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Michael F. Noone and Mary Jo Wiley

Sticks, Stones and Broken Bones: Military Law's Criteria for Aggravated Assault

Abstract: In light of recent military court decisions, this article asks whether the Uniform Code of Military Justice should be revised to encompass batteries which do not satisfy the present nineteenth century definition of grievous bodily harm. In answering this question, the article first traces the evolution of the military law of battery. Current medical views on the consequences of a criminal attack, particularly the psychic effects of violence, are then explored, concluded with a discussion of the competing considerations which should affect any decision to change the law.

*"We fought 'bout a dog—last week it were—
No more than a round or two;
But I strook 'im cruel 'ard, an' I wish I 'adn't now,
Which is just what a man can't do."*

Rudyard Kipling, "Follow Me 'Ome"

Introduction

Kipling's poem fairly expresses nineteenth-century attitudes. Men—at least those men from the class which supplied common soldiers—fought among them-

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selves. And, while fighting was deprecated, it was not considered a serious crime. Battery, the unlawful application of force to the person of another, was a common-law misdemeanor. If, however, the victim's ability to defend himself or annoy his adversary was permanently impaired, the common law punished the offense as the felony of mayhem.¹ This distinction, based on the severity of the physical consequences of the attack, still operates in the Uniform Code of Military Justice, and this article is intended to explore the consequences of the distinction in a military which expects its members to exercise self control in ways quite foreign to Kipling's time. The 1989 court-martial of Specialist Donnell O. Jones, 3d Armored Division illustrates the difference.²

On the evening of April 28, 1989, four Army enlisted men's wives took a "ladies' night out," in Giessen, Germany.³ After drinks and a show at one club, they went to another, The Big Apple, where they danced and chatted with the patrons. As they left the club early in the morning of the 29th, they noticed a fast-food stand (imbiss) and decided to purchase french fries. There was a long line and they didn't know where it ended. Specialist Donnell Jones, a Bradley fighting vehicle mechanic with five years of service, was standing in line with a friend and offered to place their order for them and they gave him money to do so. Jones subsequently placed his order and was served. As he started to leave the building he told the women to wait for their food. One of the women, Mrs. Lisa Vender, thought he was leaving with their money and, as he walked away, grabbed him by the back of the shirt, demanded their money, and as he continued toward the exit, snatched the currency he was holding in his left hand, thus dislodging the food he was carrying. Jones struck her once in the face, giving her a black eye, a small cut on her nose, and fracturing the bridge of her nose. Despite his pleas of not guilty, Jones was subsequently convicted by a general court-martial of larceny and assault in which grievous bodily harm was intentionally inflicted.⁴ He was sentenced to a bad conduct discharge, confinement for two years, forfeiture of all pay, and reduction to the lowest enlisted grade.

On appeal, Jones' military lawyer argued that the injuries Mrs. Vender sustained did not meet the legal definition of "grievous bodily harm."⁵ An Army Court of Military Review agreed and, on November 28, 1990, while affirming the larceny finding and a finding of simple battery, returned the case for a rehearing on the punishment.⁶ On February 28, 1991 the Army determined that a rehearing was not practicable and granted Jones' request for a "discharge for the good of the service," restoring all rights, privileges, and property he lost as a result of his court-martial.⁷ The following month, Jones' lawyer used the case in an article emphasizing that trial defense counsel should not concede that an injury satisfied the law's require-

ments and noting the difference in maximum punishments available under the Uniform Code of Military Justice.⁸ A simple battery can be punished by no more than a bad conduct discharge, and confinement for six months while the aggravated offense provides for a maximum punishment of confinement for up to five years and a dishonorable discharge.⁹

On reflection, one might wonder whether the law's distinctions are appropriate in the late twentieth century. Should some provision be made for the emotional—as opposed to the physical—consequences of a battery? The prosecutor in the Jones case asked only two questions of the victim regarding her injuries:

Q. "How much pain were you in after you were hit?"

A. "I had headaches for a couple of days. I remember it was especially hard because my husband was gone [on] T[emporary] D[ut]Y and I had two kids. I had a very bad headache. It was hard to go to sleep at night. And then, again, from having the cold and trying to blow my nose, sir, it was very difficult. I couldn't squeeze any kleenex or anything up my nose. At first—I'd say for about—At least the first couple of weeks was like that."

Q. "And how severe was the pain that evening and the next morning? light? moderate? or heavy?"

A. "I would say—Well, at first, it was more like a stun. I think it got worse as the day went on. I got more of a headache. At first it was moderate and then it got heavy at night especially."¹⁰

Our article asks whether the Uniform Code of Military Justice should be revised to encompass batteries which do not satisfy the present nineteenth-century definition of grievous bodily harm. In answering the question, we will first trace the origins of the present Code's provisions. Then we will discuss changing medical attitudes towards trauma victims, and conclude with discussion of the competing considerations which should affect any decision to change the law.

The Evolution of the Military Law of Battery

The Massachusetts Articles of War, adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775 provided in its Sixth Article for punishment of batteries on superior officers, and in its Twenty Third Article for violence against persons bringing provisions into the camp. Other batteries would be prosecuted under the Forty-Ninth (general) article which provided for the punishment of "All crimes not capital, and all disorders and neglects which Officers and Soldiers may be guilty of, to the prejudice of good order and military discipline, though not men-

tioned in the Articles of War..."¹¹ For nearly a century—until the Articles of War were revised in 1874—Col. Winthrop's treatise on Military Law reports that:

... courts-martial were not invested, either in peace or in war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced "good order and military discipline." In 1863, however—during the late civil war—the provision incorporated in [the 1874 revision] initiated in our military law the marked innovation of investing general courts-martial with jurisdiction, in time of war &c., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service. Its main objective evidently was to provide for the punishment of those crimes in localities where, in consequence of military occupation, or the prevalence of martial law, the action of the civil courts is suspended, or their authority can not be exercised with the promptitude and efficiency required by the exigencies of the period and the necessities of military government.¹²

The enactment Winthrop referred to was the Fifty-Eighth Article of War which, in the 1874 revision, provided that:

In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory or District in which such offence may have been committed.¹³

Thus the 1874 revision provided for four categories of assault and battery over which a court-martial could exercise jurisdiction:

- assaults or batteries directed toward a superior officer in the execution of office, punishable by death, or such other punishment as a court-martial may direct, under Article 21;
- violence inflicted on a person bringing provisions into a camp, garrison, or quarters in foreign parts, punishable by death or other punishment under Article 58;
- "serious" assaults and batteries involving the intent to kill or commit rape, and wounding by shooting or stabbing. These offenses, which need not have service connection (other than the military status of the offender and the fact that the offense occurred in time of war or rebellion) would be punishable under Article 58, utilizing whatever sanctions were provided for by local law.

- All other assaults and batteries which would be to the prejudice of good order and discipline would be punishable under Article 62, “according to the nature and degree of the offense, and punished at the discretion of the court.”^{13a}

We observe that the maximum punishment that could be invoked might depend on the status of the victim (Articles 21 and 58), or the state of national emergency and the provisions of local law (Article 58), or may be left to the discretion of the court-martial (Article 62), which was in turn restrained by a table of maximum punishments issued by the President.¹⁴ The Articles made no provision for considering the severity of the injury in determining what offense should be charged, nor did they provide that the severity of the victim’s injuries should affect the maximum punishment that could be imposed.

