The *Un*representative Military Jury: Deliberate Inclusion of Combat Veterans in the Military's Venire for Combat-Incidental Crimes

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I. INTRODUCTION

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . [I]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[1]

I don't think the kind of boy he is has anything to do with it. The facts are supposed to determine the case.[2]

What characteristics or experiences should be required of jurors, sitting on a court-martial panel, in a military criminal courtroom? This question may seem anachronistic given what we expect of the typical, modern, civilian criminal jury—a random sampling of the community's race, gender, and age groups that, in theory, approximates the "everyman" of society.[3] This result can render fair and impartial judgment on the facts presented without any specialized or unique traits.

But this question's relevance is clear when one looks at a military panel and the literal and figurative uniformity of the panel members: the short hair, the stoic

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[1] Peters v. Kiff, 407 U.S. 493, 503–04 (1972) (invalidating a state's prosecution and jury's conviction of a white man where African Americans had been deliberately excluded from the grand jury that indicted him).

[2] 12 ANGRY MEN (Orion-Nova Prod. 1957), *available at* http://www.imdb.com/title/tt0050083/quotes (last visited Feb. 8, 2008) (Joseph Sweeny played the role of Juror No. 9, a.k.a. "McCardle," dissenter Henry Fonda's first ally in Sidney Lumet's antiquated but classic film set in a murder trial's jury room).

[3] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

and stiff expression, the sharply tailored attire with award ribbons stacked in rows on their chests. Rather than a blending of different voices and backgrounds from a disparate community, these jurors come from a more homogenous pool, all working for a common employer, with similar cultural, professional, and economic characteristics.

This distinction highlights the larger exceptionalism that pervades the military justice system. The Uniform Code of Military Justice (UCMJ) is a statutory scheme that unabashedly promotes the values of discipline and efficiency—both procedurally and in its substantive criminal prohibitions—that may, at times, erode competing values of fairness and accuracy in the justice system.[4] The method of selecting court-martial panels provides a prime example of this erosion. Arguably, the UCMJ's unique venire process—a discretionary application of six qualifying criteria by the court-martial convening authority necessitated by the exceptional demands, stresses, and circumstances in which military justice functions mandate a wholly unusual procedure. However, one supplemental branch of this exceptionalism has gone largely unnoticed. A further distinction ought to be, but has not been, made between the "mundane" crimes committed by soldiers and those crimes committed by soldiers in the midst of battle—a combat-incidental crime.

Combat and everyday soldiering are totally different contexts. "Failure to obey an order or regulation" during the middle of a combat raid is not the same *kind* of offense as the same failure during a weekly vehicle maintenance program at the Fort Carson motor pool. "Cruelty or maltreatment" is not the same *kind* of offense when the victim is a detained Iraqi teenager outside Baghdad as when the victim is a soldier enrolled in Basic Combat Training at Fort Benning. Even "murder" is different in kind when the killing occurs during a raid of a household arms-cache in Basra than when it occurs during a bar fight outside Fort Bragg. In the combat context, the criminal act is derivative from combat—it either constitutes, flows directly from, or is directly caused by conduct during a combat event. The forces, factors, and feelings that drive a soldier's conduct while under fire reshape the context in which the criminal actions occur.

Yet, in terms of juror qualification, nothing in the UCMJ recognizes the distinction of the combat experience. Maltreatment is Maltreatment; Assault is Assault; Murder is Murder. As a result, a defendant soldier could face a jury of *non*-peers, possessing a background uncoupled from the reality of war that the defendant soldier experienced and which may provide critical context for the alleged crime.

This Note proposes a simple procedural fix by redefining the venire of the court-martial. This revision will improve the fairness, legitimacy, and accuracy of

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[4] Alan C. Michaels, *Rights Knowledge: Values and Tradeoffs*, 39 TEX. TECH L. REV. 1355, 1357 (2007) (referencing the "core" values of factual accuracy and procedural fairness as essential, court-recognized goals of criminal adjudication).

the outcome *without* impugning the traditional values of procedural discipline and efficiency that drives the exceptionalism of the military justice system.

This proposal focuses on the statutory criteria used to identify those who will sit in the panel box to judge the allegedly-criminal actions of fellow soldiers for conduct in combat—what this Note refers to as "combat-incidental crime." The venire should consist of a specified percentage of soldiers with relevant combat experience, related to that of the accused, when demanded by the accused. This "perspective on human events"[5] plays a much larger role when the panel executes its constitutional responsibility in assessing motivations of the defendant or witnesses, as well as "draw[ing] the ultimate conclusion about guilt or innocence,"[6] in the context of combat.

Part II of this Note examines how and why the UCMJ creates the problem of a *non-peer* jury for combat-incidental crimes and contrasts its procedures with those of venire selection in the civilian criminal courtroom. Part III lays out the proposed revision of the court-martial panel selection from the perspective of five general interests that can be culled from the advantages and criticisms of the UCMJ's venire procedure. This Part demonstrates that accounting for the context of a combat event with defined experiential characteristics of the panel is both analogous to a civilian "blue ribbon" jury and that the UCMJ *already* requires certain panel member characteristics when the accused is of an enlisted rank—the ultimate purpose of which is to increase fairness of the court-martial for the benefit of the defendant. Likewise, this proposed revision will increase fundamental fairness to the accused soldier and align the military's venire with the traditional purposes and expectations of the jury without sacrificing the traditional role played by the chain-of-command in applying military justice.

Part IV addresses two potential counterarguments: the possibility of more jury nullification, and the possibility that voir dire would undo any benefit of the revised venire procedure. Both of these issues, however, are potential byproducts of existing court-room procedures; they do not undermine the proposition that getting the right "community" of peers, given the circumstances, will increase the legitimacy and fairness of a military jury.

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5 *Peters*, 407 U.S. at 503–04.

6 United States v. Gaudin, 515 U.S. 506, 514 (1995).

II. GETTING TO THE *UN*REPRESENTATIVE COURT-MARTIAL PANEL

A. *The Impartial Civilian Jury: Balancing Fairness, Accuracy, Representation, and Inclusion*

Thomas Jefferson reverently dubbed juries an "inestimable institution."[7] Alexander Hamilton held juries—the "palladium of free government"—in "high estimation."[8] The Supreme Court agreed that "trial by jury in criminal cases is fundamental to the American scheme of justice" protected by the Sixth Amendment and applied to the States under the Fourteenth Amendment.[9] Juries, it might be said, are embedded within the *zeitgeist* of American legal culture.[10] The Court's prescription that the "jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence"[11] is engrafted onto the public's awareness of our legal system.

But that is where popular agreement ends.[12] Critics of the jury suggest alternative ways to create a productive adjudicatory environment.[13] For instance, consider the jury's fact-finding role. Generally, it includes weighing the evidence established by an adversarial colloquy between prosecutor and defense attorney. It involves filtering the testimony of witnesses by screening their credibility through

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[7] THOMAS JEFFERSON, FIRST ANNUAL MESSAGE TO CONGRESS, 1801, *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, at 325, 330 (Adrienne Koch & William Peden eds., Random House Inc. 1944) (1993) [hereinafter JEFFERSON WRITINGS].

[8] THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[9] Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (echoing the language of "fundamental principles" and "basic rights," used by the Court in *Powell v. Alabama*, 287 U.S. 45 (1932), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), to discuss the application of constitutional criminal procedure rights to the states).

[10] This is not looked upon favorably by some commentators. Mark Twain was particularly apathetic in his observation that:

> [t]he Humorist who invented trial by jury played a colossal practical joke upon the world, but since we have the system we ought to try and respect it. A thing which is not thoroughly easy to do, when we reflect that by command of the law a criminal juror must be an intellectual vacuum, attached to a melting heart and perfectly macaronian bowels of compassion.

WorkingHumor.com, Humorous Quotes, http://workinghumor.com/quotes/judges.shtml# (last visited Feb. 15, 2008).

[11] *Gaudin*, 515 U.S. at 514.

[12] *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 5 (1966) (surveying the vast field of literature on juries, the authors conclude that "the very characteristics which the critics point to as defects, the jury's champions herald as assets.").

[13] Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204 (1995) (disclaiming the utility of the Supreme Court's Sixth Amendment analysis of jury construction because the "amendment tells us only about the circumstances under which juries must be provided, not about how juries must be constituted").

a counsel's examination and through the juror's own senses.[14] As non-expert laypersons charged with serving as both fact-finders and law-appliers,[15] jurors play unique—if challenging—parts in a criminal justice system: a system that is triggered by a crime, investigated by trained professionals, charged by the state, and tried in a cloistered courtroom removed from everyday realities.

In carrying out these duties and roles, juries are traditionally understood to serve three broad functions.[16] First, they help to re-allocate the distribution of power in a representative government. That is, juries engage citizens in self-government on a micro-level—their fact-finding and law-applying in a particular case is like a variation of law-administration akin to what the Executive Branch does on a macro scale.[17] This contribution assures the average citizen possesses some state-sanctioned power over others, as well as over how the law *ought* to be applied to a particular case.[18] In the Supreme Court's view, the duty of possibly finding a person guilty or responsible in a courtroom is a "significant opportunity to participate in the democratic process."[19]

Second, the jury is traditionally believed to protect a cherished right: to be tried for a crime before an impartial jury of peers drawn from the defendant's community, rather than a government payroll, and exercising commonsense.[20] In de Tocqueville's words, the jury "puts the real control of affairs into the hands of the ruled . . . rather than into those of the rulers."[21] Free from the influence of a government paycheck and in lieu of an overzealous judge or an aristocratic lord (whose legal judgment might be strongly influenced or restrained by the king,

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[14] *See* 47 AM. JUR. 2D *Jury* § 2 (2008).

[15] *See, e.g.*, GA. CONST. art. I, § I, para. XI ("In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be judges of the law and the facts.").

[16] *See, e.g.*, Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994) [hereinafter *Brief History*]; *see also* V. Amar, *supra* note 13, at 218–21.

[17] *See* V. Amar, *supra* note 13, at 218.

[18] The ability to withhold execution of a particular criminal sanction on a particular defendant, despite technical guilt, has been recognized as a necessary and "undisputed" product of the criminal jury's power to acquit: "If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision." United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

[19] Powers v. Ohio, 499 U.S. 400, 407 (1991).

[20] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991). However, consider Einstein's pithy warning that "common sense is the collection of prejudices acquired by age eighteen." *See* Kevin Harris, Collected Quotes from Albert Einstein, http://rescomp.stanford.edu/~cheshire/EinsteinQuotes.html (last visited Feb. 19, 2008).

[21] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250–51 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966).

governor, legislature or parliament[22]), the jury stands as a rampart against the potential or actual "oppression by the government."[23]

The third traditional function of a jury has been long understood to serve as a civics classroom. By engaging laypersons in democratic self-government and in protection of individuals from government oppression, jurors became "pupils" of the law, their own rights, and idealized values of fairness and equity. This engagement creates a better-informed and educated class of citizens.[24]

These three functions—engaging the average citizen as a tool of democratic justice, interposing a third-party between the potential oppression of the state and a defendant, and educating the populace in democratic virtues and values—have shaped how courts outline the jury's composition. In striking down a provision of the Louisiana state constitution that automatically exempted women from jury service, the Supreme Court summarized its jury-selection jurisprudence as that which enforces the "American concept of the jury trial [as one that] contemplates a jury drawn from a fair cross-section of the community."[25] This "fair cross section" was to be thematically and practically analogous to the representative nature of our democratic government, where a community of lay citizens would be "instruments of public justice" in the same way that elected representatives are instruments of public order and law.[26]

Conceptually, the jury is a representative slice of the community. But this outline of the theoretically ideal jury nevertheless leaves the substance and form uncertain.[27] Jefferson often reminded his peers of the importance of selection: "Their [jury members'] impartial selection also being essential to their value, we ought further to consider whether that is sufficiently secured in those States where they are named by a marshal depending on executive will, or designated by the court or by officers dependent on them."[28] In fleshing out the contours of the "cross-section" standard, the Court has tried to address jury make-up in terms if what it should *not* be, and though admitting that *complete* representation may be impossible, "prospective jurors shall be selected by court officials without

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[22] Taylor v. Louisiana, 419 U.S. 522, 530 (1975). *See also Brief History*, *supra* note 16.

[23] Duncan v. Louisiana, 391 U.S. 145, 155 (1968). See also *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922), in which Chief Justice Taft remarked of juries: "one of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."

[24] *See* A. Amar, *supra* note 20, at 1186–87 (quoting extensively from Tocqueville's oft-cited impassioned support of juries).

[25] *Taylor*, 419 U.S. at 527.

[26] *Id.* (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

[27] *See generally* United States v. Gaudin, 515 U.S. 506 (1995).

[28] JEFFERSON WRITINGS, *supra* note 7, at 306. Throughout his public life, Jefferson was an adamant supporter of the role played by juries. His affection for this form of democratic expression can be found in his numerous letters to political colleagues and compatriots. *See* Letter to James Madison, *id.* at 416; Letter to Francis Hopkinson, *id.* at 425; Letter to Thomas Paine, *id.* at 442; Letter to Colonel William Duane, *id.* at 561; Letter to the Marquis de Lafayette, *id.* at 598.

systematic and intentional exclusion."[29] Exclusion, as a general matter, is prohibited. *In*clusion of particular groups, classes, or other distinguishable members of society, however, is neither demanded nor unacceptable.[30] This standard has become the Court's model, vague though it may be,[31] and a bedrock axiom adopted by the practicing Bar.[32]

One form of "systematic and intentional exclusion" had been the removal of African-Americans from jury venire pools and panels through prosecutorial preemptory challenges. The Court has repeatedly denounced this exclusion as a form of discrimination that violates the Fourteenth Amendment's Equal Protection Clause.[33] While the Court's ire has been directed at racial and class-based exclusions, it has clearly found (beginning with Justice Holmes one hundred years

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[29] Thiel v. S. Pac. Co., 328 U.S. 217, 220–21 (1946). The Court further explained that individual states were responsible for designing systems to determine juror qualification and standards for exemption. For two illustrations, consider that Virginia's current code provides for random selection from a pool of citizens over the age of 18 and residents of that jurisdiction, unless otherwise incapacitated, convicted of treason, or convicted of a felony. *See* VA. CODE ANN. §§ 8.01-337, 8.01-338 (2007). Massachusetts provides a similar pool: as long as one is qualified to vote in the commonwealth and does not fall under one of the numerous exceptions (inter alia, public school teachers, college administrators, attorneys, physicians, nurses, and certain government officials), then one is qualified for jury duty. *See* MASS. GEN. LAWS ANN. ch. 234 §1 (2007). I recently received a jury summons from a county in Colorado, advising me that "[t]o preserve the fairness of the jury selection there are no occupational, economic, or age-related exemptions from jury service" (summons on file with the author).

