

## Memorandum

**From:** Kirt Marsh  
**To:** Judicial Proceedings Panel – Article 120 Subcommittee  
**Date:** November 12, 2015  
**Subject:** Proposed Indecent Conduct Offense

### I. Introduction

On October 22, 2015, the Judicial Proceedings Panel - Article 120 Subcommittee considered the question of whether “indecent act” should be added to the UCMJ as an enumerated offense. During the discussion, a draft Executive Order was presented to the Subcommittee with a proposed Article 134 offense titled “Indecent Conduct,” recently submitted by the Department of Defense to the President. Some members of the Subcommittee expressed concerns about the text of the proposed offense, while others familiar with military justice practice noted that the offense, or one like it, had been charged for decades in military courts and that it would likely be met with little controversy in military justice practice. This memorandum is an effort to provide Subcommittee members with a brief overview of: 1) the history and contemporary practice of “indecent acts” offenses in military justice; 2) comparable practice in civilian courts; 3) the new proposed offense; and 4) a compilation of the concerns raised by Subcommittee members with respect to the proposal.

### II. Indecent Acts in Military Justice

#### a) *Historical Practice*

The offense of "Indecent acts with another" appeared for the first time in the 1951 Manual for Courts-Martial as a catch-all provision that criminalized a broad range of sexual behavior considered “grossly vulgar, obscene, and repugnant to common propriety.”<sup>1</sup> Over the years, the offense has been common to military prosecutions, having been used to target both consensual and nonconsensual sexual activity, heterosexual and homosexual activity, and acts occurring both in public and in private.<sup>2</sup> The provision in the Manual for Courts-Martial discussing indecent acts with another was removed from the 2008 Manual, with the offense subsumed under Article 120.<sup>3</sup> Indecent Acts was then removed from Article 120 pursuant to the 2012 amendments to the statute.<sup>4</sup>

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<sup>1</sup> David A. Schlueter, *MILITARY CRIMES AND DEFENSES* § 7.35[2] (2d ed. 2012), *see also* MCM App. 6c, 148 (1951).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, “Indecent Acts with Another” was deleted from Article 134 pursuant to Exec. Order 13447, Effective 1 October 2007. The offense was added to Article 120 pursuant to National Defense Authorization Act for Fiscal

Historically, the Manual definition of “indecent” has been sweeping in its scope, with ‘indecent’ defined as “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.”<sup>5</sup> Various military court decisions attempting to pin down the meaning of these definitions expose a circularity problem in the list of adjectives used to modify and illuminate the meaning of indecent.<sup>6</sup> Military courts have found the term ‘lascivious’ to be synonymous with ‘lewd’ or ‘indecent.’<sup>7</sup> In the 1898 case *United States v. Swearingen*, the U.S. Supreme Court determined that ‘lascivious,’ along with “obscene” and “lewd,” signified “that form of immorality which has relation to sexual impurity,”<sup>8</sup> apparently the first instance of this definition and the basis for the Manual definition of “indecent.”

Public displays of sexual activity or audience participation in the sexual activity of others have been commonly prosecuted as indecent acts.<sup>9</sup> Typically, courts have found that public display occurs if the participants know that a third party is present.<sup>10</sup> Thus, while there is no military prohibition against purely private sex between consenting adults, public sex (or, as it has often been called in military case law, “open and notorious fornication”) has been considered an indecent act.<sup>11</sup> Similarly, watching others engage in sexual activity has been found, in and of itself, to be an indecent act.<sup>12</sup>

Courts have found public sexual displays to be the easiest category of acts to characterize as indecent, with the task more complex when acts occur in private. Some acts, such as

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Year 2006, P.L. 109-163, 119 Stat. 3257 (6 January 2006). Consequently, UCMJ Article 120 (2008) read in relevant part: “(k) *Indecent act*. Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.” The corresponding MCM section read in relevant part: “12) *Indecent conduct*. The term “indecent conduct” means that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person’s consent, and contrary to that other person’s reasonable expectation of privacy, of—(A) that other person’s genitalia, anus, or buttocks, or (if that other person is female) that person’s areola or nipple; or (B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.”

<sup>4</sup> Sec. 541, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 31 December 2011.

<sup>5</sup> Schlueter § 7.35[3] (2d ed. 2012).

<sup>6</sup> Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get A Legal Review First?*, 179 Mil. L. Rev. 128, 131 (2004)

<sup>7</sup> *Id.*, citing *United States v. Gaskin*, 12 C.M.R. 419, 421 (C.M.A. 1961).

<sup>8</sup> *Swearingen v. United States*, 161 U.S. 446, 448 (1896).

