

**COMMAND PROSECUTORIAL AUTHORITY AND THE
UNIFORM CODE OF MILITARY JUSTICE—A REDOUBT
AGAINST IMPUNITY AND A NATIONAL SECURITY
IMPERATIVE**

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I. Introduction

During the American Revolution, the Continental Congress delegated executive responsibility to convene courts-martial to military commanders,¹ an arrangement that survives to this day in the U.S. military justice system. Under the Uniform Code of Military Justice (UCMJ),² commanders have the authority to refer a case to a special or general court-martial,³ provided requisite consultation has been provided by a “judge advocate,”⁴ that is, a

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¹ “[G]enerals commanding in the separate States . . . [were] expressly delegated by Congress [authority to convene courts-martial] by resolution of April 14, 1777, but it is noticeable that the authority, as ascribed to and exercised by the commander-in-chief, rested upon no express grant, but was apparently derived mainly by implication from the terms of [George] Washington’s commission.” WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 59 (2d ed. 1920) (citation and emphasis omitted).

² See generally 10 U.S.C. §§ 801–946.

³ A special court-martial (SPCM) can try most UCMJ offenses but lacks jurisdiction over penetrative sex offenses and attempts thereof, *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 201(f)(2)(D) (2019) [hereinafter MCM], has limited jurisdiction over capital offenses, *id.* R.C.M. 201(f)(2)(C)(i), and imposes a maximum sentence to confinement of six months or one year, depending how the case is referred, *id.* R.C.M. 201(f)(2)(B). A limited subset of offenses can be referred to a SPCM presided over by a military judge alone, which can impose a maximum sentence to confinement of six months, as determined solely by the judge. *Id.* R.C.M. 201(f)(2)(B), (E). For all other SPCMs, the maximum sentence to confinement is one year and, while presided over by a military judge, at the accused’s behest, military jurors (“members” who sit on a “panel”) may adjudicate the case. See *id.* R.C.M. 201(f)(2)(E), 501(a)(2). A general court-martial (GCM) has jurisdiction over all UCMJ offenses and can adjudge the maximum authorized punishment authorized for an alleged offense, including death. *Id.* R.C.M. 201(f)(1)(A). Further, a GCM is presided over by a military judge and, at the behest of the accused, can be adjudicated by a military panel, unless the Government referred the case for capital punishment, in which case a panel is mandatory. *Id.* R.C.M. 501(a)(1).

⁴ UCMJ art. 34 (2016).

uniformed military lawyer.⁵ Legislation recently proposed in the Senate, the Military Justice Improvement Act of 2020 (MJIA),⁶ would strip the commander of this authority,⁷ including the authority to initiate court-martial proceedings,⁸ and vest these authorities in a judge advocate outside the chain of command.⁹ This delegation of authority to judge advocates would, however, be limited to “covered offenses,” which are those primarily contained in Articles 118 through 132, UCMJ,¹⁰ and any conspiracy, solicitation, or attempt to commit a “covered offense.”¹¹

⁵ MCM, *supra* note 3, R.C.M. 103(18).

⁶ 166 CONG. REC. S3413–14 (daily ed. June 25, 2020) (statement of Sen. Gillibrand proposing the “Military Justice Improvement Act of 2020” as an amendment to the National Defense Authorization Act for Fiscal Year 2021).

⁷ *Id.* at S3413 (proposing so in section 539A(d)(2)).

⁸ *Id.* (proposing so in section 539A(d)(1)). Under the proposed legislation, if the prosecutor decided against preferring charges with an eye toward a GCM or SPCM, the allegation could be adjudicated by a commander via a summary court-martial (SCM) or by means of a non-judicial punishment (NJP) proceeding. *Id.* (proposing so in section 539A(d)(6)). An SCM is “a simple disciplinary proceeding” that is not a “criminal forum,” has no jurisdiction over capital offenses and penetrative sex offenses and can adjudicate a maximum sentence to confinement of no more than 30 days. MCM, *supra* note 3, R.C.M. 1301(a)–(d). An NJP proceeding is an administrative one adjudicated solely by a commander who can impose sanctions such as restriction, rank reduction, and forfeiture of pay. *See generally* UCMJ art. 15 (2016).

⁹ 166 CONG. REC. S3413 (daily ed. June 25, 2020) (proposing so in section 539A(d)(1)).

¹⁰ The reform only applies to “covered offenses,” which are all UCMJ offenses that are not deemed “excluded offenses.” *See id.* (bifurcating offenses in section 539A(b)–(c)). “Excluded offenses” include those enumerated in Article 122a, UCMJ (receiving stolen property), Article 123, UCMJ (offenses concerning Government computers), and Article 123a, UCMJ (making, drawing, or uttering check, draft, or order without sufficient funds). *Id.* (enumerating offenses in section 539A(c)(2)). “Excluded offenses” also include those contained in Articles 83 through 117, UCMJ, while Article 93a, UCMJ (cruelty and maltreatment) and Article 117a, UCMJ (wrongful broadcast), remain covered offenses. *Id.* (enumerating offenses in section 539A(c)(1)–(2)). Other “excluded offenses” include all Article 133, UCMJ, offenses (conduct unbecoming an officer and a gentleman) and offenses under Article 134, UCMJ (conduct which is service discrediting or prejudicial to good order and discipline), except that the following Article 134 offenses remain “covered offenses:” “child pornography, negligent homicide, indecent conduct, [and] pandering and prostitution.” *Id.* (enumerating offenses in section 539A(c)(1), (3)). Finally, “excluded offenses” also include any conspiracy, solicitation, or attempt to commit any “excluded offense.” *Id.* (stating so in section 539A(c)(4)–(6)).

¹¹ *Id.* (identifying so in section 539A(b)(2)–(4)). Note that even for “covered offenses,” MJIA applies only to those offenses “for which the maximum punishment authorized . . . includes confinement for more than one year.” *Id.* (proposing so in section 539A(b)(1)). Consequently, the following otherwise “covered offenses” would be excluded from the reform based on this limitation: wrongful appropriation under Article 121, UCMJ, where the value of the property is \$1,000 or less; simple assault under Article 128, UCMJ; assault consummated

While these “covered offenses” would encompass a broad swath of crimes, predominantly those familiar to the common law,¹² the impetus for the reform narrowly relates to the prevalence of sexual violence crimes in the military. As MJIA’s primary legislative sponsor explained in 2019:

[T]he chairman of the Joint Chiefs of Staff, Martin Dempsey, said the military was “on the clock” to fix [sexual assaults in the military]—and indicated we would be right to bring a bill back to the floor in a year if they hadn’t solved the problem. It’s now been five years. . . . Not only is sexual assault still pervasive across all branches of our military, but it has dramatically increased over the last two years¹³

The 2019 Department of Defense Sexual Assault Prevention and Response (SAPR) Report estimated the number of penetrative and non-penetrative sex offenses in the military, which remained virtually unchanged from 20,300 in 2014 to 20,500 in 2018.¹⁴ However, this latter number was registered after sexual assaults were estimated to have dropped to 14,900 in 2016, only to spike an estimated 38% in 2018.¹⁵

Assessing whether removing command prosecutorial authority would improve these numbers requires understanding the purpose military law

by a battery under Article 128, UCMJ; assault upon a noncommissioned or petty officer, not in the execution of office under Article 128, UCMJ; unlawful entry under Article 129, UCMJ; unnecessary delay in disposing of a case under Article 131f, UCMJ. MCM, *supra* note 3, app. 12 (providing a survey of maximum punishments for violations of the UCMJ).¹² “Covered offenses” are primarily those contained in Articles 118 through 132, UCMJ, and are mostly common law-like in nature. These articles cover offenses such as murder, involuntary manslaughter, death or injury of an unborn child, child endangerment, rape, sexual assault, other sexual misconduct, larceny, wrongful appropriation, robbery, kidnapping, arson, burning property with intent to defraud, assault, maiming, burglary, and unlawful entry. *See generally* 10 U.S.C. §§ 918–932.

¹³ Kirsten Gillibrand, *Gillibrand: The Military Justice Improvement Act Would Give Service Members a Justice System That Works*, MIL. TIMES (June 30, 2019), <https://www.militarytimes.com/opinion/commentary/2019/06/30/gillibrand-the-military-justice-improvement-act-would-give-service-members-a-justice-system-that-works>.

¹⁴ SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, at 5 (2019) [hereinafter SAPR REPORT], https://www.sapr.mil/sites/default/files/FY18_DOD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (reporting the results of a survey of Service members).

¹⁵ *Id.* (indicating that there were an estimated 20,500 sexual assaults in the military in 2018, versus 14,900 in 2016, which amounts to a 38% increase).

serves and the separate responsibilities of commanders and lawyers in furthering that purpose. The 2019 *Manual for Courts-Martial* articulates the purpose of military law as follows: “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 to strengthen the national security of the United States.”¹⁶

Note that “maintaining good order and discipline” is the commander’s duty in military law.¹⁷ That is, commanders are duty-bound to exact their subordinates’ obedience to law and disciplinary standards, also referred to as the duty “to control,” an obligation that is criminally enforceable in both war and peace.¹⁸ By contrast, lawyers have no such duty, but they do have an obligation that squarely aligns with military law’s purpose to “promote justice.” That is, prosecutors have a duty to “seek justice,”¹⁹ a duty which empowers them to take action that commanders could be prosecuted for taking—decisions not to prosecute sexual assaults and other serious crimes.²⁰

A commander’s responsibility is best understood as a byproduct of authority that all formal leaders possess to varying degrees. It has two components: “[t]he right to give orders” to subordinates and “[t]he power

¹⁶ MCM, *supra* note 3, pt. I, ¶ 3.

¹⁷ See *Brown v. Glines*, 444 U.S. 348, 356 (1980) (stating it is the military commander’s duty to maintain “morale, discipline, and readiness” in the conduct of operations); *United States v. Harris*, 5 M.J. 44, 62 (C.M.A. 1978) (stating “the courts have recognized the commander’s duty to maintain the order, security and discipline necessary to military operations.” (quoting *United States v. Burrow*, 396 F. Supp. 890, 898 (D. Md. 1975))). See also MCM, *supra* note 3, app. 2.1, ¶ 2.1 (“The military justice system is a powerful tool that preserves good order and discipline It is a commander’s duty to use it appropriately [for that purpose].”).

¹⁸ See *infra* Part II.

¹⁹ *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Oct. 28, 2020) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”); see *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

²⁰ *Criminal Justice Standards for the Prosecution Function*, *supra* note 19 (“The prosecutor serves the public interest . . . by exercising discretion to not pursue criminal charges in appropriate circumstances.”). See *infra* Part II.A (explaining that commanders lack discretion to *sua sponte* forgo prosecuting certain serious crimes, including sexual assaults).

to exact obedience.”²¹ “Responsibility,” by contrast “is a corollary of [that] authority, it is the natural consequence and essential counterpart, and whatsoever authority is exercised, responsibility arises.”²² Removing a commander’s authority to “exact obedience” therefore necessarily eliminates his responsibility for its exercise, which, in turn, risks subordinates’ diminished obedience to command directives—a risk U.S. courts have long sought to counter in the military context.²³

General Dwight Eisenhower recognized this very risk, long ago warning, “If you make a completely separate staff body to whom is charged no responsibility for winning the war and say, ‘You can do as you please about these people,’ you are going to have trouble.”²⁴ That “trouble” arises when commanders lack the formal authority to “employ . . . forces in pursuit of a common purpose,” that is, when they lack “unity of command.”²⁵ Necessary to achieve unity of command is “unity of effort,” also known as “unity of direction,”²⁶ a principal that can be expressed as “one head and one plan for a group of activities having the same objective.”²⁷

²¹ HENRI FAYOL, *GENERAL AND INDUSTRIAL MANAGEMENT* 21 (Constance Storrs trans., 2d prt. 1955) (1916).

²² *Id.*

²³ *See* *Parker v. Levy*, 417 U.S. 733, 755 (1974) (“An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” (quoting *In re Grimley*, 137 U.S. 147, 153 (1890))); *United States v. New*, 55 M.J. 95, 111 (C.A.A.F. 2001) (“To persevere and prevail amidst the danger, death, destruction, and chaos of armed combat, military personnel must develop the disciplined habit of prompt obedience to the directives of their superiors.”); *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (“The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army.”).

²⁴ *Officer Personnel Act of 1947: Hearing on H.R. 3830 Before the S. Comm. on Armed Servs.*, 80th Cong. 19 (1947) [hereinafter *Hearing on H.R. 3830*] (statement of General Dwight D. Eisenhower).

²⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at GL-17 (17 Jan. 2017) (C1, 22 Oct. 2018) [hereinafter JP 3-0] (defining “unity of command” as “[t]he operation of all forces under a single responsible commander who has the requisite authority to direct and employ those forces in pursuit of a common purpose.”).

²⁶ *Id.* at A-2 to A-3 (“Unity of effort—the coordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization—is the product of successful unified action.”); FAYOL, *supra* note 21, at 25–26 (“Unity of direction (one head one plan) must not be confused with unity of command (one employee to have orders from one superior only) Unity of command does not exist without unity of direction, but does not flow from it.”).

²⁷ FAYOL, *supra* note 21, at 25.

The UCMJ recognizes commanders' formal authority to direct the employment of force towards that single mission objective, towards "winning the war,"²⁸ and ensures the prosecutor's objective to "seek justice" remains subordinate thereto. In particular, the UCMJ vests in commanders, rather than lawyers, authority over offenses that directly bear upon the ability to exact obedience in military operations, what can be referred to as "operational offenses."²⁹ These offenses, for the most part, are uniquely military in nature and primarily classified by MJIA as "excluded offenses" that are precluded from the reform, including Articles 83 through 117, 133, and 134, UCMJ,³⁰ and any alleged conspiracy, solicitation, or attempt to violate these articles.³¹

There is a category of operational offenses, however, which MJIA does not exclude from the reform and which governs the application of lethal force on the battlefield: law of war targeting offenses.³² These offenses are not contained in the UCMJ because, under long-standing U.S. policy, "[o]rdinarily persons subject to the UCMJ should be charged with a specific violation of the UCMJ rather than a violation of the law of war."³³

²⁸ *Hearing on H.R. 3830, supra* note 24 (statement of General Dwight D. Eisenhower).

²⁹ Eugene R. Fidell, *U.S. Military Justice and "Operational Mishaps": A Primer*, JUST SEC. (Apr. 24, 2017), <https://www.justsecurity.org/40208/u-s-military-justice-operational-mishaps-primer> (defining "operational offenses" as "acts or omissions that are committed in the course of an approved and by hypothesis approvable military mission.").

³⁰ "Excluded offenses" are primarily those contained in Articles 83 through 117, 133, and 134, UCMJ, and are, for the most part, uniquely military in nature. These articles cover offenses such as malingering, missing movement, jumping from a vessel, dereliction of duty, failure to obey a lawful order, mutiny, sedition, unlawful detention, misbehavior before the enemy, subordinate compelling surrender, improper use of a countersign, forcing a safeguard, spying, espionage, aiding the enemy, damage or loss of military property, waste or destruction of non-military property, endangerment offenses, riot, breach of peace, conduct unbecoming an officer, and conduct which is service-discrediting or prejudicial to good order and discipline. *See generally* 10 U.S.C. §§ 883–917, 933–934.

³¹ 166 CONG. REC. S3413 (daily ed. June 25, 2020) (proposing so in section 539A(c)(4)–(6)).

³² Law of war targeting offenses punish violations of the following duties imposed by the laws of war: "target identification," "specialized warnings," "generalized warnings," "feasible precautions," "principle of proportionality," and "command responsibility." OFF. OF THE JUDGE ADVOC. GEN., U.S. DEP'T OF ARMY, TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT tbl.1 (2017) [hereinafter TARGETING SUPPLEMENT].

