STRUCTURES OF AMERICAN MILITARY JUSTICE

KENT S. BERNARD†

I. INTRODUCTION

In a course of decisions stretching back 100 years, the United States Supreme Court has struggled to formulate an analysis of the military justice system.¹ While taking into account the needs of the military, such an analysis would have to be, in addition, both explicable and acceptable to the civilian population and legal tradition. Although it had decided individual cases, until the 1974 case of *Parker v. Levy*² the Court was not forced to articulate a complete analysis of why the military justice system should be treated differently from a civilian system. Prior cases provided hints, but their facts allowed the Court to limit its decisions and appear to be merely fine tuning a system that differed from our civilian system only in certain narrow aspects required by the nature of any military operation.

Levy will not bear such an easy and accommodating construction. The Supreme Court there upheld the two so-called general articles of the Uniform Code of Military Justice (UCMJ).³ These provisions have no American civilian counterpart and on their face appear to outlaw anything and everything that a commanding officer dislikes. The *Levy* majority tried to explain the validity of such rules in the military context, but failed to articulate its view of the social structure underlying the military justice system and of the Constitution's place in it. Any justification of the result in *Levy*, however, requires a radically

† B.A. 1972, Colgate University; J.D. 1975, University of Pennsylvania. Member, Pennsylvania Bar.

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¹ See generally Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 396 (1976).

² 417 U.S. 733 (1974).

³ *Id.* The general articles are reprinted at text accompanying notes 9 & 10 *infra*.

different view of military society and its relation to the Constitution than the Court holds of civilian society.

This Article will present a model of the military justice system that the author believes underlies the Supreme Court's decision in *Levy*. Within the framework of this model the decision is coherent and defensible. The author does not claim that the model presented herein describes military life with perfect accuracy. Moreover, the mere presentation of the model does not in itself answer the questions of the constitutionality or the morality of the military justice system in general.⁴ Such a presentation is nonetheless a prerequisite to an understanding of these questions and the manner in which the Supreme Court answered them.

The issues separating reformers and defenders of the current system rest ultimately on moral judgments about the desirability of societal structures—not limited to the military—that follow certain patterns. Recognizing this may center and focus the debate and lead legislators and other writers to examine the questions here exposed. The conceptual underpinnings of our military justice system may, upon full examination, be found either good or bad. Until the conceptual issues are defined, however, we have no ground to make any judgment at all.

II. *PARKER V. LEVY*

Captain Levy was a physician stationed in South Carolina. He was, at least technically, a volunteer.⁵ In late 1966 his superior officer discovered that Levy had been neglecting his duty of training Special Forces aide men. A specific order to conduct the training was given, which Levy refused to obey on the ground of his medical ethics. He also made several public statements that were taken to be inflammatory by his military superiors. In one case he said:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to

⁴ In fact, the author believes that a "hybrid family-life" model of the military, developed in this Article, is a close approximation of the reality of life in the armed forces. He also believes that this reality is morally and constitutionally adequate to preserve the essence of fairness in an institution devoted to discipline and warfare. Though this Article makes suggestions along these lines, see text accompanying notes 130-33 *infra*, a full evaluation of these problems must wait for another time.

⁵ Levy's military career is reviewed in CONSCIENCE AND COMMAND 166-84 (J. Finn ed. 1971).

Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent to Viet Nam I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.⁶

Although they originally contemplated bringing nonjudicial proceedings against Levy,⁷ his superiors later decided to bring a general court-martial against him. He was convicted of disobeying orders⁸ and violating Articles 133 and 134—the general articles—of the UCMJ. Article 133 provides:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as the court-martial may direct.⁹

Article 134 states:

Though not specifically mentioned in this chapter [the penal provisions of the Code], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.¹⁰

⁶ 417 U.S. at 736-37.

⁷ Nonjudicial disciplinary proceedings are available under Uniform Code of Military Justice, Art. 15, 10 U.S.C. § 815 (1970). See text accompanying notes 58-63, 81-84 *infra*.

⁸ *Parker v. Levy*, 417 U.S. at 737. The conviction was under Uniform Code of Military Justice, Art. 90, 10 U.S.C. § 890 (1970).

⁹ Uniform Code of Military Justice, Art. 133, 10 U.S.C. § 933 (1970).

¹⁰ Uniform Code of Military Justice, Art. 134, 10 U.S.C. § 934 (1970). For a discussion of the general article, see Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971). This Article is concerned with the first two clauses of Article 134, involving conduct prejudicial to good order and discipline and conduct of a nature to bring discredit upon the armed ser-

Levy was charged, under Article 134, with making statements designed to promote disloyalty among the troops.¹¹ Much the same statements were charged, under Article 133, to be "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful to Special Forces personnel and to enlisted personnel who were patients or under his supervision."¹² Levy's conviction was upheld by the military appellate system.¹³ He then sought habeas corpus in the federal civil courts. The district court denied relief, but the Court of Appeals for the Third Circuit reversed,¹⁴ holding Articles 133 and 134 void for vagueness. The Supreme Court reversed.¹⁵

The Court's opinion, written by Justice Rehnquist, relied heavily on the concept that the military is a separate and specialized society.

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed traditions of its own during its long history. . . . In *In re Grimley* the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience" More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian"

Just as military society has been a society apart from civilian society, so "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."¹⁶

The opinion then moved to a consideration of the general articles themselves, and countered the argument that the articles were unconstitutionally vague with a two-pronged attack. First, the Court felt that "the long-standing customs and usages of

vices. The section on crimes and offenses not capital is a separate unit, and deals with those acts and omissions that are not punished by the UCMJ but that are made crimes or offenses by Congress. In that section the offenses can be known as such in the same way civilian criminal offenses are known, even though they are not specifically listed in the UCMJ. See Gaynor, *supra*, at 261-64.

¹¹ *Parker v. Levy*, 417 U.S. 733, 738 (1974).

¹² *Id.* at 739.

¹³ *Id.* at 740 & n.7.

¹⁴ 478 F.2d 772 (3d Cir. 1973).

¹⁵ 417 U.S. 733 (1974). For an overview of the Court's decision here and in similar cases, see Everett, *Military Justice in the Wake of Parker v. Levy*, 67 MIL. L. REV. 1 (1975).

¹⁶ 417 U.S. at 743-44 (citations omitted).

the services impart meaning to the seemingly imprecise standards of Arts. 133 and 134."¹⁷ Concurring, Justices Blackmun and Burger found that the moral precepts underlying the articles had remained unchanged since at least 1642.¹⁸ The Court quoted with approval language from the 1857 case of *Dynes v. Hoover*:

Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by the practical men in the navy and army, and by those who have studied the law of courts martial, and the offenses of which the different courts martial have cognizance.¹⁹

Further, because each article had been construed by the United States Court of Military Appeals (the highest tribunal within the military justice system) or by other military authorities, the Court maintained that the scope of each article had been narrowed and clarified sufficiently to pass constitutional muster.²⁰

The Court's arguments that such narrowing constructions exist are not convincing. Cases interpreting these articles show only what is being penalized; they provide little guide to what may be punished in the next case, as Justice Stewart notes in dissent:

Article 133 has been recently employed to punish such widely disparate conduct as dishonorable failure to pay debts, selling whiskey at an unconscionable price to an enlisted man, cheating at cards, and having an ex-

¹⁷ *Id.* at 746-47. Indeed, the Court traced the origin and usage of the general articles back to the Articles of the Earl of Essex of 1642. *Id.* at 745.