[30] "We impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." *Taylor*, 419 U.S. at 538 (holding that the Sixth Amendment obviates state law that systematically excludes women from the possibility of sitting on a jury).

[31] For an example of a critical look at criminal procedure standards generally, arguing that they consistently fail to recognize the role of unconscious racism in police action and prosecution, see generally Andrew D. Leipold, *Objective Tests and Subjective Bias: Some problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559 (1998).

[32] A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS, *available at* http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf (last visited Jan. 2, 2008). The ABA's Principle 2 states that "[c]itizens have the right to participate in jury service and their service should be facilitated," and the official comment to sub-division B of this Principle mentions jury duty as a "civic responsibility and an obligation." Further, according to Principle 10, "[c]ourts should use open, fair and flexible procedures to select a representative pool of prospective jurors." The comment to sub-division A says that a goal of jury pools is both "representativeness and inclusiveness."

[33] Batson v. Kentucky, 476 U.S. 79, 85 (1986). This case reaffirmed the century-old principle, first announced in *Strauder v. West Virginia*, 100 U.S. 303 (1880), that the State violates a black person's equal protection rights when it forces him or her to be tried by a "jury from which members of his or her race have been purposefully excluded" for whatever reason. *Batson*, 476 U.S. at 85. Note again that the focus of the constitutional infringement is on the right to equal protection of the black defendant, not the black potential juror. *See Brief History*, *supra* note 16, at 892–93. *Batson* has been subsequently refined by the Court, holding that the defendant need not be of the same race as the excluded juror to challenge the exclusion, Powers v. Ohio, 499 U.S. 400, 402 (1991), and that the exclusion is unconstitutional whether it is driven by the prosecution or the defense, Georgia v. McCollum, 505 U.S. 42 (1992).

ago) that the Due Process clause of the Fourteenth Amendment has *not* been breached by systematic and intentional exclusion of certain *professions* from jury pools.[34] Clearly, there exists a judicial sense that juries should represent one's peers, free from biases to the greatest extent possible, but not necessarily reflect *every* demographic.

The modern test for challenging a particular venire process attempts to ensure such representation through a case-by-case factual analysis and burden-shifting. In order to make out a prima facie case that the venire was so *un*representative that it unconstitutionally failed to meet the "cross-section" standard, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[35]

The nucleus of this three-part test is step one: the labeling of a group as "distinctive"—if not distinctive within the community, it is constitutionally irrelevant whether members are represented at all on the venire list, or whether there was any systematic exclusion by the state. "Distinctive," however, is an adjective bearing heavy normative implications and defies easy definition.[36] Courts have sidestepped the matter and explained that the issue of whether a particular group is "distinctive" is usually a question of fact, dependent on the time and locale of the trial.[37] This approach is consistent with an underlying theme of the cross-section standard: that "[c]ommunities differ at different times and places . . . a fair cross section at one time and or place is not necessarily a fair cross section at another time or a different place."[38] In other words, there are generally no categorically "distinct" groups for the "fair cross-section of the community" analysis under the Sixth Amendment.[39]

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[34] Rawlins v. State of Georgia, 201 U.S. 638, 640 (1906).

[35] Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that Missouri's law providing an automatic exemption from the jury pool for women upon their request violated the criminal defendant's Sixth Amendment right to an impartial jury under *Duncan*'s "fair cross-section of the community" standard).

[36] *Id.* Justice White nearly avoided defining it altogether, referencing it only in terms of *Taylor*'s discussion of women as being a "distinct group" because of their number and, presumably, innate characteristics.

[37] *See, e.g.*, Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983).

[38] Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

[39] The *Willis* court added as a "caveat" that the court is nonetheless free to rule, as a matter of law, that a particular group is "distinct," though conspicuously provides no standard by which a court could make that determination. *Willis*, 720 F.2d at 1217.

One method of testing the alleged distinctiveness of a group is to examine its shared attitudes and experiences—whether they are substantially different from the attitudes and experiences of other segments of the community, or so internally "cohesive and consistent" that they are effectively unique and set apart from others.[40] Under this test, age group categories have been held not distinctive because of the obviously wide and diverse range of opinions, experiences, and beliefs spread across such a "group."[41] Whether the class of combat-experienced soldiers can constitute such a "distinct" group, and would—under a Sixth Amendment analysis—be protected from exclusion in the venire process, is a question explored in Part IV.A.1. below.

Thus, the conventional approach to venire-building is an emphasis on the representative-nature of the jury, derived from a cross-section of the community from which it is drawn, and free from the exclusion of identifiably-distinguishable groups within that community.

B. *Background and Criticisms of Court-Martial Venire under the UCMJ*

1. The Influential Convening Authority

The UCMJ's venire process is, from a civilian perspective, peculiar. Congress deliberately warped the otherwise recognizable traditional image of the jury to accommodate the military's function, operating environment, and internal needs.[42] Juries are not randomly selected from public venires, then whittled down to an acceptable dozen by counsels' voir dire. Rather, Congress delegated a form of prosecutorial power to unit commanders of a certain rank and position.[43] These "Convening Authorities" (usually commanders of General Officer rank, but may also be the Secretary of Defense, the Secretary of the branch of the armed forces concerned, or the President) hand-pick both primary and alternate members of court-martial panels that will generally serve, as needed, for a relatively brief period of time.[44] These members are then excused or challenged in voir dire.[45] While this latter stage is basically analogous to a civilian court room, the resulting panel is far less democratic and far more alien to traditional eyes because the Convening Authority (CA) is able to manipulate (overtly or subtly) the original pool, much as a civilian court could in creating a blue-ribbon jury venire, using

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[40] State v. Pelican, 580 A.2d 942, 947 (Vt. 1990) (referencing state courts from Indiana, Kentucky, Massachusetts, Nebraska, and Washington, as well as the federal Courts of Appeals for the First, Sixth, Seventh, Eighth, and Eleventh Circuits).

[41] *Id.*

[42] Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 22, 23 [hereinafter *Anatomy*].

[43] 10 U.S.C. § 822 (2005).

[44] *Anatomy*, *supra* note 42, at 22. *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Kennedy, J., concurring in part).

[45] 10 U.S.C. § 841 (2005).

statutorily-created criteria. Commentators voice substantial disapproval for this system that seemingly rejects age-old procedural safeguards from unwanted executive influence.[46]

The names of the panel members in that original pool come from a list generated by that CA's Office of the Staff Judge Advocate, or staff of military officer-lawyers, based on a vague sentence-worth of qualifiers in Article 25 of the UCMJ.[47] These qualifications skirt the "fair cross section of the community" rule required by the Sixth Amendment for criminal jury trials—indeed, the courts have expressly confirmed that the CA may "depart from the norm of representativeness" because the right to trial by jury has no application to the appointment of members of courts-martial.[48] Notwithstanding military courts' avoidance of Constitutional standards, they have also—in the same breath—allowed commanders to seek "representativeness" of the *military* community in their panels within the framework of Article 25 while recognizing their substantial discretion in the formation of panels.[49] Military justice seemingly begins and ends with the CA's discretion.

This discretion to create a master list of prospective panel members based on the criteria set forth in Article 25 of the UCMJ is often attacked, even from within the military.[50] The primary target of reformers is the risk that the criteria can create an environment of unjustifiable and unlawful command influence on the selection of panel members.[51] If the court-martial CA is free to assign other soldiers and officers to courts-martial within his jurisdiction based on "his opinion" of who is most fit for the duty, then very little impedes that CA from placing on the panel those that are susceptible to his command influence or have

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[46] Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 104 (1992) [hereinafter *Critical Analysis*] (tracing the history of jury selection processes and their parallel in military justice systems and proposing numerous revisions to the UCMJ process to more directly align it with Constitutional and ABA standards); *see also* Matthew McCormick, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders*, 7 GEO. MASON L. REV. 1013 (1999); James W. Smith, III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671 (2006); Colonel James Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000).

[47] 10 U.S.C. § 825(d)(2) (2006).

[48] United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) (citing *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866), for its proposition that "offenses against military laws are determined by tribunals established in the acts of the legislature which creates these laws—such as courts-martial and courts of inquiry."); *accord* United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988).

[49] *Anatomy*, *supra* note 42, at 23.

[50] *Id.*

[51] NAT'L INST. OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), *available at* http://www.nimj.org/documents/Cox_Comm_Report.pdf [hereinafter COX COMMISSION REPORT]. *See also* Major Guy P. Glazier, *He Called for his Pipe, and he Called for his Bowl, and he Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998) [hereinafter *Impediment to Military Justice*].

articulated thoughts on the adjudication similar to those of the CA. The Rules for Court-Martial—in an effort to ward off panel tampering—prohibit commanders and CAs from administratively punishing panel members for their decisions in trial and prohibit any use of their command authority to influence how the members vote or what kind of sentence, if any, they impose.[52] An analogy can be made to a small city's elected District Attorney, a member of a certain political party, loading a jury in a political corruption case involving his rival political party with hand-selected jurors who are also members of his political party.[53]

Supporters of the current design painstakingly offer a reminder of the historical uniqueness of military justice systems, championing CA discretion required by the demands of efficiency and discipline, reinforced by the acquiescence of Congress.[54]

Critics, on the other hand, balance the values of due process against the demands of discipline or command and control, and believe the weight should tip in favor of fairness for the accused. One of the more thorough attacks on court-martial jury selection argues that Article 25 obviates the constitutional requirement for a cross-section of the community, necessarily leading to greater potential for unlawful command influence over the military justice system.[55]

Another critic, an experienced military trial and appellate judge, has argued that the current selection criteria—*all* of Article 25—ought to be scrapped in favor of a purely random selection from the defendant's military installation.[56] Military courts have expressed concern about "implied bias" and the "public perception" of unfairness engendered by CA's role in constructing the panel consisting of soldiers over whom he or she has supervisory control.[57]

As it stands now, there is little doubt that observers (civilian *and* military) would portray aspects of the UCMJ as *rusticum jus*. The primary focal point of the debate regarding this "rough justice," though, has been the role of the CA and the consequent appearance of unjust influence over what ought to be a more impartial process. Where some commentators offer a radical solution (removal of the convening authority from the panel-selection process) to one problem (unlawful command influence), this Note offers a more modest approach for the particular context of combat-originated crimes. Taking the CA's involvement as a given, this Note flanks the topic, approaching a little less directly, and merely proposes an

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[52] *See generally* Rule for Courts-Martial (R.C.M.) 104(a), *in Manual for Courts-Martial* (2005) [hereinafter MCM], *available at* http://www.apd.army.mil/pdffiles/mcm.pdf. The MCM is actually a compilation of thirteen Executive Orders, totaling more than nine hundred pages, and includes the punitive articles of the UCMJ and the Military Rules of Evidence.

[53] For a very similar analogy, see *Impediment to Military Justice*, *supra* note 51, at 2.

[54] Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 191–96, 215 (2003).

[55] *See generally Impediment to Military Justice*, *supra* note 51.

[56] *Id.* at 108.

[57] *See, e.g.*, United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001).

explicit statutory amendment to the Article 25 criteria to ensure that the defendant, accused of a crime arising from combat, is afforded a trial by jury that more accurately reflects his or her "community of peers." CA involvement in the military justice scheme need not be viewed as inherently dangerous to soldier's due process or the fairness and accuracy of the jury's deliberation. With the greater reliance on command prerogative embedded in the UCMJ comes a corresponding degree of flexibility that can and should be acknowledged by any proposed solution. We turn to this prerogative next.

2. The Flexible Commander

The breadth of the CA's power to select a jury panel is wide and is only bounded by the open-to-interpretation "qualifications" of Article 25 described above. He may ignore the foundational principles of Sixth Amendment jurisprudence by rejecting the "cross-section of the community" standard, as long as the accused is afforded his right to a fair and impartial fact-finder.[58] Alternatively, he may build a panel that ostensibly discriminates by inclusion of certain demographics in order to make the panel more "representative" of the military population, as long as it is *not* for the purpose of securing a verdict that fits his particular command policy[59] and also, does not appear to be for the purpose of achieving a "particular result as to findings or sentence."[60] Thus, a hypothetical Commander of the 101st Airborne Division, facing a rampant "barracks-theft" problem in his unit, would not be able to issue a command policy articulating a *per se* approach to the UCMJ disposition of those crimes (for example, one that is more punitive and values general deterrence over a more rehabilitative approach). Nor could he select panel members—ostensibly by the Article 25 qualifications—that he believes support that particular *per se* approach. However, again relying solely on the Article 25 qualifications, the Commander could engineer a panel venire list that consists only of soldiers that have lived, at one time or another during their service, in barracks, thus stacking the potential panel with relevant "experiential" qualifications.

This purposefully-designed discretion is not limited to the venire. Its prevalence throughout the UCMJ gives strong credence to the argument, repeated by the Supreme Court and all courts of military jurisdiction, that due process and justice should be balanced against military necessity.[61] This balancing is

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[58] *See* United States v. Carter, 25 M.J. 471, 473 (C.M.A. 1988).

[59] United States v. Hilow, 32 M.J. 439, 441 (C.M.A. 1991).

[60] *McClain*, 22 M.J. at 132.

[61] Schlesinger v. Councilman, 420 U.S. 738, 757–58 (1975). One example might be the caveat to the general rule that twelve panel members are required for a court-martial involving a capital offense: this number may be reduced (to no less than five) if they are unavailable due to "military exigencies." 10 U.S.C. § 825a (2006). This determination must be explained in writing by the convening authority (not the judge) and appended to the record, thus making it reviewable by appellate courts.

illustrated by the multiple paths that military prosecution may take regarding a particular soldier's case[62] or even in how commanders can discipline soldiers outside of courts-martial.[63]

But the flexibility to partially determine the future course of justice in a particular case does not reside solely with the accused soldier. The soldier's chain-of-command also possesses strong discretion at the pre-trial phase. The involvement in the adjudication of individual crimes by an executive branch official is what some scholars and courts refer to as the commander's "Judicial Function."[64] The ability to punish through *non*-judicial means is an illustration of how expansive this "judicial function" can be: the commander is given an option to pursue corrective measures against a soldier even though, technically, a crime under the UCMJ has been committed.