³³ MCM, *supra* note 3, R.C.M. 307(c)(2) discussion.

Nonetheless, targeting offenses are primarily punished under the “covered offenses” that MJIA would remove command authority to prosecute.³⁴

Regarding the removal of these “covered offenses” from command authority, MJIA would compromise the ability of commanders “to control” military operations with consequences its drafters surely did not intend—impunity for serious crime, including sexual assaults, and a military less capable of overcoming its adversaries. Part II of this article explains how the law punishes commanders for failure “to control” their subordinates, how they are presumed to have caused subordinate crimes occurring after they “knew” or “should have known” of them, but only to the extent of their authority to exercise that control. Part III demonstrates that by eliminating prosecutorial authority as a means to exercise that control, MJIA fosters impunity for serious crimes, including sexual assaults, while the status quo reduces criminality, provided the duty “to control” is enforced. Part IV shifts focus to law of war targeting offenses, explaining why commanders are most qualified to assess compliance with these norms, and how MJIA vests lawyers with prosecutorial discretion over them. In so doing, Part V explains how commanders and lawyers would share prosecutorial authority over norms governing the same lethal targeting operation, that their divergent objectives would compromise “unity of effort” in those operations, and that “trouble” would therefore result.

II. The Duty to Control Subordinates—Responsibility of the Commander

A. The Four Command Responsibility Obligations

“Trouble” abounds in military operations, and the law therefore attempts to protect against it by obligating commanders to exact obedience from their subordinates.³⁵ In particular, on the battlefield the law of war obligates commanders to take “reasonable measures . . . [to] control their

³⁴ See discussion *infra* Part IV (explaining that law of war targeting offenses are enforced under Articles 109, 118, 119, 128, and 134, UCMJ, and how MJIA impacts their enforcement).

³⁵ This article uses the terms “duty,” “obligation,” and “obligating” interchangeably. See *Duty*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“An *obligation*, recognized by the law, requiring [the] actor to conform to certain standard[s] of conduct for the protection of others against unreasonable risk.” (emphasis added)).

subordinates,³⁶ a duty derived from treaty law regulating the conduct of hostilities³⁷ and enforceable by means of the UCMJ.³⁸ Federal courts, however, in recognizing the obligation, have determined it also applies outside of hostilities.³⁹ Federal statutes similarly reflect a customary obligation of commanders in all situations to prevent, discipline, and discover unlawful subordinate behavior,⁴⁰ a dereliction of which is also punishable under the UCMJ.⁴¹ Other U.S. and international sources have extrapolated the duty “to control” as imposing obligations nearly identical to those in Federal statute that require commanders to take “necessary and reasonable” measures in relation to their subordinates as follows:

- (1) Prevent unlawful harm to persons and property;⁴²

³⁶ *In re Yamashita*, 327 U.S. 1, 15 (1946) (“[The] purpose [of the law of war] to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take *reasonable measures* for their protection. Hence the law of war presupposes that its violation is to be avoided through the *control* of the operations of war by commanders who are to some extent responsible for their subordinates.” (emphasis added)).

³⁷ *Id.* at 15–16.

³⁸ A duty enforceable under the UCMJ may be imposed by “the law of war, written and customary,” *United States v. Payne*, 40 C.M.R. 516, 519 (A.C.M.R. 1969), as well as “by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service.” MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(a). While the UCMJ has no specific provision that would punish a commander’s violation of the duty to control, such violation would be punishable under Article 134, UCMJ, which criminalizes “all disorders and neglects to the prejudice of good order and discipline in the armed forces,” UCMJ art. 134 (2016), including acts or omissions that violate “customs of the Service.” MCM, *supra* note 3, pt. IV, ¶ 91.c.(2)(b) (“Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them.”).

³⁹ *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (stating the command responsibility doctrine applies not only in “wartime,” but also in “peacetime”); *Mamani v. Berzaín*, 309 F. Supp. 3d 1274, 1305 (S.D. Fla. 2018).

⁴⁰ 10 U.S.C. §§ 3583, 8583, 5947 (requiring “commanding officers” and “others in authority” to be “vigilant in inspecting the conduct” of persons placed under their authority and “to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them.”).

⁴¹ See *supra* note 38 and accompanying text (explaining that a violation of “customs of the Service” may be prosecuted under Article 134, UCMJ).

⁴² TARGETING SUPPLEMENT, *supra* note 32 (“Take ‘necessary and reasonable measures’ to prevent subordinates from unlawfully harming persons and property protected by the Law of War.”); U.S. DEP’T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER’S HANDBOOK ON THE LAW OF LAND WARFARE para. 8-31 (7 Aug. 2019) (C, 20 Sept. 2019) [hereinafter FM 6-27] (stating “commanders or certain civilian superiors with similar authorities” are responsible if they “failed to take ‘necessary and reasonable’ measures to prevent or repress those violations.”); Statute of the International Tribunal for the Prosecution of Persons

(2) Discipline subordinates who unlawfully harm persons and property;⁴³

(3) Diligently monitor subordinate conduct;⁴⁴ and

(4) Inquire into allegations that subordinates unlawfully harmed persons or property.⁴⁵

Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 7(3), May 25 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY Statute] (stating in the context of subordinate law of war violations, a commander must “take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”); Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute] (stating in the context of subordinate law of war violations a commander must “take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”); Rome Statute of the International Criminal Court, 17 July 1998 art. 28(a)(i)–(ii), U.N. Doc. A/CONF.183/9 (2002) [hereinafter Rome Statute] (“That military commander . . . [must] take all necessary and reasonable measures within his or her power to prevent or repress their commission . . .”).

⁴³ See FM 6-27, *supra* note 42 (stating “commanders” have a duty to “punish”); ICTY Statute, *supra* note 42 (articulating that a “superior” has a duty “to punish”); ICTR Statute, *supra* note 42 (articulating that a “superior” has a duty “to punish”); Rome Statute, *supra* note 42, art. 28(a)(ii) (stating the “commander” has a duty “to repress” subordinate crimes).

⁴⁴ TARGETING SUPPLEMENT, *supra* note 32 (“Take reasonable steps to monitor subordinate compliance with the Law of War.”); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (June 15, 2009) (stating that a commander has an “active duty . . . to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.” (citation omitted)); United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1271 (Feb. 19, 1948) (“Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports . . . constitutes a *dereliction of duty* which he cannot use in his own behalf.” (emphasis added)). *Editor’s Note* in Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 10 (1972) (quoting the instruction provided to Captain Ernest Medina’s panel during his court-martial for the “My Lai massacre:” “[A] military superior in command is responsible . . . to make certain the proper performance by his subordinates of their duties as assigned by him.”).

⁴⁵ MCM, *supra* note 3, R.C.M. 303 (“Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”); Rome Statute, *supra* note 42, art. 28(a)(ii) (requiring commanders to report law of war violations “to the competent authorities for investigation and prosecution.”). See OFF. OF GEN. COUNS., DEP’T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM 15 (2020) (defining a “reportable incident” as “[a]n incident that a unit

B. The Elements of Command Responsibility

1. Reasonable Measures Required

Understanding how MJIA impacts the enforcement of these obligations under the UCMJ first requires understanding how they are enforced outside the UCMJ context. In any context, the first step to assess a dereliction of a command responsibility obligation requires assessing whether the action was reasonable in the circumstances as they appeared at the time.⁴⁶ An alleged unlawful act or omission is subjectively reasonable if undertaken in good faith, that is, if the commander “could honestly conclude” his or her behavior was lawful.⁴⁷ Such act or omission is unreasonable if done in bad faith,⁴⁸ if the accused acted with “actual knowledge” the act or omission contravened his or her duties.⁴⁹ If there is insufficient evidence of subjective unreasonableness, an alleged act or omission may still be objectively unreasonable if it violated the “*plain, known Rules*” superiors are expected to uphold.⁵⁰ “This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony,

commander or other responsible official determines, based on *credible information*, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict” (emphasis added).

⁴⁶ See MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (articulating the objective and subjective reasonableness standards for assessing a negligent and willful dereliction of duty under Article 92, UCMJ); Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 170 (June 8, 2018) (“There is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight. Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time.”).

⁴⁷ See *infra* notes 185–88 and accompanying text (discussing the application of subjective assessment in the context of operational norms).

⁴⁸ See *infra* notes 186–87 and accompanying text (discussing the “good faith” requirement in the context of operational norms).

⁴⁹ MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (stating that a willful dereliction of duties requires the accused to have had “actual knowledge” of the obligation at issue). See *infra* notes 185–88 and accompanying text (explaining in the context of discretionary duties that an accused has not acted in “good faith” when he or she acted with “actual knowledge” that the act in question violated a duty).

⁵⁰ See *infra* notes 180–83 and accompanying text (discussing the application of the objective assessment in the context of operational offenses).

testimony of persons who have held similar or superior positions, or similar evidence.”⁵¹

2. *Assessing a Dereliction*

If the alleged act or omission was either subjectively or objectively unreasonable, liability may ensue if that act or omission was the product of a deliberate dereliction of duty or of culpable neglect.⁵² In the case of culpable neglect, the dereliction must be willful⁵³ or, at a minimum, culpably negligent if done in violation of the laws of war.⁵⁴ In the case of deliberate omissions, the dereliction must, at a minimum, be willful and with intent to cause the resulting harm.⁵⁵ The elements of each will be discussed in turn.

a. *Culpable Neglects*

Regarding culpable neglects, liability is established when the commander’s alleged dereliction satisfies the “elements of proof” generally applicable in military law in establishing a neglect of duties.⁵⁶ Those elements are as follows:

⁵¹ MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (discussing the knowledge requirement in the context of establishing a dereliction of duty under Article 92, UCMJ).

⁵² Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (July 3, 2003) (“A military commander . . . may . . . be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully [sic] disregarding them.”); UNITED NATIONS WAR CRIMES COMM’N, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 60 (1949) (“In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused’s failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully [sic] disregarding them, not caring whether this resulted in the commission of a war crime or not.”).

⁵³ *Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35; UNITED NATIONS WAR CRIMES COMM’N, *supra* note 52; *see* MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(c) (“‘Willfully’ means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act.”).

⁵⁴ *See infra* notes 118–19 and accompanying text (explaining “culpable negligence” is the lowest level of *mens rea* required to establish a law of war violation).

⁵⁵ *See Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35; UNITED NATIONS WAR CRIMES COMM’N, *supra* note 52.

⁵⁶ TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)–(b) (citing Article 92, UCMJ (dereliction of duty), in articulating the “elements of proof” to establish a law of war violation, including a command responsibility dereliction).

- (1) That the accused had a certain duty;⁵⁷
- (2) That the accused by willfulness or [culpable] negligence was derelict in the performance of that duty; and
- (3) That such dereliction of duty resulted in unlawful harm to persons or property.⁵⁸

b. Deliberate Omissions

Regarding deliberate violations, liability is established by showing the accused's act or omission establishes principal liability,⁵⁹ a type of liability that can be established when there is a deliberate omission accompanied by an intent to cause any resulting harm.⁶⁰ The required elements to establish principal liability for a command responsibility dereliction are as follows:

⁵⁷ *Id.* ¶ 4(c) (“Whether a service member is bound by a particular . . . duty will depend upon whether he or she has authority to exercise the discretion implied by the . . . duty in question. For example, . . . the duty to conduct proportionate attacks will ‘normally’ only arise if the service member ‘has authority over military operations.’”).

⁵⁸ Note that “harm” is not limited to physical harm to persons and property, but also extends to a violation of a legal protection afforded to persons and property. For instance, “harm” occurs when there is a “taking of hostages” prohibited by the laws of war, even when the victims suffer no physical harm. Geneva Conventions Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; *Injury*, BLACK’S LAW DICTIONARY (7th ed. 1999) (defining “injury” as synonymous with “harm or damage” which occurs when there is a “violation of another’s legal right, for which the law provides a remedy”). Similarly, “extensive . . . appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” in violation of the law of war also amounts to harm even if no physical harm resulted to the property. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

⁵⁹ 10 U.S.C. § 950q (“[A] superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a *principal*.” (emphasis added)).

⁶⁰ *See, e.g.*, MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b)(ii) (“If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such a noninterference is *intended to and does operate as an aid or encouragement to the actual perpetrator*.” (emphasis added)).

(1) That the accused had certain duties to interfere in the commission of an unlawful act;⁶¹

(2) That the accused did not perform those duties;⁶²

(3) That unlawful harm occurred;⁶³

(4) That such dereliction was intended to operate as an aid or encouragement to the actual perpetrator;⁶⁴ and

(5) That such dereliction did operate as an aide or encouragement to the actual perpetrator.⁶⁵

3. *The Causation Element*

a. Physical Harm Not Required; Causation Not Always Relevant

Note that under either of the aforementioned theories, there is a causation of “harm” element. Causation is generally established in criminal law by showing an alleged criminal act was the “but for” cause of the

⁶¹ See *supra* notes 42–45 and accompanying text (discussing the four command responsibility obligations); MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (explaining principal liability under Article 77, UCMJ). See also *United States v. Simmons*, 63 M.J. 89, 94 (C.A.A.F. 2006) (Effron, J., concurring) (“The crime of aiding and abetting [under Article 77, UCMJ.] through nonperformance of a duty has four components: (1) duty (the accused has “a duty to act”); (2) inaction (the accused “has a duty to interfere in the commission of an offense, but does not interfere”); (3) intent (the “noninterference is intended to . . . operate as an aid or encouragement to the actual perpetrator” of the underlying crime); and (4) effect on the perpetrator (the “noninterference . . . does operate as an aid or encouragement to the actual perpetrator”).” (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 1.b.(2)(b) (2005))).

⁶² MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (explaining that to establish principal liability for a failure to act under Article 77, UCMJ, it must be proven that the accused “has a duty to interfere in the commission of an offense, but does not interfere . . .”).

⁶³ Principal liability theory presupposes that an actual perpetrator committed an underlying crime, and this element ensures that the underlying crime is established. See, e.g., *id.* (“If a person . . . has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime . . .”). See also *supra* note 58 and accompanying text (explaining that unlawful “harm” includes not just physical harm to persons and property, but also harm to a legal protection afforded to such persons and property).

⁶⁴ MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (stating that principal liability for a failure to act requires establishment that the “noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.”).

⁶⁵ *Id.*

resulting harm.⁶⁶ Causation, however, has particular application in the command responsibility context that requires further clarification. First, when the alleged dereliction is that the commander failed to discipline the subordinate, causation of harm is not required to establish guilt. This is because the obligation to discipline arises after the subordinate has committed the unlawful harm; therefore, it is not possible for a commander's dereliction to have caused that harm.⁶⁷ On the other hand, if the commander fails to discipline the subordinate, and that failure causes further unlawful harm, the commander can be held liable for this latter harm.⁶⁸

b. Rebuttable Presumption of Causation

Demonstrating how that commander is held liable for this latter harm requires further explanation. While causation is required in the context of command responsibility,⁶⁹ any causation analysis involving omissions requires a "highly speculative" inquiry as to "how a human being would have reacted if the precaution [in question] had been taken."⁷⁰ Consequently,

⁶⁶ See *Burrage v. United States*, 571 U.S. 204, 211 (2014) (stating that "but for" causation represents "the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." (quoting MODEL PENAL CODE § 2.03 explanatory note (AM. L. INST. 2019))); *United States v. Bailey*, 75 M.J. 527, 532–33 (A. Ct. Crim. App. 2015) (stating the proximate cause and intervening cause instructions in the Military Judges' Benchbook sufficiently address the "but for" causation requirement the Supreme Court addressed in *Burrage*); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 399 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (stating in the context of commander's duty to prevent, "but for" causation establishes the "necessary causal nexus" between the crimes committed by subordinates and the superior's failure to act). *But see* *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 (Mar. 21, 2016) (stating that in the context of command responsibility, there is no requirement under the Statute of the International Criminal Court to show "but for" causation between the commander's omission and the crimes committed." (citation omitted)).