When the Articles of War were revised in the aftermath of World War I, the provisions regarding assault and battery remained substantially unchanged. The Articles of War of 1920 maintained the four categories established in 1874¹⁵:

- assaults on superior officers and noncommissioned officers were punishable under Articles 64 and 65 respectively; in the former case the death punishment was permitted; otherwise, punishment was left to the President to prescribe. The Manual for Courts-Martial, U.S. Army 1928, published as an executive order, provided that attempted assaults on warrant or noncommissioned officers could be punished by confinement at hard labor not to exceed six months while striking a warrant or noncommissioned officer could be punished by a Dishonorable Discharge and a year’s imprisonment.¹⁶
- intimidation of persons bringing provisions into camp remained punishable under Article 88 as the court might direct. The offense is not discussed in the Manual nor was a maximum punishment established by executive order which suggests that the offense had fallen into desuetude.
- “serious” assaults were punishable under Article 93 but the requirement for a national emergency was eliminated as was reference to punishments permitted by the state where the crime occurred. An elaborate table of maximum punishments was established: any serious assault (with intent to do bodily harm; with a dangerous instrument; or with intent to commit a felony) warranted a Dishonorable Discharge; if the intent was to commit murder or rape, the maximum period of confinement was twenty years; if the intent was to commit some other felony, the maximum was ten years; if the intent was to do bodily harm with a dangerous weapon, five years; and assault with intent to do bodily harm warranted a maximum punishment of one year.¹⁷
- other assaults were punishable under the 96th Article as “crimes, not capital and not made punishable by another Article of War, which are committed in violation of public law as enforced by the civil power.”¹⁸ The maximum punishment for

assault was confinement for three months; the maximum confinement for assault and battery was six months.¹⁹

When, in 1950, Congress combined the Articles of War (applicable to the Army and Air Force) with the Naval Articles (applicable to the Navy, Marine Corps and Coast Guard) and passed the Uniform Code of Military Justice one could still perceive the lineaments of the 1775 Massachusetts Articles.²⁰ Batteries on superiors were still treated as separate offenses (Articles 90 and 91) warranting a Dishonorable Discharge and extended confinement—ten years if an officer, five years if the victim was a warrant officer and a year if a noncommissioned officer.²¹ While violence directed at persons bringing provisions into camp was no longer treated as a separate offense, assault was still treated under the general article, Article 134, which encompassed disorders and neglects to the prejudice of good order and discipline, conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital. For the first time in one hundred and seventy five years, assault was given its own Article—128—and redefined.

Winthrop's *Military Law and Precedents* offers a representative nineteenth century definition of the offense:

A battery, or assault and battery,—for the two terms are substantially equivalent, every battery including an assault,—is any unlawful violence inflicted upon a person without his or her consent. A threatening of violence, or attempt or offer to exert force against another will not suffice, since this would be no more than an *assault*—the assault which is only preliminary to a battery.²²

The 1950 provision defined assault in much the same way, as an attempt or offer to do bodily harm to another, and battery as the application of force to the person of another.²³ However, Article 128 defined a new offense: aggravated assault which can occur either when the means used is likely to produce death or grievous bodily harm or when, irrespective of the means used, grievous bodily harm is inflicted. This article is intended to reflect on the term "grievous bodily harm," and the way courts have interpreted it.

When Congress created the new offense of aggravated assault and provided that the severity of harm to the victim would be one of the offenses's defining characteristics, it followed British practice when the common law crimes of battery and mayhem were replaced by statute in the Offenses Against Persons Act, 1861.²⁴ This model was subsequently followed by a number of states.²⁵ The British statute did not define grievous bodily harm.²⁶

The Manual for Courts Martial 1951's explanation of grievous bodily harm said that the term "does not include minor injuries such as a black eye or bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries."²⁷ The examples raise definitional problems: does any broken bone satisfy the criterion? how deep must a cut be to make it grievous? what is a "torn member?" when is damage to internal organs serious? how does one distinguish between serious and trivial bodily injuries? The drafters of the explanation may have expected that expert medical testimony would be necessary in order to establish that the harm was grievous. The physician would explain why the injury was serious or why not, guided by the law's criteria. As in the case of a plea of insanity, the issue would be one of fact and the opinion of an expert witness, while it might be given greater weight than that of a lay witness, would not oblige the court to arrive at a particular finding.²⁸ Alternatively, the drafters may have intended that the court draw on its own experience in deciding whether the harm was grievous.²⁹

The term "grievous bodily harm" must be interpreted: by legal officers who have to recommend what offense should be charged; by trial judges who must decide whether there is sufficient evidence of the offense to warrant sending the government's case to the jury; by juries, who must decide whether they are satisfied beyond a reasonable doubt that the offense has been committed; and by appeals courts in the military justice system, who must decide whether the trial judge erred in permitting the case to go to the jury.³¹ Service appeals courts, originally called boards of review, were given the authority, in reviewing the record of trial "...to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."³² Appeals court decisions are published and the rules of law they apply serve as precedent in deciding subsequent cases. The doctrine of *stare decisis* invokes the principle that a legal rule, and its rationale, should be applied in similar cases. An appeals court ruling that specific injuries did, or did not, constitute grievous bodily harm does not constitute binding precedent but offers criteria which legal authorities can use in deciding whether a given injury satisfies the law's requirements. A survey of appeals courts' decisions will indicate the military's approach to the problem posed by the Manual's vague definition of grievous bodily harm.

The first reported decision interpreting the Manual's provisions was *United States v. Lee*, in which the accused had been convicted of murdering one man and wounding another.³³ The survivor had been shot in the neck and, in the course of its 1952 opinion, an Army Board of Review affirmed a conviction of aggravated assault, stating "The nature of the injury clearly brings it within the Manual [for Courts

Martial]'s provision for 'grievous bodily harm.'" The defense had not contended that the wound was minor so the case has little precedential value.

In *United States v. Lara*, another 1952 Army Board of Review decision, three soldiers were convicted of intentionally inflicting grievous bodily harm "to wit: numerous cuts, abrasions, lacerations, and bruises of the face, body, head and limbs [of the victim]."³⁴ The Board summarized testimony regarding the victim's injuries:

[The victim] received an examination at the dispensary and later went to the hospital for treatment. He apparently had several bruises about the head and face, his ankles and hands were bandaged, and according to witnesses, he seemed to be suffering considerable pain in movement. (R 56, 57, 85, 86, 87). There is no other testimony in the record relative to the extent or nature of [the victim]'s injuries....

In view of the complete lack of evidence as to the nature, extent and type of the injuries sustained by [the victim] the proof and the findings are insufficient to establish the offenses charged [i.e. intentional infliction of grievous bodily harm]. However, the evidence is sufficient to sustain a finding of the lesser included offense of assault and battery...³⁵

The opinion has been read as a case in which the Board concluded that the injuries were not serious enough to warrant the description of grievous bodily harm.³⁶ This reading is mistaken: the victim was alleged to have sustained "numerous cuts, abrasions and lacerations (as well as bruises) of the face, body, head and limbs." The government proved that the victim's head and face were bruised, that his limbs were bandaged, and that he found movement painful. The guilty finding did not match the proof, which clearly sustained a finding of simple assault and might have sustained a finding of grievous bodily harm if the charge had matched the proof. The Board of Review decision does not offer precedent for the proposition that bruising, bandages and pain are insufficient to warrant a finding of grievous bodily harm.

United States v. Bolton,³⁷ a 1952 Army Board of Review decision, is sometimes used to illustrate the kinds of injuries which warrant a charge of aggravated assault.³⁸ In fact, the opinion has no precedential value since the accused was charged and convicted under the 1948 Articles of War which did not distinguish between ordinary and aggravated assaults.³⁹

An Army Board of Review applied the Manual's discussion of grievous bodily harm to the injuries which the victim had sustained in *United States v. Salazar*, and concluded that accused's conviction of aggravated assault could not be sustained.⁴⁰ The victim had been stabbed in the back, near his shoulder blade, with a knife seven inches long. The Board of Review described the wound as a "laceration," and sum-

marized the evidence. The examining physician was Dr. Iwata. His examination of the laceration

gave [him] the impression that it did not penetrate into the chest cavity. Captain Iwata applied "several four-four bandages of gauze" to the wound and wrapped it with an "X bandage," and had [the victim] transported to the Sapporo hospital in an ambulance. [The victim] remained in the hospital for two days where his wound was given "a couple of stitches" and he received "shots every day" (R 31,50-51).⁴¹

Here is the Board's rationale for overturning the aggravated assault conviction:

Although the use of a knife was dangerous in that it was used in such a manner that it was likely to produce grievous bodily harm, it did not, in fact, inflict serious injury. Although the offense found includes the finding that the grievous bodily harm consisted of "a deep cut," there is no evidence that it was a deep cut. We conclude, therefore, that the evidence sustains only so much of the finding of guilty as finds the accused guilty of an assault likely to produce grievous bodily harm by means of a knife.⁴²

The case has been read as a holding that the wound wasn't serious enough to warrant the charge.⁴³ Alternatively, the case may be read for the proposition that a guilty finding of a charge of grievous bodily harm which includes reference to "a deep cut," when there is no evidence of a deep cut, must be overturned.⁴⁴ Because the guilty finding was not consistent with the evidence, the Board could only approve a guilty finding of a less serious offense and did not conclude that the wound was trivial.⁴⁵ This alternative reading is more consistent with the language of the opinion.