This menu of options—ranging from no punishment to non-judicial corrective action to punishment by court-martial—allows an accused's chain-of-command to make fundamental choices about the direction and scope of the criminal proceedings and is purposefully expansive. According to the Preamble of the Manual for Courts-Martial, "The purpose of military law is to promote justice, to assist in *maintaining good order and discipline* in the armed forces, to *promote efficiency and effectiveness* in the military establishment, and thereby strengthen the national security of the United States."[65] "Military law" encompasses the UCMJ, regulations that govern the implementation of the UCMJ, orders of the President, and the natural, "inherent" authority of commanders.[66] Notably, this guiding Preamble devotes two words to "justice" but devotes thirty-one words to concepts like "efficiency" and "discipline." It would seem that military law, by design, is defined by the context in which justice is supposed to function. Rather than a balancing act between the rights of the individual accused and needs of the state, *military* criminal law adds a third player—the mission or purpose for which the soldier and the state are brought together: to protect national security.[67]

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[62] *See generally* R.C.M. 903(c)(2) (requesting a bench trial), 910(a)(1) (offers to plead guilty), and Active Duty Enlisted Administrative Separations Army Regulation (AR) 635-200, ch. 10 (2005), *available at* http://www.apd.army.mil/pdffiles/r635_200.pdf. (requesting a discharge in lieu of court-martial).

[63] MCM, V-1.c., *available at* http://www.apd.army.mil/pdffiles/mcm.pdf.

[64] *See generally* Major Donald W. Hansen, *Judicial Functions for the Commander*, 41 MIL. L. REV. 1 (1968), *available at* https://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf/Main?OpenFrameset [hereinafter *Judicial Functions*].

[65] *See* Preamble to M.C.M., *supra* note 52, at I-1, *available at* http://www.apd.army.mil/pdffiles/mcm.pdf (emphasis added).

[66] *Id.*

[67] Reid v. Covert, 354 U.S. 1, 39 (1957) (holding that UCMJ court-martial jurisdiction did not extend to civilians accompanying service-members overseas, reversing the courts-martial convictions of two civilian spouses convicted of murdering their service-member husbands while stationed abroad).

Arguably, the expansive flexibility granted to CAs and commanders is a strength of the UCMJ and a consequence of the intended purposes of military law.[68] According to Justice Harlan, statutes like the UCMJ provide an appropriate Article I check[69] over the Executive Branch's military discretion, while nevertheless energizing the military's ability to *function* properly.[70] Proper functioning and the unique context of military life were factors on the mind of a more recent Court when it said: "[t]he inescapable demand of military discipline and obedience to orders cannot be taught on a battlefield" notwithstanding the fact that such "strict discipline and regulation . . . would be unacceptable in a civilian setting."[71] As one author noted, the crux of the UCMJ is enforcement of discipline in the ranks.[72]

Thus, discussion of the efficacy of Article 25's panel qualifications must give due regard to the commander's judicial flexibility and how the strains of military operations make such flexibility appropriate. As one defender of the CA's Article 25 discretion has written, "control of the court-member appointment process is vital to maintaining a system of military justice that balances the needs of the military institution with the rights of the individual."[73] However, as this Note will demonstrate below, such flexibility and control need not be absolute, and under certain conditions, this control can be restrained in order to better promote the purposes of jury trials.

III. HARMONIZING ARTICLE 25'S CRITERIA WITH THE REALITIES OF COMBAT

A. *Reconciling the Commander's UCMJ "Judicial Function" with the Functions of a Jury*

Earlier, this Note suggested that Article 25's prescription of criteria for court-martial panel qualifications was inadequate given the possibility that the resulting panel would not be sufficiently representative of a community that could most accurately and fairly determine the facts in cases of combat-originated crime. This Note also suggested that, given the strong presumptions of discretion granted to Commanders (supporting the goals of efficiency and discipline), the criteria *could* be expanded in such a way as to accommodate both supporters of a more

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[68] *Hearing on H.R. 2498 Before the H. Subcomm. on Armed Services* , 81st Cong., 1st Sess. 606 (1949).

[69] U.S. CONST. art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces").

[70] *Reid*, 354 U.S. at 68 (Harlan, J., concurring in result).

[71] Chappel v. Wallace, 462 U.S. 296, 300 (1983) (holding that the context and demands of military operations were "special factors" that become necessary considerations of a court in determining whether military personnel may sue their superior officers for racial discrimination).

[72] *Judicial Functions*, *supra* note 64, at 50.

[73] Behan, *supra* note 54, at 196.

normatively fair process and supporters of traditional command authority. Military courts of appeal, and analogous provisions of the UCMJ, provide reasonable justifications and a reasonable, if incremental, step toward this reconciliation.

1. Military Courts of Appeals: Taking an "Optional Representativeness" Approach to Article 25

Military courts of appeal have consistently operated under the uncontested belief that the Sixth Amendment guarantee of a jury trial (and thus the fair cross section of the community standard) does not apply to military courts-martial. These courts have pointed to the explicit UCMJ prescription permitting a court to deviate from such standards and "norms of representativeness" by virtue of its qualification criteria, like age, experience, and rank.[74] Nonetheless, these courts have also reflected on the possibility that CAs could expand *beyond* the Article 25 criteria in order to achieve a *more representative* panel. Translating this Janus-like duality, military courts have affirmed the intentional *inclusion* of an African-American soldier on the court-martial panel when the accused was also African-American:[75]

> As we interpret Article 25 . . . Congress has *not required* that court-martial panels be unrepresentative of the military population. Instead, Congress has *authorized* deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, a commander is *free to require* representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels.[76]

In other words, Congress has not precluded the military courts or CAs from building courts-martial panels in a "way that will best assure that the court-martial panel constitutes a representative cross-section of the military community."[77] Thus, the court-martial panel can stick with the deliberately exclusionary criteria of Article 25 or may use those criteria in conjunction with an effort to build a more "representative" (in effect, constitutionally-adequate) jury. However, these courts reiterate that the primary concern underlying the appellate review is an assurance that the panel members are not "packed" so as to achieve a desired finding of fact or sentence.[78]

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[74] *Smith*, 27 M.J. at 248; *see also* United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988); *McClain*, 22 M.J. at 128.

[75] *See generally* United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964).

[76] *Smith*, 27 M.J. at 249 (emphasis added).

[77] *Id.*

[78] *Id.* at 250.

Under this standard, a CA did not breach his Article 25 duty when he appointed female officers to the panel in a court-martial of a male officer accused of "indecently assaulting" another female *because* the inclusion was for the purpose of ensuring a representative community, and because the inclusion was *not* with the hope or expectation that such a panel of women would be either harsher (or more lenient) toward the accused simply because of their "experience" *qua* womanhood.[79] Similarly, the deliberate *exclusion* of certain ranks of soldiers (all junior enlisted and junior officers in a given CA's jurisdiction) from a court-martial of another junior enlisted solider was improper *because* of the CA's otherwise rational desire to avoid lenient sentences, presumed to be favored by such young, inexperienced soldiers.[80]

It would seem, then, that military courts have created a two-sided standard. On the one hand, the courts demonstrate an implicit recognition of the fair and representative "cross-section of the community" standard. By also prohibiting "court-packing" for a desired outcome, the courts have deliberately limited the CA's "judicial function"[81] that marks the military justice system as so unique. Thus, the Sixth Amendment's jury trial guarantee permeates the courts' Article 25 jurisprudence. On the other hand, the courts make a point of distancing themselves from the restrictions of the Sixth Amendment and promoting the discretion of the CA to rely on Article 25's admittedly non-representative criteria. In simplified form, the "speak-out-of-both-sides-of-one's-mouth" standard could be reduced to the following rule:

> Courts-Martial Convening Authorities shall select panel members in accordance with the statutory qualifying criteria listed in Article 25, UCMJ (10 U.SC. § 825(d)(2)). Convening Authorities *may, consistent with these criteria*, purposefully identify and select as panel members those soldiers that, in the CA's opinion, would produce a panel that is reasonably representative of the military community. CAs shall *not* select as members, notwithstanding compliance with Article 25 criteria or the CA's interpretation of any "fair cross-section of the community" standard, specific soldiers or soldiers with distinguishable characteristics, for the purpose of achieving a preferred verdict or sentence.

Under this type of rule-standard hybrid, in *United States v. Cunningham*,[82] an Army Court of Military Review (an intermediate appellate level court) reaffirmed that panel member selections based solely on factors—such as a member's rank—that result in the "systematic exclusion of qualified personnel" are invalid.[83]

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[79] *Id.*

[80] *McClain*, 22 M.J. at 132.

[81] Hansen, *supra* note 64.

[82] 21 M.J. 585 (A.C.M.R. 1985).

[83] *Id.* at 586.

However, the court *did* hold that the intentional and systematic *in*clusion of officers filling leadership positions was "totally compatible with the UCMJ's requirements."[84] The court focused on the conventional wisdom that a leader, by virtue of having been selected for that position, is "best qualified," having already demonstrated positive characteristics—presumably making a better juror—like "integrity, emotional stability, mature judgment, attention to detail, [and] a high level of competence."[85] From the record, the CA was apparently concerned with getting accurate, wise results, believing that leaders were in the best position to understand the context in which the soldiers behaved, as well as being "most aware of the needs of soldiers as well as commands [and] that qualification for command and court membership had much in common [and] that commanders were more concerned with caring for soldiers than punishing them."[86] In his opinion, affirmed by the court, these criteria met the intent and purpose driving the Article 25 qualifications.

In *United States v. Lynch*,[87] the United States Coast Guard Court of Military Review approved of a Convening Authority's appointment of panel members with a "sea going" professional record to hear the case of an officer accused of "negligently hazarding" his vessel and dereliction of duty.[88] The court took a route similar to *Cunningham*, and held that the CA's decision was "in keeping with the mandate" of Article 25's "experience" qualifier. Specifically, the court anchored the "experience" to the context of the fact pattern, construing the term to mean *relevant military* experience (as opposed to general life experience of, say, being a women, as in *Cunningham*), provided such qualifications did not predispose the panel members toward conviction or sentencing bias.[89]

Cunningham and *Lynch* stand for the critical proposition that Article 25's "experience" factor means *relevant military* experience. Furthermore, this relevant experience can be narrowly tailored to the context in which the criminal action allegedly occurred. The CA's discretion to build such a panel is limited only by the general commandment to follow Article 25 and—at the CA's discretion—ensuring a "representative cross-section of the military community," consistent with the military court's partial adoption of the Sixth Amendment, and the prohibitions against packing the panel to achieve a desired verdict or sentence.[90]

If the CA were to make a point of *not* including combat-experienced soldiers in the trial of combat-incidental crimes because he believed that such experience would render the panel too subjective, the CA risks offending constitutional norms under venire exclusivity standards. While the courts are reticent to handcuff

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[84] *Id.* at 587.

[85] *Id.*

[86] *Id.* at 586.

[87] 35 M.J. 579 (C.G. Ct. Crim. App. 1992).

[88] *Id.* at 581.

[89] *Id.* at 588.

[90] *Smith*, 27 M.J. at 248.

military law to traditional expectations of the jury, we have seen that they nonetheless strive to follow, at least, the cross-section prescription (screened through Article 25 though it may be). Thus, asking whether the population of combat veterans in a given CA's jurisdiction represents a "distinctive" group, and thereby making systemic under-representation of that group unconstitutional, is not an unreasonable assignment.[91] The derivative test for "distinctive" groups within a community may be instructive: to show that combat veterans fall within this rule is a function of simply demonstrating, based on all the facts available to the CA,[92] that their experiences are either (1) substantially different from other segments of the military community *or* (2) so internally cohesive and consistent that their attitudes and experiences are, realistically, unique and "set apart."[93] At a brief glance, distinguishing between those soldiers that have seen combat from those that have *not* experienced combat is not a difficult task, under either of these prongs.

Consequently, sifting the venire for relevant *combat* experience appears to be an acceptable application of Article 25's criteria, and in full accord with the military appellate courts' two-lane "optional representativeness" approach, relying on the Sixth Amendment "cross-section" norms and the CA's unequivocal discretion.

2. On-Demand and Automatic Panel Member Qualifications

Assume that, as a policy matter, we accept the proposition that combat experience is a relevant factor that a CA may consider in constructing a panel for particular courts-martial. If Article 25 were to be amended to provide the defendant with a mechanism for placing combat-experienced soldiers on the panel, a reasonable concern is the reduction in the CA's discretionary power to appoint members. In other words, why isn't the "experience" criterion of Article 25(d)(2) sufficient guidance or direction to the CA to include on the panel those members with relevant combat experience? To address the concern that such a "pro-defendant" option would unfairly and unnecessarily block the careful decisions of the CA, we only have to look within Article 25 itself. Two interrelated provisions within this Article, in effect, already provide affirmative and passive ways in which the defendant can shape the panel composition.

Article 25(c)(1) hands the accused soldier a tool for affirmatively shaping the contours of the panel. This provision permits any enlisted defendant to demand a jury, the membership of which is at least one-third enlisted.[94] Where the default

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[91] *See* Duren v. Missouri, 439 U.S. 357, 364 (1979).

[92] *See* Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983).

[93] *See* State v. Pelican, 580 A.2d 942, 947 (Vt. 1990).

