Military Sentencing Under a New Paradigm: Parameter and Criteria Offenses

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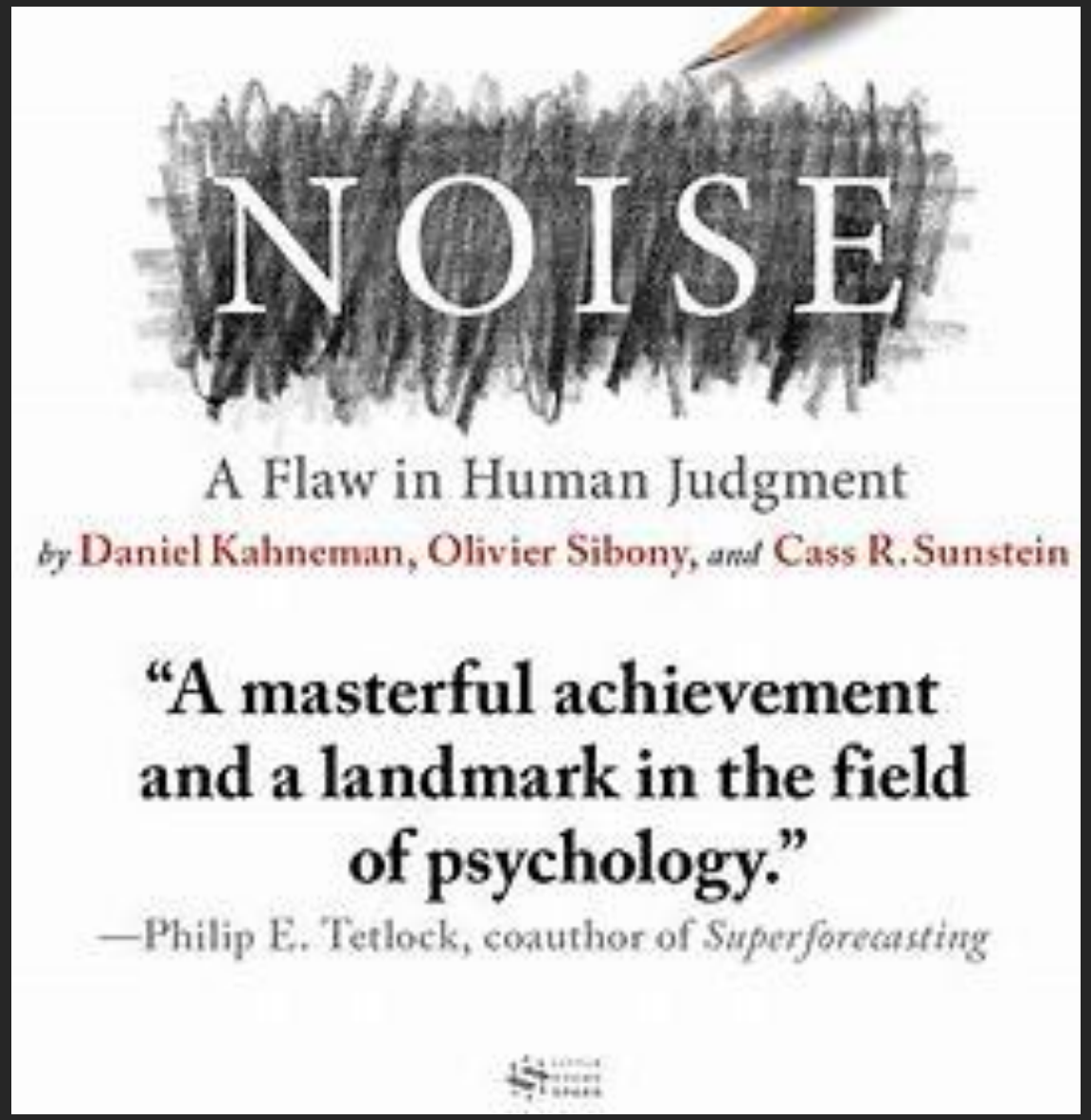
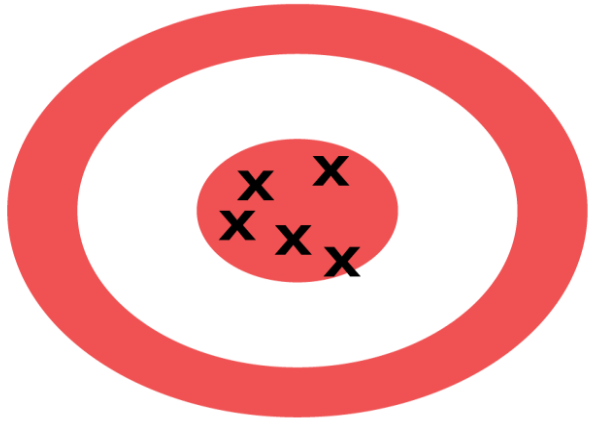
Ethics Slide