United States v. Miles, a 1953 Army Board of Review decision, is often considered the definitive military legal opinion on grievous bodily harm.^{45a} Miles was convicted of assault with an iron bar "wherein grievous bodily harm was intentionally inflicted."⁴⁶ The victim sustained a two and a half inch cut on the scalp which penetrated to the skull; the wound required at least half a dozen stitches, and the medical officer who examined the victim the following day testified

... the left posterior portion of the scalp had lacerations which had been sewn up. Around this was a great deal of feeling and it was tender. I gave the man a psychiatric examination in case he had a brain injury but there didn't seem to be anything except that he was hazy. He was slow in answering questions. He was well oriented and knew where he was... [while the wound was of a type that] could cause some serious effects [he didn't actually observe any serious complications].⁴⁷

The Board concluded that the Manual for Courts-Martial's definition "leaves a vacuum between minor injuries on the one hand and serious injuries on the other hand without a test or guide to determine either."⁴⁸ Turning to civilian court decisions it identified a number of factors relied on in determining whether an injury was severe enough to warrant conviction of aggravated assault:

1. hospitalization or confinement to bed or room;
2. persistence of injury or its adverse effects;
3. severe pain or suffering;
4. unconsciousness induced;
5. medical testimony as to whether the injury was serious;
6. unusual force or violence applied; and
7. interference with normal activities.

The Board went to observe that: "Some courts have probably been influenced by the fact that the victim was female...; by the comparative size and strength of the assailant and victim...; and by the weapon used... In view of the fact that it is the character and extent of the injury with which we are and should be concerned, it is believed that, aside from the proposition that the question is ordinarily one for the jury, only the facts (1) through (7) should be given any consideration in determining whether any injury constitutes 'grievous bodily harm' or 'serious bodily injury.'"⁴⁹ Applying these criteria to the victim's injury, the Board in the *Miles* case concluded that the issue was fairly presented to the court and that there was no legal reason to overturn the conviction.

In *United States v. Dejewski*, decided in 1953, the U.S. Court of Military Appeals spoke for the first time on the issue of "grievous bodily harm."⁵⁰ The court concluded that the term "grievous" was used in its conventional sense, no explanatory instruction was needed and ruled that the victim's testimony, unsupported by medical evidence, that he had sustained a fractured jaw and had been hospitalized for twenty-three days was sufficient to establish the fact that he had sustained grievous bodily harm.

A Coast Guard Board of Review was the first appellate panel to reverse a conviction of grievous bodily harm because the injuries were not serious enough to warrant the conviction of the offense. The accused in *United States v. Cabuag* was one of five Coast Guardsmen charged with attacking an Army sergeant.⁵¹ Two were tried before a magistrate in a civilian court, fined \$125 and \$200 respectively, and given thirty day suspended sentences. Two others were tried with the accused and acquitted. The accused was convicted of aggravated assault and given the maximum punishment available to a special court martial: a bad conduct discharge, reduction

to the lowest enlisted grade, forfeiture of pay, and confinement at hard labor for six months. The Coast Guard Board of Review's opinion, reducing the conviction to one of simple assault, was careful not to say that the victim's injuries (deep lacerations of the forehead and eyebrow, requiring six stitches; two huge black eyes, multiple lacerations and abrasions—all requiring two days of hospitalization and twelve additional days of treatment) did not constitute grievous bodily harm:

In the case before us the question of whether the injuries constitute "grievous bodily harm" would appear distinctly to be one of fact to be determined in the light of the surrounding circumstances. Here the court-martial decided this question of fact adversely to the accused. We do not say *as a matter of law* that the evidence cannot support such a finding. We are clearly empowered, however, to decide the *question of fact* differently from members of the court. [citing authority] Our concern, as stated at the outset of this decision [where the cases of the other four were summarized], is whether it would not better accord with the interests of justice here to determine the fact question in favor of the accused.⁵²

In the instant case no special weapon such as a pool cue [as in *Lara*] or an iron bar [as in *Miles*] was used; there was no unusually violent single blow [as in *Miles*]; there was no suspected brain injury [as in *Miles*]; there is not even any testimony as to pain and suffering as in the *Lara* case. It is true that there was hospitalization and stitches, but it does not appear that the wounds were anything but superficial and it is attested that they cleared up in a short time. The two black eyes, despite their size, plainly constitute only "minor injuries," as declared by para. 207b(2) MCM.

Upon all the facts and circumstances surrounding this case, therefore, it is our determination that it would better accord with the interests of justice to differ from the court in the resolution of the question of fact here, and to hold that the injuries did not amount to "grievous bodily harm" within the contemplation of Article 128(b)(1) UCMJ. Since we find as a fact that the assault was simple rather than aggravated, a bad conduct discharge is illegal; moreover, a reduction in the other provisions of the sentence appears to be warranted, *especially in view of the disposition made in the magistrate's court of the other two participants*.⁵³

The Board modified the sentence to provide for reduction in grade and confinement and forfeiture of pay for three months.

The Board made it clear that it had found no legal errors in the conviction but that, under the circumstances, the sentence was too severe. Rather than ordering a

rehearing on the sentence, the Board used the peculiar circumstances of the case to justify its ruling that only a finding of simple assault would be approved. These circumstances fell into two categories: the punishment imposed on the other two individuals convicted of the same offense, and the comparatively minor nature of the offense.

Twenty-one years were to pass before the military justice system reported a case interpreting the term "grievous bodily harm." In *United States v. Spearman*, a 1974 Court of Military Appeals decision, the accused had stabbed his victim four times; three of the wounds were in the victim's side, and one was in his shoulder.⁵⁴ The accused contended that the harm was not grievous and that the charge should not have been sent to the jury because none of the cuts were disfiguring and disabling and did not require hospitalization, although they did require stitching. The Court rejected his argument, looking to civilian cases and concluding:

The consideration common to these cases is that there was some injury more severe than that involved in the ordinary assault and that the issue is generally best left to the factfinders [citing cases]. We believe that the same considerations apply here and that the victim's wounds in this case transcended any ordinary battery, endangered his health, and constituted injuries of such a serious nature as to amount to grievous bodily harm.⁵⁵

The opinion seems to turn on three criteria: the wounds which were alleged to constitute grievous bodily harm were inflicted with a weapon; they required stitching; and treatment took place at a hospital. None of the factors are dispositive but they were used to explain why the trial judge acted properly in submitting the case to the jury.