⁶⁷ *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Judgment, ¶ 188 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) ("[N]o causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence." (citation omitted)).

⁶⁸ *See id.* ¶ 133 ("[T]he Chamber is of the opinion that by failing to take [necessary and reasonable] measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur.").

⁶⁹ *Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 ("It is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.").

⁷⁰ David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1343 (1992).

“[a] court’s resolution of these post-hoc-speculative proof problems actually is a question of policy” that is sometimes resolved by establishing “a rebuttable presumption that the omitted precaution would have prevented the harm.”⁷¹ This is precisely the approach that the U.S. Congress has taken in the Military Commissions Act⁷² and that both U.S. Federal courts and international tribunals have endorsed in the context of command responsibility.⁷³

The logic underpinning this approach is that commanders are presumptively in “effective control” of their subordinates, and “but for” their dereliction in properly executing that control, the harm would not have occurred.⁷⁴ Therefore, once the commander-subordinate relationship is established, the presumption of causation triggers, though it can be rebutted one of two ways. First, the presumption is rebutted if the commander proves there is no casual “nexus” between the dereliction and the harm caused,⁷⁵

⁷¹ *Id.* at 1344.

⁷² See 10 U.S.C. § 950q (establishing command responsibility liability for foreign commanders without requiring a causation element).

⁷³ In particular, those courts and tribunals agree that proof an accused was the commander of the subordinate who caused the unlawful harm triggers the presumption. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1299 (11th Cir. 2002) (stating with respect to a commander’s responsibility for subordinate crimes under the Torture Victims Protection Act that “causation is presumed to be the result of their failure to prevent those individual crimes.”); *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009) (following *Ford*). Cf. *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Judgment, ¶ 193 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (“It is presumed that there is such a [casual] nexus between the superior’s omission and those crimes. The Prosecution therefore has no duty to establish evidence of that nexus. Instead, the Accused must disprove it.”). This approach is also consistent with how U.S. war crime tribunals have applied the doctrine. *E.g.*, *United States v. Toyoda*, Transcript, at 5005–06 (Int’l Mil. Trib. for the Far East Sept. 6, 1949), <https://digital.lib.usu.edu/digital/collection/p16944coll30/id/9> (listing the elements of command responsibility without causation).

⁷⁴ See *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 399 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“This is not to say that, conceptually, the principle of causality [in the command responsibility context] is without application In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.”).

⁷⁵ While a “casual nexus” is presumed in the context of command responsibility, tribunals have not defined what that causal nexus entails or how it is rebutted. *Hadžihasanović*, Case No. IT-01-47-T, Judgment, ¶ 193 (stating “the Accused must disprove” the casual “nexus” in the context of superior responsibility); *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 (Mar. 21, 2016) (“It is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it. . . . [However,

which is established for U.S. commanders by showing the omission did not “operate as an aide or encouragement to the actual perpetrator.”⁷⁶ Second, it is rebutted if the accused lacked the “material ability” to take the necessary measures alleged.⁷⁷

4. *The Duty Element—Material Ability Required*

The phrase “material ability” here refers to the “authority” of the commander to have taken a “necessary” omitted action, and is requisite to establish the commander had a duty to act to prevent, discipline, monitor, or inquire.⁷⁸ Moreover, even if the commander had the “material ability” to take the omitted measure alleged, to be punishable, that measure must have been “necessary,” that is, a measure in the circumstances which the commander had no discretion but to affirmatively exercise.⁷⁹

The first step in assessing “material ability,” therefore, is to ask whether the accused possessed the requisite command authority over the

the law] does not require the establishment of ‘but for’ causation between the commander’s omission and the crimes committed.” (citation omitted)).

⁷⁶ While the Military Commission Act’s principal liability provision presumes causation, *see* 10 U.S.C. § 950q, the UCMJ’s principal liability requires a causal nexus between the omission and the resulting harm. MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b). That causal nexus is established under the UCMJ if the alleged omission “operated as an aide or encouragement to the actual perpetrator.” MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b). Consequently, this degree of causation can be deduced as the “causal nexus” applicable to U.S. commanders in the command responsibility context.

⁷⁷ *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 378 (“[I]t is the Trial Chamber’s view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have . . . the material ability to prevent and punish the commission of these offences.”); *see* *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 588 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) (“[N]ecessary measures can include reporting the matter to competent authorities where this report is likely to trigger an investigation or initiate disciplinary proceedings, carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders, protesting or criticising criminal action and taking disciplinary action against the commission of crimes.” (citations omitted)).

⁷⁸ *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 5 (June 8, 2018) (“The scope of the duty to take ‘all necessary and reasonable measures’ is intrinsically connected to the extent of a commander’s material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.”)

⁷⁹ *See infra* notes 172–77 (discussing discretionary duties and “errors in judgment” in the context of operational offenses).

perpetrator.⁸⁰ This is shown by establishing the accused had “effective control” over the perpetrator.⁸¹ However, *de jure* command authority is *prima facie* evidence of effective control,⁸² is shown through written orders demonstrating the superior-subordinate relationship,⁸³ and extends to subordinates of units for which that commander formally assumes administrative control.⁸⁴

C. Responsibility After the Military Justice Improvement Act

1. “Actual Knowledge” Obligations—Disciplining and Preventing

When “effective control” is established, the actions commanders must take depend upon their knowledge of unlawful subordinate behavior. For example, when circumstantial evidence demonstrates they had “actual knowledge” their subordinates violated the law,⁸⁵ they must have taken

⁸⁰ Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 256 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (“The concept of effective control over a subordinate—in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised—is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of [establishing criminal liability.]”); TARGETING SUPPLEMENT, *supra* note 32, ¶ 4(c) (“[C]ommand responsibility cannot arise unless the service member’s military duties provide the authority to exercise command discretion, that is, he or she must be a commander.”).

⁸¹ See *infra* notes 159–65 and accompanying text (discussing responsibility of superiors who do not possess *de jure* command authority); Delalić, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 378; Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 378 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

⁸² Mamani v. Berzaín, 309 F. Supp. 3d 1274, 1306 (S.D. Fla. 2018).

⁸³ *Id.* at 1306 n.35 (“A *de jure* superior-subordinate relationship exists for purposes of the command responsibility doctrine when ‘the superior has been appointed, elected or otherwise assigned to a position of authority for the purpose of commanding or leading other persons who are thereby to be legally considered his subordinates.’ A formal title or position of authority is insufficient to establish a superior-subordinate relationship; rather, ‘any inference concerning the relationship of subordination’ must be ‘accompanied by the powers and authority normally attached to such a role.’ A defendant in a position of *de jure* authority exercises effective control over his subordinates when he ‘was effectively able to enforce his legal authority through the exercise of his legal powers over the perpetrators.’” (citations omitted)).

⁸⁴ See Delalić, Case No. IT-96-21-T, ¶ 373 (“An officer with only operational and not administrative authority does not have formal authority to take administrative action to uphold discipline.”).

⁸⁵ Compare U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 7-3 n.3 (29 Feb. 2020) [hereinafter JBB] (explaining that circumstantial evidence of knowledge can be inferred from “all relevant facts and circumstances”), with Preparatory Comm’n for the Int’l Crim. Ct., Finalized Draft Text of the Elements of Crimes, ¶ 3, U.N. Doc.

“necessary” measures within their “material ability” to “discipline” them and “prevent” further harm.⁸⁶

As both the duties to “discipline” and “prevent” bear upon commanders’ exercise of disciplinary authority,⁸⁷ ascertaining MJIA’s impact on how they are applied requires understanding the “material ability” and discretion at each U.S. command echelon to exercise that authority. The UCMJ empowers only senior commanders—those with special court-martial convening authority (SPCMCA) and general court-martial convening authority (GCMCA)—to prosecute cases at a criminal forum,⁸⁸ that is, at a special or general court-martial.⁸⁹ Non-criminal disposition is also available to these and lower echelons, including punitive options such as summary courts-martial or non-judicial punishment⁹⁰ and non-punitive options

PCNICC/2000/1/Add.2 (Nov. 2, 2000) (“Existence of intent and knowledge can be inferred from relevant facts and circumstances.”).

⁸⁶ See *supra* note 43 and accompanying text (explaining the commander’s duty to discipline). See also U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10] (“The commander is . . . responsible if he has actual knowledge . . . that troops . . . subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”).

⁸⁷ While perhaps not intuitive, the duty to prevent harm is violated if the commander takes no disciplinary action against unlawful acts and further harm results. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 133 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (“[T]he Chamber is of the opinion that by failing to take [necessary and reasonable] measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur.” (citation omitted)).

⁸⁸ For example, “the commanding officer of a brigade, regiment, detached battalion” and “the commanding officer of a district, garrison, fort, camp, station, [or] Air Force base” have special courts-martial convening authority (SPCMCA) unless otherwise specified by competent authority. UCMJ art. 23(a)(2)–(3) (1950). Further, the President of the United States, the Secretary of Defense, and “the commanding officer of a unified or specified combatant command,” among others, have general courts-martial convening authority (GCMCA). *Id.* art. 22(a)(1)–(3). While commanders serving as a GCMCA can refer a case to a SPCM, a SPCMCA cannot refer a case to a GCM. See MCM, *supra* note 3, R.C.M. 504(b)(2) discussion; see also *supra* note 3 (discussing generally what offenses can be adjudicated at a special and general courts-martial respectively).

⁸⁹ See *supra* note 3 and accompanying text (explaining the difference between SPCMs and GCMs).

⁹⁰ See *supra* note 8 and accompanying text (explaining SCM and NJP procedures).

ranging from no action whatsoever, to adverse counseling, reprimand, and corrective training.⁹¹

While commanders have various options available to address subordinate crime, their discretion to act within their “material ability” is informed by policy, regulation, statute, and, if enacted, MJIA.⁹² Regarding sex offenses, for example, Army regulation and Federal statute withhold from GCMCA commanders discretion to dispose of these offenses via any means other than referral to court-martial.⁹³ These same commanders also lack discretion to dispose of grave breaches of the 1949 Geneva Conventions through any means other than courts-martial, as the conventions require those breaches be prosecuted at trial.⁹⁴ A disposition

⁹¹ MCM, *supra* note 3, R.C.M. 306(c)(1) (“A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.”); U.S. DEP’T OF ARMY, INTERIM REG. 27-10, MILITARY JUSTICE para. 3-3 (1 Jan. 2019) [hereinafter AR 27-10] (explaining the “[r]elationship of nonjudicial punishment to nonpunitive measures”).

⁹² *See, e.g.*, MCM, *supra* note 3, R.C.M. 306(a) (“Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.”).

⁹³ AR 27-10, *supra* note 91, para. 5-28c(5)(a) (requiring the GCMCA to forward to the Secretary of the Army for review any case where the staff judge advocate recommended a sex-related offense be referred to trial and the GCMCA disagrees); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No 113-66, § 1744(d), 127 Stat. 672, 981 (2013) (“In any case where a staff judge advocate . . . recommends that charges of a sex-related offense should not be referred [to] trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority.”).

⁹⁴ The 1949 Geneva Conventions specify that when a grave breach has occurred, the High Contracting Parties are obligated to “bring such persons . . . before its own courts” or “may . . . hand such persons over for trial to another High Contracting Party concerned.” GC I, *supra* note 58, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 58, art. 146; *see* OFF. OF GEN. COUNS., DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL para. 18.9.3 (2015) [hereinafter DOD LAW OF WAR MANUAL] (“Each Party to the 1949 Geneva Conventions shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”). The 1949 Geneva Conventions also specify that when any other breach of those conventions occurs, the High Contracting Parties are obligated to take “measures necessary

contrary to these withholdings could serve as *prima facie* evidence of a crime, one which MJIA would abolish. That is, the commander failed to take a necessary measure to “discipline” or “prevent” by not referring allegations of sexual assault or grave breaches to court-martial proceedings.⁹⁵

Below the GCMCA level, MJIA similarly would curtail commander responsibility for serious offenses. First, note that commanders below the SPCMCA echelon already lack authority to dispose of sexually violent crimes.⁹⁶ Further note that GCMCA’s “nearly universally” by internal command policy withhold from subordinate commanders the “material ability” to dispose of serious offenses, such as those that involve “death or serious injury.”⁹⁷ As a result, below the SPCMCA echelon, commanders “nearly universally” lack independent authority to take any action other than the initiation of court-martial proceedings for sexual assaults and those cases involving death or serious injury.⁹⁸ Consequently, at the company command echelon, where initial disposition decisions are generally made,⁹⁹ an action

for the suppression” of those breaches. GC I, *supra* note 58, art. 49; GC II, *supra*, art. 50; GC III, *supra*, art. 129; GC IV, *supra* note 58, art. 146. Those actions could include “a wide range of measures, such as the promulgation or revision of policies and regulations, administrative or corrective measures, or retraining of personnel.” DOD LAW OF WAR MANUAL, *supra*, para. 18.9.3.3.

⁹⁵ See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 588 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24 2016).

⁹⁶ U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROCEDURES 58 (Mar. 28, 2013) (C4, Sept. 11, 2020) (“[T]he initial disposition authority is withheld from all commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of O-6 (i.e., colonel or Navy captain) or higher, with respect to the alleged offenses of rape, sexual assault, and forcible sodomy; all attempts to commit such offenses, in violation of Articles 120, 125, and 80 of the UCMJ . . .”).

⁹⁷ In the U.S. military, commanders who are GCMCA’s “nearly universally” withhold authority from lower echelon commanders to dispose of serious crimes, including those involving “death or serious injury.” Brigadier General Charles Pedde, *Guest Post: BG Chuck Pedde’s Response to Gene Fidell’s Essay on Operational Mishaps and Military Justice*, LAWFIRE (May 31, 2017), <https://sites.duke.edu/lawfire/2017/05/31/guest-post-bg-chuck-pedes-response-to-gene-fidells-essay-on-operational-mishaps-and-military-justice> (“General Officer level commanders nearly universally withhold prosecutorial authority from lower level commanders for incidents involving death or serious injury . . .”).

⁹⁸ Withholding policies do not limit the authority of lower echelon commands to initiate disciplinary proceedings such as courts-martial charges that can be disposed of by the higher echelon commander. See MCM, *supra* note 3, R.C.M. 306(a).

⁹⁹ While each command echelon has a responsibility to discipline a subordinate, absent extraordinary circumstances, the company commander takes initial action. See, e.g., *id.* R.C.M. 401 discussion (“Ordinarily charges should be forwarded to the accused’s immediate

other than the preferral of court-martial charges could serve as *prima facie* evidence of a crime, one that MJIA would abolish. That is, that the commander failed to take necessary measures to “prevent” or “discipline” in failing to initiate court-martial proceedings for sexual violence offenses and others involving death or serious injury.¹⁰⁰

2. Impact on the Constructive Knowledge Obligations—Monitoring and Inquiring

Also abolished by MJIA therefore would be the crime of failing to ensure the initiation of court-martial proceedings for these same offenses when the commander “should have known” of the allegations. Specifically, while “actual knowledge” is required to trigger the obligations to “discipline” and “prevent,” that knowledge may be imputed when there is a failure to “monitor” or “inquire.”¹⁰¹ The duties to “monitor” and “inquire” therefore are best understood as implied because they require discovery of information necessary to carry out the duties to “prevent” and “discipline.”¹⁰² In other words, accused commanders “should have known” of sexual violence allegations and others involving death or serious injury

commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander’s authority has been withheld by superior competent authority.”). While the company commander generally takes initial action, there is no technical requirement that he or she actually prefer court-martial charges. *Id.* R.C.M. 307(a) (“Any person subject to the UCMJ may prefer charges.”).