[94] 10 U.S.C. § 825(c)(1) (2006). "Enlisted" refers to both a range of junior ranks and the method by which civilians enter those ranks. In the Army, a person enlists—usually—at the rank of "Private" (E-1). After several years and several promotions, the enlisted soldier may enter the ranks of the "Non-Commissioned Officer" or NCO (starting with "Sergeant," or E-5, and culminating with

composition is a jury comprised of those soldiers deemed most capable by the CA using the list of general criteria (which usually results in officers),[95] this rule narrows or channels the CA's field of candidates in accordance with the defendant's preference. In this sense, the CA must, upon demand by the accused, consider not only rank, experience, education and other traditional qualifications found in Article 25(d)(2), but must additionally consider how to incorporate the defendant's preference into the panel.[96]

Given the structural and judicial presumptions favoring *non*-enlisted members of a court-martial panel, the option granted to enlisted defendants suggests two things. First, it suggests that the UMCJ has acquiesced in, or at least acknowledged, the role of subjective characteristics informing the make-up of the panel—if the defendant *feels* more comfortable with a jury of his enlisted peers (having gone through the same kind of training and living environment) rather than officers, then he shall have it.[97] Second, this provision directly grants the defendant a way to manipulate the composition of the panel that constricts the CA's otherwise broad discretion.

The other primary structural device within Article 25, limiting the CA's natural discretion, is subsection (d)(1).[98] This provision passively, without the direct involvement of the defendant, defines the look of the panel by mandating that no member, "when it can avoided,"[99] shall be junior in rank to the accused. Three reasons are traditionally forwarded as justification for this provision. First, there may be a concern that a junior member of the panel—for example, a lieutenant—might be intimidated by the prestige, persona or natural inclination for

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Sergeant Major, or E-9). These ranks are distinguished—by function, pay, responsibility, education, and training—from the officer ranks (beginning with Second Lieutenant, or O-1, and culminating with General, or O-10).

[95] 10 U.S.C. § 825(d)(2) (2006).

[96] From the defendant's perspective, this structural capability may be substantial. The military courts have long recognized that panels consisting of enlisted members may be fundamentally attuned to different values than one consisting of officers or senior non-commissioned officers. *See* United States v. Timmons, 49 C.M.R. 94 (N.C.M.R. 1974). In *United States v. Carman*, the court opined that "as a class," senior leaders are "older, better educated, more experienced, and more thoroughly trained than their subordinates . . . [and their] leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member." United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985); *see also* United States v. Firmin, 8 M.J. 595, 597 (A.C.M.R. 1979) (holding that "it is not improper for a convening authority in his selection process to look *first* to officer and enlisted personnel of senior rank because they are more likely to be best qualified by reason of age, education, training, experience, length of service and judicial temperament"); United States v. Yager, 7 M.J. 171, 173 (C.M.A. 1979) (affirming conviction of a soldier tried by a panel in from which the lowest two enlisted ranks were systematically excluded, finding a "demonstrable relationship between excluded ranks and the criteria of Article 25(d)(2)"); United States v. Cunningham, 21 M.J. 585 (A.C.M.R. 1985).

[97] *Crawford*, 35 C.M.R. at 26 (Ferguson, J., dissenting) (quoting testimony from the *Hearing on H.R. 2498 Before the H. Armed Services Comm.*, 81st Cong., 1st Sess. 1142 (1949)).

[98] 10 U.S.C. § 825(d)(1) (2006).

[99] *Id.*

deference associated with higher ranks that may join him on the panel.[100] Second, there may be a concern that junior members of the court would wish to see a defendant of higher rank "cashiered from the service" to improve promotion opportunities.[101] Third, and most significant, is the concern that junior members, due to their relative inexperience with the situations encountered by the accused, would be less likely to appreciate the alleged offense in the proper context.[102] This last justification unambiguously resembles the argument in favor of a combat-experienced panel trying a defendant accused of a crime arising out of a combat event. Just like Article 25(c)(1), this subsection directly limits the CA's discretion over who may sit on the court-martial panel. Instead of the defendant's *preference*, it is his or her relative position within the military hierarchy that imposes a bright-line perimeter defining the panel.

While the "experience" qualification in Article 25(d)(2) appears broad enough for the CA to include the enlisted status of the defendant, the "rank" qualifier could similarly be interpreted by the CA as imposing a minimum rank requirement. However, Congress nonetheless drafted these limitations to specifically address a fairness-to-the-defendant concern and reinforce traditional norms of a hierarchical social and professional culture. At least for these two subsections of Article 25, the competing value of CA's discretion gives way.

3. Blue-Ribbon Juries of Combat Veterans in Military Courtrooms

The civilian justice system, like the UCMJ itself, demonstrates an experience with breaking from the conventional cross-section of the community standard. The so-called "blue-ribbon" jury is derived from a selection process that discriminates for certain qualities among potential jurors.

In jurisdictions permitting blue-ribbon panels, jury pools are screened for more "qualified" members. The Supreme Court has long recognized that creating a dual system of jury pools, with the blue-ribbon pool ostensibly more qualified than the general pool and used in higher-profile or specialized cases, "presents easy possibilities of violations of the Fourteenth Amendment."[103] Nonetheless, the

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[100] United States v. Nixon, 30 M.J. 1210, 1212 (A.C.M.R. 1990) (suggesting a reason why CAs might wish to stack a panel with relatively senior ranks).

[101] Young, *supra* note 46, at 118.

[102] Behan, *supra* note 54, at 255–56.

[103] Fay v. New York, 332 U.S. 261, 265 (1947). In this leading case on blue-ribbon juries, the Court rejected petitioners' claims that an existing state statute authorizing blue-ribbon juries violated equal protection concerns and that the state's administration of those statutes had violated their due process. *Id.* at 286, 296. The defendant union organizers were convicted on conspiracy and extortion charges by such a blue-ribbon jury. New York state law provided for the creation of "special" juries, in which the available jury pool would be, essentially, sifted a second time. Subpoenaing the prospective jurors, the court would assess their qualifications through direct testimony. This specialized, deep end of the jury pool would be available for duty over a designated period of time, but not assigned to a specific case. *Id.* at 267–71.

burden on the defendant to show either a due process violation or an equal protection violation stemming from the use of a blue-ribbon jury is difficult to overcome. The defendant must prove that the state's enabling statute, or that statute's administration, permitted the court officers to exclude certain classes of people based on race, color, creed, or occupation from the jury rolls.[104] In other words, the blue-ribbon system benefits from a presumption of validity: discriminating for *quality* of juror—according to some standard of education, experience, or skill-set, depending on the case's facts—does not necessarily eviscerate the constitutionality of a particular jury.

That such a system discriminates for special qualities tailored to a specific type of case appears to breach the cross-section of the community standard. Indeed, critics argue that a criminal defendant receives unequal protection when tried by a blue-ribbon panel as a result of "intentional and systematic exclusion of certain classes of people who are admittedly qualified to serve on the general jury panel."[105] Distinguishing between those qualified and those unqualified amounts to an "obliterat[ion of] the representative basis of the jury."[106]

With the specialized jury, like a blue-ribbon jury, it is possible to see parallels to courts-martial panels consisting of "experts" possessing combat experience similar to that of the accused soldier.[107] The clearest rationale that validates the blue-ribbon jury was that the enabling statute imposed juror qualifications based not on suspect class discrimination, but rather on an assessment of the nature of the case and the juror's "fitness" to understand, interpret, and analyze the facts of the case. Under this guideline, consider a hypothetical court-martial panel trying a case of a junior military police officer charged with physically assaulting a *sheikh* during an impromptu interrogation meant to acquire information about a local improvised explosive device maker responsible for a series of recent road-side explosions that claimed four soldiers under his command. To accurately and fairly assess the facts of this kind of case—including the emotional or physical strains experienced by the accused and any orders regulating tactics or decisions he made—would require a jury panel that possessed "relevant military experience." A blue-ribbon jury would thus consist of officers with similar types of command experience in a combat environment and officers with similar types of experience overseeing and giving orders to such junior leaders.

But a reasonable question to ask is whether a blue-ribbon jury's innate partiality (at least in terms of shared experience) is mere flirtation with disaster. If

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[104] *Id.*

[105] *Id.* at 297 (Murphy, J., dissenting).

[106] *Id.* at 298.

[107] Indeed, several commentators have likened the *prototypical* court-martial panel, selected according to the statutorily-mandated criteria of Article 25(d)(2), to a "blue-ribbon" jury. *See* United States v. Matthews, 16 M.J. 354, 383–84 (C.M.A. 1983) (Fletcher, J., concurring in the result); *see also* United States v. Rome, 47 M.J. 467, 471 (C.A.A.F. 1998) (citing United States v. Youngblood, 47 M.J. 338, 346 (C.A.A.F. 1997) (Crawford, J., dissenting)).

the primary value of this specialized jury is its ability to promote more accurate outcomes, an inherent flaw of that jury is the risk that accuracy may take a back seat to favoritism or pro-defendant bias. One hypothetical questioning the value of a blue-ribbon jury might depict a member of a specialized class accused of a crime arising out of that member's job performance within that class, and tried by a jury consisting of other members of that class with similar experience performing that job.

Consider the trial of a police officer accused of unlawfully killing a criminal suspect. Assume that the police officer is a trained, experienced member of the police department's SWAT unit. Assume that the officer took unnecessarily aggressive steps in reacting to a physical threat he encountered when he and his SWAT team executed a raid on a "crack house." Assume that the target of the raid was a man with several felony convictions, all involving the possession of a firearm, and had previously been a suspect in a "cop-killing" case. Upon entering the home, the officer was punched in the face by the targeted suspect in the process of restraining him. The officer's response was to open fire, killing the man instantly. After an internal investigation of the incident, the officer is formally charged with voluntary manslaughter. Finally, assume that the jurisdiction permits the use of a blue-ribbon panel to hear specific types of cases, including those that—in the State's considered opinion—impose special concerns of publicity and in which the special nature of the panel would demonstrate substantially-improved "fitness to judge." In this case, should the accused officer be tried before a jury consisting, in part, of former police officers—or, even more dramatically, former SWAT officers?

If the chief concern is ensuring that the defendant has access to a jury fully capable of rendering an accurate outcome, then the experience of being a police officer, or more specifically the experience of operating on a SWAT team, would drastically increase the degree of expertise and subject-matter perspective on the facts; the reasonable answer, then, would be to permit such a blue-ribbon-type jury because it enhances accuracy.

But if concerns about the objectivity and prejudice of the jury, and enforcing norms of the larger community, are foremost, then the value of a "special" jury, sharing unique experiences with the accused, is—or should be—negligible. The thought that a police officer might be tried by a jury of fellow police officers for a crime resulting from his official duties shocks the conscience as patently unjust. One might reasonably fear that the police "look out for their own," and thus would consciously or unconsciously shed any pretense of impartiality. In this view, the answer would be no—the jury should not deliberately include members of this specialized class.

On this view, the argument that a court-martial panel should consist of combat-experienced service members upon the demand of an accused is, at the very least, pragmatically suspect. In other words, the blue-ribbon jury is simply a failed analogy or justification for revising Article 25.

But this argument would ignore the stark procedural and functional distinctions between a court-martial and the civilian criminal trial of a police officer. Though there is a clear parallel between a police officer engaging a suspect unlawfully during an attempted arrest and a soldier unlawfully committing an act of violence during a combat mission, the similarities end there. The fundamental flaw of the counterargument hypothetical is that it fails to acknowledge the distinction between the communities from which the jurors can be pulled. In the hypothetical, the blue-ribbon jury is constructed of police officers in lieu of the much larger pool of civilian citizens unaffiliated with a police department—in essence, the "community" is not "represented." In the case of a court-martial, however, the universe of citizens from which the court-martial panel will be drawn consists *only* of fellow soldiers. The pool of available jurors already, and significantly, shares traits and characteristics with the defendant. Therefore, the image of a "fair cross-section of the community" is repainted such that the nature of "community" itself reduces the threat of partiality. Undue favoritism or bias benefiting the defendant, reasonably feared in the police officer's trial, would be inapplicable.

Not only is the blue-ribbon jury an apt metaphor, its functional quality-discrimination would be constitutionally required for combat-incidental crimes if military courts considered themselves more clearly subject to the traditional Sixth Amendment law. Under the *Duren* three-part test, for instance,[108] the class of combat veteran soldiers could be distinguished as a "distinct" group whose representation within the military community is such that deliberate representation on the panel is both reasonable and fair, and under-representation, if systematically achieved, would be unconstitutional. A panel intentionally devoid of this characteristic would arguably be an unconstitutional exclusion.

But saying that relevant combat experience *could* be an articulated qualification under the "experience" criterion of Article 25 says little about whether it *should* be that refined in relevant situations. That proposition faces its most serious challenge from proponents of the traditional discretion that is afforded to CAs performing their traditional "judicial function" as part of a criminal justice system that values discipline and efficiency so heavily.[109] To say that this discretion is outweighed by a heavier need for justice—that soldiers accused of crimes that arise out of a combat event *should* be afforded a panel consisting of similar combat veterans—is a normative, policy-based argument about "fairness." Such arguments are convincing only to the extent that they mesh with the reader's sense of how to prioritize and distinguish among competing values.[110]

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[108] Duren v. Missouri, 439 U.S. 357, 364 (1979).

[109] *See* Reid v. Covert, 354 U.S. 1, 36 (1957); *see also* MCM, *supra* note 52, pt. I, ¶ 3.

[110] Jan-R. Sieckmann, *Why Non-Monotonic Logic Is Inadequate to Represent Balancing Arguments*, 11 ARTIFICIAL INTELLIGENCE & L. 211, 212–13 (2003).

B. *Augmenting Article 25: Five Interests*

Five general, but interrelated, interests or values can be harvested from the criticisms and support of the court-martial panel system discussed above: first, the interest in recognizing the unique strains on soldier conduct and the unique setting in which military justice operates to police that conduct;[111] second, the interest—correlated with the first—in recognizing the influence and discretion afforded to the convening authority as part of his or her "judicial function" of command;[112] third, an interest in matching the panel to the traditional expectations and purposes of the jury;[113] fourth, an interest in satisfying the "optional representativeness" approach to venire, taken by military courts of appeal, by incorporating the theme of a "fair cross-section of the community" to the application of Article 25(d)(2)'s criteria;[114] and finally, the interest in securing for the defendant a fair trial by a fair, impartial, and accurate jury.[115]

These interests should both inform the design and test the value of a proposal to augment the current Article 25 panel member selection criteria. In a way, they are the gravitational forces affecting and contributing to the "relativity" of the context in which the alleged crime occurred and in which it is to be judged. This Note suggests that these five interests open the door for revising Article 25, endorsing a defendant's ability to shape the panel's composition to reflect the "relativity" and "gravity" of the combat experience. The next task, then, is to see how such a revision might look.