Fifteen more years were to pass before the issue was again raised in a reported appellate decision. In *United States v. Haynes* a 1989 Army Court of Military Review case, the accused contended that the evidence was legally insufficient to establish that his assault resulted in grievous bodily harm.⁵⁶ He had sliced his victim across the chest and arm but the physician who stitched up the wounds said that the injury to the chest was superficial since it did not affect musculature, and injury to the arm was not serious because it was not a threat to life or limb. The Court rejected the argument, citing *Spearman* as authority that decisions as to the seriousness of an injury should be left to the factfinders, and concluded with the statement; "Our review of the evidence leads us to the same conclusion as the trial court and we find that grievous bodily injury did occur in this case."⁵⁷

When the Donnel Jones case was submitted to the Army Court of Military Review, military jurisprudence had forty years of experience with the term "grievous

bodily harm” as it had been used in the Manuals for Courts-Martial.⁵⁸ On three occasions appeals courts had overturned a conviction on the grounds that grievous bodily harm had not been established: the *Lara* and *Salazar* decisions in 1952 where the prosecution failed to establish the injuries alleged, and the *Cabuag* decision a year later where, in order to achieve parity of punishment, a Coast Guard Board of Review substituted its view of the facts for that arrived at by the jury. Donnell Jones’ lawyers had three options: they could argue, as in *Cabuag*, that the appeals panel should act as a factfinder and reject the findings of the trial court; they could attempt to find fundamental differences between the facts as charged and the facts as proven and, as in *Lara* and *Salazar*, have the verdict overturned on those grounds; or, they could attempt to persuade the court that, for the first time, an appeals panel should apply the definition of grievous bodily harm in the Manual for Courts-Martial to the victim’s injuries and conclude, as a matter of law, that the injuries did not satisfy the definition.

In fact, appellant’s counsel asserted that the injuries suffered by Mrs. Vender did not satisfy the legal criteria for grievous bodily harm established by the *Miles* decision and subsequently applied by appellate courts in the military system.⁵⁹

Ms. Vender’s injuries were not “of a graver and more severe character than that resulting from a simple assault and battery”.⁶⁰ In layman’s terms, Vender had a black eye and a bloody nose—the exact examples that the Manual [for Courts Martial] gives as being “minor injuries” as opposed to grievous bodily harm. These injuries are the classic, archetypical injuries that people receive as the result of an ordinary everyday simple assault and battery. The type of injuries that kids playing and fighting in neighborhoods get every day of the year.⁶¹

But counsel did not ask the court to overturn the decision on the legal grounds that the offense charged had not been proven. Instead, he asked the court to substitute its judgement as a fact finder for that of the jury.

Applying the factors which the *Miles* opinion had taken into consideration: “persistence of the injury and its adverse effects, severity of pain or suffering, ...hospitalization or confinement to bed or room, unconsciousness induced, ...interference with normal activities and medical testimony.”⁶² Vender’s injuries in the instant case are not “grievous bodily harm” under any reasonable definition of the term. Just as the Coast Guard Board of review did in *Cabuag*, this Court ought to determine this question of fact in favor of the appellant.⁶³

The Army Court of Military Review unanimously accepted the *Cabuag* argument:

The victim required no medical treatment or surgery. She suffered no loss of function or disfigurement. There was no danger to her life, health, or limb. The pain was neither persistent nor severe. After reviewing the evidence in accordance with Article 66(c), Uniform Code of Military Justice, we are not satisfied that the victim's injuries amount to "grievous bodily harm." [citing *Cabuag, Salazar, and Lara*.]⁶⁴

Arguably the *Jones* decision had no direct effect on the military justice system because unpublished opinions have little or no precedential value. Moreover, a subsequent unanimous Army Court of Military Review opinion, *United States v. Brian M. Chapman*, joined by two of the same judges, distinguished *Jones* and held that grievous bodily harm had been proven.⁶⁵ A comparison of injuries, as they were described in the two opinions, is instructive:

Chapman: Victim rendered momentarily unconsciousness.

Jones: No loss of consciousness.

Chapman: Victim suffered a comminuted fracture of the nose.

Jones: Nose simply described as broken.

Chapman: A hemorrhage on the sclera (coating on the eyeball).

Jones: Hematoma (swelling containing blood) and reddening of the right eye.

Chapman: Significant swelling and bruising around the eye and nose.

Jones: No parallel statement in the opinion; the opinion refers to a 5 cm. cut on the nose and the Appellant's Brief refers to swelling.⁶⁶

Chapman: Victim treated at emergency room.

Jones: No parallel statement in the opinion; however, the night of the incident the victim was taken by the military police to a civilian clinic for treatment.⁶⁷

Chapman: Two follow-up visits to battalion aid station.

Jones: No parallel statement and no evidence in the record of trial.

Chapman: Victim testified he was in pain for about two weeks; it was a month before the blood cleared from his eye, and he still had nosebleeds during PT runs three months later.

Jones: Contrary to the opinion's statement that the pain was neither persistent nor severe, Mrs. Vender testified that the after effects lasted for a "couple of weeks," and that the pain was moderate during the day and "heavy at night."⁶⁸

Military prosecutors, defense counsel, and judges will never have the opportunity to make this comparison because neither opinion has been published and the

records of trial have been retired. However, they will read, in an official Army publication, Jones' lawyer's statement that: "If a case involves not much more than a broken nose or some other common injury, [defense] counsel has precedent [in *Jones*] to support the proposition that grievous bodily harm does not exist."⁶⁹

In summary, it can be said that military lawyers will continue to utilize *Miles* criteria, which rely heavily on observable physical consequences and disregard the fact that the victim was a female and the comparative size and strength of the assailant and victim, factors expressly disregarded by *Miles*.⁷⁰ Of course the description of these consequences will be shaped by the testimony of the medical personnel who examined the victim. The following section will consider the forensic implications of recent medical research on the victims of assault.

Current Medical Views on the Consequences of a Criminal Attack

The *Miles* case was decided in 1953 and relied on precedents which, in many cases, dated to the early years of the twentieth century. Although the somatic effects of trauma, and the protocols for treating them, have remained relatively constant, late twentieth century medicine has become far more aware of the psychic effects of violence. Research is now available which describes the intellectual and emotional consequences of assault and this research, in turn, suggests new modes of diagnosis and treatment. The defense lawyer who described his success in the *Jones* case observed that "In many cases, doctors will testify that an injury is minor while most laypersons initially might believe it to be serious."⁷¹ Alternatively, an apparently minor instance of abuse may be serious, and health professionals are now taking steps to ensure that such cases receive appropriate treatment.

In March 1991 the Joint Commission on the Accreditation of Health Care Organizations (JCAHO) directed hospitals to establish and follow procedures for evaluating and treating adult victims of abuse.⁷² The Joint Commission's 1993 standards require that hospital emergency departments develop criteria for identifying possible victims of abuse involving physical assault, rape or other sexual molestation, and domestic abuse of elders, spouses, parents, or children.⁷³ Procedures must include patient consent; examination and treatment; and the hospital's responsibility for the collection of evidentiary material and the release of information to proper authorities.⁷⁴ The emergency service must maintain a list of agencies that evaluate and care for abuse victims⁷⁵ and there must be documentation of treatment, referrals and reporting.⁷⁶ Finally, there must be a plan for educating staff on the medico-legal criteria for identifying and handling victims of abuse. Military treatment facilities are subject to these standards so it can be expected that, after initial physical needs

are met, emergency room physicians will refer assault victims to a psychiatrist or social worker to evaluate and treat somatic conditions.

While the accreditation requirement is new, professional recognition of the psychological needs of physically abused patients can be traced to the 1970s.⁷⁷ Although much of the literature focuses on rape, child abuse, and recurring domestic violence (the "battering syndrome"), procedures developed for the diagnosis and treatment of the abused elderly or of battered women⁷⁸ are appropriate in any case involving physical abuse.⁷⁹ Health professionals have, in the past ten years, become more aware of the need to assess the possibility of Post Traumatic Stress Disorder (PTSD).⁸⁰

While documentation will facilitate proof of injuries, and treatment, the military legal system will have to decide whether the victim has sustained grievous bodily harm.⁸¹ If the trauma renders the servicemember medically unfit for further military service it would presumably constitute grievous bodily harm within the meaning of the Manual for Courts Martial.⁸² As the *Miles* criteria become less clear—no loss of consciousness; outpatient visits instead of hospitalization; persistence of the injury measured in weeks or days rather than months or years; pain described as "persistent" rather than "severe"; and only moderate interference with normal activities—the importance of medical testimony increases.⁸³ However, the term "grievous bodily harm" has no medical meaning, and the appeals opinions cited in *Miles* to illustrate the use of medical testimony give no guidance on the kind of medical testimony which would establish severity. The cases *Miles* looked to as precedent were decided between 1895 and 1943⁸⁴ and, with one exception⁸⁵ were used to illustrate cases where Texas appeals courts had reversed convictions because of medical testimony even though the injuries were of a "...nature... which would probably motivate courts of other jurisdictions to affirm."⁸⁶

The Manual for Courts Martial discussion of the term "grievous bodily harm" emphasizes the physical consequences of the assault, and attempts to distinguish between short term after-effects—a black eye or a bloody nose—from those of longer duration.^{86a} Consequences which would qualify as serious enough to warrant charging aggravated assault are described in physical terms: "fractures," "deep cuts," and "tears." The drafters of the Manual did not discuss the possibility that the psychological after-effects of trauma, in themselves or in conjunction with physical aftereffects otherwise minor, might be serious enough to constitute grievous bodily harm. There are institutional, historical, and cultural explanations for this lacuna and the legal implications of their silence will be considered in the final section of this article. Certainly medical literature in the past half century—and it must be remembered that the Manual's language was written forty-four years ago, and based on the experience of World War II—has come to recognize the potential severity of somatic trauma.