¹⁸ *Id.* at 763 (Blackmun, J., concurring).

¹⁹ *Id.* at 747 (quoting *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857)).

²⁰ *Id.* at 752-53. "Article 134 does not make 'every irregular, mischievous, or improper act a court-martial offense,' but its reach is limited to conduct that is 'directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline.'" *Id.* at 753 (citation omitted). Further:

"There are certain moral attributes which belong to the ideal officer and gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not everyone can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which an officer or cadet cannot fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness."

Id. at 777 n.12 (Stewart, J., dissenting) (quoting B. REYNOLDS, *THE OFFICER'S GUIDE* 435-36 (1969 ed.)).

tramarital affair. Article 134 has been given an even wider sweep, having been applied to sexual acts with a chicken, window peeping in a trailer park, and cheating while calling bingo numbers.²¹

The second prong of the Court's analysis is more important to its understanding of military structure. The Court asserted that prior constructions by military authorities, the means by which outsiders can learn what activities are crimes under the articles, are not the only sources of the insider's knowledge: "the practical men in the navy and army" learn the scope of these articles by being part of the military.²² That is, the general articles are reflective of the special relationship between the soldier and the army:

While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman.²³

The UCMJ is seen as informing the soldier's whole life, because in general the government and the members of the military have nothing less than a "whole-life" relationship.²⁴ "[The relationship] is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one."²⁵ This all-encompassing relationship between the military and the individual is the Court's strongest justification for upholding the UCMJ's general articles. Even if they are vague, and their constructions confusing, they are constitutional because the Court finds them necessary to the functioning of the military as a separate society.²⁶

²¹ *Id.* at 778-79 (Stewart, J., dissenting) (footnotes omitted).

²² *Id.* at 747; *see id.* at 763 (Blackmun, J., concurring).

²³ *Id.* at 749.

²⁴ Meaning that while an individual is in the armed services, the military surrounds and touches his whole life, not that he can never get out.

²⁵ 417 U.S. at 751. This is not a recent perception. Military membership traditionally has been considered a "status," with rights and duties unknown to the civilian society. *See, e.g., In re Grimley*, 137 U.S. 147 (1890).

²⁶ 417 U.S. at 743, 744. *See United States v. Priest*, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).

Flexibility is necessary to any whole-life relationship, military or otherwise.²⁷ Therefore, rather than trying to forsee all sanctionable acts by members of the military, Congress has left a general power to deal with such acts to the military itself. Accepting, for the purposes of the current analysis, this view of the military as a distinct and all-encompassing society, it is possible to understand the Court's reasoning and to develop a new tool for understanding military justice.

III. A PERSPECTIVE ON AMERICAN MILITARY JUSTICE

A. *A Short History*

Before the enactment of the UCMJ in 1950,²⁸ the armed services of the United States were governed by Articles of War.²⁹ In June 1775, the Second Continental Congress resolved to send a military force to join the army near Boston, and appointed a commission—one of whose members was George Washington—to prepare rules and regulations to govern this Continental Army.³⁰ At General Washington's request, these Articles were later revised by a commission which included Thomas Jefferson and John Adams. As Adams recorded it:

There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the British, for the British Articles of War were only a literal translation of the Roman. . . . I was therefore for reporting the British articles *totidem verbis*. . . . The British articles were accordingly reported.³¹

²⁷ See text accompanying notes 66-93 *infra*.

²⁸ Act of May 5, 1950, Pub. L. No. 506, ch. 169, § 1, 64 Stat. 107 (codified at 10 U.S.C. §§ 801-940 (1970)).

²⁹ See generally Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (Professor Morgan was the chairman of the committee that drafted the UCMJ).

³⁰ See W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9-10 (1955).

³¹ 3 WORKS OF JOHN ADAMS 93 (1850), *quoted in* Morgan, *supra* note 29, at 169. The Roman source of which Adams speaks and its later history are discussed by Gaynor:

Almost two thousand years ago a law of Arius Meander in the Roman *Digest* provided that: 'Every disorder to the prejudice of general discipline is a military offense, such as, for instance, the offense of laziness, or insolence, or idleness.' The Articles of War of Gustavus Adolphus of Sweden, issued in 1621, made punishable whatever was not contained therein but was repugnant to military discipline.

Gaynor, *supra* note 10, at 260. The United States added "all conduct of a nature to bring discredit upon the military service," but otherwise accepted this piece of history almost verbatim. Act of Aug. 29, 1916, ch. 418, § 3, art. 96, 39 Stat. 666.

These were adopted in 1776 and were never fundamentally re-done. The history of the articles themselves only serves to reinforce what has been noted from the start: Military law traditionally has been perceived as an entirely separate system from civilian law.³²

Historically, courts-martial have not been regarded as courts at all, but rather as "[I]nstrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."³³ This view, in slightly milder form, still commands a following.³⁴ There is persuasive evidence that a basic difference between the law applied to civilians and that applied to people in the military was intended originally, regardless of whether a court-martial was a "real" court.³⁵ Indeed, it seems that the framers of the Constitution never considered the Bill of Rights applicable to persons in the military.³⁶ Early congresses went along with this inapplicability premise,³⁷ as did the Supreme Court, which noted that "the power of Congress in the Government of the land and naval forces of the militia is not at all affected by the fifth or any other amendment."³⁸ This reflects a deep-seated view that the "rights" of those in the military are not rights at all in the most rigorous sense; they are a matter of the grace of Congress, which Congress may decide to alter or abolish.³⁹

This may serve to explain why certain seemingly odd features of the current military justice system have escaped general attack. For example, except in trials of crimes that carry a man-

³² See W. AYCOCK & S. WURFEL, *supra* note 30, at 8-9. See also *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

³³ 1 W. WINTHROP, *MILITARY LAW* 53 (1886) (emphasis in original) (footnotes omitted).

³⁴ *Cf.*, e.g., Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 484 (1971).

³⁵ See Note, *Courts-Martial vs. Constitutional Guarantees*, 17 U. PITT. L. REV. 454, 457 (1956).

³⁶ See Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 266, 294, 301-02 (1958). *Contra*, Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

³⁷ See Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964).

³⁸ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 138 (1866) (dictum).

³⁹ See Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964). *But see* Henderson, *supra* note 36; *cf.* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[I]t must be assumed that the military court system will vindicate servicemen's constitutional rights.").

datory death penalty, the UCMJ (and prior articles of war) never required unanimous agreement for conviction.⁴⁰ And the Military Judge, who serves roughly the function of the judge in a jury trial, is permitted to use the pretrial files to familiarize himself with the case before it comes before him for trial.⁴¹ Tolerance for such procedures makes sense only upon the hypothesis that the military justice system is not bound by the constraints on civilian practice.

B. *The Present General Articles: Sources of Conflict*

In 1950 Congress amended, unified, and codified the military justice system through the enactment of the UCMJ.⁴² While granting the right to counsel,⁴³ and attempting to deal with the most severe perceived problems of "command influence,"⁴⁴ the distinctive structure of the military justice system as a world apart was left unimpaired.⁴⁵ For purposes of this Article, the UCMJ's main feature is a negative one; it did not repeal the general article that made punishable all disorders and neglects to the prejudice of good order not treated elsewhere in the UCMJ.

These broad provisions for punishing prejudicial or discreditable conduct reflect the peculiar nature of the military justice system most clearly.

