a military custom under Article 134:
    Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned.
    MCM, supra note 27, at § 60b(2)(b).
    In the past, at least one other military judge expressed a similiar view. In United States v. Penick, 19 B.R. 257, 261-62 (A.B.R. 1945), a dissenting judge expressed his dissatisfaction with the fraternization offense. He contended that officers socializing with subordinates did not violate the disciplinary article because the Army encouraged officers to build close relationships with their men. The philosophy underlying the offense was inconsistent with a democratic Army because it created a caste system, injured soldiers' self respect, and unduly burdened an individual's freedom.
179 See AR 600-20, supra note 23; AFR 30-1, supra note 23.
180 See Flatten, supra note 13, at 114. For example, Air Force regulations allow officers and enlisted personnel to visit each other's clubs as guests, permit married officer-enlisted couples to live in post housing, and provide for mixed participation in recreational and religious activities.
181 See supra notes 107-10 and accompanying text.
182 E.g., United States v. Horton, 14 M.J. 96 (C.M.A. 1982)(first sergeant accused of fraternizing with female subordinates); United States v. Goodyear, 14 M.J. 567 (N.M.C.M.R.
viewing the varying descriptions of fraternization which all depart substantially from its original definition, have concluded that there is no longer a prosecutable custom.\textsuperscript{183}

Despite ambiguity as to the contours of the custom, the military services charge fraternization \textit{most often} as a violation of Article 134.\textsuperscript{184} This occurs because so far only limited Army commands have punitive fraternization regulations that would sustain a conviction under Article 92.\textsuperscript{185} Article 133 is used less often because it requires disgraceful or dishonorable acts by an officer. Rather than eroding the custom, the Marine Corps, Army, and Navy have recently taken steps to preserve it, as evidenced by numerous courts-martial and administrative proceedings.\textsuperscript{186} This recent tack has created additional confusion as to prohibited relationships under the custom in the minds of both service members and military judges.\textsuperscript{187}

In order to alleviate this confusion and the other problems associated with the fraternization offense, the military services should issue punitive regulatory standards to guide the participants in the military justice system: the soldier, the commander, and the court. The next section of this Note proposes those standards and other steps to clarify the fraternization prohibition in the military.

\section*{IV. Recommendations}

As evidenced by the number of courts-martial, military personnel will fraternize despite the prohibition.\textsuperscript{188} In view of the services' desire to enforce the ban for disciplinary reasons, and military and civilian courts' continued support, the rule will undoubtedly endure.\textsuperscript{188} However, the

\textsuperscript{183} See authorities cited supra note 178.
\textsuperscript{184} Flatten, supra note 13, at 110-11.
\textsuperscript{185} See supra notes 124-28 and accompanying text. However, several commentators have urged adoption of such service-wide standards. See Flatten, supra note 13, at 114; Navy Times, Dec. 19, 1983, at 26, col. 1.
\textsuperscript{186} See authorities cited supra notes 31 & 182.
\textsuperscript{187} See, e.g., Rodriguez, No. ACM23545, slip op. at 4-14; Drogin, supra note 21, at 30-31. One Army NCO, court-martialed for fraternizing with a basic trainee, expressed his confusion: "I feel fraternization . . . conflicts with personal interests." \textit{Id.} at 30.
\textsuperscript{188} From 1978 to 1983, there were at least eight reported and two unreported court-martial decisions involving a specification of fraternization. Other sources indicate additional courts-martial and nonjudicial punishment. \textit{See} Drogin, supra note 21, at 31; Navy Times, Dec. 12, 1983, at 18, col. 1; \textit{id. Dec.} 19, 1983, at 26, col. 1.
\textsuperscript{189} Civilian recognition of the basis for the prohibition, that intimate association between superiors and subordinates interferes with working relationships, will probably encourage this trend. \textit{See} Jamison, supra note 14; \textit{Sexual Side of Enterprise}, \textit{Mgmt. Rev.}, July 1980, at 51; \textit{Unethical and Improper Behavior by Training Professionals}, \textit{Training \& Dev. J.},
fraternization offense as currently defined has great potential for arbitrary application. Although held to provide sufficient notice, the prohibition provides little actual notice to a service member confronted by conflicting interpretations of the wrongful conduct. The present lack of guidelines, as to which article of the UCMJ is violated by fraternization, permit its prosecution under Article 133, even though the requirements of that Article may not be satisfied in fact. Thus, the military services should take steps to avoid recurrences of the adverse consequences which stem from enforcement of the prohibition.