The third edition of *Diagnostic and Statistical Manual of Mental Disorders*⁸⁷ published by the American Psychiatric Association describes the essential feature of Post-Traumatic Stress Disorder, as “the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience (i.e., outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marital conflict)...⁸⁸ The trauma may be experienced alone (e.g., rape or assault) or in the company of groups of people... The disorder is apparently more severe and longer lasting when the stressor is of human design.”⁸⁹ While the stressor criterion based on the need for an event to be outside the range of usual experience has been criticized⁹⁰ as has the requirement that symptomatology continue for at least one month,⁹¹ experts agree that impairment may be severe and affect nearly every aspect of life.⁹² The literature also establishes that violent crimes (such as assault) are more psychologically disturbing than less violent crimes and thus increase the need for mental health assistance.⁹³ The *Miles* opinion⁹⁴ suggested that persistence of adverse effects and interference with normal activities were indicia of aggravated assault. And although *Miles* said that the fact that the victim was female should have no effect on the criteria for determining aggravated assault, maxillofacial (jaw) injuries arising from an assault may be more common among women than men. These injuries⁹⁵ are often caused by a male’s assault⁹⁶ and women are more affected than men by facial injuries.⁹⁷ It is recognized that there are sex related differences in health and illness⁹⁸ and that criminal trauma’s long term effects on women’s health are severe.⁹⁹ Thus recent data suggests that *Miles* criteria must be applied in the context of medical developments in the recognition and treatment of traumatic injuries. However, the question remains: when the Uniform Code of Military Justice and Manual for Courts Martial speak of grievous “bodily” harm are they speaking only of injuries to the body that can be externally observed? That will be the subject of the final section of this article.

Psychic Injury as a Component of Grievous Bodily Harm

Traditionally the emotional state of the victim was irrelevant in the law of crimes. The offense of assault was established whether the victim shrugged off the attack or sustained mental pain for the rest of his life. Criminal law made allowance for adverse consequences—mental or physical—by giving judges discretion to impose a wide range of punishments dependent on mitigating or aggravating factors.¹⁰⁰ Victorian efforts to rationalize the criminal justice system by classifying and punishing crimes according to the degree of seriousness were duplicated in the United States.¹⁰¹ State statutes which “sought to create a range of

personal injury offenses focusing upon the means by which the actor caused or threatened the injury, the person upon whom the injury or threat was inflicted, and the seriousness of the injury caused or threatened" served as models for the Uniform Code of Military Justice.¹⁰²

However there were two differences between state assault statutes and the UCMJ. The typical state assault statute provided for more severe punishments than the UCMJ. New York was representative: "maiming (15 years [maximum imprisonment]); assault with a deadly weapon or a destructive or noxious thing (ten years), inflicting grievous bodily harm or assault with any weapon (five years), and simple assault or battery (one year).¹⁰³ Under the UCMJ, the maximum punishment for maiming was seven years; for assault with a deadly weapon three years; and for simple assault or battery six months. The UCMJ prescribed five years confinement as the maximum punishment for intentionally inflicting grievous bodily harm with or without a weapon.¹⁰⁴ Unlike the UCMJ, those state statutes which utilized severity of injury as a factor formally defined "serious bodily injury" (the term that had come to replace "grievous bodily harm"), and distinguished it from bodily injury. The *Miles* survey¹⁰⁵ of American law concerning grievous bodily harm assumed that the Manual's descriptive definition was identical with state statutes which the cases cited in *Miles* interpreted and that state statutes defining grievous bodily harm could be treated as sufficiently similar so that differences between statutes did not affect state courts' judicial interpretations of the term.¹⁰⁶ In 1992, a year after the *Jones* and *Chapman* cases were decided by Army courts, American Law Reports published a comprehensive survey of state and federal approaches to the problem posed in those cases. Entitled "Sufficiency of Bodily Injury to Support Charge of Aggravated Assault," this analysis of over four hundred appeals court decisions illuminated distinctions created by differing statutory language.¹⁰⁷ Only five opinions addressed the issue of whether mental injury is comprehended by statutory definitions of serious injury. In four cases, decided in two states, the response was negative. Arizona's statute defining aggravated assault requires "serious bodily injury" which is in turn defined as "injury which creates a reasonable risk of death, or which causes serious and permanent disfigurement, or serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."¹⁰⁸ In 1983 an Arizona appeals court concluded that the legislature intended that the impairment be physical, and that the adverse emotional consequences of a rape would not sustain a conviction for aggravated assault¹⁰⁹ and its precedent was followed in a 1987 Arizona appeals court decision interpreting the same statutory provision.¹¹⁰ Connecticut's assault statute defines serious physical injury as one which "creates a substantial risk of death, or which causes serious disfigurement, serious impairment

of health, or serious loss or impairment of the function of any bodily organ.”¹¹¹ In *State v. Rossie*,¹¹² a 1978 opinion, the Connecticut Supreme Court concluded that a psychiatric diagnosis of post-trauma reaction did not satisfy the statutory requirement for serious physical injury, and that precedent was followed in a 1985 Connecticut Supreme Court decision.¹¹³

Both states’ statutes followed the definition of serious bodily injury proposed by the American Law Institute’s Model Penal Code¹¹⁴: “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”¹¹⁵ The Model Code, however, envisioned three categories of assault¹¹⁶: scuffles entered into by mutual consent, which would be treated as petty misdemeanors (carry a maximum term of 30 days imprisonment); assaults which cause bodily injury, defined as physical pain, illness, or any impairment of physical condition, which would be treated as a second degree felony, punishable by maximum term of 10 years, and aggravated assault which would be treated as a third degree felony, punishable by imprisonment in excess of ten years.¹¹⁷ The Model Code’s maximum punishment for aggravated assault is more than double that provided for in the UCMJ.

The federal government¹¹⁸ and other states have not attempted a definition of the term and have relied on what has been called “the common-law meaning of a common-law term.”¹¹⁹ Only one reported decision from these jurisdictions has considered whether emotional injuries would satisfy the law’s requirements. In *State v. Everhardt*, a 1990 decision of the South Carolina Supreme Court, the Court concluded that evidence that the victim of sexual assaults had suffered a mental injury which required several hospital admissions and medication was sufficient to support a conviction of aggravated assault causing serious bodily harm.¹²⁰ The Court’s reasoning—that bodily harm includes mental injuries which may be more severe and of longer duration than their physical counterparts—could be applied in an Article 128 UCMJ prosecution without revising the Manual for Courts Martial’s definition which excludes minor injuries.¹²¹ Does The Manual’s definition need to be reinterpreted?