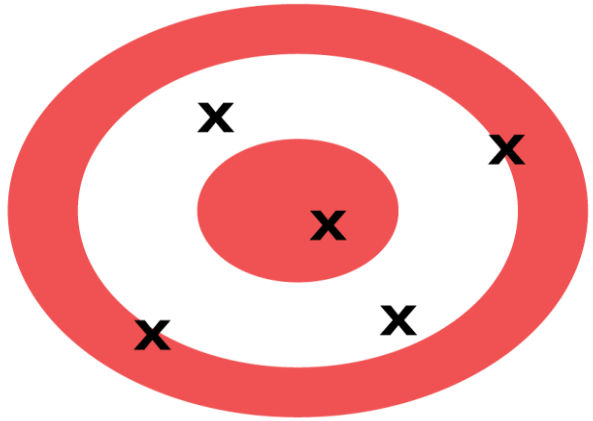
My thoughts

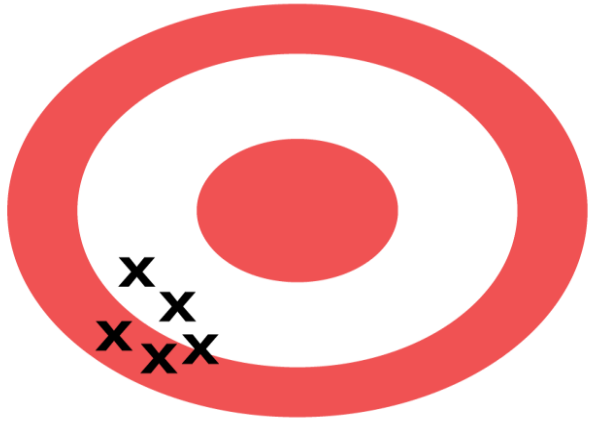
Opinions of the US Navy, DOD, Sentencing Parameter Board, NMCTJ, my wife, and definitely not my teenage daughters.



NOISE
A Flaw in Human Judgment
by Daniel Kahneman, Olivier Sibony, and Cass R. Sunstein
"A masterful achievement and a landmark in the field of psychology."
—Philip E. Tetlock, coauthor of Superforecasting







Def Jam recordings
PUBLIC ENEMY
33 1/3 RPM
STEREO
44 07545
1. BRING THE NOISE (noise version) 3:50
2. BRING THE NOISE (no noise instrumental) 4:25
3. BRING THE NOISE (no noise acappella) 1:45
COLUMBIA