The following steps are recommended. To minimize the possibility of arbitrary application of the fraternization policy, the military services should issue regulations setting forth the prohibited associational activities. The regulation should manifest its prohibitiveness and punitiveness allowing prosecution under Article 92 of the UCMJ. In indicating its disciplinary purpose, the regulation should be gender neutral demonstrating its application to same and opposite sex fraternization. Furthermore, the regulation should key its employment to immediate-command relationships recognizing the services' self-imposed definition of wrongful fraternization.

The regulation should encourage specific and timely reaction to its violation. By encouraging such response, commanders and supervisors may be able to avoid commission of more serious offenses under the Code and lessen sanctions applied to the service member. Unless the conduct has proceeded to the point where it violates a substantive article of the

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192 E.g., United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), appeal denied, 13 M.J. 31 (C.M.A. 1982). The argument that there is sufficient notice given by the fraternization prohibition relies on evidence that the accused had actual notice or on past judicial interpretation. For example, the court in Staton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975), indicated that judicial decisions involving fraternization and homosexual conduct provided sufficient notice as to prohibited fraternization between members of the opposite sex. Id. at 505-06.


194 See supra notes 117-20 and accompanying text (explaining requirements of a punitive regulation under Article 92).

195 Both types of fraternization have been held to prejudice order and discipline. See, e.g., United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981) (prohibited fraternization included association with male and female enlisted personnel), appeal denied, 13 M.J. 31 (C.M.A. 1982).

196 See supra note 182 and accompanying text.
UCMJ (e.g., indecent assault, sodomy, etc.), violation of the regulation should be met by counseling or nonjudicial punishment rather than by court-martial. That treatment would standardize the method used by most commanders when fraternization arises in a unit.\textsuperscript{196} When a service member’s conduct violates the regulation and a substantive UCMJ article, there should be prosecution of both offenses unless multiplicity intervenes. Such prosecution penalizes the conduct offending discipline and warns of the services’ continued desire to enforce the prohibition.

An additional aim ought to avoid the present discretionary enforcement of the prohibition.\textsuperscript{197} The current discharge of military policy varies widely among commands and raises charges of arbitrariness. It also creates a reasonable but erroneous perception among service members that fraternization is permissible.\textsuperscript{198}

The following regulation is suggested.

**PROHIBITED RELATIONSHIPS**

1. **PURPOSE:** This regulation prohibits higher ranking service members from engaging in certain relationships with lower ranking service members if:
   (a) the service members are within the same chain of command; or
   (b) have a direct supervisory relationship; or
   (c) are in the same battalion or lesser sized unit.

The relationships described in this regulation are likely to harm discipline in military units. Military personnel cannot effectively lead all their subordinates when they become intimately involved with particular subordinates. Engaging in a prohibited relationship under this regulation is a violation of Article 92 of the UCMJ.

2. **SCOPE:** Compliance with this regulation is mandatory for all service personnel. For UCMJ purposes, this regulation precludes

\textsuperscript{196} See Flatten, supra note 13, at 114.

\textsuperscript{197} For examples of nonuniform application of the Army’s fraternization policy, see Drogin, supra note 21, at 30. One commentator indicates that the Air Force has the same problem. Flatten, supra note 13, at 114. Nonuniformity is probably also present in the Navy. See Navy Times, Dec. 12, 1983, at 18, col. 1. This Article, concerning a recent fraternization case in the Navy, states: “[The officer] continues to perform her duties in Norfolk while the board recommendation [that she be discharged] is being reviewed. Recently an ensign who recently [sic] arrived at her command married an enlisted man. [The officer] said no action was taken against the other ensign.” Id. at 20, col. 2.

A nondiscretionary approach has been studied and rejected by the Army and Navy. Both services feared that detailed fraternization regulations would remove necessary commanders’ discretion to apply the policy on a case by case basis. See Women in the Military Hearings, supra note 23, at 118; Navy Times, Dec. 19, 1983, at 26, col. 1.

\textsuperscript{198} See Drogin, supra note 21, at 30.
further fraternization specifications under Articles 133 and 134. Nothing in this regulation shall be construed to apply to marital relationships between service members.