1. A Modest Reduction in Convening Authority Discretion

To satisfy obligations imposed by the five interests identified above, 10 U.S.C. §825 (UCMJ Article 25) ("Who may serve on courts-martial") should be amended to account for combat-incidental crimes (recommended revision in **bold**):

> (d)(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

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[111] *See, e.g., Reid*, 354 U.S. at 35–36; *supra* Part II.B.

[112] *See, e.g., supra* Part II.B; *see generally* Behan, *supra* note 54.

[113] *See, e.g., supra* Part II.A.

[114] The "optional representativeness" approach is described *supra* Part III.A.1 and is illustrated by the methodology taken by the courts in *United States v. Cunningham*, 21 M.J. 585 (A.C.M.R. 1985), and *United States v. Lynch*, 35 M.J. 579 (C.G. Ct. Crim. App. 1992).

[115] This interest is promoted by existing structural limits on the CA's discretion in Article 25(c)(1) and (d)(1) and finds a useful analogy in blue-ribbon juries benefiting from an increased degree of expertise and experience. *See supra* Part III.A.3.

When the accused is charged with a violation under the Code in which the alleged predicate acts constituted, were directly derived from, or were directly attendant to, the accused's conduct during a combat event in a Hostile Fire Zone (HFZ), the convening authority, upon oral request on the record or in writing by the accused before the court is assembled for trial, shall:
(A) ensure that not less than one-third of the total membership of the court is comprised of panel members possessing relevant combat experience.
(i) Relevant combat experience is defined as deployment to an HFZ which, in the convening authority's opinion, renders the panel member presumptively capable of understanding or appreciating the context in which the alleged acts occurred.
(ii) Subsection (d)(2)(A) shall not be construed as limiting the ability of either trial counsel or defense counsel in applying Article 41 challenges for cause.
(iii) If the total membership of the court is the mandatory minimum in accordance with Art. 16(1)(A), the requisite number of panel members possessing experience as defined by Art. 25(d)(2)(A)(i) shall be not less than two.
(B) make a reasonable effort to detail members that have deployed to the same HFZ as the accused and in which the predicate acts allegedly occurred.

"Combat event" is a not a term easily defined, and could—with its ambiguity—repel many forms of small-scale military engagements from its scope, limiting the reach of this revision's coverage and applicability. Or its ambiguity may—instead—be interpreted too inclusively, resulting in an unwanted broadening of applicability beyond the intended purpose of the revision. It is therefore advisable to either define the term precisely as part of the amended statutory text, or replace it with a clearer phrase. For the sake of readability and ease of construction, the safest course is to define it separately. The Army comes close with its own doctrinal view on modern military operations: it defines "close combat" as "warfare carried out on land in a direct firefight, supported by direct, indirect, or air-delivered fires."[116] This definition is, itself, fraught with ambiguities because it does not speak to the scale limitations of the event, resulting in confusion over whom it would apply. Use of the term "warfare" also fails to explain whether it encompasses only traditional, armed hostilities between traditional, belligerent forces or whether it also includes hostilities between state and non-state actors. Maybe a better definition of "combat event," would speak of "battles, engagements, strikes and other forms of tactical action conducted by

[116] Field Manual 3-0 (Operations), para. 1-77, *available at* http://ftp.fas.org/irp/doddir/army/fm3-0.pdf (last visited Jan. 26, 2009).

combat forces to achieve strategic or operational objectives in an operational area."[117] This definition is slightly better because it directly analogizes "combat event" to common illustrative examples and explains, generally, over whom—and where—the definition applies. But "operational area" is a fairly loose term, and many types of "tactical" operations ripe for combat-incidental crime are not necessarily tied to clear "strategic or operational objectives." The best approach, if the Code drafters were to consider defining the phrase, would be to avoid potential confusion over the scale of the operation, potential confusion over participants in the "event," and potential confusion over objectives of the mission. One, albeit imperfect, attempt would be defining a combat event as

> the application or threat of force by the accused, using military weapons systems, against an identified military target for an identified military purpose, whether to deliberately accomplish an assigned objective against a hostile armed force or in reaction to contact with a hostile armed force.

While this "military system-military target-military purpose" definition does not adopt or incorporate existing Army doctrinal language, its advantages lay in the clearer expression of "who, what, when, where, and why," making it a more apt description of modern combat scenarios and better at providing a framework for interpretation and application by the convening authority when he or she must select the panel under Article 25.

2. Applying the Five Interests

This Note suggests that revising Article 25 to grant the defendant a power over panel composition to reflect his or her personal combat experience, should try to satisfy five general interests that seem to define the contours of jury membership in a combat-incidental crime context.

The first question is whether this revision appropriately recognizes the unique setting and strains of military operations and soldier conduct. Where the U.S. Supreme Court and military courts of appeal have tried to accentuate the differences between civilian and military justice norms,[118] this revised provision is designed to remind the CA that there are differences still between those soldiers with combat experience and those lacking it; these differences can and ought to be recognized as important values and "perspective[s] on human events"[119] that should shape the characteristics of the panel. The current structure of Article 25(d)(2), with its generic criteria and explicit dominance of CA discretion, authorizes panels possessing "experience" unrelated to the facts and inexperienced

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[117] *Id.* at para. 2–10.

[118] *See, e.g.*, *Reid*, 354 U.S. at 39; Chappell, 462 U.S. at 300; *Smith*, 27 M.J. at 248.

[119] Peters v. Kiff, 407 U.S. 493, 504 (1972).

in the realities of a combat environment. This lack of *relevant* experience—though fully permissible under the current scheme—ignores the lessons of *Cunningham*, *Lynch*, and the blue-ribbon jury model, in which correlating the court-marital panel to the unique nature of the offense was not only acceptable conduct on the part of the CA, but a positive application of the Article 25 criteria and safe from constitutional challenge.[120]

The follow-up question is whether this revision adequately values the influence and discretion traditionally afforded to CAs. Any statutory provision that begins with a command like "the convening authority shall . . ." is, admittedly, removing muscle from the otherwise broad discretion over the course of military justice that CAs typically flex. On the other hand, this proposed revision attempts to allay that loss: it balances the directive "shall" with areas in which the CA can exercise a fair degree of prudence, acumen, and the competent, professional judgment associated with senior leaders recognized by the courts.[121] By not explicitly defining "combat event in a Hostile Fire Zone," the CA is free to reasonably determine that the situation in which the alleged crime occurred did *not* trigger the remainder of the Article's proscriptions. For instance, if a soldier is charged with assaulting a superior commissioned officer during the middle of a foot patrol in downtown Basra, the CA has a powerful discretionary choice over whether the preceding clause in the revised Article 25(d)(2) ("constituted, were directly derived from, or were directly caused by") is operational.

Further, the CA can decide how many of the members, beyond the imposed minimum one-third, will have the requisite combat experience. This provides the CA with an opportunity, case-by-case, to balance the composition in a way that fits within his or her discretionary design of the panel in accordance with the qualifying criteria already found in Article 25(d)(2). The CA may also determine the extent to which the prospective panel member's combat experience is sufficient to "understand and appreciate the context in which the alleged act occurs." Any number of factors—duration of deployment, location of deployment, or the type of missions in which the member participated—may be considered by the CA in this evaluation. For example, a forty-eight year old Colonel, assigned to a supervisory quartermaster position in the "Green Zone" of Baghdad for six months, may be considered (depending on the context of the offense) far *less* experienced than a twenty-two year old Second Lieutenant, assigned for sixteen months as a platoon leader in the Anbar Province of Iraq. This outcome occurs notwithstanding equally important roles in support of the same conflict, and the vast professional gulf between the two officers that would—in other contexts—make the Colonel a far more impressive and valuable "asset" to a military unit. This weighing reinforces, and does *not undermine*, the traditional "judicial function" of the CA

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[120] *Supra* Part III.A.1.

[121] *Cunningham*, 21 M.J. at 587 (citing United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985)).

lauded as predominate in the military justice system.[122] In effect, it is analogous to the minimum rank requirement of Article 25(d)(1) and the mandated enlisted member participation-upon-request of Article 25(c)(1).[123]

The next question is whether this revision helps in matching the court-martial panel with the norms, expectations, and purposes of the prototypical jury. As elaborated on above, three core functions of the jury seem to dominate both its composition and its performance.[124] By mandating an additional layer and type of "experience" in accord with the defendant's preference, this revision satisfies one of those values by fostering "representative government" on a micro-scale. The defendant has the discretionary power to place soldiers, with whom he or she feels comfortable based on a shared professional experience, in a position to decide how the law ought to be applied to a particular context.[125] This is functionally similar to an electorate choosing representatives to place in a position where they have the discretionary power over law-formulation. While the current Article 25(d) offers a potentially larger population of soldiers to sit on trials of combat-related crimes—in the sense that the venire is not limited to combat veterans—it nonetheless fails to give the defendant a vote over the professional background of those hearing the case. The provisions giving the defendant a vote over the enlisted member composition,[126] as well as the minimum rank requirement,[127] are existing ways in which the UCMJ attempts to voice the defendant's preferences, accommodate his or her relative rank in the hierarchy of military culture, and acknowledge that the *context* of the crime may dictate the characteristics of the panel trying that crime.[128] In other words, both the defendant and the context of the crime are "represented" by the combat-experienced panel.

In satisfying the second core value, the revision engrafts additional qualifying requirements—reducing the CA's traditional discretion—making it more difficult for the prejudices or unlawful command influence of a CA to infect the composition of the panel.[129] In a sense, this is a reinforcement of the check on

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[122] *See generally* Behan, *supra* note 54; *Judicial Functions*, *supra* note 64.

[123] *See* discussion *supra*, Part III.A.2.

[124] *See supra* Part II.A.

[125] United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (recognizing that, notwithstanding the law, jury members have an "undisputed power" to judge for themselves the culpability of an accused based on their perceptions of the law's fairness, exigent circumstances that may provide a justification, their "logic," or may acquit simply based on "passion." The accused soldier, tried by a court-martial panel consisting of other combat-experienced soldiers he or she more or less "elected," is submitting to a decision-making process that is similar to those factors influencing the democratic decision-making process through elected representatives on a larger scale).

[126] 10 U.S.C. § 825(c)(1) (2006).

[127] 10 U.S.C. § 825(d)(1) (2006).

[128] *See generally* Behan, *supra* note 54.

[129] For thoughtful commentary on the dangers and prevalence of unlawful command influence over the court-martial, see generally Glazier, *supra* note 51, at 44–67.

arbitrary and oppressive government domination thought to be a primary, traditional advantage of a criminal jury of peers.[130] The current scheme does little to check the discretion offered the CA and—presuming he or she stays within the bounds of the Article 25(d)(2) criteria—leaves the CA ultimately free to engineer a panel that lacks combat experience to such an extent that it is nether a fair representation of the military community nor a jury of the defendant's "peers."

The third function of the jury—educating the public (at least the public participating on the jury) on the virtues of the Rule of Law and values of fairness, rehabilitation, and retribution—is less direct under this revision. Admittedly, mandating that a certain percentage of the panel reflect a shared background reduces diversity and constricts the universe of potential members currently available under Article 25(d)(2)'s broad qualifiers. However, given that the panel consists entirely of one profession anyway, this concern for diversity is less accented than in civilian trials. And, importantly, this shared combat experience, regardless of whether it leads to a generally more skeptical or generally more partial jury of soldiers, "educates" the military justice system by reinforcing—or perhaps redefining—expected norms of behavior for the context of combat.

The fourth question is whether this revision satisfies the "optional representativeness" approach to venire endorsed by military courts of appeals. As discussed above,[131] this approach can be defined as:

> Courts-Martial Convening Authorities (CAs) shall select panel members in accordance with the statutory qualifying criteria listed in Article 25, UCMJ (10 U.SC. § 825(d)(2)). CAs *may, consistent with these criteria*, purposefully identify and select as panel members those soldiers that, in the CA's opinion, would produce a panel that is reasonably representative of the military community. CAs shall *not* select as members, notwithstanding compliance with Article 25 criteria or the CA's interpretation of any "fair cross-section of the community" standard, specific soldiers or soldiers with distinguishable characteristics, for the purpose of achieving a preferred verdict or sentence.

This general rule appears to say nothing directly about a *defendant's* choice in shaping the make-up of the panel. The courts—discussing how far a CA may go in getting the right *kind* of "experience" on the panel—have affirmed the CA's discrimination for certain professional backgrounds as consistent with both the purpose and text of Article 25's criteria, provided that the selections are not "stacked" to arrive at a predetermined verdict or sentence.[132] But if the CA has this much room in which to define "experience," it seems plausible that a system in which the *defendant* can discriminate for a certain professional experience is also

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[130] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

[131] *See* discussion *supra* Part III.A.1.

[132] *Id.*

consistent with the purposes and text of Article 25. Admittedly, the relative powers of the CA and the defendant, and their relative purposes and aims within the judicial system, are vastly different; it would be nonsensical to suggest that a defendant should adopt the same powers as the official with charging authority. However, given that two other provisions—also in Article 25—either directly or tacitly provide the defendant with a means for such quality discrimination,[133] it is not too much to suggest that an additional layer be added that refines this discrimination in a very narrow set of circumstances, largely triggered by the CA's factual determinations.

The final question, hoping to address interests raised by military panel member selection, is whether this revision secures a fair jury for the defendant accused of a crime originating in a combat event. Rather than answering it as if it were a discrete test, this question relates to—and encapsulates—the previous four questions. The Court in *Gaudin* reminded us that the "jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[134] In doing so, the jury fulfills three broad functions: engaging the public in democratic process, shielding the defendant from the abuses of government, and educating the public in civic virtues.[135] Instead of a precise recipe for constructing a jury that can satisfy these functions in meeting its constitutional responsibility, the jury is to represent a "cross section of the community."[136] In a military environment, where the values of discipline and efficiency are superimposed, the justice system attempts to adopt these guiding principles in light of the unique demands, characteristics, and purposes of the Armed Forces.[137]

The proposed revision both illustrates and is guided by these principles. It refines the Article 25(d)(2) definition of "experience" within a narrow setting of a combat-related crime's prosecution. It constricts the CA's discretion, targeted within this setting, to ensure that a relevant "community" is represented on the panel—without obliterating the CA's traditional and necessary "judicial function."[138] It gives the defendant a voice in shaping the panel's composition in a

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[133] *See* discussion *supra* Part III.A.2.