<sup>9</sup> See Schlueter § 7.35[3], citing *United States v. Blake*, 33 M.J. 923 (A.C.M.R. 1991) (“The single most common circumstance relied upon by military courts in finding consensual sexual acts indecent, is the public nature of the act.”).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, citing *United States v. Johnson*, 60 M.J. 988 (N.M.Ct.Crim.App. 2005) (accused walked into a hotel room where a fellow Marine was having sexual intercourse with an underage female, watched the sexual activity, and made encouraging comments; court affirmed conviction for indecent acts with another).

consensual incest,<sup>13</sup> are inherently indecent regardless of where they occur. Other acts must be evaluated contextually and on a case-by-case basis.<sup>14</sup> Accordingly, military courts have found that acts that might not be inherently indecent can become so depending on the accused's intent and the surrounding circumstances.<sup>15</sup> Military courts have found a wide variety of acts to be indecent, including: spanking young boys on their bare buttocks for sexual enjoyment;<sup>16</sup> consensual heavy petting between a married officer and the family's teenage babysitter, the daughter of another service member;<sup>17</sup> an engaged couple having oral sex together and videotaping it (though not sharing the video with anyone);<sup>18</sup> a service member masturbating in front of two women in a public restroom while restraining them from leaving;<sup>19</sup> a male officer grabbing "certain parts" of another male officer's anatomy;<sup>20</sup> and a male officer forcibly grabbing and attempting to embrace another male.<sup>21</sup> "The true limit to indecent acts is contained not in any firm definition or statement of a court, but rather in the prurient imaginations of those who conceive of and commit the acts."<sup>22</sup>

As a threshold matter, military courts have not required that indecent acts occur with a human being. In *United States v. Sanchez*,<sup>23</sup> the court affirmed an indecent acts conviction for the accused's sexual activity with a chicken; in *United States v. Mabie*,<sup>24</sup> the court affirmed an indecent acts conviction for the accused's sexual intercourse with a corpse. However, when another human being is involved, the acts must occur with that person's participation.<sup>25</sup> "Participation" does not require active, willing involvement by the other person; it requires nothing more than some type of involvement that goes beyond mere involuntary observation of a sexual act.<sup>26</sup> Thus, courts have found "participation" for acts as varied as masturbation in front of a physically restrained and unwilling audience;<sup>27</sup> dancing naked with a group of children;<sup>28</sup>

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<sup>13</sup> *Id.*, citing *United States v. Wheeler*, 40 M.J. 242 (C.M.A. 1994) (accused convicted of indecent acts with another based on consensual sexual intercourse with his 17-year-old stepdaughter).

<sup>14</sup> *Id.*, citing *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986) (noting that wrongfulness and indecency are to be evaluated on a case-by-case basis and citing *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982) for the proposition that indecency is determined by circumstance).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, citing *United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992), aff'd 37 M.J. 330 (C.M.A. 1993).

<sup>17</sup> *Id.*, citing *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R. 1986), vacated and remanded on other grounds, 23 M.J. 400 (C.M.A. 1987), findings set aside on other grounds, 24 M.J. 514 (A.F.C.M.R. 1987).

<sup>18</sup> *Id.*, citing *United States v. Allison*, 56 M.J. 606 (C.G.C.C.A. 2001). Compare *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) (affirming conviction where accused participated in consensual sexual activity with a woman that was filmed by another man).

<sup>19</sup> *Id.*, citing *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

<sup>20</sup> *Id.*, citing *United States v. Holland*, 31 C.M.R. 30 (C.M.A. 1961).

<sup>21</sup> *Id.*, citing *United States v. Annal*, 32 C.M.R. 427 (C.M.A. 1963).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, citing 29 C.M.R. 32 (C.M.A. 1960). Note that sexual activity with animals is currently proscribed by Article 125, UCMJ and both the Joint Services Committee and the MJRG have proposed a comprehensive Animal Abuse offense under Article 134 that would apply to sexual acts with animals.

<sup>24</sup> *Id.*, citing 24 M.J. 711 (A.C.M.R. 1987).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

and giving directions to military recruits to disrobe, bounce up and down and change positions while surreptitiously videotaping them.<sup>29</sup> In contrast, in a case where a sailor masturbated in front of a sleeping victim, the court held that because the victim was unaware of the accused's acts, the element of participation was not met.<sup>30</sup>

b) *Contemporary Practice*

In contemporary military justice practice, indecent acts with respect to children are currently punishable under Article 120b(c), "Sexual abuse of a child," which proscribes a "lewd act upon a child." The term "lewd act" is then specifically defined by the statute in a four-part definition.<sup>31</sup> Lewd acts include: (A) any sexual contact with a child, (B) indecent exposure to a child, (C) communicating indecent language to a child, and (D) indecent conduct with a child.<sup>32</sup> The last provision, (D), proscribes indecent conduct that "amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations."<sup>33</sup> This definition corresponds to the definition of indecent conduct proposed for the new Article 134 offense.