Conclusion

Donnell Jones’s case exemplifies the dilemma posed by the present assault provisions of the UCMJ. He struck Mrs. Vender under circumstances which warranted a criminal investigation and preferment of charges. Either he would be charged with a simple battery—the same offense which would be charged in a scuffle entered into by mutual consent—or he would be charged with aggravated assault. The

UCMJ, unlike the Model Penal Code, offers no third alternative.¹²² Once he was charged, the trial judge quite properly decided that the evidence of physical injury was sufficient to warrant sending the charge of aggravated assault to the jury.¹²³ Although the prosecutor in the *Jones* case, unlike the prosecutor in the *Chapman* case, made no effort to portray the injury as serious (possibly because the defense counsel did not challenge this contention), the jury found Jones guilty of the charged offense.¹²⁴ On appeal, the Army Court of Military Review substituted its judgment as a fact finder for that of the jury and concluded that the injury was not serious enough to warrant a conviction of aggravated assault. The decision was unpublished and had it remained unpublicized it would have no effect on anyone other than Donnell Jones.

However the summary of the decision in the Army Lawyer¹²⁵ may affect the judgments of military lawyers of all the armed services, since the publication is distributed throughout the Department of Defense. The precedential value of *United States v. Miles*¹²⁶ will be reinforced although the Miles opinion misread three of four prior military opinions on aggravated assault and failed to distinguish, in its discussion of state cases, those jurisdictions which had statutorily defined serious bodily harm from those which had not.^{126a} The precedential value of *United States v. Cabuag*^{126b} will be misunderstood to stand for the proposition that judges have held, as matter of law, that certain injuries do not constitute grievous bodily injury¹²⁷ rather than—as was actually the case—that appeals court judges may exercise their fact finding authority and substitute the jury's judgment for their own. Further, the article's emphasis on bodily harm may lead uninformed readers to conclude that psychological harm could never be "grievous" within the meaning of Article 128.

The potential for misunderstanding is particularly grave as military hospitals, in response to JCAHO accreditation standards, establish more comprehensive protocols to identify assault victims and health care providers strive to ensure that the psychological needs of trauma victims are met.¹²⁸ The record of trial in the 1991 aggravated assault case of *United States v. Donna L. Barnes*, illustrates military medicine's response. The Court of Military Appeals opinion describes the assault which, like Mrs. Vender's, occurred at an Army cassern in Germany. "For the next hour or 2 [sic] Pvt. S was subjected to various assaults. Appellant [Barnes] repeatedly hit Pvt. S in the face with her fists and a combat boot while holding on to Pvt. S's hair. Appellant also lit PVT S's hair and T shirt on fire. Finally, appellant and Pvt. D took off all of Pvt. S's clothes, tied her hands and feet to the bed with shoelaces, and stuffed a sock in her mouth. The appellant proceeded to beat Pvt. S with a plastic coat hanger."¹²⁹

While Barnes's defense counsel did not argue, as had defense counsel in the Jones case, that these were "the type of injuries that kids playing and fighting in neighborhoods get every day of the year," Private S, like Mrs. Vender, suffered no loss of function or disfigurement.¹³⁰ There was no danger to her life, health or limb. The pain was neither persistent nor severe. These facts had persuaded the Army Court of Military Review to conclude that Mrs. Vender had not sustained grievous bodily harm.¹³¹ However Private S, unlike Mrs. Vender, was seen by a military physician and admitted to hospital although her injuries were superficial.¹³² Unlike Mrs. Vender, Private S was X-rayed; X-rays of the chest, lungs, c-spine (neck) and facial bones were within normal limits, indicating no clinical fractures. Unlike Mrs. Vender, Private S was sent for an emergency psychiatric consult after her physical injuries were treated. A psychiatrist concluded that she was not suicidal but referred her for further assessment. Two days later, in a follow-up psychiatric exam, concern was expressed over the emotional trauma resulting from the beating and arrangements were made for outpatient treatment after her release from the hospital. Private S sustained no fractures or dislocated bones, no deep cuts or torn members of her body and no serious damage to internal organs. In fact, the only *Miles* criterion she clearly met was hospitalization—but single persons like Pvt S. who are barrack residents are routinely hospitalized in order to ensure that they are adequately cared for. If asked, Mrs. Vender probably would have refused hospitalization. She had to care for her two children because her husband was away.¹³³

Barnes's conviction and sentence to a dishonorable discharge, confinement for four years, and total forfeitures has been confirmed. Perhaps she merited the punishment—as Donnell Jones did not—because her assault extended over two hours and reflected a depraved mind. However, if *Miles* criteria, and the language of the *Manual for Courts Martial* are to be taken literally—the question remains: were Private S's injuries more grievous than Mrs. Vender's? We conclude that they were not. Like the victim in the Chapman case, her treatment was more comprehensive and the prosecutor was more aggressive.¹³⁴ Our conclusion suggests that legal and medical considerations dictate that the assault provisions promulgated by the Provisional Congress of Massachusetts in 1775, and amended by the Congress of the United States in 1950 need to be re-examined. We believe that the fundamental statute would benefit from revision: in order to distinguish truly minor affrays from those where some injury was inflicted, as suggested by the American Law Institute; and to provide for an array of maximum sentences which would provide that aggravated assault be charged only in the most serious cases—leaving the Donna Barnes in the criminal justice system to be tried for assault causing

bodily harm. However, neither the statute nor the *Manual for Courts Martial* need be amended to provide for more sensitivity among lawyers to the psychic consequences of assault. Prosecutors must ensure that victims, unlike Mrs. Vender, describe the aftermath of the trauma.¹³⁵ Judges at both the trial and appellate level must treat *Miles* criteria with suspicion. Men and women in the armed forces will, on occasion, continue to strike each other. It is up to the law to decide when the blow is "cruel hard." It could do better.

Notes

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1. See generally J. Stephens, 4 Commentaries on the Laws of England 57 (21st ed. 1950).
2. Army Court of Military Review Case No. 8902640.
3. All references are to the Jones record of trial.
4. At common law, Jones would have been charged with battery, an unlawful touching, rather than assault, an offer or attempt to unlawfully touch. However, by the nineteenth century, the term "assault" had come to encompass the term battery. See Winthrop, *Military Law and Precedents*, note 11 infra. Perkins, "Non-Homicide Offenses Against the Person," 26 Boston University Law Review 119 (1946).
5. ACMR 8902640, Defense Appellate Division, U.S. Army Legal Services Agency, Assignment of Errors and Brief on Behalf of Appellant and Argument on Sentence Appropriateness (29 June 1990); See also, Government Appellate Division, Answer to the Assignment of Errors (27 September 1990).
6. CM 8902640 (A.C.M.R. 28 Nov. 1990)(unpub.).
7. CM 8902640 (A.C.M.R. 8 May 1991) (unpub. memorandum opinion on further review).
8. Berrigan, "Grievous Bodily Harm?: Give Me a (Real) Break!" March 1991, *The Army Lawyer*, DA PAM 27-50-219, 6-8.).
9. Confinement automatically results in reduction to the lowest enlisted grade. Forfeiture of pay must be specified by the court-martial and depends on the type of court sentencing of the accused. A special court-martial may not order forfeiture of more than two-thirds pay. A general court-martial may order total forfeitures. Slightly different punishments are imposed on officers. They may be dismissed rather than discharged and there are no provisions for reduction in rank.
10. CMR 8902640 R. 80-81.
11. W. Winthrop, *Military Law and Precedents*. 2d ed. 1920 repr. (Washington: GPO, 1920) 947 at 951.
12. *Ibid.*, p. 667.
13. Rev. Stat. §1342.
- 13a. *Id.* The court's discretion was not absolute. Unlike general courts-martial, regimental and—subsequently—summary courts-martial were limited to certain maximum punishments. Inferior courts could not impose the death penalty, nor inflict a fine exceeding one month's pay, or put to hard labor a soldier or non-commissioned officer for more than one month. Article 83 *Id.* Within structural limits, and subject to the Constitution's prohibition of cruel and unusual punishments, for over a century there were no restraints on a court-martial's statutory discretion. In 1890 Congress provided that whenever a statute left sentencing to the discretion of the court "the punishment shall not, in time of peace, be in excess of

a limit which the President may prescribe." Act of Congress, September 27, 1890. 26 Stat. 491. A table of maximum punishments for crimes committed by enlisted persons was subsequently published as a general order. See note 14 following.