3. PROHIBITED RELATIONSHIPS:
   (a) dating or sexual activity; or
   (b) frequent socializing where rank is ignored.

4. COMMANDER'S RESPONSIBILITIES:
   (a) Commanders should not ignore the beginning signs of a prohibited relationship between unit members. By counseling the members involved, the commander may avoid the necessity of nonjudicial punishment or more serious action.
   (b) If there has been a violation of this regulation, the commander should use nonjudicial punishment or counseling unless the service member's conduct also violates other Articles of the UCMJ (with the exception of Article 133 or the prejudice or discredit clauses of Article 134).
   (c) If the service member's conduct violates this regulation and other Articles of the UCMJ (with the exception of Article 133 or the prejudice and discredit clauses of Article 134) the commander can take action as appropriate. If permissible under military law, violation of the regulation should be sanctioned.
   (d) Commanders should ensure that all personnel become familiar with the purpose and requirements of this regulation.

As a final matter, implementation of the issued punitive fraternization regulation should include measures tending to ensure that service members will become aware of its standards. Basic and officers' training must instruct enlisted and officer trainees about the existence and necessity of the military prohibition. The teaching should go beyond mere reference to the policy. It should emphasize: the rationale underlying the policy; the kinds of forbidden association; adverse consequences of violation; and courses of action when the rule and reality meet.

199 The UCMJ itself, at least in the case of enlisted personnel, provides one measure. Article 137, 10 U.S.C. § 937 (1982), requires that the punitive Articles of the Code be "explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter." When commands fulfill this requirement, explanation of the fraternization policy could also occur.

In the case of officers, this instruction is also needed. In the past, officer training courses only briefly mentioned the prohibition. See Flatten, supra note 13, at 109 (providing example of the discussion). During the active duty service of the author of this Note, in the Army from 1978 to 1982, the existence of the prohibition was alluded to briefly in an officer's basic course. In this author's experience, even after issuance of the Army regulation proscribing certain types of fraternization, the limits of superior and subordinate relationships were rarely discussed or disseminated among officers and NCOs.

200 A Department of Defense official suggested one course of action. "[I]f [superiors and subordinates] want to marry, they would have to work toward getting one of them a transfer to another department." Navy Times, Dec. 19, 1983, at 26, col. 1.
V. Conclusion

The Supreme Court recognized in *Parker v. Levy*\(^{201}\) that the military has an exceptionally strong interest in order and discipline. One of the methods of effectuating this interest is prosecution of disciplinary offenses such as wrongful fraternization. By judicial interpretation and service application, this offense has incorporated numerous conflicting meanings.\(^{202}\) The failure to preempt these varying definitions by service wide regulatory standards creates unnecessary confusion in both service members' and military courts' understanding of the prohibition.\(^{203}\) With renewed emphasis on the prohibition, further confusion seems likely. Prosecution of associational-type conduct under Articles 133 and 134 without charging fraternization helps to blur definitions.\(^{204}\)

There is a great need to provide detailed standards to service members, commanders, and other participants in the military justice system as to what relationships between service members of different rank are permissible. The services can accomplish this objective by issuing detailed and punitive fraternization regulations. By doing so, they should eliminate prosecution under the essentially standardless Articles 133 and 134. Besides providing necessary clarification, the services might avoid congressional intervention fueled by public dissatisfaction.\(^{205}\)

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\(^{202}\) See supra notes 79-110 and accompanying text.
\(^{203}\) An example of the confusion is *United States v. Rodriguez*, No. ACM23545 (A.F.C.M.R. Oct. 19, 1982), modified on other grounds, 18 M.J. 363 (C.M.A. 1984). The service member contended that fraternization was not an offense under the UCMJ. *Id.* at 1. The majority held that it was an offense, but that the military judge erred in instructing the members of the court on the elements of the offense. *Id.* at 3. A concurring judge decided that fraternization was no longer an offense. *Id.* at 11-12.
\(^{205}\) In 1980, the following exchange took place between an Army spokesman and a member of the House of Representatives:

[Congressman] White. I really think the DOD ought to present to Congress some kind of [specific and uniform fraternization policy]. Every day - not every day, frequently, I have some member contact me because someone is wrestling with two officers or officer and enlisted man problem as to fraternization. There are as many results or policies as there are incidents. I feel this is very destructive to morale. You are losing good officers and men and enlisted women and women officers, I am sure, as a result of not having a clear position.

When I say you, I am talking about the Department of Defense.

Mr. Clark [Army spokesman]. I am not aware, frankly, that we have any degree of dissatisfaction about that policy. I am fully aware of the one incident, of course. We simply should not judge a policy by one incident.

[Congressman] White. I suggest a lot of people are winging at the problem right now, not addressing it, hoping it might go away, but it is not going to.

*Women in the Military Hearings, supra* note 23, at 130.