As early as 1896 Winthrop listed more than a hundred different types of conduct which had resulted in convictions under the general article. Some of the more unusual were: (1) being offensively unclean in person, (2) lawless conduct by a soldier resulting in his civilian conviction and confinement which deprived the

⁴⁰ Uniform Code of Military Justice, Art. 52, 10 U.S.C. § 852(a)(2) (1970).

⁴¹ *United States v. Mitchell*, 15 U.S.C.M.A. 516, 521, 36 C.M.R. 14, 19 (1965). It would be fascinating to compare this use of files with the European custom of the judge using a dossier containing all the evidence obtained before trial. See generally Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 517 n.16 (1973). Such a comparison is well beyond the scope of the present Article, but casual research has convinced the author that the overlap between military practice and the practice in European civil courts extends over too many areas to be mere coincidence.

⁴² See note 28 *supra*.

⁴³ See generally Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

⁴⁴ That is, pressure by the commanding officer (who convened the court-martial) to influence the decision. See generally West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. Rev. 1 (1970).

⁴⁵ But see Sherman, *supra* note 1. For a brief history and overview of the UCMJ, written by the chairman of the committee that drafted it, see Morgan, *supra* note 29.

Government of a considerable portion of his enlisted service, (3) a noncommissioned officer engaging in a public sparring exhibition in a saloon.⁴⁶

Many unusual activities still are held to be criminal under this section.⁴⁷ Officers may find themselves held to an even higher standard⁴⁸ under Article 133 than that applied to enlisted personnel.

The majority and dissent in *Levy* joined issue over whether a "reasonable military man" would know what conduct was prohibited by these articles.⁴⁹ Perhaps having the better of the argument that the general articles are not concrete, the dissent may nonetheless have lost on the larger question of whether concreteness is necessarily a virtue in all aspects of the military justice structure. The disagreement between the majority and dissent suggests a parallel between the present state of military law and the growth of the civilian criminal common law. A system of definitive statutes, giving advance notice of what conduct will be punished, is a quite recent development in our criminal law.

Needless to say a primitive people does not in the beginning enact an exhaustive and thoroughly integrated code of laws. By usage and custom certain rules come to be accepted . . . for dealing with those who commit misdeeds of a seriously antisocial nature. Hence there gradually develops a complicated set of rules, principles, concepts and standards which are enforced by the courts although they have never been adopted by any legislative enactment.⁵⁰

Cast in these terms, the *Levy* dissent is claiming that it is fundamentally unfair (violates due process) to subject an individual in the military to a part of the military law because the entire military justice system is not sufficiently developed. It is just too "primitive," particularly in comparison with civilian justice, to be forced on an individual. In *Levy's* case, the compulsion to accept the general articles as part of his code of conduct was real, even

⁴⁶ Gaynor, *supra* note 10, at 266 (footnotes omitted).

⁴⁷ See *id.* 267-85.

⁴⁸ Gaynor, *supra* note 10, at 285.

⁴⁹ See text accompanying notes 16-26 *supra*. Defenders of the present system are prone to argue that a reasonable military man *would* know what conduct is prohibited. See, e.g., J. BISHOP, JUSTICE UNDER FIRE 87-88 (1974). But see Bruton, Book Review, 123 U. PA. L. REV. 1482 (1975).

⁵⁰ R. PERKINS, CRIMINAL LAW 22 (1957).

though he technically "volunteered" for induction. The dissent's description of him as "a draft-induced volunteer"⁵¹ seems accurate, for had he not "volunteered" he would have been drafted and made subject to the same system anyway. If, in fact, Levy had a right to a system comparable in development to our civil one, it is fairly clear he did not waive that right.⁵² Yet once the dissenters grant the legitimacy of an entire military system separate and distinct from our civilian one, and once they grant further that society can compel its citizens to become part of this separate system, it is difficult to justify singling out the justice system for condemnation simply because it is too "primitive" in comparison with the civilian; the two initial concessions vitiate the force of the argument that the two systems must be the same in all respects.

But, it may be suggested, this analysis puts the burden of going forward on the wrong party. We have had a separate military system, this voice argues, and we may need to keep it separate in some areas. Why, however, should we tolerate such separateness when it comes to something as basic as knowing what acts are punishable? Surely it is up to the defenders of the military to justify this throwback to a more primitive era. The traditional defenders of the military justice system have tried to meet just this argument.

C. *The Traditional Justifications*

In 1921 Dean Wigmore formulated what well may remain the ultimate defense against allegations that military justice is primitive or unfair:

Military justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.⁵³

⁵¹ 417 U.S. at 782 (Stewart, J., dissenting).

⁵² See generally *Johnson v. Zerbst*, 304 U.S. 458 (1938) (waiver is an intentional abandonment of a known right).

⁵³ Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. Soc'y 151 (1921). But see Zillman & Imwinkelried, *supra* note 1, at 402-04 (wide-ranging authority to punish may

The need for discipline in the military, however, can explain fully the military justice system only when we more completely take into account the nature of the court-martial itself as perceived by the military authorities:

In their opinion a court-martial is merely an agency "appointed" by the commanding officer for the training of soldiers in discipline, and though one is sentenced by such a tribunal to death or to a long term of imprisonment, he is not deprived of life or liberty or in fact punished at all, but merely trained and educated and disciplined. A criminal sentence in the army, in short, serves the same purposes as the manual of arms or the setting up exercises, and must be cheerfully acquiesced in, no matter how severe it may be, as it is but a part of the school of the soldier.⁵⁴

Although the courts-martial-are-nothing-but-disciplinary-tools argument may seem dated, it retains a powerful intellectual attraction. As recently as 1969 the Supreme Court noted that "[a] court-martial is not yet an independent instrument of justice, but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."⁵⁵ Thus, the military system is not a "justice system" at all, but is purely a training device. That it is more primitive than the civilian justice system is irrelevant; the two systems have different purposes.

This is a radical approach, and has not been adopted or, in some cases, perceived, by either side of the current military justice debate. To most people, a military trial has basically the same function as does a civilian one. Even in the military, this view has its adherents. General Westmoreland, for example, ob-

not be necessary in some cases, given the nature of modern military service).

Military commanders traditionally bemoan the lack of discipline in their troops, and long for a return to the old-fashioned discipline of their fathers. Such sentiments were voiced as far back as 40 B.C. by Roman commanders. Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1, 4 (1972). During the Revolutionary War, George Washington urged Congress to raise the limit on flogging from 39 to 100 lashes, claiming that military discipline needed the greater sanction in order to be effective. *Id.* 4-5. Criticism of the military justice system as failing sufficiently to provide the needed discipline is also a military tradition, stretching back at least as far as our Civil War. *Id.* 5 (quoting Robert E. Lee).

⁵⁴ Bruce, *Double Jeopardy & The Power of Review in the Court-Martial Proceedings*, 3 MINN. L. REV. 484, 489 (1919). *But see* Hodson, *supra* note 53.

⁵⁵ O'Callahan v. Parker, 395 U.S. 258, 265 (1969) (footnote omitted). *But cf.* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[I]t must be assumed that the military court system will vindicate servicemen's constitutional rights.").

viously feels that military and civilian trials are directly comparable: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function it will promote discipline."⁵⁶ Most reformers seem to be proceeding on this basis.⁵⁷

Such an assumed comparability overlooks not only history, but also the existence of nonjudicial punishment under Article 15 of the UCMJ.⁵⁸ Article 15 gives a commander discretion to initiate action officially designated as "punishment" which does not utilize a court-martial at all, and which results in "minor" sanctions.⁵⁹ The soldier so disciplined can receive a court-martial on demand, but risks a more severe punishment if he does so.⁶⁰ An analogue in the civilian system—the individual who formally initiates the criminal prosecutions also having the power to impose a "minor" punishment without trial—is difficult to imagine.