[134] United States v. Gaudin, 515 U.S. 506, 514 (1995).

[135] *See supra* Part II.A.

[136] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

[137] *Compare Chappell*, 462 U.S. at 300 (recognizing that a long history of honing the necessary hierarchical relationships between commanders and enlisted personnel to effectively wage war is the foundational justification for the United States' "special and exclusive system of military justice" that has no direct parallel to civilian law), *with* MCM, *supra* note 52, pt.I (speaking of the "nature and purpose of military law" in terms of balancing justice, the inherent authority of commanders, "efficiency and effectiveness in the military establishment," national security, and discipline within the ranks, most of which find no clear analogy in civilian criminal law).

[138] An apt metaphor would be to consider this tailored constriction of the CA's discretion as a "smart bomb" that pinpoints one particular and narrow target, minimizing the danger of collateral damage—in this case, to the broader powers of the CA known as its "judicial function."

way similar to existing Article 25 provisions and for similar reasons. It educates the military justice system by ensuring that combat experienced soldiers have an opportunity to "apply the law to [the] facts"[139] of a combat-related crime, thereby teaching a lesson about expected and acceptable behavioral norms in this context. Finally, to the extent that military courts approve of CAs deliberately matching the jury composition to the crime's context, the revision is already grounded in judicial support.

C. *Iraq: Placing Revised Article 25 in Context*

In order to adequately defend the argument that the current design of the UCMJ's empanelling provisions are obsolete and unfair to the defendant, this section will attempt to briefly describe and condense the operations ongoing in Iraq. It will squeeze them into a very limited window through which the reader might better understand the background of a soldier's typical day. This should, hopefully, provide some justification for this Note's recommendations.

1. The Mosquito Effect

A commanding general once referred to the combat in Iraq—with its myriad political, social, religious and military layers affecting daily operations—as "three-dimensional chess in the dark."[140] I was far less expressive when describing my own experience as a platoon leader in the first year of the war: the analogy I used was of the Army as a lumbering elephant attempting to ward off a swarm of mosquitoes.

Whatever one's metaphor, the substance of the war is a counterinsurgency. If an insurgency is defined as an "organized . . . struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control,"[141] then a *counter*insurgency is anything and everything used to disable that struggle and to strengthen the government or occupying power's legitimacy.[142] Hallmarks of legitimacy include the population's security, a fair selection or election of civil leaders, and popular

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[139] *Gaudin*, 515 U.S. at 514.

[140] Kirk Semple, *U.S. Forces Sweep Iraq Area, Seeking 3 Missing Soldiers*, N.Y. TIMES, May 14, 2007, at A6 (statement by Major General Rick Lynch).

[141] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ 1-2 (2006), *available at* http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf. This Manual details the Army and Marine Corps' new doctrine and explains the history, nature, and conditions of modern insurgencies and counterinsurgencies, as well as broad concepts and lessons for applying tenets of counterinsurgency in current operations. The drafting and widespread publication of the manual are based on the recognition that Western, conventional militaries "falsely believe that armies trained to win large conventional wars are automatically prepared to win small unconventional ones. . . . [Rather,] they almost always fail." *Id.* at ix.

[142] *See id.* ¶ 1-113.

engagement in social and political processes.[143] But in this type of warfare, a relatively "small number of highly motivated insurgents with simple weapons, good operations security, and even limited mobility can undermine security over a large area."[144] They have a natural ability to melt back into the population, attack larger forces and civil services seemingly at will, and sustain recruitment despite lopsided losses.

This means that "killing insurgents—while necessary, especially with respect to extremists—by itself cannot defeat an insurgency."[145] Thus, counterinsurgency operations are labor intensive activities[146] that require decentralized operations—what the Army calls "empower[ing] the lowest levels"—in order to efficiently and effectively accomplish the dynamic missions of the operation, even if it is only to regain some semblance or veneer of security.[147]

This empowerment is simply a delegation of management: the commander (of any size unit) receives the mission from his or her higher command; a good commander then *dictates* only the barest of necessities: the nature of the mission, the "commander's intent," the "concept of operations" or how the moving pieces should turn together, as well as certain logistical requirements.[148] Theoretically, this encourages small units and their leaders to operate with flexibility and use independent initiative to achieve the commander's intent,[149] whether it be setting up a road checkpoint to intercept bomb-making materials or conducting humanitarian assistance in an insurgent-rife village. However, as the Haditha massacre demonstrated in 2005,[150] such micro-level empowerment can be the proverbial double-edged sword. When service-members succumb to fear, rage, and intolerance—in my experience, inescapable in combat—coupled with failures in communication and leadership, the normal rigid hierarchy of command collapses and the risk of combat atrocities increases. Broadly-speaking, this is the

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[143] *Id.* ¶ 1-116.

[144] *Id.* ¶ 1-10.

[145] *Id.* ¶ 1-14.

[146] *Id.* ¶ 1-134.

[147] *Id.* ¶ 1-145.

[148] *Id.*

[149] *Id.* ¶ 1-146.

[150] The incident, still under investigation at the time of this writing, involved an ambush of a Marine patrol in the town of Haditha in November 2005. After an IED exploded killing one Marine, the remainder of the unit responded by allegedly executing twenty-four Iraqi civilians living or working in the area in the minutes after the initial attack. The senior Marine commanders and staff did not immediately regard the incident as a potential war crime because of reports indicating that the unit had received small arms fire accompanying the road-side bomb. This report would have probably suggested that the Marines had encountered a well-planned and coordinated ambush executed by multiple insurgents. In the fog lingering after the incident subsided, scattered reports by locals detailed a much more systematic and unlawful use of deadly force against civilians. Commanders at the time regarded the reports as "insurgent propaganda." *See* Sonya Geis, *Iraqis Sought Probe of Killings*, WASH. POST, June 2, 2007, at A2.

generic portrait of modern combat operations in the Iraq theater and what most panel members ought to be fully cognizant of when trying a soldier for crimes committed in that environment and originating in a particular mission.

2. Multiplicity of Missions

Service members in Iraq face enemies on many fronts. Generally, these enemies do not appear on a horizon wearing uniforms, standing amid familiar formations with rifles aimed. After the rapid and conventionally devastating attack north into Baghdad in the first days of the war (March of 2003), most military operations were focused on preventing eruptions of civil violence, hunting down escaped military and political leaders, and accounting for the mammoth number of arms caches left by the decimated Iraqi military.[151] Five years later, by the spring of 2008, nearly half of the Army's brigades were in Iraq (nearly 150,000 soldiers), serving extended fifteen-month deployments, and—as some retired senior officers have described as being over-committed—stretched thin attempting to quell extreme sectarian violence, pacify urban neighborhoods, and destroy the insurgency attempting to break the Iraqi government.[152]

The Bush Administration's "surge" strategy beginning in the early months of 2007 was designed to both assuage growing public dissatisfaction with the direction of the war[153] and to provide the Iraqi government with "breathing space" during which it could aim for concrete political reconciliation amid a backdrop of

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[151] *See generally* William H. McMichael, *Swift March to Baghdad Left Ammo Depots Unguarded, GAO Finds*, ARMY TIMES, Apr. 2, 2007.

[152] *Department of Defense Authorization for Appropriations for Fiscal Year 2008: Hearing on S. 1547 Before the S. Comm. on Armed Services*, 110th Cong. 810–16 (2007) (statement of General Barry R. McCaffrey (Ret.)). *See also* EXECUTIVE OFFICE OF THE PRESIDENT, INITIAL BENCHMARK ASSESSMENT REPORT (2007), http://georgewbush-whitehouse.archives.gov/nsc/iraq/2007/FinalBenchmarkReport.pdf. This report was submitted by the Bush Administration to Congress on July 12, 2007, pursuant to §1314(b)(2)(B) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110-28), and assesses progress made with respect to eighteen military, economic, and political "benchmarks" designed to provide more objective criteria to defining "victory" in Operation Iraqi Freedom.

[153] At the five-year anniversary of the conflict, grim (though not unpredictable) statistics abounded: approximately 4,000 U.S. troops had been killed, 8,000 Iraqi police and allied Iraqi military members had been killed, and estimates ranging from 89,000 to 1 million Iraqi civilians killed; nearly 1.7 million members of the U.S armed forces have deployed in support of operations in either Iraq or Afghanistan, and nearly 25,000 troops have deployed five or more times. Karen Jowers et al., *5 Years in Iraq: the War by the Numbers*, ARMY TIMES, Mar. 24, 2008, at 22. *See also* Operation Iraqi Freedom Military Deaths, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oif-deaths-total.pdf (Council on Foreign Relations-produced table of demographics sorted by casualty type, gender, age, rank, race, and military service) (last visited Mar. 20, 2008); INST. FOR THE STUDY OF WAR, IRAQ STATISTICS REFERENCE (Mar. 2008), *available at* http://www.understandingwar.org/files/Iraq%20Statistics%20Reference%20March%202008_0.pdf (document produced by the Institute for the Study of War, Council on Foreign Relations, documenting weekly and monthly trends in attacks and coalition casualties).

greater security.[154] To this end, combat troops left well-fortified bases, dispersed into smaller enclaves throughout the city of Baghdad at its environs, beefed up the fledgling Iraqi army and police forces, and enlisted tribal fighters and disaffected former members of insurgent groups.[155] The influx of soldiers and increased "operational tempo" dampened the number of civilian casualties. It also increased the exposure of troops to the kinds of asymmetrical tactics and weapons that define urban warfare in Iraq: eighty percent of the service members killed in action over a three month period in spring 2007 were attacked by surface-laid or deeply-buried Improvised Explosive Devices, or IEDs.[156] Several thousand explosive devices were found monthly—either discovered before they detonated or "found" after the fact.[157] One infantry company, part of a unit that arrived in Baghdad as part of the surge effort, suffered these weapons and tactics mercilessly: nineteen wounded and four killed in a single month by eighty IED attacks and almost as many attacks by direct-fire, rocket-propelled grenades, and mortars as the soldiers navigated daily through sectarian neighborhoods.[158] To defeat these hidden menaces, significant military effort is devoted to neutralizing the entire IED "network": the bomb-maker that assembles the device, the financiers that pay for the materials, the operatives that place the bomb and detonate it on demand.[159]

When these homemade bombs first started appearing on the main routes patrolled by troops in the summer of 2003, my unit's missions were—even then—quite varied: patrolling the few paved roads linking the larger towns in the heavily vegetated regions north of Baghdad; responding to mortar attacks on dispersed forward operating bases; investigating and hunting reported weapons caches; conducting police-styled raids on homes and businesses of reported insurgents and

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[154] Karen DeYoung & Thomas E. Ricks, *Administration Shaving Yardstick for Iraq Gains*, WASH. POST, July 8, 2007, at A1. The so-called "surge" of U.S. forces was first publicly outlined by President Bush in an address to the nation on January 10, 2007, announcing a need to "change America's course in Iraq." Address to the Nation on the War on Terror in Iraq, 43 WEEKLY COMP. PRES. DOC. 19 (Jan. 10, 2007).

[155] *See generally* Ann Scott Tyson, *Iraqis Join U.S. in Fighting Al-Qaeda*, WASH. POST, June 30, 2007, at A15.

[156] Thom Shanker, *Iraqi Bombers Thwart Efforts to Shield G.I.'s*, N.Y. TIMES, June 2, 2007, at A1. Whereas roughly forty servicemen were killed in July 2006, eighty soldiers and Marines were killed in the same month a year later. *See* Iraq Coalition casualty Count, http://icasualties.org/Iraq/index.aspx (last visited Nov. 20, 2008) (providing detailed tables and statistics updated regularly by icasualties.org, an independent tracking organization).

[157] *See* Michael R. Gordon et al., *Insurgent Bombs Directed at G.I.'s Increase in Iraq*, N.Y. TIMES, Aug. 17, 2006, at A1.

[158] David Finkel, *Unit's Mission: Survive 4 Miles to Remember Fallen Comrade*, WASH. POST, July 9, 2007, at A1.

[159] *Id.* Describing them as "operatives" is misleading because it connotes a sense of training and professional sophistication; one recent study of the demographics of these fighters revealed that a majority of suicide bombers in Iraq—as one example of asymmetrical war-fighting—came from disaffected, blue-collar, and undereducated populations of young males. *See Suicide Bomber Is Al-Qaida's Deadliest Weapon*, MSNBC, Mar. 16, 2008, http://www.msnbc.msn.com/id/23651109.

Ba'ath party sympathizers; establishing road checkpoints; delivering school supplies to reopened primary schools; meeting and fostering relationships with local *sheikhs* and provincial leaders; instructing the newest members of the Iraqi police on weapon-use and tactics; and erecting defensive barriers at civil service providers, like hospitals and police stations.[160]

Coupled with the overt assaults directed principally at U.S. forces were the attacks on the civilian population and Iraqi security forces—the beheadings, the kidnappings, the car bombs that soldiers inevitably responded to and investigated.[161] Nowhere in Iraq was the archetypal battlefield—envisioned during the Cold War—of open terrain with two opposing armies facing off at polar ends attempting to gain or hold pieces of terrain. Rather, the "battlefields" were urban marketplaces and roadways or thickly-vegetated orchards and unpaved canal roads; the distinctions between the antagonists were—as Professor Huntington famously predicted—"not ideological, political, or economic, [but rather] cultural [identities]."[162] As two Army judge advocates[163] recently described it: "Never before has it been so difficult for the Soldier to distinguish between the targeted and the protected . . . . [Understanding this] distinction is the fundamental difference between heroic Soldier and murderer."[164]

While their view of the problems facing the modern soldier in urban warfare is accurate, this asymmetry of battle is nothing new; New England colonists became well-versed in the guerilla tactics that the musket-less and far-outnumbered Native Americans used to great success during King Philip's War of 1675.[165] To hear Protestant minister Increase Mather woefully complain that "[e]very swamp is a castle to them, knowing where to find us; but we know not where to find them," one may be reminded of parallels to the tactical environment that today's military faces in Iraq.[166]

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[160] Personal notes written during the author's deployment to Iraq, serving mostly in the Tigris River valley, near the cities of Samarra and Balad, between April 2003 and March 2004 (on file with the author).