¹⁰⁰ See *Karadžić*, Case No. IT-95-5/18-T, ¶ 588.

¹⁰¹ See FM 27-10, *supra* note 86 (“The commander is also responsible if he . . . should have knowledge, through reports received by him or through other means, that troops . . . subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”).

¹⁰² For example, it is well established in U.S. military jurisprudence that one may be held responsible for violating a principle duty if the accused remained negligently or intentionally ignorant of the information that would have triggered a duty to act. JBB, *supra* note 85, para. 5-11-2 n.1 (“[T]he (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.”); *id.* para. 3-10-1(d) n.2 (“The accused may not . . . willfully and intentionally remain ignorant of a fact important and material to (his) (her) conduct in order to escape the consequences of criminal law. . . . Such deliberate avoidance of positive knowledge is the equivalent of actual knowledge.”).

when they fail to take a “necessary” measure to “monitor” or “inquire,”¹⁰³ foreclosing a defense of ignorance arising from their own dereliction.¹⁰⁴

Consider then the following scenario as to how a commander might be held liable on a “should have known” theory for failing to monitor. A regulation, for example, might limit discretion as to how to monitor subordinates by requiring a confinement facility commander to conduct periodic inspections of his or her facilities.¹⁰⁵ If a commander willfully or negligently did not comply with that regulation and, as a result, was unaware subordinates were committing sexual assaults against prisoners, that commander would have failed to take a “necessary” measure within his or her “material ability” to monitor.¹⁰⁶ Consequently, the accused commander here may be liable for his or her subordinates’ crimes on the grounds he or she “should have known” of the allegations, foreclosing a defense of ignorance arising from his or her own dereliction.¹⁰⁷

Next consider how “should have known” liability might be imposed when the commander failed to act within his or her “material ability” to inquire. First, note this duty is triggered whenever there is a “credible” allegation a crime was committed—in other words, when the commander “had reason to know” of subordinate crimes.¹⁰⁸ For serious crimes, such

¹⁰³ 10 U.S.C. § 950q (holding foreign commanders responsible for their subordinates’ crimes when they “should have known” or “had reason to know” of those crimes and failed to act).

¹⁰⁴ *United States v. Pohl* (The Pohl Case), Case No. 4, 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1055 (Nov. 3, 1947) (“Mummenthey’s assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.”); *United States v. Weizsaecker* (The Ministries Case), Case No. 11, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1088 (Apr. 13, 1949) (“[I]t was his duty . . . to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was . . . forbidden by the rules of warfare . . .”).

¹⁰⁵ See, e.g., U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 7-2a(4) (15 June 2006) (“A person from a healthcare provider or medical technician designated by the commander of the supporting medical treatment facility, will perform a monthly inspection of the facility, to ensure that the operation of the facility is consistent with accepted preventive medicine standards. The facility commander or designated representative will be provided a copy of all such inspection results at the time of the inspection.”).

¹⁰⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 588.

¹⁰⁷ *JBB*, *supra* note 85.

¹⁰⁸ The obligation to conduct an inquiry or investigation, or report the matter to competent authorities, only applies to an allegation that is “credible.” In other words, rumor, innuendo, and specious allegations do not meet the threshold, but only those allegations “about whom some credible information exists to believe that the person committed a particular criminal

as sexual assault and death cases, Army regulation mandates only the U.S. Army Criminal Investigation Command (CID) investigate credible allegations of these crimes.¹⁰⁹ Commanders do not act within their “material ability” when they investigate the matter themselves or fail to report the matter to CID to investigate. If, as a result of such dereliction, the commander remains ignorant of actual knowledge the crime occurred, he or she cannot assert this ignorance in his or her own defense.¹¹⁰ The accused commander “should have known” to initiate court-martial proceedings in such cases, foreclosing a defense of ignorance arising from his own dereliction.¹¹¹

This is not to suggest that MJIA would eliminate a commander’s responsibility on a “should have known” theory by removing authority to initiate courts-martial. It certainly would not, but it would lessen the seriousness of the commander’s crime by lessening the authority the commander “should have known” to exercise. For example, while the pre-MJIA theory of liability might be that the accused “should have known” to initiate court-martial proceedings, the only post-MJIA theory for covered offenses would be that the commander “should have known” to report the allegation to the prosecutor.¹¹² The aggravating factor in the former case is

offense.” U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 59 (1 Apr. 2016) [hereinafter AR 15-6] (defining a “suspect”); see OFF. OF GEN. COUNS., *supra* note 45, ¶ 3.2. (defining a “reportable incident” as “[a]n incident that a unit commander or other responsible official determines, based on *credible information*, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict” (emphasis added)). When credible information does exist and the accused does not take appropriate action, international law justifies liability on the grounds the commander “had reason to know” of subordinate crimes. 10 U.S.C. § 950q (holding foreign commanders responsible for their subordinates’ crimes when “had reason to know” of those crimes and failed to act); *Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 586 (“To prove that the accused had reason to know of crimes committed, it is necessary to show that he had information available to him which would have put him on notice of unlawful acts committed or about to be committed by his subordinates. In this regard ‘it must be established whether, in the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry.’ This information does not need to contain extensive or specific details about the unlawful acts committed or about to be committed.” (citations omitted)).

¹⁰⁹ U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B-1 (9 June 2014).

¹¹⁰ JBB, *supra* note 85.

¹¹¹ *Id.*

¹¹² See, e.g., Rome Statute, *supra* note 42, art. 28(a)(ii) (requiring commanders to report law of war violations “to the competent authorities for . . . prosecution”).

that it was the commander's duty to ensure court-martial proceedings were initiated, while extenuating in the latter case is a prosecutor had independent discretion not to do so.¹¹³

3. Reasonableness and Mens Rea

In summary, commanders must always take "necessary" measures within their "material ability" to "monitor" or "inquire," and if they fail to do so, they risk prosecution for failing to "prevent" or "discipline" on the theory they "should have known" of their subordinates' crimes. Recall, however, liability does not ensue unless the omissions were unreasonable,¹¹⁴ which must be assessed in reference to the limitations placed on their "material ability" by policy, regulation, and, if enacted, MJIA.¹¹⁵

Also note that liability on a "should have known" theory in U.S. military jurisprudence is normally established by showing simple negligence,¹¹⁶ and there is support that "should have known" connotes the same meaning in command responsibility doctrine.¹¹⁷ Nonetheless, for U.S. Service members, when that doctrine is enforced under the laws of war, the

¹¹³ *Criminal Justice Standards for the Prosecution Function*, *supra* note 19. See also *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹¹⁴ See *supra* notes 46–51 (explaining the application of subjective and objective reasonableness tests in the context of command responsibility).

¹¹⁵ See, e.g., *supra* notes 92–100 and accompanying text (discussing how withholdings of authority via regulation, statute, and policy impact a commander's "material ability" to investigate or discipline certain offenses).

¹¹⁶ *JBB*, *supra* note 85 ("[T]he (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.").

¹¹⁷ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Meetings of the Committee of the Whole: 1st Meeting*, ¶ 67, U.N. Doc. A/CONF.183/C.1/SR.1 (Vol. II) (June 16, 1998) (quoting a U.S. representative for the proposition that a showing of mere negligence is sufficient to establish liability on a command responsibility theory); *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶¶ 313–33 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (asserting command responsibility is a negligence-based assessment); *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (June 15, 2009) (asserting "the term 'should have known' is in fact a form of negligence."). *But see* *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (rejecting the trial chamber's determination that command responsibility is a negligence-based assessment).

minimum *mens rea* must be culpable negligence,¹¹⁸ though simple negligence can be applied outside this context.¹¹⁹

III. Command Prosecutorial Authority—A Safeguard Against Injustice

A. A Redoubt Against Impunity

1. *Protecting Victims*

In any context, commanders, by virtue of their duty “to control,” currently risk extensive criminal responsibility in the exercise of their prosecutorial authority, which MJIA would eliminate if it were to become

¹¹⁸ TARGETING SUPPLEMENT, *supra* note 32, at 7 & 20 n.57 (articulating the minimum *mens rea* for law of war violations as “gross” or “culpable” negligence); United States v. Schultz, 4 C.M.R. 104, 115 (C.M.A. 1952) (holding that in the context of the “law of war” that “[i]mposing criminal liability for less than culpable negligence . . . has not, as yet, been given universal acceptance by civilized nations.”); JBB, *supra* note 85, para. 3-44-2(d) (defining culpable negligence as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”); see United States v. Von Leeb (High Command Case), Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 543 (Oct. 27, 1948) (“There must be a personal dereliction [by the commander] . . . where his failure to properly supervise his subordinates constitutes criminal negligence on his part.”); ANTONIO CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW 53 (3d ed. 2013) (“It would seem that, given the intrinsic nature of international crimes . . . negligence operates as a standard of liability only when it reaches the threshold of gross or culpable negligence.”); FM 6-27, *supra* note 42, para. 8-31 (stating command responsibility requires a showing of “criminal negligence”).

¹¹⁹ In the law of war context, the U.S. Army has indicated it follows the Model Penal Code approach to mistake defenses which would ensure the *mens rea* applicable thereto is never less than what is required by the laws of war: culpable negligence. See TARGETING SUPPLEMENT, *supra* note 32, at 21 n.61. In particular, the Model Penal Code provides that “[i]gnorance or mistake as to a matter of fact or law is a defense if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.” MODEL PENAL CODE § 2.04(1)(a) (AM. L. INST. 2019). Under this approach, a mere simply negligent failure to obtain knowledge when demonstrated could in fact serve as a defense to an alleged willful or culpably negligent failure to prevent harm or discipline subordinates. See *id.* In fact, a culpably negligent failure to obtain information would be a defense to an alleged willful failure to prevent harm, though the accused here could be liable for that culpably negligent failure. See *id.* § 2.04(2) (“Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.”).

law. Specifically, commanders currently violate the law when they fail to ensure initiation of court-martial proceedings when they “knew” or “should have known” of serious offenses committed by their subordinates, such as sexual assault, murder, and other crimes involving death or serious injury.¹²⁰ Further, GCMCA commanders also risk prosecution for not referring grave breaches and sexual assaults to court-martial.¹²¹ If MJIA were enacted, these offenses, which are punished principally under Articles 118 through 130, UCMJ,¹²² would become “covered offenses” under MJIA,¹²³ offenses over which prosecutors would hold prosecutorial discretion.¹²⁴ Unlike commanders, these prosecutors would risk no criminal liability if they failed to prosecute when they “knew” or “should have known” of these crimes, as their obligation is to “seek justice,” that is, they have “discretion to not pursue criminal charges in appropriate circumstances.”¹²⁵

As a result, in the context of sexual violence crimes, fewer resources would be dedicated to prosecuting these cases. Consider that in fiscal year 2018, the acquittal rate for sexual violence offenses adjudicated at court-martial was approximately 70%.¹²⁶ This compares to an approximate 98%

¹²⁰ See *supra* notes 85–111 and accompanying text (explaining when a commander can be held liable when he or she “knew” or “should have known” of his or her subordinates’ crimes and failed to act).

¹²¹ See *supra* notes 93–95 and accompanying text (explaining that GCMCA commanders lack authority to dispose of grave breaches and sexual assaults via any means other than referral to courts-martial).

¹²² See *supra* notes 10–12 and accompanying text (explaining that “covered offenses” are primarily those contained in Articles 118 through 130, UCMJ); TARGETING SUPPLEMENT, *supra* note 32, ¶ 10(c) (specifying the grave breaches of “wilful [sic] killing” and “wilfully [sic] . . . causing serious injury to body or health” are punishable under Article 118, UCMJ (murder), and Article 128, UCMJ (assault), respectively).

¹²³ 166 CONG. REC. S3413 (daily ed. June 25, 2020) (stating in section 539A(b)–(c) that “covered offenses,” with limited exception, generally exclude UCMJ “articles 83 through 117” and “articles 133 and 134” and a “conspiracy,” “solicitation,” and “attempt” to commit such offenses).

¹²⁴ See, e.g., UCMJ arts. 118 (2016) (murder), 119 (1950) (involuntary manslaughter), 119a (2017) (death or injury of an unborn child), 119b (2019) (child endangerment), 120 (2017) (rape and sexual assault generally), 120b (2016) (rape and sexual assault of a child), 120c (2012) (other sexual misconduct), 121 (1950) (larceny and wrongful appropriation), 122 (2016) (robbery), 125 (2016) (kidnapping), 126 (2016) (arson; burning property with intent to defraud), 128 (2018) (assault), 128a (2016) (maiming), 129 (2016) (burglary; unlawful entry).

¹²⁵ *Criminal Justice Standards for the Prosecution Function*, *supra* note 19. See also *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹²⁶ Chuck Mason, Att’y-Advisor, Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) 21 (Aug. 23,

conviction rate for those offenses prosecuted in Federal district court over the same period.¹²⁷ It follows that an independent military prosecutor, unhindered by safeguards that steer even the most difficult sexual violence cases towards trial,¹²⁸ would simply be more sparing with scarce prosecutorial resources. The likely result, therefore, of removing command prosecutorial authority is of little doubt: fewer resources dedicated to sexual violence prosecutions in the interest of “justice.”¹²⁹

“Justice” is a subjective concept, underscoring the risk that impunity for grave breaches could proliferate under its guise if MJIA were to become law. Consider a recent poll by the Clarion Project that revealed that 77% of respondents believe war crimes should not be prosecuted,¹³⁰ as well as the President’s public criticism of such prosecutions¹³¹ and the judge

2019) (stating the acquittal rate of sex-related offenses “is about 70 percent”), https://dacipad.whs.mil/images/Public/05-Transcripts/20190823_DACIPAD_Transcript_Final.pdf.

¹²⁷ *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*, U.S. CTS. 3, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf (last visited Nov. 7, 2020) (showing that of the 733 sexual abuse cases adjudicated in Federal district courts, 720 resulted in conviction at trial, which amounts to a conviction rate over 98%).

¹²⁸ The following safeguards which steer sexual assault cases towards prosecution would become obsolete if commanders had no authority to convene courts-martial. First, in any case where the staff judge advocate has recommended a case not be prosecuted, a commander can go against that advice and refer the case to trial. UCMJ art. 34 (2016). Second, in the U.S. Army, if the judge advocate recommends a case involving a sex-related offense be referred to trial and the commander disagrees, that commander would lack the authority to dismiss the case until the Secretary of the Army completes a review. AR 27-10, *supra* note 91, ¶ 5-28c(5)(a) (“In any case where a GCMCA decides not to refer any sex-related offense to trial by court-martial after receiving [a staff judge advocate’s] Article 134 pretrial advice recommending that a sex related offense be referred to trial by court-martial, the GCMCA must forward the case to the Secretary of the Army for review.”). Third, Federal law requires that even when the commander and staff judge advocate agree that a case involving a sex-related offense should not be prosecuted, the commander must forward the case “to the next superior commander authorized to exercise general court-martial convening authority.” National Defense Authorization Act for Fiscal Year 2014, Pub. L. No 113-66, § 1744(d), 127 Stat. 672, 981 (2013).

¹²⁹ *Criminal Justice Standards for the Prosecution Function*, *supra* note 19.

¹³⁰ *Should We Prosecute for Overseas War Crimes? Poll Results*, CLARION PROJECT (Nov. 14, 2018), <https://clarionproject.org/should-we-prosecute-for-overseas-war-crimes-poll-results>.