14. The second executive order implementing the Act of September 27, 1890, note 8 supra, was circulated as General Orders No. 16, Headquarters of the Army, March 25 1895, reproduced in Winthrop, op. cit supra at 11, p. 1003. It provided that the maximum punishment for assault with intent to kill should be a dishonorable discharge, forfeiture of all pay and allowances, and ten years' confinement at hard labor.

15. Act of June 4, 1920, 41 Stat. 787, amending the Act of August 29, 1916, 39 Stat. 619. The 1916 revisions had no effect on the law of assault and battery.

16. Para. 104c (Washington D.C.: Government Printing Office, 1943 ed.).

17. Id.

18. Id. para. 152c.

19. Id. para. 104c.

20. Act of May 5, 1950, 64 Stat. 107.

21. *Manual for Courts Martial*, 1951 (Washington D.C.: Government Printing Office, 1951) para. 127c.

22. Op. cit. supra at 11 p. 687. (emphasis in original).

23. MCM, 1951 op. cit. supra at 21, para. 207a.

24. 24 & 25 Vict., ch. 100. utilized the term "grievous bodily harm" in setting sentencing levels.

25. See generally, American Law Institute, *Model Penal Code and Commentaries*, Part II, Definition of Specific Crimes §210.0 to §213.6 (1980), 181.

26. "Early English statutes extended the offense to include intentional disfigurement of a permanent, though not necessarily disabling, character." A.L.I. Mod. Pen. Code note 25 supra citing W. LaFave & A. Scott, *Criminal Law* 614 (1972); R. Perkins, *Criminal Law* 185-187 (2d ed. 1969).

27. MCM 1951, note 21 supra at para. 207b(2). Similar/identical language can be found in MCM 1984, Part IV, para. 54 c(4) (a) (iii).

28. See generally, para. 122 MCM 1951.

29. Compare the proof requirements for larceny. "When the character of the property clearly appears in evidence, as when, for instance, it is exhibited to the court, the court, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of \$50, as in the case of an automobile in good condition or a large collection of precious stones, the court may find a value of more than \$50." Para. 200 a (7) (a), Id.

31. Appeals courts were first introduced in the Army during World War I. They were called "boards of review," and the 1950 Uniform Code of Military Justice required each service to establish a board or boards to review all cases "in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more." Article 66b, 64 Stat. 107 at 128. The Code also established a Court of Military Appeals which automatically reviewed all cases in which the sentence approved by a board affected a general or flag officer or extended to death. The Court also reviews those cases which a service Judge Advocate General sends to it (because he disagrees with the board of review's handling of the case), and those cases where the Court is satisfied that a convicted person had shown good cause for seeking review. Article 67b, Id. at 129.

32. Art. 66c, Id. at 129-130.

33. 2 C.M.R. 387, (A.B.R. 1952).

34. 3 C.M.R. 277 at 279 (A.B.R. 1952).

35. Id. at 280.

36. "The injury in the Lara case appears to fall within the classification of injuries resulting from a simple assault and battery except for the doubt engendered by the description of the pain as 'considerable.' If intended as nothing more than emphasis or differentiation from slight pain we have no quarrel;

but if intended to indicate an unusual and severe pain induced by an assault, it is at least debatable whether the question was not one of fact for the court-martial to determine. In view of the paucity of facts set forth in the decision, however, we express no firm opinion on the matter." *United States v. Miles*, 10 C.M.R. 283, 293 (A.B.R. 1953).

37. 3 C.M.R. 374 (A.B.R. 1952).

38. See e.g., *United States v. Miles*, 10 C.M.R. 283 at 292.

39. See text accompanying note 17 *supra*.

40. 7 C.M.R. 389 (A.B.R. 1952).

41. *Id.* at 393.

42. *Id.* at 397.

43. *United States v. Miles*, 10 C.M.R. 283, 293 (A.B.R. 1953) (declining to accept *Salazar* as precedent and concluding that the wound "was of sufficient gravity to warrant resolution by the court-martial as a question of fact.")

44. The Manual for Courts Martial model specification for the charge of inflicting grievous bodily harm provided: "In that ____ did,(at) (on board) ____, on or about ____ 19 ____, commit an assault upon ____ by (shooting) (striking) (cutting) (____)(him) (in)(on) the ____ with a (club)(rock)(brick) (____) and did thereby intentionally inflict grievous bodily harm upon him, to wit: a (broken leg) (*deep cut*) [Emphasis added] (fractured skull) (____)." MCM 1950, p. 486, Appendix 6c.

45. See MCM 1950, para. 87a.(4).

45a. 10 C.M.R. 283 (A.B.R. 1953).

46. *Id.* at 284.

47. *Id.*

48. *Id.* at 285. (misreading three of the four prior Board of Review decisions on the topic. See text accompanying notes 36, 38 and 44 *supra*.)

49. *Id.* at 291-292.

50. 3 U.S.C.M.A. 532, 11 C.M.R. 53 (1953).

51. 22 C.M.R. 734 (C.G.B.R. 1955).

52. *Id.* at 735-36, emphasis in original.

53. *Id.* at 736, emphasis supplied.

54. 23 U.S.C.M.A. 31, 48 C.M.R. 405 (1974).

55. *Id.* at 407.

56. 29 M.J. 610 (A.C.M.R.1989).

57. *Id.* at 612-13.

58. Notes 2 to 8 *supra* and accompanying text.

59. Notes 45 to 49 *supra* and accompany text.

60. *Miles* at 293.

61. Defense Assignment of Errors, note 5 *supra* at 10 and 11.

62. *Miles* at 293.

63. Defense Assignment of Errors, note 5 *supra* at 12.

64. CM 8902640, note 6 *supra*, p. 2.

65. ACFM 9001501, 14 February 1991 (unpublished).

66. Assignment of Errors, note 5 *supra*, p. 10.

67. Record of trial, note 2 *supra*. Exhibit 4.

68. Record of trial note 2 *supra*.

69. *Army Lawyer*, note 8 *supra* at 8.

70. *United States v. Miles*, note 45 *supra* at 291-292.