[161] *See generally* Alissa J. Rubin, *2 Car Bombings in Iraq Kill 25*, N.Y. TIMES, May 7, 2007, http://www.nytimes.com/2007/05/07/world/middleeast/07iraq.html (describing several car bomb attacks).

[162] SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 20–21 (1996).

[163] A judge advocate is the official title for commissioned military officers that are graduates of ABA-accredited law schools and who serve as military lawyers. The Army, Navy, Air Force, and Marines each have a Judge Advocate General Corps consisting of officer-lawyers and civilian attorneys.

[164] Mark David Maxwell & Richard V. Meyer, *The Principle of Distinction: Probing the Limits of its Customariness*, ARMY LAW., Mar. 2007, at 1.

[165] GEOFFREY PARKER, THE MILITARY REVOLUTION: MILITARY INNOVATION AND THE RISE OF THE WEST 119 (2d ed. 1996).

[166] *Id.* The parallels certainly do not end there. Consider that the U.S. military faced similar insurgent and guerilla tactics during the Philippine Insurrection immediately after the conclusion of the Spanish-American War, where nearly 10,000 troops, or ten percent of its force, became

The elephant that is the U.S. Army often finds itself tugged in various directions at once, its trunk sniffing at leads that may lead nowhere, its enormous footprint sometimes unwittingly trampling through its environment, and its hide continually harassed by mosquitoes that it can neither see nor easily combat.

3. Misery Loves Company: "Sure, this robe of mine doth change my disposition."[167]

A description of combat in any theater of war is incomplete if it does not include some mention of the environmental and psychological factors that complicate a soldier's mission and make his or her daily life unavoidably miserable. When combined with physical exhaustion and the psychological costs of war,[168] forces of nature can account for what some call the "Weight of Exhaustion" leading to, in many cases, "psychiatric casualties" on the modern battlefield.[169]

Iraq's geography plays both a tactical and psychological role in piling on the "Weight of Exhaustion." The country is geographically divided into four types of terrain: mountainous in the northeast, desert plateau in the northwest, semi-desert and steppe-like plains in the southwest, and finally the fertile marshes and plains running through the center of the country between the Euphrates and Tigris Rivers.[170] In the peak summer months between June and August, temperatures range from 68 to 104 degrees, and can often reach daily highs of 113 degrees or much higher.[171]

Military operations were focused—though not exclusively—in the extremely vegetated and fertile region encompassing Baghdad and the "Sunni Triangle."[172] On hot, humid, cloudless days I am often reminded of my own experiences in and

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casualties—twice the number that the U.S. suffered during the actual war. *See* LARRY H. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY 126 (2d ed. 1994). Between the beginning of the war in Iraq and the end of "major combat operations" forty days later on May 1, 2003, 140 service members were killed, contrasted against the nearly 4,000 that were killed between that date and mid-July of 2008—a twenty-eight fold increase. Updated casualty statistics can be found at Iraq Coalition Casualty Count, *supra* note 156.

[167] WILLIAM SHAKESPEARE, THE WINTER'S TALE act 4, sc. 3.

[168] For support of the theory that situation and context are key factors on a soldier's decision-making, and the psychological costs of those decisions, when engaged in combat, *see generally* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 45–48 (1995); JONATHAN SHAY, ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER (1994); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007).

[169] GROSSMAN, *supra* note 168, at 67–73.

[170] United Nations Environment Programme, Conflict and the Environment in Iraq: Country Facts, http://www.unep-wcmc.org/latenews/Iraq_2003/facts.htm (last visited July 9, 2007).

[171] *Id.*

[172] Michael R. Gordon, *Military Hones a New Strategy on Insurgency*, N.Y. TIMES, Oct. 5, 2006, at A1.

around the cities of Samarra and Balad, battling the creeping insects and swarms of flies, the thick and heavy blanket of heat, and the occasional sky-tanning sandstorm. Our typical "combat load" of weapons and equipment—besides the ubiquitous M-16 or M-4 rifle—often included, depending on the mission, extra rations and clothing, batteries for flashlights, night vision devices, and hand-held GPS systems.

For soldiers stationed out of forward operating bases (FOBs) a constant companion was some variant of the Interceptor Body Armor System (IBAS), or bullet-proof vest. At more than sixteen pounds and made out of a Kevlar weave and ceramic plates, it quickly added significant weight to one's shoulders, neck, chest, and back and left one feeling roasted—especially after attaching the must-wear accessories, like first aid packs, extra magazines of ammunition, throat and groin protectors, walkie-talkies and other hand-held communication instruments.[173] After completing a mission and being debriefed by the chain-of-command, sinking down onto my cot[174] and shedding my IBAS was often the best part of my day. After a year of nearly continual wear (there were times when we were encouraged to sleep with it on), "gearing up" became as routine as changing one's socks. It was, nonetheless, a constant reminder of how very vulnerable soldiers in that environment remained.

Given the unaccustomed temperatures and climate, compounding the daily wear-and-tear caused by the missions and our equipment, it was not uncommon to see a soldier fall victim to his or her environment. On more than one occasion, despite our best efforts at avoiding it, soldiers in our unit fainted during missions from extreme fatigue and dehydration.[175] On other occasions, the weather easily frustrated, called short, or canceled entire operations.[176] An important, and daily, mission assigned to rotating platoons within my company was to conduct a link-up with a logistical supply unit, pick up dozens of ice bags, and return to our FOB where we would attempt to keep hundreds of bottles of water somewhat chilled. This simple task, meant entirely for soldier comfort, was a full-scale operation subject to Improvised Explosive Device attacks and ambushes.[177] When the halting nature of operations was brewed together with the natural frustrations of a counterinsurgency (echoing the same irritation that riled Reverend Mather more

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[173] *See* Interceptor Body Armor, http://www.globalsecurity.org/military/systems/ground/interceptor.htm (last visited July 11, 2007). *See also* Megan Scully, *Infantrymen Carry Too Much*, ARMY TIMES, Jan. 26, 2004, at 10.

[174] Of course, cots were not always available for use. Many soldiers and officers that worked fulltime outside of "hardened" facilities (like deserted palaces or converted Iraqi military posts) often slept on the metal floors or roofs of their vehicles, strategically cozying up near the diesel exhaust port to stay warm during chilly nights.

[175] *See* author's notes, *supra* note 160.

[176] *Id.*

[177] *Id.*

than three centuries ago[178]), the resulting product was a continually tired, sweaty, dirty, overheated soldier facing off against a faceless enemy.[179]

Exhaustion and frustration of combat troops was rarely mitigated by our living conditions. While there were, and continue to be, several large installations around Iraq that serve as logistics and operations hubs, housing thousands of support troops, and sprinkled throughout insurgent-rife provinces, these were not the loci of battle. During the first year of the war most combat and counter-insurgency operations were directed by small units living in abandoned schools, government offices, and unfinished or half-destroyed estates. They operated in discrete bubbles or "areas of operation" that usually included major transportation routes and population centers. In the year I served with an infantry battalion task force, our "beds" consisted of the back ramps and interior storage benches of combat vehicles, cots tucked beneath camouflaged netting, and concrete floors of abandoned farmhouses. Showers, before more permanent facilities could be erected or converted, were infrequent luxuries and usually consisted of rubber bags hoisted overheard with holes dotting the underside. Mail and pre-made, hot meals would arrive only as often and regularly as logistics units could deliver them to us, a condition heavily dependent on local security and mission priorities. Base camps, however temporary and mobile, were heavily defended and the threat of snipers, mortars, and suicide bombers consistently modified behavior—even as mundane as locating a latrine.[180]

So, depending on the type of unit a soldier was assigned to and that unit's mission, a soldier may not have access, for extensive periods of time, to anything more than rudimentary or homemade personal hygiene facilities, cold or lukewarm meals-ready-to-eat ("combat rations"), and the occasional crossword puzzle book or dated magazine to give some reminder of normalcy. While difficult to sustain individual and unit morale under harsh conditions, they were not unexpected conditions. Napoleon once said that "[p]overty, privation, and want are the school of the good soldier."[181] In the words of one military police soldier assigned to Abu Ghraib prison in one of the most violent areas of central Iraq, service members recognized this fact of war-time life, and had to "suck it up or [sic] drive on."[182]

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[178] *See* PARKER, *supra* note 165.

[179] *See* author's notes, *supra* note 160.

[180] *See* Philip Gourevitch & Errol Morris, *Exposure*, NEW YORKER, Mar. 24, 2008, at 44 (chronicling the personal stories of several soldiers at Forward Operating Base Abu Ghraib, known for the horrific prisoner abuse well-documented by photographs publicized around the world in 2004).

[181] GROSSMAN, *supra* note 168, at 67.

[182] Gourevitch & Morris, *supra* note 180, at 44. While the authors admirably captured the feeling with this quote from Sergeant Davis, in the spirit of accuracy, the soldier more likely said "suck it up *and* drive on" (emphasis added). This may seem like a finicky editorial correction, but the phrase is so common to the service that anyone wearing a uniform would immediately find the quoted remark puzzling—to "suck it up" means to accept that which cannot be changed and to "drive on" means to finish the mission as assigned. Taken together, they are complimentary and are meant

This "Weight of Exhaustion"—a combination of decrepit living conditions and environmental factors—was as much the enemy as any insurgent or IED. Mitigating its effect was as much a part of our mission as conducting route-clearance operations or destroying weapons caches at soccer fields would have been.

These facts, conditions, perceptions, and forces place the soldier, accused of a crime arising out of a combat event, at a certain position "relative" to the positions of other soldiers—closer to those who share the experience, and farther from those that do not. As the Supreme Court noted in a case of discrimination against black potential jurors in the case of a white defendant, some "identifiable segment[s]" of a community share such unique qualities, in relation to each other, to the parties, or to the facts, that they add value to the jury: a "perspective on human events that may have unsuspected importance in any case that may be presented."[183]

4. The "Perspective on Human Events": A Lesson from Staff Sergeant Werst

In the afternoon of January 2, 2004, my company commander—the twenty-eight year old officer to whom I directly reported as one of his three subordinate platoon leaders—was killed when mortar rounds struck our forward operating base. He was the first soldier from my unit killed in action after we had experienced nine months of close calls with dozens of similar (but imprecise) mortar attacks, ill-timed ambushes with rocket-propelled grenades, and IEDs that exploded too soon or too late to cause significant damage.

Captain Paliwoda's death marked a turning point in our deployment. Having evaded the more destructive attacks for so long, and having experienced so many of them, our collective mood up to that point was an awkward balance of hope and invincibility against a "heightened . . . sense that no place was safe."[184] Ironically, there was also a sense of "numbness" from continuous immersion in such an environment. I can describe the initial self-awareness of being in a war only as surreal. Over time, however, the novelty tended to erode into a kind of new normalcy, and the early evening mortar attacks that coincided with calls-to-prayer from mullahs, the throngs of children kicking dusty soccer balls in front of tanks, armed foot patrols near palaces, even the continuous threat of death, all became mundane.[185]

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to convey that adverse conditions will not prevent a soldier from completing her mission. With the disjunctive "or" the idiom is nonsense.

[183] Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

[184] Gourevitch & Morris, *supra* note 180, at 48 (discussing the effect that the "randomness and imprecision of the persistent bombardments" had on junior soldiers at Abu Ghraib, the "most-attacked American base in Iraq" in summer and autumn of 2003).

[185] *Id.* at 51. Sergeant Davis recalled his experience at Abu Ghraib: "[O]ver time, you become numb to it, and it's nothing. It just became the norm. . . . You move on." *Id.* Specialist Harman described her own thought-process similarly, as in "'Oh, that's pretty bad—I can't believe I just saw that' and then you go to bed and you come back the next day and you see something worse. Well, it

The deadly attack on our forward operating base, with its physical and emotional proximity, shocked everyone back into a sense of hyper-alertness against a backdrop of grief and disbelief. We had been assured that we would be returning home within a few months; having the leadership of our unit taken from us was like decapitating a chicken—the rest of the body struggled and squirmed reflexively for a time.[186]

As a platoon leader responsible for more than twenty soldiers, I was concerned that the immediate effect would be—should we immediately be called on to execute a mission—overzealousness or distraction, or both, among the surviving soldiers. But being in a leadership position did not immunize me from some of the same worries, fears, and anxieties that I knew my soldiers would be experiencing. I can, more than four years later, recall minute details of the attack itself, but cannot remember more than the vaguest images of what I did or said in the following three or four hours as I tried to digest and adapt to this new reality.

One thing that did happen that evening was the continued preparation for a large battalion-sized raid on a neighborhood on the outskirts of the city in which our base was located. The battalion had a number of targets to detain, deemed threats based on intelligence reports that they were part of organized insurgent cells or had been aiding in local attacks on Coalition forces. The mission had been in the early stages of preparation when the mortar attack temporarily halted our efforts. We presumed—because of the general state of shock permeating the units at the camp—that the mission would be postponed, or at least shifted to another battalion. Instead, a decision was made to "Charlie-Mike," or "continue-mission," albeit with a less robust force and a little later than planned. Instead of my entire platoon of combat engineers attached to an infantry company for the mission,[187] I was ordered to provide one of my three squads. After debating with my platoon sergeant,[188] we felt it was necessary and appropriate to send the largest squad.

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seems like the day before wasn't so bad." *Id.* While both soldiers were discussing their observations of the prisoner maltreatment, both speak in terms equally applicable to general observations of combat and living in harsh, threatening conditions with no respite. According to Sergeant Davis:

> [W]hen you're surrounded by death and carnage and violence twenty-four hours a day, seven days a week, it absorbs you. You walk down the street and you see a dead body on the road, whereas a couple of months ago, you would have been like, "Oh, my God, a dead body," today you're like, "Damn, he got messed up, let's go get something to eat."

Id. at 56.

[186] This morbid biological fact comes from first-hand survival training provided by my Army Reserve Officer Training Corps (ROTC) instructors in college: other than useful advice on providing food for oneself in desperate situations, an unintended lesson was the ease with which fowl can be unintentionally decapitated. Disturbed readers are encouraged to shop at their local grocery store as an alternative.