¹³¹ Roberta Rampton, *Trump Says Considering Pardons for Some U.S. Soldiers Accused of War Crimes*, REUTERS (May 24, 2019, 2:24 PM), <https://www.reuters.com/article/us-usa-trump-pardons/trump-says-will-consider-pardons-for-us-soldiers-accused-of-war-crimes-idUSKCN1SU26W>.

advocates who carried them out.¹³² It would be unsurprising, therefore, if a military prosecutor determined that “justice” merited not prosecuting grave breaches, particularly when the victim was a captured combatant who fought for the Islamic State,¹³³ a terrorist organization that has committed among the most horrific crimes of our age.¹³⁴ It is precisely in these circumstances where a commander’s responsibility is needed most; unlike prosecutors, commanders have no discretion to forego prosecuting such crime.¹³⁵ In other words, command authority over military justice serves as a redoubt against impunity, even when it is unpopular to do so.

2. *Accountability for Command Climate*

Impunity would proliferate in at least one other way, were MJIA to become law: prosecutors, unlike commanders, would risk no criminal liability for fostering a climate where lawbreaking is acceptable. In particular, recall that commanders can be criminally responsible not only for failing to bring grave breaches and sexual violence allegations to trial, but their culpability is also presumed for any crimes that flow from that failure.¹³⁶ In other words, commanders are liable for their “failure to create or sustain . . . an environment of discipline and respect for the law,”¹³⁷ such liability lawyers do not have if they fail to prosecute.

Commander liability, by contrast, is so vast that U.S. tribunals have held commanders responsible for the mere failure to act within their “material ability” to protest crimes carried out by those only nominally under their control. In the “Hostage Case,” for example, a commander was held

¹³² Peter Baker, *Trump Orders Navy to Strip Medals from Prosecutors in War Crimes Trial*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/us/politics/trump-navy-seal-war-crimes.html>.

¹³³ *Navy SEAL Killed Young Prisoner and Called Him “ISIS Dirtbag,” Witnesses Testify*, CBS NEWS (June 20, 2019, 10:22 AM), <https://www.cbsnews.com/news/edward-gallagher-us-navy-seal-charged-war-crimes-service-iraq-hears-testimony-trial-san-diego>.

¹³⁴ See generally Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, *“They Came to Destroy:” ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 16, 2016).

¹³⁵ See *supra* note 94 and accompanying text (explaining that GCMCA commanders lack unilateral authority to forego prosecuting grave breaches of the 1949 Geneva Conventions).

¹³⁶ See *supra* notes 69–73 and accompanying text (discussing the applicability of the rebuttable presumption of causation to command responsibility doctrine).

¹³⁷ Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 50 (June 7, 2001); see Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 96 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (“This failure to [appropriately] punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding.”).

accountable for the crimes carried out by security police in his area of responsibility even though he had no authority over them.¹³⁸ The tribunal justified the commander's responsibility in part on the grounds that, "Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts."¹³⁹ In the "High Command Case," a commander was similarly held responsible for the crimes of a security force unit operating in his area of responsibility, partly on the grounds he "[had not] in any way protested against or criticized the action of the SD [security service] or requested their removal or punishment."¹⁴⁰

B. An Incentive to Intervene

The policy assumption for holding leaders accountable in this manner is that incentivizing the proper exercise of leadership authority reduces criminality, and empirical data supports this conclusion. In the context of sexual assault, for example, a 2014 study demonstrated that leadership intervention, even among informal leaders of high school age, can dramatically reduce sexual assault rates.¹⁴¹ That study assessed the effectiveness of those leaders taking steps pursuant to training to discourage and prevent sexual violence amongst their peers at school.¹⁴² By the end of year four of the study, the number of sexual assaults decreased by 48% at those schools where the interventions occurred,¹⁴³ leading the Air Force to incorporate the study's methodology into its training protocols.¹⁴⁴

¹³⁸ United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1271–72 (Feb. 19, 1948).

¹³⁹ *Id.* at 1272.

¹⁴⁰ United States v. Von Leeb (High Command Case), Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 623 (Oct. 27, 1948) (emphasis added).

¹⁴¹ Ann L. Coker et al., *RCT Testing Bystander Effectiveness to Reduce Violence*, 52 AM. J. PREVENTIVE MED. 566, 566 (2017).

¹⁴² *Id.*

¹⁴³ In the first year after the intervention training was implemented, there was a mean number of 300 acts of self-reported sexual violence in the group of schools that received the intervention, versus 157 in year four, which is a 48% decrease. *Id.* tbl.1. This contrasts with the control group of schools for which there were 211 acts of self-reported sexual violence in year one, versus 245 in year four—a 16% increase. *Id.*

¹⁴⁴ The Air Force has adopted the "Green Dot" leadership intervention training methodology used in the study. SAPR REPORT, *supra* note 14, enclosure 3, at 31; *id.* enclosure 3, at 7

These findings comport with several other studies focusing on sexual assault in the military. A 2017 study found that “[n]egative leader behaviors” such as military leaders allowing “sexually demeaning comments to occur” were associated with “[an] increased assault risk, at least doubling servicewomen’s odds of [sexual assault in the military].”¹⁴⁵ These findings are consistent with a 2003 study which determined that military leaders “allowing or initiating sexually demeaning comments or gestures towards female soldiers was associated with a three- to four-fold increase in likelihood of rape.”¹⁴⁶ The 2019 SAPR report also determined that “[t]he odds of sexual assault were . . . higher for members indicating their command took less responsibility for preventing sexual assault, encouraging reporting, or creating a climate based on mutual respect.”¹⁴⁷

C. Enforcement Required

Taken together, the data makes clear that the key to reducing criminality is not less command authority, as MJIA seeks, but the exercise of more leadership authority as the command responsibility doctrine seeks to incentivize. Yet the UCMJ contains no specific command responsibility provision to inculcate that incentive across the military services. Rather, the doctrine’s obligations must be “boot strapped” under existing UCMJ offenses,¹⁴⁸ for example, as articulated in Part II of this article.¹⁴⁹ This has

(“The development of targeted rather than universal training and approaches (e.g. the leadership and bystander intervention toolkit, Cadet Healthy Personal Skills) are a significant step in the Air Force’s plan to provide high quality and evidence-based prevention training from accession to separation or retirement.”).

¹⁴⁵ Anne G. Sadler et al., *The Relationship Between US Military Officer Leadership Behaviors and Risk of Sexual Assault of Reserve, National Guard, and Active Component Servicewomen in Nondeployed Locations*, 107 AM. J. PUB. HEALTH 147, 147 (2017).

¹⁴⁶ Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 268 (2003).

¹⁴⁷ SAPR REPORT, *supra* note 14, at 12.

¹⁴⁸ See, e.g., William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 14 (1982) (stating in reference to Captain Ernest Medina’s prosecution relating to the My Lai Massacre, “Shocking, a commander’s responsibility had to be boosted by ‘boot strapping’ his individual responsibility [under the UCMJ] on top of his command responsibility to give it more depth.”); Victor Hansen, *What’s Good for the Goose is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335, 394 (stating “in the Medina case the prosecution was forced to establish the scope of a commander’s responsibility by bootstrapping from sources outside the UCMJ because no clear standard of command authority and responsibility was contained in the UCMJ.”).

¹⁴⁹ See *supra* notes 38–41 and accompanying text (explaining how command responsibility derelictions can be punished under Article 134’s “general article”).

led to the non-enforcement of the doctrine in high-profile cases,¹⁵⁰ fostered confusion regarding the United States' interpretation of the doctrine,¹⁵¹ resulted in its misapplication at court-martial,¹⁵² and feeds misconceptions within the military services that leaders are impugned from accountability.¹⁵³ Promulgating a command responsibility provision would eliminate misunderstanding and “provide commanders with the needed incentive to make detection and prevention of sexual assault within the ranks a top priority.”¹⁵⁴ That is, it would “send a powerful message to commanders that it is their responsibility” to “investigate, suppress and punish” all suspected crime, a message that would bring about a “cultural shift” within the military services.¹⁵⁵

That cultural shift could not come a moment too soon. The 2019 SAPR report determined the overwhelming majority of military sexual assaults in

¹⁵⁰ See, e.g., Victor Hansen, *The Jordan Abu Ghraib Verdict: Command Responsibility in the UCMJ*, JURIST (Sept. 1, 2007, 8:01 AM) (“[A]nother reason why the case against Lieutenant Colonel Jordan ultimately failed . . . is quite simply that under the Uniform Code of Military Justice (UCMJ) there is no adequate mechanism to hold commanders and supervisors criminally accountable for the law of war violations committed by forces under their command.”); Hansen, *supra* note 148, at 339 (“To date . . . no criminal proceedings have yet been initiated against any commander at the battalion level or higher for the detainee abuse that occurred at Abu Ghraib.” (citations omitted)).

¹⁵¹ Eckhardt, *supra* note 148, at 28 (“The failure of our government to clearly articulate domestic standard [of command responsibility] . . . has caused considerable misunderstanding, confusion, and embarrassment. That failure provides a dangerous vacuum in the vital area of a soldier’s social contract with the citizenry he serves.”); Hansen, *supra* note 148, at 341 (asserting that there is “a lack of understanding by even members of Congress and senior Department of Defense officials about the legal doctrine of command responsibility.”).

¹⁵² See, e.g., *Editor’s Note*, *supra* note 44, at 8 (quoting the instruction to Captain Ernest Medina’s military panel during his prosecution related to the My Lai massacre: “While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.”).

¹⁵³ CHRISTOPHER SWECKER ET AL., FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 115 (2020), https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf (“[There is] an overwhelming perception on the part of interviewees within the Fort Hood community that they would likely be subjected to direct or indirect retaliation, reprisal, intimidation or adverse reputational impact by their respective chains of command if they filed reports of sexual harassment or sexual assault . . .”).

¹⁵⁴ Victor M. Hansen, *Introduction to Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weakness in a Special Society*, 50 NEW ENG. L. REV. 13, 19 (2015).

¹⁵⁵ *Id.*

2018 occurred on military installations,¹⁵⁶ with 26% of women and 43% of men even reporting they occurred at work or during duty hours.¹⁵⁷ While the Department of Defense asserts it will “prepare and hold new leaders and first-line supervisors accountable for advancing a culture free from sexual assault,”¹⁵⁸ it has identified no mechanism to enforce that accountability. This article’s appendix proposes such a mechanism through an amendment to Article 134, UCMJ, that would punish “superior responsibility” derelictions.¹⁵⁹ More to the point, irrespective of *de jure* command status, it would require even the most junior “superiors” to control their subordinates, as required by the law of war¹⁶⁰ and Federal statute.¹⁶¹

Even if lacking *de jure* command status, “[junior] leaders . . . command large numbers of subordinates [in the military],”¹⁶² and are most likely to

¹⁵⁶ SAPR REPORT, *supra* note 14, at 11 (citing a 2018 Workplace and Gender Relations Survey of Active Duty Members that found “62 percent of women and 57 percent of men indicated the situation with the greatest impact occurred at a military installation or on a ship”).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 4.

¹⁵⁹ This proposal combines the aforementioned “elements of proof” that are modeled after Article 92, UCMJ, TARGETING SUPPLEMENT, *supra* note 32, at 21–22 n.66, with the UCMJ offenses the Army has identified as punishing command/superior responsibility derelictions in the context of targeting, *id.* at 7–8 (identifying, among others, the following UCMJ articles: 81 (principals), 109 (unlawful harm to non-government property), 118 (murder), 119 (involuntary manslaughter), and 128 (assault)). The proposal, however, removes the causation elements of these offenses to reflect the rebuttable presumption but does leave their maximum punishments intact.

¹⁶⁰ ICTY Statute, *supra* note 42 (“The fact that any of the acts referred to in . . . the present Statute was committed by a subordinate does not relieve his *superior* of criminal responsibility”) (emphasis added); ICTR Statute, *supra* note 42 (same); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“The fact that a breach . . . was committed by a subordinate does not absolve his *superiors* from penal or disciplinary responsibility”) (emphasis added)). See also Rome Statute, *supra* note 42, art. 28(a) (stating “[a] military commander or person effectively acting as a military commander” can be responsible for the crimes of subordinates).

¹⁶¹ 10 U.S.C. §§ 7233, 8167, 9233 (requiring “commanding officers *and others in authority*” to be “vigilant in inspecting the conduct” of persons placed under their authority, and “to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them” (emphasis added)).

¹⁶² Leonard Wong et al., *Military Leadership: A Context Specific Review*, 14 LEADERSHIP Q. 657, 659 (2003).

directly supervise the perpetrators of sexual assault.¹⁶³ Therefore, holding these leaders criminally accountable for their leadership failure is key to reducing sexual assault rates, albeit more difficult to establish at trial than for *de jure* commanders. Specifically, it must be shown the leader in question actually had a duty “to control” the putative subordinates in the first place. This can be established by showing the leader had “actual knowledge” or “reasonably should have known”¹⁶⁴ of the following: (1) the authority to take the allegedly omitted measure “to control” and (2) that the putative subordinate was subject to that authority.¹⁶⁵ Once the duty “to control” attaches, as with *de jure* commanders, any leader who failed to take “necessary” and “reasonable” measures within his material ability to exercise that control would risk criminal prosecution.¹⁶⁶

IV. Operational Offense Prosecutions

A. Commander Expertise Required

While the risk of criminal prosecution can incentivize the lawful performance of duties, it can also discourage compliance if Service

¹⁶³ Non-commissioned officers in the military generally range in pay grades from E-5 to E-9, while most sexual assault perpetrators across the military services served in grades between E-3 and E-5. SAPR REPORT, *supra* note 14, at 4 (“[T]he vast majority of sexual assaults of Service members occurred between people aged 17 to 24 who work, train, or live in close proximity In addition, the alleged offender’s rank was most often the same as the victim’s or one rank higher, with most alleged incidents involving junior enlisted women in the grades of E3 and E4.”).

¹⁶⁴ See MCM, *supra* note 3, pt. IV, ¶18.c.(3)(b) (“Actual knowledge [of duties] need not be shown if the individual reasonably should have known This may be demonstrated by regulations, training, or operations manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.”).

¹⁶⁵ See *Mamani v. Berzaín*, 309 F. Supp. 3d 1274, 1306 n.35 (S.D. Fla. 2018) (“A de facto superior must be (1) ‘cognizant of his position vis-à-vis other persons whose conduct he is responsible for,’ and (2) ‘aware of the duties which his relationship with another person, or group of persons, implied for him (in particular, a duty to prevent and punish crimes) and must have accepted this role and responsibility, albeit implicitly.’” (quoting GUÉNAÉL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 145 (2009))).

¹⁶⁶ *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1290–91 (11th Cir. 2002) (“[A] showing of the defendant’s actual ability to control the guilty troops is required as part of the plaintiff’s burden under the superior-subordinate prong of command responsibility, whether the plaintiff attempts to assert liability under a theory of *de facto* or *de jure* authority.” (citing *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 256 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001))).

members risk prosecution in the course of that lawful performance, and MJIA fosters this risk in the context of operational offenses. This risk stems in part from the fact that “[a]ttorneys, no matter how experienced in criminal prosecution or defense, generally don’t engage in actual combat or plan or execute kinetic operations. Therefore, in the unique context of operational offenses, commanders are critical in defining and recognizing a criminal dereliction.”¹⁶⁷

Consider, for instance, operational offenses MJIA does not impact: Article 99, UCMJ, (misbehavior before the enemy) and Article 110, UCMJ, (improper hazarding of a vessel or aircraft). Both are *malum prohibitum* offenses that regulate technical aspects of conducting operations that commanders are bound to understand better than lawyers by virtue of their professional competence and experience as operational commanders. For example, Article 99, UCMJ, penalizes one who “shamefully abandons, surrenders, or delivers up any command, unit, place, or military property”¹⁶⁸ It also criminalizes, among other behavior, “cowardly conduct”¹⁶⁹ and one’s willful failure to do “his utmost to encounter, engage, capture, or destroy any enemy troops.”¹⁷⁰ Similarly, Article 110, UCMJ, penalizes one who “hazards or suffers to be hazarded any vessel or aircraft of the armed forces.”¹⁷¹

The technical reason commanders are uniquely qualified to assess compliance with these UCMJ articles is that both require evaluating whether operators exercised appropriate professional judgment, the standards for which commanders are responsible for instilling. In particular, both articles distinguish between a criminal dereliction and an operational “error in judgment,”¹⁷² an attribute they share with norms enforceable under the

¹⁶⁷ Pede, *supra* note 97.