"The commanding officer needs this additional authority so that he can correct a youngster by taking him out to the woodshed, so to speak, without being forced to give him a summary court-martial for a minor infraction."⁶¹ This justification for nonjudicial punishment, made in Senate hearings, catches the spirit of Article 15, while remaining true to its letter. In the more formal terms of Army regulations, the purposes of Article 15 are to:

- 1) Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;
- 2) Preserve, in appropriate cases, an offender's record of service from unnecessary stigmatization by record of a court-martial conviction; and

⁵⁶ Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV 5, 8 (1971).

⁵⁷ See, e.g., Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973); West, *supra* note 44, at 150-55; Zillman & Imwinkelried, *supra* note 1.

⁵⁸ Uniform Code of Military Justice, Art. 15, 10 U.S.C. § 815 (1970). For some of the interesting practical effects that the existence of nonjudicial punishment has on the strategy of an accused, see Bruton, *supra* note 49, at 1485 n.14.

⁵⁹ Compare Everett, *Some Comments on the Role of Discretion in Military Justice*, 37 LAW & CONTEMP. PROB. 171, 188-91 (1972), with Imwinkelried & Gilligan, *The Unconstitutional Burden of Article 15: A Rebuttal*, 83 YALE L.J. 534 (1974).

⁶⁰ 10 U.S.C. § 815(b) (1970).

⁶¹ *Hearings on S.R. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., 299 (1962) (Constitutional Rights of Military Personnel) (Statement of Z. Neff, Civilian Member, Navy Board of Review) [hereinafter cited as *Hearings*].

- 3) Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.⁶²

What the informal summary suggests more clearly than does the formal version is that nonjudicial punishment rests on a particular view of the relationship of the commanding officer and the soldier.⁶³ Although discipline must be maintained, it would be wasteful and absurd to invoke the formal criminal process for every minor infraction in a whole-life relationship.

D. Summary

This Article has suggested that the military justice system is not directly comparable to our civilian system because it responds to different needs. Having suggested that the normal comparison of civilian versus military justice system is not fruitful, it is time to suggest a comparison that is. The taking-the-youngster-to-the-woodshed justification of nonjudicial punishment quoted above suggests a new analysis. Perhaps the military justice system is, after all, a justice system, if not one based on traditional adversary lines.⁶⁴ A new model is needed in order to understand the system before it can be criticized adequately.

IV. MODELS OF MILITARY JUSTICE

It is received wisdom that our civilian criminal justice system is "adversary" in nature. In such a system

[t]he fundamental matrix is based upon the view that proceedings should be structured as a dispute between two sides in a position of theoretical equality before a court which must decide the outcome of the contest. . . . The protagonists of the model have definite, independent, and conflicting functions: the prosecutor's role is to obtain a conviction; the defendant's role is to block this effort.⁶⁵

The model of the system is that of a battle between the government and the defendant. This does not fully define the system, of course; the type of battle waged can vary tremendously de-

⁶² Army Reg. No. 27-10, ¶ 3-4a (Dec. 12, 1973).

⁶³ See notes 66-74 *infra* & accompanying text.

⁶⁴ For a discussion of the distinguishing features of adversary and nonadversary systems, see Damaška, *supra* note 41, at 563-64.

⁶⁵ Damaška, *supra* note 41, at 563.

pending on the strengths of the interests that are competing to shape it.

There are, of course, other possible models for a system of criminal justice. This section will set out one of them: the family model. This model will be distinguished from the battle (adversary) model, and then applied to the military.

A. *The Family Model*

In constructing a model for military justice along nonadversary lines, the work of Karl Llewellyn provides a logical starting point. Llewellyn presents a model for a criminal justice system that he suggests is at work in our military system.⁶⁶ Speaking of the New Mexico Pueblo Indians, he observed:

Here is a completely different approach to problems of criminal law. Offenses are foreknown as such, so far as experience is at hand, but hitherto unprecedented offenses can be *forefelt* as such when they run clearly counter to the tone and purpose of ongoing institutions. A "trial" lies half in an inquiry The officials will go drum up evidence for him [the "defendant"] on their own or at his instance. *They want to find him innocent*: he is part of their team. What is known as the "trial," the second half of the procedure, is formal on the point of fact Its purpose is instead to bring the erring brother, now known to be such, to repentance, to open confession, and to reintegration with the community of which he *was and still is regarded as an integral part*. As contrasted with the arm's-length attitudes, the law, the procedure, the treatment, the attitudes, the emotions are *parental*.⁶⁷

This society is more homogeneous than American civil society. The core of assumptions shared by its members is much larger than that shared, for example, by Americans in general. A written code exists, but uncoded offenses may be "*forefelt*" by the people. Justice in this society may be called parental: punishment is meant to take place without estrangement. The accused is not "the defendant," but is treated as an erring brother.

⁶⁶ K. LLEWELLYN, *The Anthropology of Criminal Guilt*, in JURISPRUDENCE 441, 449 (1962) (originally in the N.Y.U. Series on Social Meaning of Legal Concepts, CRIMINAL GUILT 100 (1950)).

⁶⁷ *Id.* 447-48 (emphasis in original).

Professor Griffiths proposed a variation of Llewellyn's conceptualization, which he described as the "family" model.⁶⁸ He recognized that real punishment occurs within a family, but that its nature is different from punishment by the authorities in civilian society:

Although punishments are expected to and do come out of the family's adjudication process, it is not a bitter "struggle from start to finish." A parent and child have far more to do with each other than obedience, deterrence, and punishment, and *any* process between them will reflect the full range of their relationship⁶⁹

What we have called a whole-life relationship exists in the family.⁷⁰ Unlike policeman and citizen, parent and child do not meet each other principally in the disciplinary process, but instead live together in total interaction.⁷¹ Whether naughty or good the child remains part of the family—he is one of us, and is not "the defendant."

The need for trust in public officials inheres in any nonadversary concept of criminal justice.⁷² These officials must be seen to act in the best interests of both the erring brother and the whole group. Without such trust, checks on official power are sought, as individuals feel the need to be able to "fight" the authorities and to resist rehabilitation. Such thinking is inconsistent with a family model of justice, as Griffiths has argued in detail.⁷³

A "family" system coerces strongly those members of the society who do not share its assumptions. No member need abuse the system for this coercion to occur: the structure itself works to eliminate heterogeneity.⁷⁴ There is no mechanism

⁶⁸ Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 371 (1970).

⁶⁹ *Id.* 373 (emphasis in original) (footnote omitted).

⁷⁰ "Punishment is not something a child receives in isolation from the rest of his relationship to the family" *Id.* 376.

⁷¹ Paradoxically, Griffiths seems to ignore this point in his treatment of the juvenile court system. *Id.* 399-404. He focuses on the lack of "Family Model spirit" of love and concern among public officials and the people at large. *Id.* 400. Yet it seems that his whole family model structure is based on the idea that the parties are involved in a whole-life relationship. For many children who come into contact with the juvenile court system, this element of overarching relationship is absent.

⁷² K. LLEWELLYN, *supra* note 66, at 444; Griffiths, *supra* note 68, at 380; cf. Damaška, *Structures of Authority & Comparative Criminal Procedure*, 84 YALE L.J. 480, 532-33 (1975).

⁷³ See Griffiths, *supra* note 68, at 367-410.