Noise by Design

Multiple Sentencing Authorities

Non-Uniform

Rules/Sentencing Philosophies Promote **Discretion and Individualization**

X X
X X

Target A

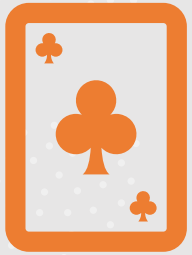
X X X
X X
X
X

Target B

XXX
XX

Target C

Problem with Noise



Lottery—subject to individual bias, preferences

Perception of Fairness, Lack of Transparency, and predictability

Reducing Noise

Military Justice Review Group

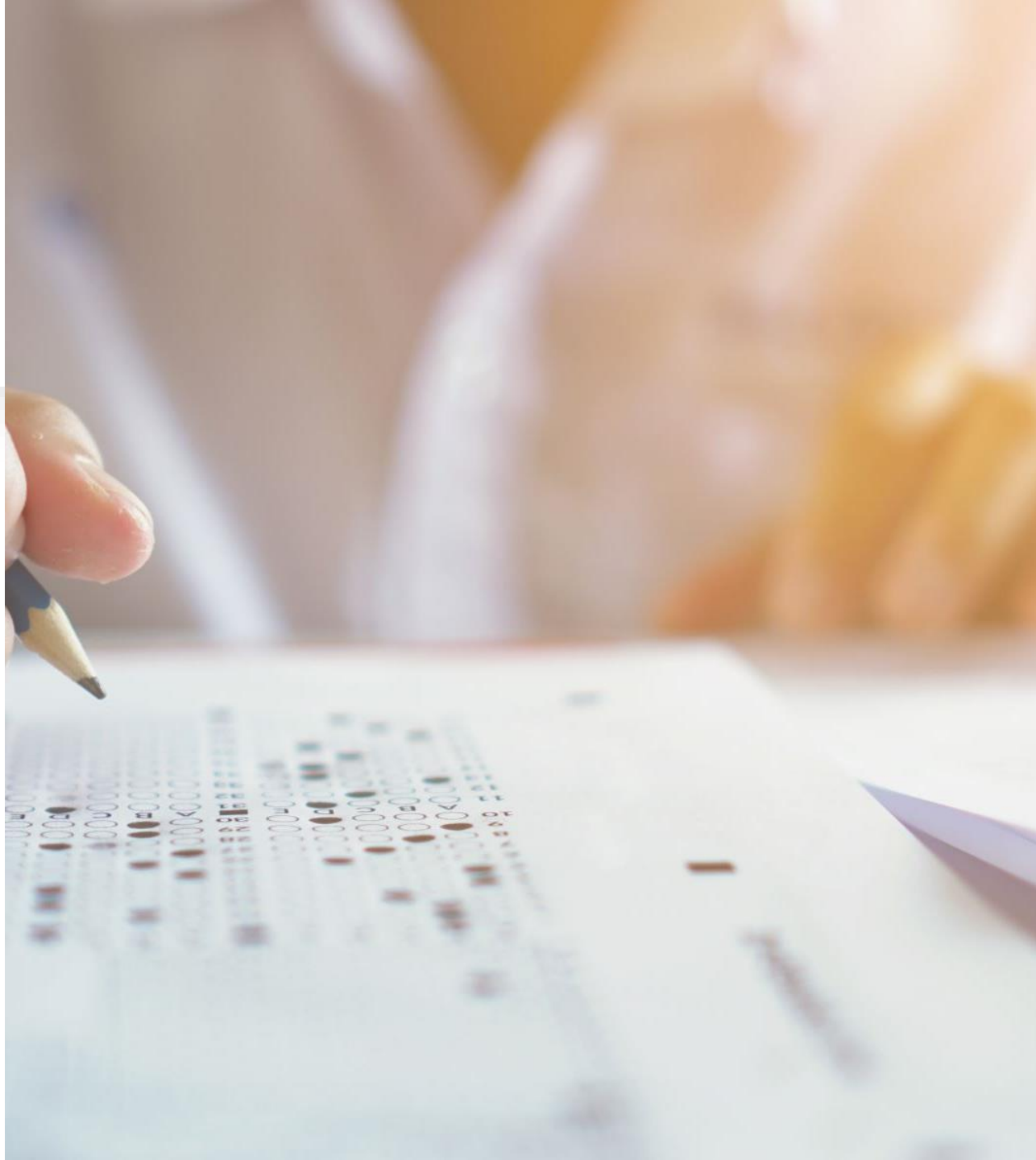
Report of the Military Justice Review Group

Part I: UCMJ Recommendations

- **Military Judge Alone Sentencing**
- **Introduced Sentencing Parameters and Criteria**
- **Sentencing Parameters and Criteria Board**
- **Recommended a Phased Approach**

NDAA 2022

- MJ Alone Sentencing
- Uniform Application
- Sentencing Parameters & Criteria Board
  - Statutory Directive?