¹⁶⁸ UCMJ art. 99(2) (1950).

¹⁶⁹ *Id.* art. 99(5).

¹⁷⁰ *Id.* art. 99(8).

¹⁷¹ *Id.* art. 110(a) (2016).

¹⁷² The *Manual for Courts-Martial* states in the discussion of Article 110, UCMJ, that “[a] mere error in judgment . . . does not constitute an offense” under that article, MCM, *supra* note 3, pt. IV, ¶ 47.c.(3), and at Article 99, UCMJ, that “[i]ntentional misconduct’ does not include a mere error in judgment,” *id.* pt. IV, ¶ 27.c.(3)(b).

laws of war,¹⁷³ including targeting norms.¹⁷⁴ “Errors in judgment” can occur only in the context of “discretionary” duties,¹⁷⁵ mandatory legal obligations which leave discretion for “judgment and decision” on how to comply,¹⁷⁶ that is, “judgment as to which of a range of permissible courses is the wisest.”¹⁷⁷ These “permissible courses,” as such, are what “commanders are critical in defining,”¹⁷⁸ a feat they accomplish by instilling professionalism through training and other means as their duties require.¹⁷⁹

B. Objective and Subjective Reasonableness

1. *The Objective Test*

Command-instilled professional standards inform the juridical analysis of whether a discretionary duty was violated, undergirding commanders’

¹⁷³ *United States v. List (The Hostage Case)*, Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1246 (Feb. 19, 1948) (“Where room for an honest error in judgment exists [an accused] is entitled to the benefit thereof by virtue of the presumption of his innocence.”); *id.* at 1297 (holding that while an accused in a particular case “[m]ay have erred in the exercise of his judgment . . . he was guilty of no criminal act.”); *United States v. Von Leeb (High Command Case)*, Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 511 (Oct. 27, 1948) (stating that an accused “[c]annot be held criminally responsible for a mere error in judgment as to disputable legal questions.”).

¹⁷⁴ TARGETING SUPPLEMENT, *supra* note 32, ¶ 6 (distinguishing between an “error in judgment” and a criminal dereliction in the context of law of war targeting norms).

¹⁷⁵ *Compare Discretionary Act*, BLACK’S LAW DICTIONARY (6th ed. 1990) (defining a “discretionary act” as one guided by no “hard and fast rule”), *with Mississippi v. Johnson*, 71 U.S. 475, 498 (1866) (describing ministerial obligations as those for which “nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.”). *See also Ministerial Duty*, BLACK’S LAW DICTIONARY (6th ed. 1990) (defining “ministerial duty” as one for “which nothing is left to discretion—a simple definite duty, imposed by law, and arising under conditions admitted or proved to exist.”).

¹⁷⁶ *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

¹⁷⁷ *United States v. Gaubert*, 499 U.S. 315, 325 (1991); *see Prosecutor v. Gombo*, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 170 (June 8, 2018) (“[C]ommander[s] may take into consideration the impact of measures to prevent or repress criminal behavior on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes.”).

¹⁷⁸ *Pede*, *supra* note 97.

¹⁷⁹ DOD LAW OF WAR MANUAL, *supra* note 94, ¶ 18.4.4 (“[C]ommanders should ensure that members of the armed forces under their command are, commensurate with their duties, aware of their duties under the law of war.”); AP I, *supra* note 160, art. 87(2) (“In order to prevent and suppress breaches . . . commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.”).

ability to recognize derelictions of those duties. Specifically, an objective test assesses compliance with a discretionary duty by asking “if officers of reasonable competence could disagree on the issue” because, if they can, the act will be considered lawful.¹⁸⁰ Another way of articulating the objective test is to say that “[i]f the facts were such as would justify the action by the exercise of judgment . . . it cannot be said to be criminal.”¹⁸¹ Conversely, an act will be considered unlawful if “every reasonable official would have understood that what he is doing violates” the law¹⁸² or if “no reasonably competent officer would have concluded”¹⁸³ his or her acts were lawful. Perhaps the clearest articulation of the objective test, and clearest indication that professional standards inform the test, was by an eighteenth-century author, who wrote:

There are in every Art certain Maxims and in which all Artists agree: thus far there is *Certainty*, and no *Artist doubts*; But farther than this there may be *Doubt* and *Difficulty*; and there Artists *may* and *will*, as often as consulted, though impartial, *differ*. The *single Point* therefore is, *Has the [accused] observed the plain, known Rules of his Profession?*¹⁸⁴

2. The Subjective Test

“*[P]lain, known*” professional standards also inform the subjective test. That test requires an assessment of whether those accused willfully violated any aspect of their discretionary duties, as those who have cannot

¹⁸⁰ *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (addressing whether a state trooper was entitled to qualified immunity against a civil claim for damages under 42 U.S.C. § 1983 alleging the state trooper, by applying for an arrest warrant, violated of the respondent’s Fourth and Fourteenth Amendment rights).

¹⁸¹ *United States v. List (The Hostage Case)*, Case No. 7, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Judgment, at 1296 (Feb. 19, 1948).

¹⁸² *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

¹⁸³ *Malley*, 475 U.S. at 341.

¹⁸⁴ DAVID MALLET, *OBSERVATIONS ON THE TWELFTH ARTICLE OF WAR 27* (1757) (distinguishing between an “innocent error of judgment” and a commander’s alleged criminal failure to do his “utmost” in confronting enemy forces). *See also* Pede, *supra* note 97 (“[S]enior level field commanders bring decades of operational experience to bear upon the key legal issue in [operational offense] cases which they are uniquely qualified to analyze—whether the accused ‘*observed the plain, known Rules of his Profession.*’”).

be said to have committed a “mere error in judgment.”¹⁸⁵ Put another way, the law imposes an obligation to act in “good faith,” a phrase which means “the absence of malice,” an “honesty of intention,” and “being faithful to one’s duty or obligation.”¹⁸⁶ Thus, if a Service member “could honestly conclude” his or her decision was justified in the context of the discretionary duty at issue, there is no criminal act.¹⁸⁷ On the other hand, if one acted with “actual knowledge” the act or omission contravened one’s military duties, that individual has not acted in good faith.¹⁸⁸ A Nuremberg tribunal, in making clear that military expertise informs the subjective test, articulated it as follows:

One trained in military science will ordinarily have no difficulty in arriving at a [legally] correct decision and, *if he willfully refrains from so doing for any reason*, he will be held criminally responsible Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.¹⁸⁹

C. Targeting Norms and the Military Justice Improvement Act

It follows that safeguarding the presumption of innocence in the context of discretionary obligations requires the prosecutorial authority to have a thorough understanding of the standard of professional competence which

¹⁸⁵ MCM, *supra* note 3, pt. IV, ¶ 27.c.(3)(b) (specifying “intentional misconduct” is not “a mere error in judgment”); *Wilkes v. Dinsman*, 48 U.S. 89, 131 (1849) (“In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful [sic] error”). *See also* MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(c) (“‘Willfully’ means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act.”).

¹⁸⁶ *Good Faith*, BLACK’S LAW DICTIONARY (6th ed. 1990).

¹⁸⁷ *United States v. List (The Hostage Case)*, Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1297 (Feb. 19, 1948); *see Fox v. Hayes*, 600 F.3d 819, 834–35 (7th Cir. 2010) (“[W]e make all reasonable credibility determinations and inferences in favor of the [public official], asking whether under their version of the facts a reasonable officer could conclude [their actions were in compliance with the law].” (emphasis added)).

¹⁸⁸ MCM, *supra* note 3, pt. IV, ¶¶ 18.b.(3)(b), 18.c.(3)(b) (articulating that a willful dereliction occurs under Article 92, UCMJ, when one has “actual knowledge” of their duties and nonetheless acts in contravention of them).

¹⁸⁹ *United States v. List (The Hostage Case)*, Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1245–46 (Feb. 19, 1948) (emphasis added).

Soldiers are expected to uphold in their field of expertise. The drafters of MJIA thus wisely excluded both Articles 99 and 110, UCMJ, from the reform, ensuring commanders will maintain prosecutorial authority over these operational offenses. However, MJIA's drafters failed to exclude law of war targeting norms, which govern how the military applies lethal force on the battlefield. These norms are listed in the following table.

Table¹⁹⁰

	Targeting Duties	Information Assessment Duties
Target Identification	Attack lawful targets only. ¹⁹¹	Take reasonable steps to identify a person or object as legal target.
Specialized Warnings	Do not attack objects subject to special protection (e.g., medical units, enemy hospitals, medical transports) unless the enemy has misused them. ¹⁹²	Exercise due regard in determining whether an object subject to special protection lost its protected status under the law of war.
	Provide "due warning" before attacking an object subject to special protection, ¹⁹³ unless acting in self-defense. ¹⁹⁴	Take reasonable steps to determine what means of communicating the warning would be adequate.
Generalized Warnings	Provide advance warning before conducting an attack where protected persons may be injured, unless the	Take reasonable steps to determine whether the circumstances permit

¹⁹⁰ The targeting obligations listed in this table and their citations are taken verbatim from the U.S. Army's targeting investigation supplement. TARGETING SUPPLEMENT, *supra* note 32, tbl.1.

¹⁹¹ DOD LAW OF WAR MANUAL, *supra* note 94, ¶ 5.6.3 (criteria for determining if an object is a lawful military objective); *id.* ¶ 5.8.3 (criteria for determining if an individual can be targeted as a member of an armed group or for directly or actively participating in hostilities); *id.* ¶ 4.3 (criteria for determining if an individual can be targeted as a lawful combatant or unprivileged belligerent). *See also id.* ¶ 5.5.2 (stating which persons and property are protected from attack).

¹⁹² *See id.* ¶ 7.10.3.3–.6 (explaining the factors that bear upon whether an object has lost its special protection).

¹⁹³ *Id.* ¶¶ 7.10.3.2, 7.11.1 (explaining that "due warning" is required before attacking an object subject to special protection); *id.* ¶ 5.11.5.2 (explaining what type of advanced warning may be "effective").

¹⁹⁴ *Id.* ¶ 7.10.3.2 (stating the requirement to provide warning "does not prohibit the exercise of the right of self-defense.").

	circumstances do not permit. ¹⁹⁵	providing an advanced warning.
	When warning is required, provide “effective advance warning.” ¹⁹⁶	Take reasonable steps to determine what means of communicating the warning would be adequate.
Feasible Precautions	Take feasible measures to minimize incidental harm. ¹⁹⁷	Take reasonable steps to determine what precautionary measures are feasible.
Principle of Proportionality	Conduct proportionate attacks—the expected incidental injury must not be excessive in relation to the direct and concrete military advantage anticipated. ¹⁹⁸	Take reasonable steps to determine whether the incidental harm would be excessive in relation to the direct and concrete military advantage anticipated.

1. Enforcement Under the Laws of War

To understand how MJIA relates to the enforcement of the duties in the table, one must first understand how those duties are enforced outside the UCMJ context. In any context, attacks made in compliance with law of war targeting duties can justify even the premeditated killing of innocents, for example, when death is collateral and proportionate to an attack on a lawful target.¹⁹⁹ Assessing whether a death can be so justified requires the prosecutorial authorities to understand the “*the plain, known Rules*” that inform the targeting duties in the table, and to distinguish between a decision that was subjectively and objectively reasonable from unlawfully caused harm.²⁰⁰

¹⁹⁵ *Id.* ¶ 5.11.5 (stating advance warning must be given if “circumstances permit”); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

¹⁹⁶ *Id.* ¶ 5.11.1.1 (explaining that “effective warning” must be given unless “circumstances do not permit”); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be “effective”).

¹⁹⁷ *Id.* ¶ 5.2.3 (articulating the general rule that feasible precautions must be taken); *id.* ¶ 5.11.3 (explaining that adjusting the timing of an attack is a form of precaution); *id.* ¶ 5.11.6 (explaining that “weaponizing” is a form of precaution); *id.* ¶ 5.2.3.2. (listing factors that bear on what precautions are feasible).

¹⁹⁸ *Id.* ¶ 5.12 (explaining pertinent factual considerations to be assessed in determining whether an attack would be proportionate).

¹⁹⁹ *See id.*

²⁰⁰ *See supra* notes 172–88 and accompanying text (discussing application objective and subjective reasonableness).

When a targeting decision was unreasonable, the accused will have violated the laws of war if he or she either acted willfully or was culpably negligent, provided the accused's dereliction actually caused the alleged harm, as required by the "elements of proof."²⁰¹ Even if no harm was inflicted, liability still ensues under the laws of war if one has attempted or conspired to violate a targeting duty.²⁰² Moreover, those who aided and abetted an unlawful targeting decision are liable to the same extent as the actual perpetrator, both under the laws of war and the UCMJ.²⁰³ In any case, an accused is not required to have engaged in detached reflection in assessing legal compliance,²⁰⁴ and the lawfulness of targeting decisions must be assessed from "the conditions as they appeared to the defendant at the time."²⁰⁵

2. Enforcement Under the UCMJ

If in those conditions the accused willfully violated a targeting duty, MJIA will impact the prosecutorial authority to the extent the "elements of proof" applicable thereto also establish an offense under a MJIA-covered UCMJ article.²⁰⁶ In the case of willful derelictions resulting in

²⁰¹ See *supra* notes 57–58 and accompanying text (explaining the "elements of proof" necessary to establish a law of war violation); TARGETING SUPPLEMENT, *supra* note 32, ¶ 2 ("Law of War [targeting] obligations . . . are violated when an individual willfully or through culpable negligence is derelict in complying with them, resulting in harm to persons or property protected by the Law of War. A Law of War violation also occurs when an individual attempts to commit, conspires to commit, or aids and abets the commission of such unlawful acts of harm.").

²⁰² TARGETING SUPPLEMENT, *supra* note 32, ¶ 2.

²⁰³ *Id.* (specifying one who "aids and abets the commission" of a law of war violation violates the law of war); MCM, *supra* note 3, pt. IV, ¶ 1.b.(1) (explaining that a "principal" is a "person who aids, [or] abets . . . the commission of an offense . . . [and as such] is equally guilty of the offense as one who commits it directly . . .").

²⁰⁴ *Brown v. United States*, 256 U.S. 335, 353 (1921) ("Detached reflection cannot be demanded in the presence of an uplifted knife").

²⁰⁵ *United States v. List (The Hostage Case)*, Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 401 (Feb. 19, 1948); see TARGETING SUPPLEMENT, *supra* note 32, ¶ 6(c)(1)(c) ("In analyzing the 'conditions as they appeared to the defendant at the time,' *Rendulic* established those conditions by analyzing what current U.S. Army doctrine would refer to as the 'METT-TC' variables—'mission, enemy, terrain and weather, troops and support available, time available, and civil considerations.' It was only after analyzing these factors that the tribunal determined the accused 'could honestly conclude' the actions taken were justified." (citations omitted)).