⁷⁴ Other risks exist in a family-type system when those in power attempt to abuse

within the structure to challenge the "tone and purpose of going institutions" that pervades the society; each member of the family knows his role, and there is no structural support for dissent. This is in sharp contrast with the way in which the adversary system supports the accused: opposition is expected and is the defendant's right.

B. *Distinguishing the Models*

Properly distinguishing between the family and adversary models of criminal justice requires an understanding of the interests served by each and of the way in which those interests are revealed in the structures and assumptions of the models. Herbert Packer identified two competing interests in the American civilian criminal justice system: "crime control"—the efficient repression of criminal conduct through speedy informal fact-finding—and "due process"—the protection of the individual from the coercive power of the state through formal and often lengthy procedures.⁷⁵ Where crime control is the dominant policy, officials wish to screen out the "probably innocent" quickly. Others then may be processed under a factual—as opposed to a legal—presumption of guilt. The logical end point would be a trialless system: either the suspect is exonerated in the administrative fact-finding process or he pleads guilty.⁷⁶ The due process policy, on the other hand, seeks to protect the factually innocent, even at the expense of letting some of the guilty go free. Where it dominates, no one should be convicted except on the strongest proof, presented in the fairest possible proceedings.

The adversary nature of the battle model emerges most

that power: "Let officials turn the machinery to work out a personal grudge; or to enrich themselves corruptly; or to put down political dissent—and one begins to understand why our forefathers, through the centuries, found it worth blood to win through to measures which could partly control officials." K. LLEWELLYN, *supra* note 66, at 448.

⁷⁵ H. PACKER, *Two Models of the Criminal Process*, in *THE LIMITS OF THE CRIMINAL SANCTION* 149 *passim* (1968) (originally printed in 113 U. PA. L. REV. 1 (1964)). Packer describes the two policies in terms of two "Models": "Crime Control" and "Due Process." *Id.* 158, 163. They are not, however, models in the sense that this Article uses the term. As Packer notes, "the Due Process Model is basically a negative model." *Id.* 173. It is a second order system, made up solely of checks, consisting of modifications and limits on some prior operative procedure, which the model does not define. As Professor Damaška has put it, "In its pure form it would lead not to an obstacle course, but rather to mere obstacles and no course on which to place [them]." Damaška, *supra* note 41, at 575. Both "Due Process" and "Crime Control" are carried out in this country in the context of a basically adversary system.

⁷⁶ H. PACKER, *supra* note 75, at 160-62.

clearly when due process interests dominate, because that is when formal courtroom struggles occur most frequently. When crime control is considered to be the chief aim of the criminal justice system, however, the underlying structure remains that of a battle. Even (perhaps especially) when administrative criminal-detection procedures dominate the criminal justice structure, the sense of battle between the suspect and the government is not diminished—the suspect is expected to resist detection and, as a matter of right, to struggle within whatever structures remain to him. In any case, we have an “arm’s length” system of criminal law.⁷⁷ As Griffiths noted: “Packer consistently portrays the criminal process as a struggle—a stylized war—between two contending forces whose interests are implacably hostile. . . . [The two policies reflect] nothing more than alternative derivations from that conception of profound and irreconcilable disharmony of interest.”⁷⁸

All this is antithetical to a family-type system in which the society attempts to “bring the erring brother . . . to repentance,”⁷⁹ in which offenses grow not only from the written law, which all can see and choose to obey, but from the spirit of the society, and, as in the case of Article 15 military punishments,⁸⁰ in which discipline can sometimes be expected without any formal procedure at all. Although some features of an adversary system operating principally for the purpose of crime control may look like parts of a family system, such as reliance on “administrative” fact-finding, the underlying societal structures and the assumptions that need to be shared in order to make the system work are different.

C. *Application to Military Justice*

The family model articulated above illuminates one prevailing view of the military justice system that was a major component of the Court’s analysis in *Levy* and that is consistent with the Court’s holding. Perhaps more importantly, although no claim is made herein that the family model in fact underlies the military justice system or that if it does it should continue to do so, the model does appear to explain at least certain features of the system.

⁷⁷ K. LLEWELLYN, *supra* note 66, at 444.

⁷⁸ Griffiths, *supra* note 68, at 367.

⁷⁹ K. LLEWELLYN, *supra* note 66, at 447-48.

⁸⁰ See text accompanying notes 58-63 *supra*.

Even critics of the present military justice system generally recognize the need for a relationship of trust between servicemen, both among comrades and between officers and enlisted personnel.⁸¹ A soldier may be asked to risk his life in battle; it is imperative that he trust his fellows. Further, the military constitutes a whole-life relationship, reaching far beyond the adjudicatory process. That the UCMJ affects this whole-life relationship was a main ground of the *Levy* decision. The military roles of Government as "employer, landlord, provisioner, and lawgiver rolled into one"⁸² suggest one obvious conclusion in terms of the model: the Government is the "parent" of the military "family";⁸³ the commander is, so it seems, the father surrogate. It thus makes sense to speak of a commander using non-judicial punishment to take "a youngster" "out to the woodshed."⁸⁴ Nonjudicial punishment is the sort of informal correction suited to the family relationship—there is no sense of setting the offender apart, because he is still "one of us."

The family model of the military justice system also serves to explain why Article 134 is open ended.⁸⁵ Given the family model's premise of mutual trust, the possibility of abuse is not regarded as a major flaw; the entire adversary idea is foreign to the model. An open-ended provision anticipates those unprecedented offenses that, in Llewellyn's term, can be "forefelt,"⁸⁶ though not written down. The model explains why the "judge" in the military system was originally, in adversary terms, a combination judge, prosecutor, and defense counsel.⁸⁷ To the extent the family model is accurate, one person can play all three roles, because the roles do not exist in the sense that they do in a battle system; there is no one in the institution whose function it is to convict the offender. Instead, the goal is to bring the erring individual back into the mainstream of the unit. He, therefore, does not need a "defense" as we generally use that term.

⁸¹ See, e.g., Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1681, 1682 (1971).

⁸² 417 U.S. at 751; see text accompanying notes 22-27 *supra*.

⁸³ This seems to have been the view held by Mr. Justice Holmes in *White v. United States*, 270 U.S. 175, 180 (1926), where he observed that "the relation of the Government to the soldiers if not paternal was at least avuncular."

⁸⁴ See *Hearings*, *supra* note 61, at 299.

⁸⁵ See text accompanying note 10 *supra*.

⁸⁶ See text accompanying note 67 *supra*.

⁸⁷ See L. Ashlock, *The Military Trial Judge* 6 (1972) (unpublished S.J.D. thesis, on file at Biddle Law Library, University of Pennsylvania).

Once it is recognized that an unarticulated family model may be presupposed by defenders of the military (and by the Court), one can begin to see why some reform suggestions strike the defenders as nonsense. For example, to codify all Article 134 offenses, and thereby protect against some kinds of official overreaching,⁸⁸ only makes sense to one operating outside the family context.⁸⁹ A similar vice is seen to infect proposals to curtail command influence;⁹⁰ the analogy would be to curb parental influence within the family. Reform proposals that assume an adversary model are bound to seem incoherent to those who accept the assumptions of the family model.⁹¹

V. THE MODEL AND THE REALITY

This Article so far has stressed the coherence of viewing military justice as a family-type structure. Yet it is unlikely that the system was designed with any particular social model in mind. The elements of the system may be reconcilable with no single conceptualization; elements fitting different models may coexist with various degrees of tension, in what Llewellyn called (in a different context) "a sort of institutional semi-schizophrenia."⁹² In fact, some elements of the military justice system

⁸⁸ See generally Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 479 (1971); Sherman, *supra* note 1, at 78-82.