Indecent exposure is punishable under Article 120c(c), "Indecent exposure." The key definition for the indecent exposure offense, defining what constitutes exposure in an "indecent manner" under Article 120c, is stated as "conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite the sexual desire or deprave morals with respect to sexual relations." This definition also appears consistent with the definition of indecent conduct proposed for the new Article 134 offense.

Finally, Indecent Language is proscribed under Article 134, and is directed at "indecent" language which is "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends to reasonably corrupt morals or incite libidinous thoughts. The language must violate community standards." Notably, this definition of indecent does not reference "a form of immorality relating to sexual impurity," as the other two offenses do. It also requires that the language violate community standards.

In sum, there are currently three examples in the UCMJ of similar language to that proposed for the new Article 134 offense, directed at related misconduct. However, this broadly-defined indecent conduct proscribed in the UCMJ is limited to children or to indecent exposure,

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<sup>28</sup> United States v. Thomas, 25 M.J. 75 (C.M.A. 1987).

<sup>29</sup> United States v. McDaniel, 39 M.J. 173 (C.M.A. 1994).

<sup>30</sup> United States v. Brown, 39 M.J. 688 (N.M.C.M.R. 1993).

<sup>31</sup> See UCMJ Article 120b(h)(5).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

or more narrowly defined in the indecent language offense. This raises the question of specifically what non-public indecent conduct between adults is the new proposed offense meant to address?

### III. Civilian Practice

#### a) *Federal Criminal Law*

There is no provision of federal criminal law directly analogous to the proposed Indecent Conduct Article 134 offense. The most similar provisions would likely be those found in U.S. Code Title 18, Chapter 71, “Obscenity.” However, those provisions are more similar to the current Article 134 offense of “Mails: depositing or causing to be deposited obscene matters in.” Title 18, Chapter 71 of the U.S. Code does not criminalize the private possession of obscene matter, but the act of receiving such matter may violate the statutes prohibiting the use of the U.S. Mails, common carriers, or interactive computer services for the purpose of transportation.<sup>34</sup>

#### b) *State Practice*

The criminal codes of all fifty states and the District of Columbia contain laws forbidding various types of lewd, obscene, or indecent conduct, many of which are generally analogous to the proposed Indecent Conduct offense.<sup>35</sup> Depending on the jurisdiction, these laws may be directed at “lewd” conduct, “indecent” acts, or “obscene” acts, which all refer to the same type of conduct. The District of Columbia is typical of prevailing practice in the states of requiring the proscribed activity to be done in public.<sup>36</sup> D.C. Code § 22–1312 states in relevant part that “It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8).”<sup>37</sup> In contrast, Utah’s Criminal Code § 76-9-702 takes a broader approach to the scope of punishable acts, which include “any...act of lewdness,” but violation of the statute still requires that the acts be performed “in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another...” New York’s statute takes a similar approach, stating that “a person is guilty of public lewdness when he or she intentionally exposes the private or intimate parts of his or her body in a lewd manner or commits any other lewd act: (a) in a public place, or (b) (i) in private premises under circumstances in which he or she may

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<sup>34</sup> See U.S. Dept. of Justice “Citizens Guide to US Federal Law on Obscenity” *available at*: <http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity>, *citing* 18 U.S.C. § 1460; 18 U.S.C. § 1461; 18 U.S.C. § 1462; 18 U.S.C. § 1463)

<sup>35</sup> See “State Prohibited Consensual Sexual Activity Laws,” *available at*: <http://statalaws.findlaw.com/criminal-laws/prohibited-consensual-sexual-activity.html>. Another helpful resource is an index compiled by the National Conference of State Legislatures listing the breastfeeding exemptions legislatures have created in each jurisdiction to many state indecent acts/exposure-type offenses: “Breastfeeding State Laws” *Available at*: <http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>.

<sup>36</sup> D.C. Code § 22–1312. “Lewd, indecent, or obscene acts; sexual proposal to a minor.”