²⁰⁶ See *supra* notes 56–58 and accompanying text (explaining the necessary elements to establish "culpable neglect"); 166 CONG. REC. S3413 (daily ed. June 25, 2020) (establishing in section 539A(b)–(c) that "covered offenses" generally exclude UCMJ "articles 83

death, the applicable UCMJ offense encompassing those elements would be premeditated or unpremeditated murder under Article 118, UCMJ.²⁰⁷ For willful targeting derelictions not resulting in death, Article 128, UCMJ, would punish the act based upon one of the following theories: assault consummated by a battery²⁰⁸ or aggravated assault in which either “substantial bodily harm is inflicted”²⁰⁹ or “grievous bodily harm is inflicted.”²¹⁰ For willful derelictions resulting in property damage, liability would ensue under Article 109, UCMJ, which prohibits intentional unlawful harm to both real and personal property.²¹¹ Note that for all but the latter offense, MJIA would vest prosecutorial discretion in a lawyer when the maximum punishment for a violation of the UCMJ article in question is greater than one year²¹² and in any conspiracy, solicitation, or attempt to commit such offenses.²¹³

If, by culpable negligence, an accused failed to comply with a targeting duty, MJIA’s impact again would depend upon the extent to which the “elements of proof” applicable to that dereliction also establish a “covered offense” under MJIA. If death resulted from such dereliction, the accused

through 117” and “articles 133 and 134” and a “conspiracy,” “solicitation,” and “attempt” to commit such offenses).

²⁰⁷ MCM, *supra* note 3, pt. IV, ¶ 56.b.(1) (listing the elements of premeditated murder); *id.* pt. IV, ¶ 56.b.(2) (listing the elements of “intent to kill or inflict great bodily harm”). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that willful violations of one’s targeting duties are prosecutable as premeditated or unpremeditated murder under Article 118, UCMJ).

²⁰⁸ MCM, *supra* note 3, pt. IV, ¶ 77.b.(2) (listing the elements of assault consummated by a battery). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one’s targeting duties are prosecutable as an assault consummated by a battery under Article 128, UCMJ).

²⁰⁹ MCM, *supra* note 3, pt. IV, ¶ 77.b.(4)(b) (listing the elements of aggravated assault in which substantial bodily harm is inflicted).

²¹⁰ *Id.* pt. IV, ¶ 77.b.(4)(c) (listing the elements of aggravated assault in which grievous bodily harm is inflicted). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one’s targeting duties is prosecutable as an assault in which grievous bodily harm is intentionally inflicted under Article 128, UCMJ).

²¹¹ MCM, *supra* note 3, pt. IV, ¶ 45.b.(1)–(3) (listing the elements of waste, spoilage, or destruction of property other than military property of United States). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one’s targeting duties can be prosecuted as intentional harm to both real and personal property under Article 109, UCMJ).

²¹² *See supra* notes 29–31 and accompanying text (explaining what offenses are not covered by MJIA).

²¹³ 166 CONG. REC. S3413 (daily ed. June 25, 2020) (distinguishing in section 539A(b)–(c) “covered offenses” and “excluded offenses”).

could be prosecuted for involuntary manslaughter under Article 119, UCMJ.²¹⁴ In the case of culpably negligent harm not resulting in death, the accused could be prosecuted for violating Article 128 under one of the following theories: assault consummated by a battery²¹⁵ or aggravated assault in which either “substantial bodily harm is inflicted”²¹⁶ or “grievous bodily harm is inflicted.”²¹⁷ In the case of harm to real property, the accused would be liable under Article 109,²¹⁸ and in the case of harm to personal property, the accused would be liable under Article 134.²¹⁹ Again, note that for all but the latter two offenses, MJIA would vest prosecutorial discretion in a lawyer when the maximum punishment for a violation of the UCMJ article in question is greater than one year.²²⁰

V. The Impact on the Battlefield

A. Compromising Unity of Command

Vesting prosecutorial discretion in lawyers and removing primary prosecutorial authority from commanders would compromise the “unity of command.” It would do so by creating what is known as “dual command,”

²¹⁴ MCM, *supra* note 3, pt. IV, ¶ 57.b.(2).

²¹⁵ *Id.* pt. IV, ¶ 77.b.(2) (listing the elements of assault consummated by a battery). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that culpably negligent violations of one’s targeting duties are prosecutable as assault consummated by a battery under Article 128, UCMJ).

²¹⁶ MCM, *supra* note 3, pt. IV, ¶ 77.b.(4)(b) (listing the elements of aggravated assault in which substantial bodily harm is inflicted).

²¹⁷ *Id.* pt. IV, ¶ 77.b.(4)(c) (listing the elements of aggravated assault in which grievous bodily harm is inflicted). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one’s targeting duties is prosecutable as an assault in which grievous bodily harm is intentionally inflicted under Article 128, UCMJ).

²¹⁸ MCM, *supra* note 3, pt. IV, ¶ 45.b.(1) (listing the elements of wasting or spoiling of non-military real property when the accused’s actions amount to the “reckless” form of culpable negligence). *See also* JBB, *supra* note 85, para. 3-44-2(d) (defining culpable negligence as “a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.”).

²¹⁹ The UCMJ does not contain a provision that allows an accused to be prosecuted for the culpably negligent destruction of private property that is personal in nature. However, an Article 134, UCMJ, offense could be crafted to encompass such an offense. *United States v. Garcia*, 29 M.J. 721, 723 (C.G.C.M.R. 1989) (“The offense of recklessly spoiling or wasting property applies exclusively to real property, not personal property. . . . [W]hile an offense under Article 134 might be crafted, such was not done at trial.”).

²²⁰ *See supra* notes 29–31 and accompanying text (explaining what offenses are not covered by MJIA).

which is defined as “[e]xercising the same powers and having the same authority over the same men.”²²¹ Under MJIA, for example, if a Soldier allegedly disobeys directives to attack a target in violation of Article 92, UCMJ, or is allegedly derelict in doing so under that same article,²²² a commander would possess prosecutorial authority.²²³ However, if a Soldier does as directed and attacks the target in compliance with Article 92, UCMJ, but allegedly violates a targeting norm implicating a MJIA “covered offense,” a prosecutor would possess that authority.²²⁴ Thus, MJIA would vest commanders and prosecutors with prosecutorial authority over the same targeting operation, and there is no guarantee those individuals will possess the same views regarding lawfulness. This arrangement risks creating “hesitation on the part of the subordinate, irritation on the part of the superior set aside, and disorder in the work.”²²⁵

The tendency towards disorder might be tempered were commanders and prosecutors able to achieve a degree of “unity of direction,” what contemporary military doctrine refers to as “unity of effort.”²²⁶ That feat would require both commanders and prosecutors to have the same objectives in exercising their prosecutorial authority.²²⁷ That feat, however, would likely not be achieved, as commanders must “win the war,”²²⁸ while prosecutors must “seek justice.”²²⁹ This is not to suggest that the pursuit of “justice” cannot coincide with a commander’s mission objectives. “Legitimacy,” for example, guides command decision-making as an

²²¹ FAYOL, *supra* note 21, at 25.

²²² UCMJ art. 92 (1950) (criminalizing dereliction of duty and failure to obey an order).

²²³ 166 CONG. REC. S3413 (daily ed. June 25, 2020) (listing “covered offenses” in section 539A(b)).

²²⁴ *Id.*

²²⁵ FAYOL, *supra* note 21, at 24.

²²⁶ *Id.* at 25.

²²⁷ U.S. DEP’T OF ARMY, FIELD MANUAL 100-5, OPERATIONS para. 73 (27 Sept. 1954) (C3, 24 Jan. 1958) [hereinafter FM 100-5] (“Unity of command obtains unity of effort by the coordinated action of all forces toward a common goal. . . . Unity of effort is furthered by willing and intelligent cooperation among all elements of the forces involved.”).

²²⁸ *Hearing on H.R. 3830, supra* note 24 (statement of General Dwight D. Eisenhower) (“Remember this: You keep an Army and Navy to win wars. That is what you keep them for. The line officer is concerned with the 4,000,000 men on the battle line far more than he is with the small number who get in trouble. The lawyer is there, of course, to protect their absolute rights under our system to the ultimate, but those men who are in charge of and are responsible for these things which come from the President through the Secretary of War to the commanders, have to win the war.”).

²²⁹ *Criminal Justice Standards for the Prosecution Function, supra* note 19.

abiding principle of warfare,²³⁰ the purpose of which can be summarized as follows: “lose moral legitimacy, lose the war.”²³¹ Nonetheless, divergent objectives—and divergent expertise between commanders and prosecutors—will inevitably foster doubts that they would share the same views regarding the lawfulness of a contemplated targeting operation.

B. Legal Uncertainty and Targeting Norms

Uncertainty fostered by the divergent objectives of commanders and prosecutors would compound the legal uncertainty law of war targeting duties inherently engender. These duties are akin to what Louis Kaplow refers to as “standard”-like norms, a type of norm he distinguishes from “rule”-like norms. A “rule”-like norm “might prohibit ‘driving in excess of 55 miles per hour on expressways,’” while “[a] standard might prohibit ‘driving at an excessive speed on expressways.’”²³² Rules, as such, tend to provide “advance determination of what conduct is permissible, leaving only factual issues for the adjudicator,”²³³ resultantly making pre-decision legal advice less costly than standards.²³⁴ By contrast “individuals tend to be less well informed concerning [what is permissible with] standards,”²³⁵ and, as a consequence, they tend to “place a greater value on legal advice because advice reduces their uncertainty.”²³⁶

Currently, to assuage that uncertainty in the targeting context, authoritative advice can be attained simply by consulting operational experts on the battlefield, including one’s peers and superiors, those who live by the “*plain, known Rules*” infused by operational expertise.²³⁷ Were lawyers

²³⁰ The other nine traditional principles are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, simplicity, restraint and perseverance. JP 3-0, *supra* note 25, at I-2.

²³¹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 7-9 (15 Dec. 2006).

²³² Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

²³³ *Id.*

²³⁴ *Id.* at 569 (“Because a standard requires a prediction of how an enforcement authority will decide questions that are already answered in the case of a rule, advice about a standard is more costly.”).

²³⁵ *Id.* at 605.

²³⁶ *Id.*

²³⁷ See, e.g., Interview by John McCool & Matt Matthews Major Erik Krivda, Exec. Officer, Task Force 2-2 (Feb. 6, 2006), in 1 COMBAT STUD. INST., EYEWITNESS TO WAR: THE US ARMY IN OPERATION AL-FAJR: AN ORAL HISTORY 231 (Kendall D. Gott ed., 2006) (“[I]t was a very simple tactic [the enemy] would use—they knew that we wouldn’t shoot at them

to attain prosecutorial authority over targeting norms, that operational expertise would naturally become less authoritative, less likely to reduce uncertainty, for two principal reasons. First, while operational expertise might be useful in gauging how a contemplated targeting decision would be received by an operational commander who seeks “to win the war,” its predictive utility would certainly be less with a prosecutor who “seeks justice.” Second, “[a]ttorneys, no matter how experienced in criminal prosecution or defense, generally don’t engage in actual combat or plan or execute kinetic operations.”²³⁸ Operational expertise, therefore, can be expected to play a lesser role in informing a lawyer’s prosecutorial decisions than it would an operational commander’s.

Post MJIA, three consequences will logically follow to undermine “[t]he decisive application of full combat power” by U.S. forces.²³⁹ First, the time necessary to reach a target engagement decision will necessarily increase due to the increased legal uncertainty engendered by a prosecutor who not only lacks operational experience but also “seek[s] justice,” thereby creating opportunities for enemy forces on the battlefield.²⁴⁰ Second, in more “legally complicated and doubtful cases,” U.S. forces simply will not “struggle through to decision,” as they will lack the time and resources to assuage their uncertainty.²⁴¹ Third, U.S. adversaries will be further

if they didn’t have a weapon, if they were walking in the street. So a lot of times they would fire from one building, drop their weapon and run to another building, where another cache was. We kept finding these caches strategically located throughout the city. So they’d run from one to another without a weapon, thinking that we wouldn’t shoot at them because that was against our ROE [Rules of Engagement]. But at that point, we were 100 percent sure that everyone to our front was our enemy, and we were coming through to kill everything we possibly could as we came through the city.”)

²³⁸ *Pede*, *supra* note 97.

²³⁹ FM 100-5, *supra* note 227.

²⁴⁰ See, e.g., Charlie Dunlap, *LTG Pede on the COIN/CT “Hangover”; ROE, War-Sustaining Targets, and Much More!*, LAWFIRE (Mar. 7, 2020), <https://sites.duke.edu/lawfire/2020/03/07/ltg-pede-on-the-coin-ct-hangover-roe-war-sustaining-targets-and-much-more> (“According to published reports, a drone hovered over two Ukrainian mechanized infantry battalions for 30 seconds before Russian artillery began pummeling the units. The Ukrainian commanders hesitated to return counterbattery fire against the Russian artillery because they had been warned not to be provocative. That hesitation cost them. Within three minutes, both battalions were destroyed by Russian artillery, including 23 dead, 93 wounded. That is the speed and character of nation state, near-peer fighting—and our National Defense Strategy demands that we be ready for it.”).

²⁴¹ *United States v. List (The Hostage Case)*, Case No. 7, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Judgment, at 1227 (Feb. 19, 1972) (“If the Tribunal passes sentence in cases such as that of Field Marshal List, then Your Honors will create a juridical precedent which may have incalculable

incentivized to employ tactics that create legal uncertainty, such as human shielding,²⁴² to exploit the “asymmetry” that MJIA fosters.²⁴³

C. The Nangar Khel Incident

That MJIA would foster such asymmetry is illustrated by the so-called Nangar Khel incident, which involved Polish forces.²⁴⁴ The Polish have a military justice system that, as MJIA endeavors to establish, vests prosecutorial discretion in uniformed attorneys who are assigned to a “prosecutor’s office.”²⁴⁵ That system’s detrimental impact on “[t]he decisive application of full combat power”²⁴⁶ became glaringly apparent after a Polish patrol in Afghanistan came under attack from a nearby

consequences. Because in the future no commanders will ever dare to issue an order with any bearing on international law without first obtaining a legal opinion on it. In legally complicated and doubtful cases he will probably never struggle through to a decision. Your Honors would thereby hit the core and the striking power of Your Honors’ own army. *In practice this means that in the future the course of military events would be determined not by soldiers, but by lawyers!* May it please the Tribunal. The consequences of this would be that an enemy with no scruples concerning international law would be given colossal opportunities, and he will not hesitate to make every possible use of them.”)

²⁴² See, e.g., Yoram Dinstein, *Conduct of Hostilities: The Practice, the Law and the Future* (Sept. 4, 2014) (unpublished manuscript) (on file with the International Institute of Humanitarian Law) (“[T]oday . . . most organized armed groups in non-international armed conflicts are deliberately using the shield of civilians, trying to screen military operations, military objectives and so forth, on a widespread and massive scale. This is unprecedented.”); Mike N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT’L L. 292, 294 (2009) (“Tragically, human shielding has become endemic in contemporary conflict, taking place across the legal spectrum of conflict.”).

²⁴³ STEVEN METZ & DOUGLAS V. JOHNSON II, U.S. ARMY STRATEGIC STUD. INST., *ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS* 5–6 (2001) (“In the realm of military affairs and national security, asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one’s own advantages, exploit an opponent’s weaknesses, attain the initiative, or gain greater freedom of action. It can be *political-strategic*, *military strategic*, *operational*, or a *combination* of these. It can entail different *methods*, *technologies*, *values*, *organizations*, *time perspectives*, or some *combination* of these. It can be *short-term* or *long-term*. It can be *deliberate* or *by default*. It can be *discrete* or pursued in *conjunction with* symmetric approaches. It can have both *psychological* and *physical* dimensions.”).