⁸⁹ One point may cause some confusion at this juncture. The relationship between the development of procedural safeguards and the vagueness or exactness of the substantive law to be enforced is one of correlation only. Knowledge of one does not allow definition of a full model for a criminal justice system in the absence of the other. It is more harmonious to have open-ended provisions of substantive law in a family model context; the homogeneity of the society gives a type of fair warning of the behavior proscribed. It is tempting to think that the converse of this is logically compelled—that the adversary model requires a more definite exactness in the substantive matrix. But history is not so generous. The common law procedure was an adversary one, yet the common law tolerated very vague definitions of offenses. Common law crimes—acts violating no statute but condemned by the courts as counter to the public welfare, still exist in England and some states. See, e.g., *Shaw v. Director of Public Prosecutions*, [1961] 2 W.L.R. 867 (H.L.); *Commonwealth v. Mochan*, 177 Pa. Super. 454, 110 A.2d 788 (1955). This court power to declare acts criminal generally is limited, however, to the creation of misdemeanors, see, e.g., *Commonwealth v. Branch*, 207 Pa. Super. 137, 215 A.2d 392 (1965), which may serve to make it more palatable. Such a sugarcoating is unavailable in the military context, as the text of Article 134 makes clear.

⁹⁰ See, e.g., West, *supra* note 44, at 151-55.

⁹¹ Llewellyn points out that "the book," the written Code, serves as a check on the parent—or commanding officer—who never should have been granted that power at all. K. LLEWELLYN, *supra* note 66, at 449-50. Giving the argument its full weight, Llewellyn still sees the military in family model terms. Just as child abuse laws do not destroy the family, so some external limits do not eliminate the family model.

⁹² Compare K. LLEWELLYN, *supra* note 66, at 446 (discussing a system that uses adversary-type trials and then moves into a pure cure-and-prevention line of treatment,

look like components of an adversary system, in which the accused soldier and the Government do battle, while other elements fit the family model of conciliation and reintegration of the "erring brother" into society.

A. *The Rights of Servicemen*

Outside the realm of Article 15 (informal) punishments,⁹³ there are many procedural safeguards in the military justice system. In major cases, military "defendants" have appointed counsel;⁹⁴ in some areas servicemen may have greater protection than civilians.⁹⁵ As noted previously,⁹⁶ this sort of protection makes sense only in an adversarial structure. The commentators disagree whether these rights are constitutionally protected or are merely statutory grants by Congress that may be revoked at any time.⁹⁷ Although perhaps unanswerable, this question is of moment for the purposes of this Article because it concerns the fundamentality of adversary proceedings to the military justice system. With *Levy* the Supreme Court has recognized certain powers of commanding officers to be fundamental to the functioning of the military. Consistent with a family model, these powers are inconsistent with a battle model of justice. To the extent courts have held that certain civilian procedures are constitutionally guaranteed,⁹⁸ elements of adversariness must be as deeply ingrained in the military as familial elements.

Right now, only a suggestion for reconciliation of these disparate elements of military justice can be made. Perhaps for

and arguing that the institution has an incoherent view of the individual), with Griffiths, *supra* note 68, at 379 (remarking on "the curious dichotomizing which puts so wide a gulf between criminal law and procedure, and penology," and arguing that the battle model, because it ignores the punishment stage, cuts the criminal off sharply at the point of conviction).

⁹³ See text accompanying notes 57-63 *supra*.

⁹⁴ A "major case" limitation may be the result of *Middendorf v. Henry*, 96 S. Ct. 1281 (1976).

⁹⁵ See, e.g., Kent, *Practical Benefits for the Accused—A Case Comparison of the U.S. Civilian and Military Systems of Justice*, 9 DUQUESNE L. REV. 186 (1970); Moyer, *supra* note 43.

⁹⁶ See text accompanying notes 75-78 *supra*.

⁹⁷ See generally *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) ("[I]t must be assumed that the military court system will vindicate servicemen's constitutional rights."); Henderson, *supra* note 36, at 293; Weiner, *supra* note 36, at 294; Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964); Note, *Courts-Martial vs. Constitutional Guarantees*, 17 U. PITT. L. REV. 454 (1956); text accompanying notes 33-39 *supra*. The readings the commentators give to the history diverge greatly.

⁹⁸ Cf. *Parker v. Levy*, 417 U.S. 733, 766-68 & nn.4 & 5 (1974) (Douglas, J., dissenting).

serious (non-Article 15) and well defined (non-General Article) offenses, the military feels that the possibility of genuine struggle is too great, and the possibility of brotherly reintegration too small, to allow informal family-type procedures to continue; a battle is inevitable, in which civilian-type procedures are needed.

B. *The Structure of Military Authority*

Family authority is primarily individual-centered,⁹⁹ and attempts to reach appropriate answers to problems as they arise.¹⁰⁰ Power is ascribed to parents by their status, not delegated to them by higher authority, and its exact nature may remain uncertain until it needs to be used.¹⁰¹ This uncertainty is necessary in order to deal with new developments in an all-encompassing relationship; generally, a parent does not attempt to determine outcomes by unbending rules.¹⁰² In short, the relationship is flexible, despite the ordering that may exist in particular families.¹⁰³ On the other hand, delegation and precise limitation on the authority of both law enforcement officials and judges are vital parts of both a fully developed adversary system of justice and a rational bureaucracy.

Authority in the military looks in some ways like individual-centered family authority and in others like bureaucratic authority. A family-authority description once came close to fitting the structures of authority in military organizations. In the past, such organizations had basic two-level structures. The civilian aristocracy provided the officers while the lower classes provided the soldiers.¹⁰⁴ Ignoring for the moment possible authority structures within each class, it is reasonable to equate the officers with the parents of the family model for the purpose of analyzing the way authority was limited and handled.¹⁰⁵ Like its paren-

⁹⁹ Damaška, *supra* note 72, at 509-10. I do not use Professor Damaška's term "coordinate," *id.* 509, because the implication of that term seems to be that authority is shared horizontally. This is not necessarily the case with the family model.

¹⁰⁰ *Id.* 509.

¹⁰¹ *Cf. id.* 516. Child abuse laws are left out of the account here. Child abuse may well exemplify a breakdown of the family model. For purposes of this Article, the point is made if it is conceded that, within the parameters of those laws, there is a wide range of discretion left open.

¹⁰² *Id.* 510.

¹⁰³ *Id.* 531-32. The usage here departs from Professor Damaška's.

¹⁰⁴ M. JANOWITZ, *SOCIOLOGY AND THE MILITARY ESTABLISHMENT* 28-29 (rev. ed. 1965).