NDAA 2022, Cont'd

- Sentencing Parameters
  - Typical Violation of the Offense
  - Severity of the offense
  - Similar Federal Guideline/other guidelines
  - Any military-specific sentencing factors
  - Sufficiently Broad to allow for individualized consideration
  - No less than 5 no more than 12
- Criteria Offenses
- >10 months to implement

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Criteria Offenses

The nature of the offense is indeterminate and unsuitable for categorization; and there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia

Appendix 12D - List of Sentencing Criteria Offenses

UCMJ Article	Title
82	Solicitation to desert (in time of war)
83	Malingering (in time of war or in hostile fire pay zone)
85	Desertion (in time of war)
89	Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office (in time of war)
90	Willfully disobeying a lawful order of superior commissioned officer (in time of war)
94	Mutiny or sedition
95	Offenses by sentinel or lookout (in time of war or while receiving special pay under 37 U.S.C. 310)
98	Misconduct as prisoner
99	Misbehavior before the enemy
100	Subordinate compelling surrender
101	Improper use of countersign
102	Forcing a safeguard
103b	Aiding the enemy
108a	Captured or abandoned property (looting or pillaging)
110	Improper hazarding of vessel or aircraft (willfully and wrongfully)
133	Conduct unbecoming an officer
134	General article
134	Self-injury without intent to avoid service (in time of war or in a hostile fire pay zone)

Article 94. Mutiny or sedition.

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

The accused's relationship to the military or civil authority against which the accused committed the mutiny or sedition;

Whether the offense disrupted or, in any way, impacted the operations of any organization;

Whether the offense was committed to avoid the movement of a vessel or hazardous duty or shirk important service;

Whether the offense was committed before or in the presence of the enemy;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the

Parameter Offenses

Appendix 12B

Offense Category	Months
1	0–12
2	1–36
3	30–120
4	120–240
5	240–480
6	Confinement for life with eligibility for parole

Sentencing Parameter Table – Confinement Range Categories

Article	*Offense*	*Offense Category*
120	Rape and sexual assault generally	
	Rape	Category 4
	Sexual assault	Category 3
	Aggravated sexual contact	Category 3
	Abusive sexual contact	Category 2
120a	Mails: deposit of obscene matter	Category 2
120b	Rape and sexual assault of a child	
	Rape of a child	Category 5
	Sexual assault of a child	Category 4
	Sexual abuse of a child	
	Cases involving sexual contact	Category 3
	Other cases	Category 3
120c	Other sexual misconduct	
	Indecent viewing	Category 1
	Indecent recording	Category 2
	Broadcasting or distributing of an indecent recording	Category 2
	Forcible pandering	Category 3
	Indecent exposure	Category 1
121	Larceny and wrongful appropriation	
	Larceny	
	Property of a value of $1,000 or less	Category 1
	Military property of a value of more than $1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	Category 2
	Property other than military property of a value of more than $1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive	Category 2
	Wrongful appropriation	
	Of a value of $1,000 or less	Category 1
	Of a value of more than $1,000	Category 1
	Of any motor vehicle, aircraft, vessel, firearm, explosive, or military property of a value of more than $1,000	Category 1
121a	Fraudulent use of credit cards, debit cards, and other access devices	

Parameters Applied:

- Offenses committed after 27 December 23
- Confinement only
- Must sentence within the confinement range, unless MJ finds specific facts that warrant a sentence outside the range
- Plea Agreements
  - agreement controls, but if outside a range MJ may reject agreement if plainly unreasonable

Rational & Critiques

- Not Federal Guidelines
- Broad
  - Lack of Concise Data
  - limit noise w/out injecting bias or unfair advantages/disadvantages
  - Embraces Discretion of MJ as an Attribute vs. "Fear of Judging"
  - MJRG Phased Approach
- What about other Noisy Areas?

Future

Board is charged with measuring the effectiveness and recommending changes

Application and Consistency