²⁴⁴ Aleksandra Kulczuga, *Poland’s ‘Vietnam Syndrome’ in Afghanistan*, FOREIGN POL’Y (July 7, 2011, 8:54 PM), <http://foreignpolicy.com/2011/07/07/polands-vietnam-syndrome-in-afghanistan>.

²⁴⁵ VENICE COMM’N, EUR. COMM’N FOR DEMOCRACY THROUGH L., *POLAND: ACT ON THE PUBLIC PROSECUTOR’S OFFICE 3* (2017), https://www.legislationline.org/download/action/download/id/7416/file/Poland_act_public_prosecutors_office_2016_am2017_en.pdf.

²⁴⁶ FM 100-5, *supra* note 227.

village in August 2007.²⁴⁷ The patrol returned fire with mortar rounds, one of which killed several civilians, including a pregnant woman and some children.²⁴⁸ A Polish prosecutor in Warsaw filed murder charges against seven of the soldiers; afterwards, the “Nangar Khel Syndrome” set in as the Polish soldiers became reluctant to engage the enemy, as they came to believe they could no longer trust their leaders.²⁴⁹

That lack of trust was grounded in the fact that prosecutors, rather than commanders, possessed ultimate authority “to control” Polish operations. The commanding general for Polish forces in Afghanistan later tacitly acknowledged:

The worst thing before was that we never knew if we were right or not, according to the law, in using force. . . . [I]t was easier to be hurt or dead than to act and be potentially jailed because you reacted to something. It wasn’t fair to send people here without the proper rules of engagement.²⁵⁰

Most revealing is the general’s assertion is that Polish forces “never knew if [they] were right or not, according to the law, in using force,” as it highlights legal uncertainty engendered by operational norms. It also highlights that Polish soldiers could not assuage that uncertainty by relying on their peers, superiors, and commanders on the battlefield, those who live by the “*plain, known Rules*” undergirding those norms. A U.S. Soldier who accompanied Polish units on patrol after the Nangar Khel incident explained how that uncertainty impacted the Polish soldiers’ tactical decision-making:

If there was even a chance of killing a civilian, they wouldn’t shoot. . . . I would try to explain to them, “You’re with me—if I shoot, you need to shoot too.” . . . They were afraid of going to jail. They were always thinking about [Nangar Khel]. They would say, “You don’t understand—I go to jail if I kill people.”²⁵¹

²⁴⁷ Kulczuga, *supra* note 244.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* (quoting Slawomir Wojciechowski).

²⁵¹ *Id.* (quoting Nicolae Bunea).

VI. Conclusion

While MJIA's sponsors do not intend to undermine military readiness in ways illustrated by the Nangar Khel incident, the reform would do so by weakening the formal leadership authority commanders require to maintain "unity of command." Maintaining that unity has made the difference in many a war,²⁵² and in weakening it, MJIA would increase the likelihood of Nangar Khel Syndrome, "beset[ing] U.S. forces, the implications [of which] would be global in scale."²⁵³ Indeed, the danger is that U.S. forces would go "into action with an invisible disadvantage which no amount of personal courage or numerical strength could entirely make up for."²⁵⁴

This is not to deny that immediate action is necessary to address the continued prevalence of sexual assault in the military. The prevalence of indiscipline in any organization has long been understood as a hallmark of leadership failure,²⁵⁵ one which justice requires be remedied,²⁵⁶ as MJIA's sponsors are attempting to do.²⁵⁷ Nonetheless, for two principal reasons MJIA would ultimately fail to promote the justice its sponsors seek. First, it is premised upon the incorrect notion that reducing the occurrence of sexual assaults requires removing leadership authority. The empirical data shows just the opposite is true: that the proper exercise of leadership authority reduces the occurrence of sexual assaults.²⁵⁸ Second, rather than promote justice, MJIA removes prosecutorial authority from commanders

²⁵² CTR. OF MIL. HIST., U.S. ARMY, *AMERICAN MILITARY HISTORY* 9 (rev. ed. 1989) ("Unity of command was successfully achieved for the Union under Grant in 1864, for the Allies under Marshal Foch in World War I, and for the Allied forces under General Eisenhower in the European Theater of Operations in World War II. Divided command of British forces in America played an important role in leading to the surrender at Saratoga. The lack of unity of command or even effective co-operation between Admiral Halsey's Third Fleet and MacArthur's landing force in Leyte might have cost American forces dearly in 1944. . . . [A]n interesting case in divided command was MacArthur's failure to place X Corps of the United Nations forces under the command of the Eighth Army in Korea during the fall and early winter of 1950.").

²⁵³ *Pede*, *supra* note 97.

²⁵⁴ NICHOLAS RODGER, *THE COMMAND OF THE OCEAN: A NAVAL HISTORY OF BRITAIN, 1649–1815*, at 272 (2005).

²⁵⁵ *FAYOL*, *supra* note 21, at 23 ("When a defect in discipline is apparent . . . and subordinates leave much to be desired . . . the ill mostly results from ineptitude of leaders.").

²⁵⁶ *Id.* at 21 ("The need for sanction, which has its origin in a sense of justice, is strengthened by this consideration, that in the general interest useful actions have to be encouraged, and the opposite discouraged.").

²⁵⁷ *Gillibrand*, *supra* note 13.

²⁵⁸ *See supra* notes 141–47 and accompanying text (discussing empirical data showing how leadership climate affects a sexual violence crimes).

who are criminally accountable for prosecuting sexual assaults, and transfers it to prosecutors who are immune from that accountability.²⁵⁹ In other words, MJIA guarantees impunity for the very leadership failure it seeks to remedy.

This article has proposed amending the *Manual for Courts-Martial* to include a superior responsibility provision that would promote the justice MJIA seeks without compromising military readiness. The military services, however, need not wait to begin implementing reform, as superior responsibility derelictions are already punishable under Article 134, UCMJ, in the manner reflected in the Appendix. As a first step toward punishing those derelictions, the military services should implement a leader-focused intervention training methodology to instill the “*plain, known Rules*” undergirding superior responsibility obligations. That training methodology would preferably be one proven to reduce sexual assault rates, such as the Air Force has implemented,²⁶⁰ and targeted at those junior leaders most likely to supervise perpetrators of sexual assault.²⁶¹ Then, when leaders fail “to control” their subordinates in violation of the “*plain, known Rules*” instilled by the training, they would need to be disciplined to incentivize the prevention of sexual violence. In this way, the military services would promote justice without undermining military readiness.

²⁵⁹ See *supra* notes 120–25 and accompanying text (discussing a commander’s responsibilities *vis-à-vis* a prosecutor’s responsibilities in the context of MJIA’s “covered offenses”).

²⁶⁰ See *supra* notes 143–44 and accompanying text (discussing the “Green Dot” intervention training, and the Air Force’s implementation thereof).

²⁶¹ See *supra* note 163 and accompanying text (explaining that “junior leaders” are most likely to directly supervise the perpetrators of sexual assault).

Appendix

Article 134—(Superior Responsibility—failure to prevent, discipline, or discover criminal acts)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) *Deliberate failure to prevent, discipline, or discover criminal acts.*

(a) That the accused was a superior who had certain duties to control one or more subordinates;

(b) That the accused did not perform those duties;

(c) One or more of those subordinates inflicted unlawful harm;

(d) That such dereliction was intended to operate as an aid or encouragement to the actual perpetrator; and

(e) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Culpable neglect resulting in unlawful harm to another person.*

(a) That the accused was a superior who had certain duties to control subordinates;

(b) That the accused knew or reasonably should have known of those duties;

(c) That the accused was (willfully) (through culpable negligence) derelict in the performance of those duties;

(d) That one or more of those subordinates unlawfully inflicted bodily harm, substantial bodily harm, grievous bodily harm, or death to another person; and

(e) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: Add the following elements only when the dereliction was willful and death was inflicted—both elements must be satisfied to be applicable.]

(f) That the omission was inherently dangerous to another and showed a wanton disregard for human life; and

(g) That the accused knew that death or great bodily harm was a probable consequence of the omission.

(3) *Culpable neglect resulting in damage or destruction to non-military property.*

(a) That the accused was a superior who had certain duties to control one or more subordinates;

(b) That the accused knew or reasonably should have known of those duties;

(c) That the accused was (willfully) (recklessly) derelict in the performance of those duties;

(d) That one or more of those subordinates damaged or destroyed non-military personal property, or wasted or spoiled non-military real property;

(e) That the destroyed personal property or the wasted or spoiled real property were of a certain value, or the damage to personal property was of a certain amount; and

(f) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *In general.*

(a) *Harm*. “Harm,” except as it relates to the person and property of the accused, refers to any unlawful damage to property, injury to persons, or a violation of a legal protection afforded to property and persons.

(b) *Superior*. “Superior” refers to one who has a duty “to control” a subordinate and can be *de jure* or *de facto*.

(i) *De jure superior authority*. “*De jure* superior authority” is shown through written orders formally appointing an individual as a commander, and extends to subordinates of units for which that commander formally assumes administrative control.

(ii) *De facto superior authority*. “*De facto* superior authority” is established by demonstrating the accused had actual knowledge, or reasonably should have known, of the following: (1) the possession of authority to have taken a particular action “to control” a putative subordinate; and (2) that the putative subordinate was subject to that authority.

(c) *Duty to control*. “Duty to control” means the duty of superiors to take those measures within their authority that are necessary in the circumstances to prevent, discipline, or discover unlawful acts carried out by their subordinates. The following are measures which may be necessary in the circumstances:

(i) *Preventing*—protesting or criticizing criminal action; issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders; training subordinates on compliance with the law.

(ii) *Disciplining*—counseling the subordinate; initiating disciplinary or criminal proceedings against the commission of unlawful acts; or referring the matter to courts-martial or to competent authority to initiate such proceedings;

(iii) *Monitoring*—reviewing reports of subordinate conduct sent to superiors for their special benefit; periodically inspecting detention facilities or barracks;

(iv) *Inquiring*—initiating and carrying out an investigative inquiry when in receipt of credible information that subordinates caused unlawful harm; or reporting information to competent authorities to do so.

(d) *Knowledge.* Actual knowledge of duties or authority may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of their duties or authority to take a particular action. This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

d. *Deliberate failure to prevent, discipline, or discover criminal acts—* [Principal Liability].

(1) *Maximum punishment.* A superior who commits this offense is equally guilty of the offense committed directly by a subordinate and may be punished to the same extent.

(2) *Sample specification.*

In that, _____ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations) (periodically inspect (detention facilities)(barracks), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary (to discipline) (to prevent) (to discover) unlawful harm inflicted by _____, who (was) (were) than (his)(her) subordinate(s), and that the accused intended the omission to operate as an aide or encouragement to the said subordinate(s) who committed an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) \$____, the property of _____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

e. *Culpable neglect—failure to prevent, discipline, or discover unlawful acts that unlawfully inflict injury or death.*

(1) *Derelict.* A person is derelict in the performance of duties when that person willfully or by culpable negligence fails to perform that person's duties. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. An act is not willful if the person could have honestly concluded the act or omission was lawful. "Culpable negligence" means an act or omission which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.

(2) Where the dereliction of duty resulted in death or injury, the intent to cause the harm is not required.

(3) *Harm.* When specified "harm" also has the same meaning ascribed it as "bodily harm," "substantial harm," and "grievous harm" in Article 128 (paragraph 77).

(4) *Great bodily harm.* For purposes of this offense, the phrase "great bodily harm" has the same meaning ascribed to it in Article 118 (paragraph 56).

(5) *Act or omission inherently dangerous to others.*

(a) Intentionally engaging in an act or omission inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may enhance criminal liability if the act or omission shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm.

(b) Knowledge. The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act or omission. Such knowledge may be proved by circumstantial evidence.

(6) *Maximum punishment.*

(a) *Willful derelictions.*

(i) *Without bodily harm*—[Dereliction of duty]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(ii) *Resulting in death or grievous bodily harm*—[Dereliction of duty]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(iii) *Resulting in death from an act or omission inherently dangerous to others*—[Murder—Act inherently dangerous to another]. Mandatory minimum—imprisonment for life with the eligibility for parole.

(b) *Culpably negligent derelictions.*

(i) *Without bodily harm*—[Dereliction of duty]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(ii) *Resulting in bodily harm to a child under 16 years*—[Assault consummated by a battery upon a child under 16 years]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(iii) *Other cases*—[Assault consummated by a battery]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Culpably negligent dereliction resulting in substantial bodily harm*—[Aggravated assault in which substantial bodily harm is inflicted].

(i) *When substantial bodily harm is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *Resulting in substantial bodily harm to a child under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(d) *Culpably negligent dereliction resulting in grievous bodily harm*—[Aggravated assault in which grievous bodily harm is inflicted].

(i) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(ii) *Resulting in grievous bodily harm upon a child under the age of 16 years.* Dishonorable discharge, total forfeitures, and confinement for 8 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(e) *Culpable negligent dereliction resulting in death.*

(i) *Resulting in death upon a child under the age of 16 years—*[Involuntary Manslaughter]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(ii) *Other cases—*[Involuntary Manslaughter]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(7) *Sample specification.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), was derelict in the performance of those duties in that (he) (she) (willfully) (by culpable negligence) failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations) (periodically inspect (detention facilities) (barracks), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary (to discipline) (to prevent) (to discover) unlawful harm inflicted by _____, who (was) (were) then (his)(her) subordinate, and who inflicted [(bodily harm) by (striking) (_____) _____ (on) (in) the _____ with _____.] [substantial bodily harm by (shooting) (striking) (cutting) (____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____)], [by (shooting)

(striking) (cutting) (____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict grievous bodily harm upon (him) (her), to wit: a (broken leg) (deep cut) (fractured skull) (_____.) [, to a child under the age of 16 years] [, that the dereliction was inherently dangerous to one or more persons, and evinced a wanton disregard for human life and that the accused knew that death or great bodily harm was a probable consequence of the act], and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

g. Culpable neglect—failure to prevent, discipline, or discover unlawful acts that damage or destroy non-military property.

(1) *Wasting or spoiling non-military property.* For purposes of this offense, the terms “wasting” or “spoiling” have the same meanings ascribed to them in Article 109 (paragraph 45).

(2) *Destroying or damaging non-military property.* For purposes of this offense, the terms “destroying” or “damaging” have the same meanings ascribed to them in Article 109 (paragraph 45).

(3) *Value and damage.* For purposes of this offense, the value and damage of the harm is determined in the same manner as in Article 109 (paragraph 45).

(4) *Maximum punishment*—[Property other than military property of United States—waste, spoilage, or destruction].

(a) *Wasting or spoiling, non-military property—real property.*

(i) *Of property valued at \$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Of property valued at more than \$1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) *Damaging any property other than military property of the United States.*

(i) *Inflicting damage of \$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Inflicting damage of more than \$1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(c) *Destroying any property other than military property of the United States.*

(i) *Destroying property valued at \$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Destroying property valued at more than \$1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(5) *Sample Specification.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), was derelict in the performance of those duties in that (he) (she) (willfully) (recklessly) failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary and (to discipline) (to prevent) (to discover) the unlawful harm inflicted by _____ who (was) (were) than (his) (her) subordinate, and who did [(waste) (spoil) of real property, to wit: _____] (wrongfully (destroy) by (method of damage) (identify personal property destroyed _____), of a value of (about) \$ _____] [(wrongfully damage by (method of damage) (identify personal property damaged), the amount of said damage being in the sum of (about) \$ _____), the (personal) property of _____], and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).