¹⁰⁵ By no means is it suggested that officers and soldiers fit the family model in all other ways. *Cf. id.* 43.

tal equivalent, military authority was ascribed. One was born to officership with little regard to one's achievements or skills.¹⁰⁶

Over time, both the makeup of the military and the structure of military authority changed. Soldiers became less an unruly mob of streetfighters, and more a cross-section of civilian society.¹⁰⁷ Professionals displaced gentleman soldiers,¹⁰⁸ and the idea that one could *achieve* authority grew.¹⁰⁹ In short, the military became bureaucratized.¹¹⁰ Each position gradually was assigned a place in a hierarchy, and each officer was subject to strict control and discipline in the conduct of his office. Operations became governed by rules;¹¹¹ what discretion there was flowed to the higher offices.¹¹²

The military hierarchy, therefore, is a far cry from the paradigm of the individual-centered structure of authority associated with the family model. In the hierarchy, positions of super- and sub-ordination are sharply defined.¹¹³ Moreover, there is a distinct separation of the office from the individual who occupies it.¹¹⁴ John Doe has certain authority because he is, for example, a major, and other majors have somewhat commensurate authority. Orders are issued by authority of "the commanding officer," not of a specific person.¹¹⁵ Thus, the decision of an officer at one level can only be changed by his hier-

¹⁰⁶ *Id.* 29. Some commentators and participants have never moved beyond this stage, and still view the military as made up of headstrong and rowdy young men who need to be controlled by the commanders from the higher classes. See, e.g., J. BISHOP, *supra* note 49, at 23.

¹⁰⁷ See Bruton, *supra* note 49, at 1502-03; Zillman & Imwinkelried, *supra* note 1, at 400.

¹⁰⁸ M. JANOWITZ, *supra* note 104, at 30.

¹⁰⁹ *Id.*

¹¹⁰ See generally C. COATES & R. PELLEGRIN, *MILITARY SOCIOLOGY: A STUDY OF AMERICAN MILITARY INSTITUTIONS AND MILITARY LIFE* 95-113 (1965).

¹¹¹ *Id.* This is, of course, part of the classic Weberian definition of bureaucracy. See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 330, 333 (A. Henderson & T. Parsons trans. 1947). The concepts used in this Article, however, are not purely Weberian, and the reader should be wary of the reading more into the language than was meant.

¹¹² C. COATES & R. PELLEGRIN, *supra* note 110, at 101.

¹¹³ See Damaška, *supra* note 72, at 484.

¹¹⁴ *Id.*

¹¹⁵ C. COATES & R. PELLEGRIN, *supra* note 110, at 109. In contrast to a pure bureaucracy, see Damaška, *supra* note 72, at 486, there is a sense in which lateral entry within the military is possible because of the personal authority inhering in one's rank. For example, a colonel in one division may move into another; he will still be a colonel in his new division. Thus, although it is accurate to describe military authority as primarily structured hierarchically, see *id.* 483-509, the military does not fit any conceptual structure without some bulging at the seams. Mindful of this caveat, one may fruitfully analyze the military as embodying an essentially hierarchical structure of authority.

archical superior;¹¹⁶ the structure itself places a premium on certainty of decisionmaking.¹¹⁷ For example, the authority convening a court-martial chooses as members those who are competent in a bureaucratic sense—those who are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament”¹¹⁸—rather than the naive cross-section of the community that makes up a civilian jury.

The foregoing is an incomplete description, but is sufficient to show that the structure of military authority is different from an individual-centered structure. Yet the family model of a criminal justice system seems to employ just such a structure of authority. One might conclude, therefore, that there is a fundamental inconsistency in trying to analyze the military in terms of the family model.

Such a conclusion, however, would not be entirely accurate. The military may well order authority along bureaucratic lines, but it nonetheless has undeniably personal features. To see them one must look not at an organization chart, but at the total relationship between the commanding officer and the soldier. The military, after all, ultimately must be able to function as a fighting force, and the sacrifice that a soldier may need to make is not commonly inspired by civilian bureaucracies. For the military to function properly, there must be a “we-ness,” a sense of togetherness¹¹⁹ not found in a bureaucracy where both the authority of a supervisor and the relationship among equals and between unequals is limited to specific subject matter.

Nevertheless, there is no theoretical reason why such loyalty can never exist within a bureaucracy.¹²⁰ It was noted previ-

¹¹⁶ See Damaška, *supra* note 72, at 484. It might be thought that such a structure militates against the flexibility of nonjudicial punishment. See text accompanying notes 58-62, 82-84 *supra*. Once the vertical ordering of authority is taken into account, however, the fog clears. The commanding officer has substantial rank, and its concomitant authority and discretion.

¹¹⁷ Damaška, *supra* note 72, at 491. For a traditional illustration of this regarding court-martial verdicts and voting (“hung juries” do not exist within the military justice system), see Rothblatt, *supra* note 88, at 469.

¹¹⁸ Uniform Code of Military Justice, Art. 25, 10 U.S.C. § 825 (1970).

¹¹⁹ See, e.g., Nichols, *supra* note 34, at 484; Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1681, 1682 (1971).

¹²⁰ Some historians see traditional Chinese society as a bureaucracy based on personal loyalty to one's superior, and eventually to the Emperor. See generally T'UNG-TSU CH'Ü, *LAW & SOCIETY IN TRADITIONAL CHINA* (1961); K. LATOURETTE, *THE CHINESE: THEIR HISTORY & CULTURE* 450-80 (4th ed. 1962).

ously¹²¹ that in the old military there was a much more paternal relationship between officers and enlisted men, based on class distinctions. But military rank is not a new idea, and both of the old classes in fact had hierarchies which looked similar to those of the modern military. What was missing, of course, was the specialization brought on by modern military technology. A fighter pilot must trust his ground mechanic completely, but not quite in the same way the old infantryman would have had to have trusted his fellows or his commander in a pinch. So long as the relationship that the military fosters among comrades and between commander and subordinate encourages the proper interactions, the type of overall organization that the military possesses may still encourage a family-type social structure.

Thus, it is possible to identify these family elements without denying the hierarchical structure of military authority. And it is apparent that the Court in *Levy*, though it may have been either right or wrong on both its facts and its moral judgement, at least employed a workable conceptual framework.

That family-type relationships can exist within a bureaucracy, however, does not mean that the modern military bureaucratic structure puts no pressure on its justice system to become at least partly adversarial. Insofar as a modern soldier lives less within his unit than did his predecessors, and more in working contact with other units and with the outside world, the close personal bonds of the military tend not to form. If he is punished, the modern soldier does not feel that his own group is punishing him, but rather the Army or the Government. To the extent that servicemen and officers feel this way, the sharing of assumptions needed to prevent a family structure of justice from becoming despotic does not occur. Demands therefore arise for "due process" protection from the military by its own members, while the increasing specialization of the armed forces allows the development of a more independent legal branch to operate the adversary system.

C. *An Impure Model*

The foregoing discussion should make clear that the military justice system does not fit either a pure adversary or pure family model. But an impure model, at once combining both

¹²¹ See text accompanying notes 104-06 *supra*.

family and adversary elements and explaining the current military justice framework, can be constructed.

At the first level, the present system operates in predominantly family model terms. In day-to-day interaction, nonjudicial punishment provides a means for enforcing rules without treating the erring individual as an outsider (defendant). The commanding officer has wide discretion in deciding when and what to chastise, but in turn the actual chastisement is statutorily limited to certain more or less minor deprivations.¹²² Adversary principles are incorporated by the limitations so placed on nonjudicial punishment. Maximum discretion entails maximum possibility for abuse of power. To protect against such abuse and yet still preserve the flexibility of discretion, the sanctions that can be imposed are strictly limited, and the accused is given the right to opt out of nonjudicial discipline and demand a court-martial.