[187] Under such circumstances, combat engineers would provide explosive demolition expertise to breach obstacles impeding the movement of combat vehicles or dismounted troops, and—as needed—would provide additional infantry support.

[188] Platoon sergeants are the senior-ranking non-commissioned officers in the platoon and are "second-in-command," reporting to platoon leaders—typically lieutenants ten to fifteen years younger and less experienced. While the young officers are ostensibly responsible for the planning

This squad, aside from size, also benefited from the most experienced and trusted junior leaders in the platoon. I briefed Staff Sergeant Shane Werst, the squad leader, on the new plan. Our collective judgment was that this mission—to be both safe and effective—must have the natural feelings of overzealousness and distraction mitigated by attentive, direct control by the squad leader and his two fire team leaders, young sergeants each responsible for four or more junior soldiers. This decision proved to be hugely consequential; in hindsight, I should have insisted that I go as well, notwithstanding the detrimental effect this micromanagement probably would have had on the command and control over the squad itself.

Several hours later, the squad returned with the rest of the battalion after completing its raid. Ostensibly successful, several key targets were found and detained, weapons caches were discovered and destroyed, and—of note—shots had been fired in close quarter engagements inside homes.[189] There were reports of at least one Iraqi killed during the mission.

Sixteen months later, long after our return and normal scattering of soldiers into new assignments and new units, Staff Sergeant Werst was court-martialed[190] at Fort Hood, Texas, having been charged with pre-meditated murder of Naser Ismail, an Iraqi national and suspected insurgent, during the raid the night that our commander was killed.[191] The prosecution attempted to show that Werst, enraged and retaliatory following the death of Captain Paliwoda, executed a detained and unarmed Iraqi and tried to cover-up the crime by planting a gun at the scene and fabricating a story that his squad had been directly engaged by the targeted individual while inside the suspect's home. According to his defense team, however, Werst opened fire only upon seeing Ismail lunge for one of his soldiers' weapons. The factual dispute centered on the characterization of the killing: was it intentional homicide incidental to the combat mission, or was it simply a "react-to-contact," in which the man's death was a justifiable and necessary result?

After five days of trial, the court-martial panel (consisting of several veterans) returned a not-guilty verdict.[192] The specific weight that the panel members gave to the evidence, and the relative value they assigned to the context of the crime,

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and operations of the platoon, and all that "happens or fails to happen" within that platoon, no action or decision of consequence is ever taken without at least consulting the platoon sergeant.

[189] This fact is notable because, after hundreds of raids, patrols, and near misses with rocket-propelled grenades and IEDs, shots fired in an actual close-quarters engagement had not occurred in any of our unit's missions; after nine months, such a rare scenario was unexpected.

[190] United States v. Werst, ARMY 20050639 (2005), http://www.aclu.org/natsec/foia/pdf/Army10304_10333.pdf (record of trial). As a disclaimer, I was called as a prosecution witness and testified against my former subordinate. My testimony was intended to rebut the defense's character evidence and was directed at his leadership ability and relationship with his subordinates, rather than the factual circumstances underlying the charges.

[191] Murder is defined by the UCMJ under punitive Article 118. 10 U.S.C. § 918 (2006).

[192] *Soldier Acquitted in Shooting of Iraqi*, WASH. POST, May 27, 2005, at A18, *available at* http://www.washingtonpost.com/wp-dyn/articles/A24768-2005May27.html.

will never be fully known. However, the fact that the alleged crime arose during a combat mission necessarily means that the fact-finders must understand something about the scene in which the crime allegedly occurred.

Distinguishing between what was reasonable and unreasonable in light of the unique forces and conditions *of combat* requires another layer of experience not found in the general population—even among the general population of soldiers. In other words, the probable psychological effect of a recent trauma like the death of a comrade-in-arms, the compounding strains of living and working in environmentally harsh conditions over long periods, the tacit implications of military orders in less-than-clear combat conditions, the often-conflicting goals of rooting out an insurgency while "winning the hearts and minds" of the population, and the more general moral and ethical ambiguity of war are all factors likely to be pervading the internal weighing of evidence and arguments at trial of a combat-incidental crime. It seems normatively unreasonable, then, to ask panel members to consider such factors without that additional layer of shared experience—the "perspective on human events"[193] for which a jury is *intended to be* used—through which they can more accurately filter and judge testimony, arguments, and facts.

Nothing in the UMCJ currently guarantees an accused soldier, facing charges for a combat-incidental crime like Staff Sergeant Werst, access to a court-martial panel that possesses—at least to some extent—similar *relevant* combat experience. In other words, the defendant cannot point to any provision of the Code to argue that he was not judged by a community of his true peers, regardless of any other value the Convening Authority believes—in good faith or not—they might bring to the deliberation.

IV. NULLIFICATION AND VOIR DIRE

Two possible objections to the proposed revision are considered here. First, a nullification objection: would the loading of combat veterans on the panel lead to a more defendant-favorable jury prone to nullification? Second, a voir dire objection: attorneys may use Article 41's traditional voir dire procedure to remove any undesirable combat veteran experience that would have been in place as a result of the Article 25 revision.

A. *Inevitable Nullification?*

A court-martial panel specifically selected for its combat experience suggests at least the possibility that it may relate *too* well to the defendant and acquit, in spite of a belief in guilt, in solidarity with the defendant. There are two answers to such an objection: first, nothing in the revised text tacitly endorses or actively

[193] Peters, 407 U.S. at 504.

promotes nullification; second, no available evidence currently suggests that a combat-experienced panel would be more likely to acquit in the face of factual guilt.

Jury nullification is almost universally condemned by civilian and military courts.[194] The power to check what the juror or jury regards as an unjust prosecution (empathizing with the accused) or the application of an unjust law (a form of civil disobedience[195]) has a horde of detractors because it exploits the frailty and key vulnerability of our justice system—that it is *human*. Courts and scholars—both within and outside the military—recognize that the jury's ability to bypass the law to arrive at what it believes to be a "just outcome" is both inherent to a system of general verdicts and uncontrollable. Nevertheless, they tend to regard this innate *power* as detached from any valid *right* to exercise it—doing so would equate to a "violation of [the] juror's oath to apply the law as instructed."[196]

Nothing in the revised text of Article 25 endorses nullification, whether it may be for empathy with the defendant or as a check against unjust prosecution. The CA can cap the panel's combat-experienced panel membership to one-third of the total panel, thus balancing—if believed necessary by the CA—any concern that the combat-experienced members would or could dominate the deliberation. Furthermore, the only requirement imposed is possession of relevant combat experience that, quoting from the revision, "renders the panel member presumptively capable of understanding or appreciating the context in which the alleged acts occurred."[197] Members are not pulled from the same unit as the accused, may still be voir dired as to qualifications and prejudices, and the CA must still balance relevant combat experience against the other statutory factors (most notably, "judicial temperament"[198]) in selecting the panel member. These restrictions avoid dangerous inferences of nullification; instead, they reinforce the

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[194] United States v. Hardy, 46 M.J. 67, 72 (C.A.A.F. 1997) (citing decisions from First, Fourth, Sixth, Seventh, Eight, Ninth, Eleventh, and District of Columbia courts of appeals) ("The same considerations that militate against endorsing jury nullification in civilian criminal trials apply in the military justice system.").

[195] United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997).

[196] *Id. See also* Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 71 (2002). Some commentators, however, have pointed out that nullification, despite its reputation for "lawlessness," offers a counter to the power and discretion normally tilting in favor of the prosecution. In cases of extreme prosecutorial zealotry, or the community's disrespect for a particular criminal prohibition, "the jury will not convict when they empathize with the defendant, as when the offense is one they see themselves as likely to commit, or consider generally acceptable or condonable under the mores of the community." United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (holding, inter alia, that the district court did not err by refusing to instruct the jury on its "power" to acquit in spite of the law and the facts involving the unlawful entry and destruction of property by the so-called "DC-Nine" in this Vietnam-era protest case).

[197] *See supra* Part III.B.1.

[198] 10 U.S.C. § 825(d)(2) (2006).

goals of impartiality and objectivity while nonetheless recognizing the relevance of context to the normative goals of accurate and fair criminal adjudication.[199]

Secondly, no evidence suggests that a panel with combat experience would be more likely to acquit a soldier accused of a combat-incidental crime. In fact, nothing even suggests that the panel would necessarily be more *empathetic*—an entirely reasonable and potential alternative is a *skeptical* panel that more actively questions the choices made by the accused during the combat event or the defenses raised at trial, and therefore is less likely to present a traditional nullification problem. This potential to swing between empathy and skepticism is raised in similar ways by a panel that partially consists of enlisted members when the accused is an enlisted soldier and requests this panel of "peers." Yet, the UCMJ approves of this design.[200] At most, the presence of combat experience on a panel judging this type of crime only reinforces the habitual concern for nullification—a concern that courts grudgingly accept as a natural by-product of jury-based criminal adjudication. Indeed, nothing in the proposed revision precludes military judges from applying the customary remedy should combat-incidental crimes heighten their concern for nullification: give no instruction at all that describes or intimates that such a power exists or could be exercised.[201] Rather than increase the odds of nullification, no current evidence tells us that a revised Article 25, just as the original, would be anything but nullification-neutral.

B. *The Problem of Voir Dire*

A final criticism lies in the argument that any normative value added to the process of venire by including combat experience on the panel could be scattered by the process of voir dire. This criticism is more easily dismissed. First, it is more akin to a practical problem of application rather than any theoretical disagreement with the policy or fairness of the revision.

Second, using voir dire to strategically remove members from the final panel can be mitigated. By adding a caveat to Article 41 ("Challenges"),[202] the UCMJ could avoid the problem altogether by explicitly mandating—voir dire challenges

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[199] *See* Michaels, *supra* note 4; *see, e.g.*, *Dougherty*, 473 F.2d at 1137 ("The jury system provides flexibility for the consideration of interests of justice outside the formal rules of law.").

[200] *See* discussion *supra* Part III.A.2.

[201] United States v. Hardy, 46 M.J. 67, 72 (C.A.A.F. 1997) (affirming a military judge's refusal to instruct the panel on nullification based on the general principle that courts should not legitimize the jury's power to nullify by including such an explanation within the judge's instructions on the law); *accord* United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969); *see also* U.S. DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK, ¶¶ 8-3-8 to -11, at 923–26 (2002), *available at* http://www.jag.navy.mil/documents/MJBenchbook.pdf.

[202] 10 U.S.C. § 841. The UCMJ provides for one peremptory challenge per side and an unlimited number of "for cause" challenges subject to Art. 16, *id.* § 816(1)(A), mandatory *minimum* court-martial composition requirements (for capital cases, twelve; otherwise, five).

notwithstanding—that the provisions of Article 25(d)(2) apply to the final panel composition. This would impose a continuous obligation on the part of the CA (with the help of the supporting Office of the Staff Judge Advocate) to be conscientious about the qualifications of his or her primary and alternate venire panel and halt any systematic attempt to remove combat experience from the panel.

Alternatively, if Article 41 were not so amended, the final decision regarding a particular panel member's qualifications rests in the hands of the military judge—he or she may choose to disregard the offered challenge and seat the panel member if doing so would be consistent with the policy undergirding the revised Article 25 for combat-incidental crimes. Aside from each parties' effort to get the most favorable jury possible, the procedural goal of voir dire is to confirm that each potential juror is statutorily qualified and free from bias—seating of a juror can only be prevented if the challenging party shows "specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."[203]

Military courts have held that, just as in civilian trials, the trial judge has substantial discretion over the acceptance or rejection of a "for cause" challenge and is close to the final arbiter of what it means for a specific juror to be so qualified. In *United States v. Miller*, the Court of Military Appeals looked to Article 41 and the Manual for Courts-Martial and expressly adhered to this axiom: the judge has discretion to determine the "relevancy and validity" of the challenge, bounded only by "existing principles of law."[204] One such "principle of military law," the Court noted, was none other than Article 25(d)(2)'s list of member qualifications.[205] Thus, a military judge may alter the final composition of the court-martial panel to ensure it possesses the "relevant combat experience" over the objection of opposing counsel's voir dire challenge if doing so is consistent with the purposes or the letter of Article 25.

V. CONCLUSION

The composition of a court-martial panel, charged with trying the facts of a crime that exploded from a combat event, can and should account for its unique context. The defendant soldier should have a right to a panel that represents a "community" of fellow soldiers sharing the experience of combat that approximates the setting of the alleged crime. This principle of panel composition "relativity" need not undermine the important, traditional role of CA discretion in military justice, while respecting the norms and values associated with trial by jury. This principle, underlying the proposed revision to Article 25, satisfies the

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[203] Gray v. Mississippi, 481 U.S. 648, 652 n.3 (1987).

[204] United States v. Miller, 19 M.J. 159, 163 (C.M.A. 1985).

[205] *Id.*

five interests and values associated with jury composition and is not undermined by concerns for nullification or irrelevance in the face of voir dire.

Einstein once reduced the complexity of his Theory of Relativity to the following: "A man sits with a pretty girl for an hour, it seems like a minute. He sits on a hot stove for a minute, it's longer than any hour. That is relativity."[206] Context, in other words, shapes how we perceive our world. The "relativity" of combat provides what the Court has called, in other settings, a "perspective on human events"[207] that, under the *current* Article 25, is missing-in-action. To harmonize the reality of combat with fair trials of soldiers, accused of crimes springing from that combat, we need simply to recalibrate the UCMJ's definition of "experience."

[206] Albert Einstein, Quotes About Relativity, http://chatna.com/theme/relativity.htm (last visited on Feb. 19, 2008). The physics principle of relativity serves as a rough metaphor for—what the author believes—to be the "relativity" of combat and its implications for the design of court-martial panels trying cases erupting from that combat. The theory rests on two foundations: that the speed of light is constant, across time and space, but also that time and space are *not* constant—they are relative to one's frame of motion, or how fast you are traveling. For Einstein, and nearly all of modern physics since, relativity was a metaprinciple—an intuition defining how other (indeed *all* other) physical principles must operate. *See* KIP S. THORNE, BLACK HOLES AND TIME WARPS 72–79, 82 (1994). Relativity is the "Due Process" of the physical universe.

[207] Peters, 407 U.S. at 504.