<sup>37</sup> *Id.*

readily be observed from either a public place or from other private premises, and with intent that he or she be so observed, or (ii) while trespassing...”<sup>38</sup> In sum, prevailing state practice appears to require that lewd or indecent acts be done in public or in circumstances that they be observed by others before criminal liability attaches.

c) *Model Penal Code*

The Model Penal Code proscribes acts in separate offenses that have historically fallen under the UCMJ’s Indecent Acts offense. The “Open Lewdness” offense states that “a person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.”<sup>39</sup> This offense thereby limits the reach of the offense to lewd acts that (1) are actually observed by other people, and (2) that the actor knows would affront or alarm those other people. This stands in stark contrast to the broad application of the historical application of Indecent Acts under the UCMJ, or the reach of the recently proposed Indecent Conduct offense. The UCMJ Indecent Acts offense has also been applied in the past to sexual acts committed with a corpse,<sup>40</sup> conduct which would be addressed by a separate offense in the Model Penal Code.<sup>41</sup>

#### **IV. Proposed Indecent Conduct Offense**

As noted in the Judicial Proceedings Panel Article 120 Subcommittee Meeting of October 22, 2015, the Department of Defense has recently proposed a new “Indecent Conduct” offense to be added to Article 134 by Executive Order, pursuant to the President’s authority under Article 56, UCMJ. The text of that proposed offenses is as follows:

“90. Article 134—(Indecent Conduct)

a. *Text of Statute.* See paragraph 60.

b. *Elements.*

- (1) That the accused engaged in a certain conduct;
- (2) That the conduct was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

- (1) “Indecent” means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.
- (2) Indecent conduct includes offenses previously prescribed by “Indecent acts with

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<sup>38</sup> N.Y. Penal Law § 245.00.

<sup>39</sup> Model Penal Code § 251.1. “Open Lewdness”

<sup>40</sup> United States v. Mabie, 24 M.J. 711 (A.C.M.R. 1987).

<sup>41</sup> See Model Penal Code § 250.10. Abuse of Corpse. (“Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor.”)

another” except that the presence of another person is no longer required. For purposes of

this offense, the words “conduct” and “act” are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). See paragraph 60c(5)(a).

d. *Lesser included offense.* See paragraph 3 of this part and Appendix 12A.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), (wrongfully commit indecent conduct, to wit: \_\_\_\_\_), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).”

## V. Potential Concerns with Proposed Offense

Subcommittee members expressed several concerns in response to the proposed Indecent Conduct offense. One concern expressed was the proposed offense might be too broadly applied, and would leave room for the possibility of prosecuting private conduct between consenting adults. The Subcommittee member expressed concern that the language of the proposed offense was too vague and unspecific, and the definition of “indecent” should make clear that indecent conduct does not include any conduct between consenting adults unless it is recorded or observed by sight or sound by minors or non-consenting adults.

Another concern raised regarding the proposed offense was that it may be overbroad and might raise concerns under the First Amendment. The Subcommittee member stated that while the military has greater latitude, the current Supreme Court may not accept the broadest reading of older cases, and in any case, the vagueness and broad substantive reach of this definition may not be appropriate as a matter of policy. During the meeting, the designated federal official indicated that the Supreme Court held in *Parker v. Levy*, that the First Amendment’s application to Service members is constrained in some areas.<sup>42</sup> At least one practitioner has argued that indecent acts fall outside the Constitutional exception articulated by the Supreme Court in *Parker v. Levy*, as the military’s need to regulate speech activities to fill its role in defense of the nation does not extend to “a particular need to regulate the adult, consensual, noncommercial, private sex-related decisions of its members.”<sup>43</sup>

With respect to the process for adopting the proposed offense, a Subcommittee member expressed continuing reservations of two kinds: (1) problems readily apparent; and (2) problems

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<sup>42</sup> *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>43</sup> Cullen, *supra* n. 6, 163.

that may not be readily apparent because the Subcommittee has not had comprehensive input on the need for and application of this provision. The Subcommittee member suggested two alternatives: “either (1) we make explicit -- in response to the question #11 as referred to us -- that we decline to answer that question in view of the proposal already published and our lack of opportunity to study it in depth; or (2) we take time to inform ourselves in more depth and allocate Subcommittee time to deliberating about it.”

## **VI. Conclusion**

“No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>44</sup> The current proposed Indecent Conduct offense appears to leave open the question of whether consensual, private sexual activity may be considered “indecent” and therefore punishable under Article 134. This question is left open by the cases interpreting previous versions of the offense, as well as the language of the proposed new offense. Accordingly, the Subcommittee may wish to recommend that greater specificity or explanation be added to the proposed offense, which could provide better utility and transparency for practitioners, convening authorities, and Service members subject to the UCMJ. Such explanation might be language added to the offense listing proscribed acts as guidance for practitioners and convening authorities, i.e. “indecent conduct includes public masturbation, sex acts with the dead, etc.” Also helpful might be including words to the effect of “this offense is not directed towards private, consensual sexual activity between adults.” A second potential approach might be to adopt the Model Penal Code approach, which would limit the offense to acts that the accused “knows are likely to be observed by others who would be affronted or alarmed.” A third approach might be for the Subcommittee to simply withhold comment on the provision, allowing courts to define the limits of the offense over time.

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<sup>44</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)