At the level between nonjudicial punishment and a full court-martial is the summary court-martial.¹²³ It is not deemed to be a full adversary proceeding,¹²⁴ but rather an informal but structured proceeding for offenses considered more serious than those that are to be treated by nonjudicial punishment. In a summary court, there is no prosecutor or defense counsel. The presiding officer acts as counsel and factfinder. Since the offenses heard by a summary court are more serious than those resolved by nonjudicial punishment, the sanctions available at the summary court level are correspondingly more severe.¹²⁵ To protect against abuse, there are certain procedures governing conduct of the court, and the accused again has the right to opt out of the summary procedure entirely and be tried by a special or general court-martial.¹²⁶

Finally, the most adversarial of structures is imposed on the general court-martial. Proceedings resemble civilian trials, with lawyer judges and lawyer counsel for both the prosecution and the defense.¹²⁷ General courts-martial are authorized to award

¹²² See Uniform Code of Military Justice, Art. 15, 10 U.S.C. § 815 (1970).

¹²³ See *Middendorf v. Henry*, 96 S. Ct. 1281 (1976).

¹²⁴ *Id.* at 1290.

¹²⁵ The maximum punishments are: one month confinement at hard labor; 45 days' hard labor without confinement; two months' restriction to specified limit; forfeiture of two-thirds pay for one month. Uniform Code of Military Justice, Art. 20, 10 U.S.C. § 820 (1970).

¹²⁶ *Id.*; MANUAL FOR COURTS-MARTIAL ¶ 79 (1969).

¹²⁷ Uniform Code of Military Justice, Arts. 16, 25, 26, 27, 38, 10 U.S.C. §§ 816, 825, 826, 827, 838 (1970).

any lawful sentence, including death.¹²⁸

It is at this level, where nearly full adversary procedural protections are given to the accused, that the general articles come into play. They preserve the tie with the family model that is felt to be required by the whole-life relationship between the military and military personnel. Because it is impossible, in such a relationship, to foresee all possible acts that may need discipline, Congress has left a residual power in the military system to deal with such cases. At the same time, however, possible abuse of that power is restrained by the procedural safeguards and right of appeal built into the general court-martial structure.

The three tiers of the military justice system can be conceptualized as an impure model, combining family and adversary elements in different amounts at different levels. As noted earlier,¹²⁹ this mixing can lead to structural tension of its own, for the military is attempting to be both parent and state, both the head of a family and the prosecutor in court. Insofar as the model accurately reflects the existing factual situation, it must reflect this problem. As this Article has tried to show, neither pure model allows the military justice system to function with due regard for its whole-life relationship with, and life or death control over, military personnel. A pure adversary model is insufficiently flexible. A pure family model is too coercive and open to abuse. The tensions inherent in blending these two areas of concern are reflected in the impure model proposed here.

VI. SOME TENTATIVE CONCLUDING THOUGHTS

At this point the debate must shift gears. Attempts to reform the military justice system are neither new nor abating. Even the system's staunchest advocates admit that it is not perfect.¹³⁰ But neither the reformers nor the defenders have articulated the theoretical structures underlying their views. Once such structures are bared, it becomes clear that the two sides are moving from different starting points and towards different goals. The failure to deal with this reality has left the parties moving past each other, missing the real core of their dispute. The military and the Supreme Court seem to view the military justice system in terms of the impure family model. The

¹²⁸ Uniform Code of Military Justice, Art. 18, 10 U.S.C. § 818 (1970).

¹²⁹ See text accompanying note 92 *supra*.

¹³⁰ See, e.g., J. BISHOP, *supra* note 49, at 300-05.

potential reformers seem to dispute such a view. Now, the debate must shift to an evaluation of the impure family model in normative terms. Although a thorough examination must be left for another time, some suggestions along these lines can now be made.

This author believes that the dangers of applying a pure family model bulk larger than the concomitant benefits. To impose a structure that relies on a high degree of homogeneity¹³¹ on a system the size and complexity of the military can have several undesirable results. As a factual matter, this homogeneity seems not to exist in the military today;¹³² Captain Levy was not an isolated case. Many people, both within and without the military, shared his views on Vietnam. To accept a model that assumes homogeneous views and beliefs within a society, in the face of clear evidence that such homogeneity does not exist, seems perverse. Indeed, because our society is heterogeneous, it might well be dangerous to have a military force whose views did not, at least in some rough fashion, parallel those of society at large. Fundamentally, the pure family model is suited to

[T]ribal cultures or . . . those modern societies that attempt to restrain antisocial conduct independently of state authority. . . . But from the moment the state appears as a factor of any significance . . . the parental ideology may rightly be regarded with some circumspection, for it may provide a rationalization for the most brutal kinds of governmental oppression.¹³³

The military plainly is not the sort of simple society that tries to restrain conduct by means other than state authority. The whole command structure and hierarchy is such an exercise of authority. Failure to obey an order results, not in social pressure, but in state-imposed punishment.

The pure adversary model also seems unsuitable as a base for the military justice system. First, of course, some credence probably is owed to the idea of "military necessity," the need for a prompt and sure method of enforcing discipline in a fighting force. More fundamentally, an adversary system functions best in a situation where prosecutor and defendant do not have to

¹³¹ See text accompanying notes 67-68, *supra*.

¹³² See Bruton, *supra* note 49, at 1502-03; Zillman & Imwinkelried, *supra* note 1, at 400.

¹³³ Damaška, *supra* note 72, at 531.

work together after their encounter in those roles, where they do not constantly interact in a whole-life relationship. In civilian society, this is seldom a problem. In situations where it might become a problem (for example, a district attorney prosecuting his own assistant for misfeasance), we generally respond by saying that the situation engenders a conflict of interest and get an outside prosecutor. In a military society, this option is not as available. Admittedly, prosecutors can be imported from units other than the defendant's, but it is the commanding officer of the defendant's unit who convenes the court-martial. Absent unusual circumstances, it is probable that a defendant would resent his commanding officer if the two were placed in a formal adversary posture. Although no evidence has been discovered regarding the effect of such resentment on morale and fighting efficiency, it does not seem unreasonable to suggest that putting the commander in a pure adversary relationship with his troops would make those troops less ready to fight and (perhaps) die at his command. An adversary relationship would work against the "we-ness" needed in a fighting force.

The impure family model appears to withstand these criticisms. The evolution of the three levels within today's military justice system has provided a means by which both familial and adversary elements can be preserved, the availability of the latter serving as a check on possible abuses of the former. Nonjudicial punishment allows the system to restrain individuals while preserving the "we-ness" necessary to the military and inherent in the family.

Summary courts-martial are a halfway house: the family ideals are still operative but the adversary mechanism begins to intrude as the possible sanctions become more severe. Because there is more power at this level than at the level of nonjudicial punishment, the possibility of misuse of such power is considered more dangerous. Hence the possibility of abuse is limited by imposing certain adversarial restraints on the process as part of the summary court-martial procedure. Still, the adversary elements are limited. There is neither prosecutor, nor defense counsel, and a single commissioned officer presides over the court.

Finally, there is the general court-martial. This is a full adversary proceeding, with full procedural protection for the accused. It is only at this level, where all safeguards are operating, that the general articles of the UCMJ come into play. They pre-

serve the connection with the family model by recognizing the whole-life relationship between the military and its personnel. At the same time, the potential for abuse of the articles is restrained by the formality and adversary nature of the general court-martial procedures themselves. While the adversary elements of a general court-martial carry some danger to the "we-ness" of the fighting force, these risks may be necessary in order to have the protection against arbitrary action at this level that the adversary system provides.

Although these conclusions can, of course, be disputed, they do appear to underlie the actions of the Supreme Court in this field. Perhaps more importantly, they provide a coherent framework in which questions about the future structure of American military justice can be raised and argued.