71. Grievous Bodily harm, note 8 *supra* at 8.

72. See generally, note, "The Use of Medical Protocols in Identifying Battered Women," 30 Wayne L.Rev. 1941 (1992).

73. JACO Accreditation Manual for Hospitals 1993 ES.4.1.2.9.
74. Id. ES 4.1.2.9.2.
75. Id. ES. 4.1.2.9.3.
76. Id. 4.1.2.9.4.
77. See, e.g., Symonds, "Victims of Violence: Psychological Effects and Aftereffects," 35 *Journal of Psychoanalysis* 19 (1975); Solomons, "Child Abuse and Developmental Disabilities," 21 *Developmental Medicine and Child Neurology* 101.
78. S. Aravanis et al., "Diagnostic and Treatment Guidelines on Elder Abuse and Neglect," 4*Archives of Family Medicine* 371 (1993).
79. McLeer & Anwar, "The Role of the Emergency Physician in the Prevention of Domestic Violence," 16 *Annals of Emergency Medicine* 1155 (1987); McLeer & Anwar, "Education is not Enough: A Systems Failure in Protecting Battered Women", 18 *Id.* 651 (1989); Randall, "Hospital-Wide Program Identifies Battered Women; Offers Assistance," 266 *JAMA* 1177 (1991).
80. See generally, C.B. Scrignar, *Post-Traumatic Stress Disorder: Diagnosis, Treatment and Legal Issues* (2d ed. 1984).
81. In the Jones case, in which the Court of Military Review refused to uphold a conviction of grievous bodily harm, the medical evidence consisted of a stipulation of fact in which prosecution and defense agreed that the victim was examined in a German emergency room; that the examination revealed certain injuries, described in one sentence; that the injuries involved swelling and discomfort, but that her injuries did not require any treatment or surgery. Record of Trial, note 2 *supra*, Prosecution Exhibit 4. The record is silent as to whether she was subsequently seen by a physician. In the Chapman case, in which the Court of Military Review upheld a conviction of grievous bodily harm, the medical evidence also consisted of a stipulation of fact. In contrast to the three-sentence statement in Jones, the description of the victim's initial U.S. Army emergency room visit in Chapman was six paragraphs long, describing each diagnostic step taken, the reasons for the step, and the outcome. A follow-up visit the next morning required three paragraphs, and two subsequent visits described the "markedly decreased ecchymosis (bruising) and edema (swelling)." Record of Trial, note 65 *supra*, Prosecution Exhibit 1. It's possible that the appeal in the Jones case would have failed had the prosecutor been as careful in reciting the evidence as his counterpart in Chapman.
82. See, e.g., Chapter 3, AR 40-501, "Standards of Medical Fitness," 14 June 1989.
83. Note 49 *supra* and accompanying text
84. Id. at 291, citing *Gonzalez v. State*, 146 Tex Cr R 108, 172 SW2d 97 (1943); *Svidlov v. State*, 90 Tex Crim R 65, 236 SW 101 (1922); *Parish v. State*, 69 Tex Cr R 254, 153 SW 327 (1913); *Head v. State*, 52 Tex Cr R 488, 107 SW 829 (1908); *Wilson v. State*, 34 Tex Crim 64, 29 SW 41 (1895).
85. *Svidlov v. State*, *supra*.
86. *Miles*, note 45a. *supra* at 290.
- 86a. Note 27 *supra* and accompanying text.
87. *DSM-III-R* 1987.
88. Id. pp. 247-248.
89. *DSM-IV Options Book*, Work in Progress (7/1/91), H:15.
90. Id. H:16.
91. *DSM-III-R*, note 87 *supra* at 249.
92. Compare R.F. Cook, et. al., *Helping Crime Victims: levels of trauma and effectiveness of service* (1987), U.S. Dept. of Justice, Washington, D.C.; and K. Johnson et al., *Criminal Victimization in Kentucky: a longitudinal study* (1986) (on less serious violent crimes), Research Report Series 9, Urban Studies Center, Univ. of Louisville.
93. Norris et. al. "Use of Mental Health Services among Victims of Crime: Frequency, Correlates and Subsequent Recovery," 58 *Journal of Consulting and Clinical Psychology* 538 (1990) (drawing on sources listed in note 92 *supra*.) See also, Golding et. al., "Sexual Assault History and the Use of Health

and Mental Health Services," 16 *American Journal of Community Psychology*, 625; C.B. Smith, Response to Victims: Are the Institutional Mandates of Police and Medicine Sufficient?" 10 *Victimology* 560 (1985).

94. Note 45 *supra* at 291-292

95. Bailey et al., "A Comparative Study of Psychosocial Data on Patients With Maxillofacial Injuries in an Urban Population—A Preliminary Study," 26 *British Journal of Oral & Maxillofacial Surgery* 199 (1988) (based on English victims).

96. Zachariades et al., "Facial Trauma in Women Resulting from Violence by Men," 48 *Journal of Oral Maxillofacial Surgery* 1250 (1990) (based on Greek victims).

97. *Courtroom Medicine*, *Psychic Injuries*, Volume 12, sec. 12.60 (1980).

98. Strickland, "Sex-Related Differences in Health and Illness," 12 *Psychological Womens Quarterly* 381 (1988) (surveying literature).

99. Koss et al., "Deleterious Effects of Criminal Victimization on Women's Health and Medical Utilization," 151 *Archives of Internal Medicine* 342 (1991).

100. See, e.g., *Rex v. Thomas*, Cas. T. Hard. 278, 95 Eng. Rep. 179 (1736).

101. See, e.g., *Offenses Against the Person Act*, note 24 *supra*.

102. A.L.I. Mod.Pen.Code Arts. 210-213. Note 25 *supra* at pp. 180-181.

103. *Id.*

104. MCM 1951, note 21 *supra*, para. 127c.

105. Note 49 *supra* and accompanying text.

106. Note 27 *supra* and accompanying text.

107. 5 ALR5th 243 (1992) (Tracy Bateman, author).

108. A.R.S. § 13-105(29).

109. *State v. Garcia*, 138 Ariz. 211, 673 P.2d 955 (Ariz. App. 1983) (also rejecting contention that rupture of the victim's hymenal membrane constituted disfigurement).

110. *State v. Cain*, 152 Ariz. 479, 733 P.2d 676 (Ariz. App. 1987).

111. General Statutes §53a-3(4).

112. 175 Conn. 204, 397 A.2d 110 (1978).

113. *State v. Milum*, 197 Conn. 602, 500 A.2d 555 (1985).

114. The American Law Institute undertook the project in the early 1950s, shortly after the UCMJ, modeled on earlier state statutes, was promulgated. The first section of the Code, pertaining to crimes against property, was circulated in 1953, the same year the *Miles* opinion was rendered. Commentary and provisions regarding crimes against persons were not circulated until 1959 and were not adopted until 1962. The ALI definition continues to be the subject of judicial interpretation. See e.g., Freeman, "State v. Godwin: Defining Serious Bodily Injury in Aggravated Assault and Kidnapping Cases," 48 *Mont. L.Rev.* 179 (1987).

115. Model Penal Code, note 25 *supra*. Section 210.0(30). The Montana Criminal Code, enacted in 1973, adds to the ALI's definition of "Serious bodily injury," the words "serious mental illness or impairment." *Mont. Code Ann.* §45-2-101(59) (1985).

116. *Id.*, Section 211.1.

117. *Id.*, Section 210.0(2). The Montana Criminal Code adds "mental illness or impairment" to the ALI model definition. *Mont. Code Ann.* §45-2-101(5) (1985).

118. The Act of May 29, 1976, P.L. 94-297, § 3, 90 Stat. 585, 18 U.S.C. 113(f) added "assault resulting in serious bodily injury" to a list of offenses tryable under the special maritime and territorial jurisdiction of the United States. The maximum punishment is ten years imprisonment or a fine of \$10,000, or both.

119. *United States v. Johnson*, 637 F.2d 1224 at 1245 (9th Cir., 1980) (interpreting 18 U.S.C. 113(f)). See also *United States v. Webster*, 620 F.2d 640 (7th Cir, 1980) (rejecting argument that Congress intended to reserve sec 113(f) to assaults creating a high probability of death).

120. 326 NC 777, 392 SE2d 391 (1990).

121. Note 27 *supra*.
122. Note 117 *supra* and accompanying text.
123. *United States v. Spearman*, 23 U.S.C.M.A. 31, 48 C.M.R. 405 (1974) note 54 *supra* and accompanying text; *United States v. Haynes*, 29 M.J. 610 (A.C.M.R. 1989).
124. Note 65 *supra* and accompanying text.
125. Note 8 *supra* and accompanying text.
126. Note 45a. *supra*.
- 126a. *United States v. Lara*, notes 33 to 36 *supra* and accompanying text; *United States v. Bolton*, notes 37 to 39 *supra* and accompanying text; *United States v. Salazar*, notes 40 to 44 *supra* and accompanying text. *Lara* and *Salazar* are both cited in the *Army Lawyer* article, note 8 *supra* at 7, as standing for the legal propositions mistakenly ascribed to them in the *Miles* opinion.
- 126b. Notes 51 to 53 *supra* and accompanying text.
127. *Army Lawyer*, note 8 *supra* at 7.
128. Notes 72 to 76 *supra* and accompanying text.
129. United States Court of Military Appeals, No.68241, CMR No. 9102191, decided Sept. 27, 1993, slip opinion, p. 4.
130. Note 61 *supra* and accompanying text.
131. Note 64 *supra* and accompanying text.
132. Ecchymosis (bruising) over the left side of face and neck, back, buttocks and legs; tenderness on left side of face over zygoma (cheekbone) and head of mandible (jaw); reddened sclera (eye). Information drawn from medical records included in Record of trial CMR 9102191, note 129 *supra*.
133. Note 10 *supra* and accompanying text.
134. Notes 65 to 68 *supra* and accompanying text.
135. See, e.g., Kiev, "Conveying Psychological Pain and Suffering: Juror Empathy is Key." 29 Trial 10 (October 1993).

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